

Conclusion

For those jurisdictions that have determined that Section 8 is covered by local laws preventing source of income discrimination, the litigation has now become focused upon the landlord defenses that a family may be rejected for other factors, including poor credit or insufficient income, or that its basis for rejecting applicants is non-discriminatory because the program is burdensome. While recent decisions have unanimously found that Section 8 program requirements alone are insufficient to justify rejection of Section 8 applicants, the issues of whether a landlord may reject assisted applicants for poor credit or insufficient income continue to evolve. In most cases, courts are requiring a demonstrated relationship between a poor credit report and a legitimate concern about the tenants' ability to make future payments of their share of the rent. Other related issues remain unresolved, such as how to handle erroneous and unreliable credit reports. These recent cases also demonstrate that determining the specific policies and practices at issue in each case, as well as the actual reasons for rejection, will always be critically important. ■

Using HUD's Updated Physical Inspection Scores to Preserve Threatened Multifamily Properties

One vital aspect of affordable housing preservation is ensuring the proper physical and financial maintenance of projects to avoid loss of the property. The Department of Housing and Urban Development (HUD) created its current inspection standards for multifamily properties a decade ago, as part of its 2020 Management Plan.¹ HUD also created the Real Estate Assessment Center (REAC) and the Enforcement Center, both located in HUD Headquarters, to address problems presented by noncomplying properties. The REAC evaluates the financial and physical condition of all HUD-funded public and assisted housing developments. The Enforcement Center takes action against troubled developments that fail the financial and physical inspection standards.² Enforcement actions may include termination of the project-based contract. Understanding the standards and enforcement can help advocates take action to preserve affordable housing.

REAC's physical condition standards help determine if a development is decent, safe, sanitary and in good repair. Inspectors review the site, building exterior, building systems, dwelling units, common areas, and health and safety concerns.³ The standards neither include state or local housing codes, nor do they supersede or preempt them.⁴ While the REAC process also encompasses financial and management issues, physical conditions create the most common risk of enforcement action that could lead to precipitous termination of the project-based Section 8 contract and displacement of the residents.

Under the REAC physical inspection scoring system, all multifamily housing properties are rated on a 100-point scale, resulting in rankings as either a Standard 1 (90 points or higher), Standard 2 (80 to 89 points), or Standard 3 (fewer than 80 points) performing properties. Standard 1 performing properties are required to undergo physical inspection only once every three years; Standard 2 performing properties, once every two years; Standard 3 performing properties are inspected annually.⁵ The regulations also require that Standard 1 and 2 performing properties address any health and safety

¹24 C.F.R. Part 200, subpt. P (2007). *See also* 63 Fed. Reg. 35,649 (June 30, 1998).

²Notice of New HUD Field Structure, 62 Fed. Reg. 62,478 (Nov. 21, 1997); HUD 2020 Management Reform Plan, 62 Fed. Reg. 43,212 (Aug. 12, 1997).

³24 C.F.R. § 5, Subpt. G (2007) (Physical Condition Standards and Inspection Requirements).

⁴*Id.* § 5.703(g)(2007).

⁵*Id.* § 200.857(b) (2007).

hazards immediately in order to maintain their favorable classification,⁶ and admonish that all properties must be maintained according to HUD's uniform physical condition standards.⁷

The regulations require that HUD publish REAC scores on its website, in the Federal Register, or elsewhere.⁸ Last November, after many years of advocacy by NHLP and allies, HUD finally posted each building's most recent REAC score online.⁹ Owners must also notify residents of any physical inspections and make all related documents available for tenant review.¹⁰

On September 23, 2008, HUD updated its website data to provide the three most recent physical inspection scores for almost 27,000 HUD-assisted project-based Section 8 multifamily housing contracts. This database reportedly covers approximately 18,000 properties, as some properties have more than one contract. Listed along with the REAC scores are the release dates of the inspection score, the name of the property, the property's city and state, and the property identification number. Using the standard query features in programs such as Access, advocates can use the property ID to link these REAC scores with other multifamily housing datasets published by HUD.

The recent September 2008 posting marks the first time HUD has provided the last three inspection scores. The scores and related data are available in PDF files by state and city, or in one Excel spreadsheet for all properties nationally. The Excel spreadsheet is especially useful because it enables sorting of the information by jurisdiction, and by score from lowest to highest within each jurisdiction, permitting advocates to focus attention on properties facing or undergoing enforcement action.

Hopefully, HUD will honor its commitment to keep these scores updated periodically, every sixty days, with a goal of posting monthly revisions.

Low REAC scores are the primary determinant of whether HUD will commence enforcement action against a non-complying owner. Especially low scores correlate with properties in serious trouble and thus can help housing advocates target preservation efforts. Because the scores provide early warning on significant physical problems, they can be extremely helpful for developing proactive strategies to improve conditions and avoid sudden contract terminations.

How Scores Are Theoretically Determined

On the REAC 100-point scale, a higher score indicates a property in better condition. A property is divided into five areas for scoring. A property's overall score is the weighted average of "area" scores,¹¹ which are adjusted to take into account how many of an area's listed items can actually be inspected. If all five property areas are available for inspection, HUD's system establishes the following overall weights for each:

- 15% – Site
- 15% – Building exterior
- 20% – Building systems
- 15% – Common areas
- 35% – Dwelling units

Each individual area score is calculated by deriving weighted averages of sub-area scores over buildings or dwelling units as appropriate. These sub-area scores are calculated by deducting points for deficiencies observed based on criticality and severity levels, with further decreases for identified health and safety issues. Additional controls theoretically prevent disproportionate influence of deficiencies at particular sub-areas or units.

The REAC physical inspection protocol includes more than 600 potential deficiencies, which are further graded for severity level. Although all observed deficiencies are reported in each inspection, each particular deficiency has its own point deduction from the score, as determined by various labels. Seven named deficiencies are categorized as "very-high" impact, whereas thirty-three are "high" impact, and fifty-four are "medium."¹² The very-high impact deficiencies all involve only individual dwelling units; these include such items as inoperable Ground Fault Interrupters in bathrooms or kitchens, clogged plumbing or toilets, inoperable ventilation in bathrooms, inoperable heat, and damaged or missing kitchen sinks. High- and medium-impact deficiencies cover many more areas and items. The remaining deficiencies (approximately 500 in number) are designated low impact and can each reduce the score only by relatively small amounts.

⁶*Id.*, at § 200.857(b)(iii)(2).

⁷*Id.*, at § 200.857(b)(iii)(3). See also 24 C.F.R. § 5, Subpt. G (2007) (Physical Condition Standards and Inspection Requirements).

⁸*Id.*, § 200.857(f)(2).

⁹HUD's website address for the REAC physical inspection scores is: www.hud.gov/offices/hsg/mfh/rem/reminspecscores/remspphysinscores.cfm.

¹⁰24 C.F.R. § 200.857(g). Residents and advocates can increase the probability of getting notice of future inspections by reminding owners and HUD of this obligation and requesting individual notices.

¹¹According to HUD's guidance at <http://www.hud.gov/offices/reac/pdf/reapscr.pdf>, the numerical scores are accompanied by a letter that grades the property on what HUD calls health and safety (H&S) deficiencies (if any). An "a" denotes no adverse H&S, a "b" denotes non-life-H&S deficiencies, and a "c" calls out exigent deficiencies requiring immediate attention or remedy, including fire safety H&S conditions. The H&S letter grades have two forms: with and without an asterisk (*). The asterisk designates that the property has at least one smoke detector deficiency. When the asterisk is present, that part of the score is pronounced as "risk," as in "93a, risk" for 93a* and "71c, risk" for 71c*.

¹²Appendix 2 to HUD's REAC explanation, *id.*, contains more detail about the categorization of various deficiencies by impact.

For the building exterior or systems areas, one to two high-impact deficiencies will effectively take away all or most of the possible points. For the areas involving site, building exterior and building systems, two medium-impact deficiencies could also remove all or most of the possible points. For dwelling units, it would take one very-high, two or three high- or three to six medium-impact deficiencies to deduct all or most of the possible points. With common areas, the one possible medium-impact deficiency (damaged stairs or handrails, if graded “severe”) cannot result in loss of all possible points if the common areas have a substantial point value. A large number of low-impact deficiencies in an area could also result in deduction of all or a substantial number of possible points, and various combinations of different level deficiencies could have the same effect.

Impact of Physical Inspection Scores

Under the regulations, properties scoring thirty points or less are automatically referred to the Departmental Enforcement Center (DEC) for evaluation.¹³ These owners may submit corrective action plans to assist the DEC in creating a Compliance Plan, which the owner must accept or promptly counter.¹⁴

Late in 2002, HUD’s Office of Asset Management announced a new procedure for properties scoring less than sixty points.¹⁵ Under that policy, apparently still effective, properties with scores under sixty points are also referred to the DEC, but the HUD Multifamily Hub Director may delay or recall the referral of any property scoring between thirty-one and fifty-nine upon providing a written justification to the Asset Management Director in Headquarters. However, owners receive no additional time for repairs to correct deficiencies if the Hub Director is overruled and the referral to DEC proceeds. In any case, owners must correct all health and safety conditions. After referral, the DEC reviews the file, prepares a notice of violation, and meets with the owner promptly (within fifteen days of the release of an under-sixty inspection score). A re-inspection is scheduled approximately sixty days after the meeting, and the owner has the intervening period to complete and certify necessary repairs. Additional time for repairs may be approved by Asset Management. If the reinspection yields a score higher than sixty, normal monitoring resumes. If not, DEC apparently pursues its enforcement protocol for properties in default.

If the DEC compliance process fails to deliver both the necessary repairs and improved scores, HUD moves to abate or terminate Section 8 contracts before pursu-

ing a foreclosure on any underlying HUD-insured mortgage. Congress recently established policies requiring that HUD retain project-based assistance rather than terminate contracts as part of the foreclosure process.¹⁶ However, the department’s actions to abate or terminate a contract prior to pursuing foreclosure sometimes leave no Section 8 contract to maintain because the contract authority has already been used for relocation vouchers. In such cases, the contract is lost as a critical resource to preserve and improve the development. Although advocates have sought changes in HUD’s administrative procedures to ensure pursuit of alternative default remedies that retain project-based assistance contracts prior to foreclosure, subject to relocation for imminent major health and safety threats, no major changes in HUD policy have yet been made. Hopefully, a new Administration will soon bring a more preservation-oriented perspective to this complex issue.

The September 2008 data indicates that only about 160 contracts (out of 27,000) scored below the automatic DEC referral threshold of thirty points. However, approximately ten times as many—1650—had recent inspection scores equal to or less than the presumptive referral threshold of sixty points. The recent data also indicates that many properties have experienced wild swings in REAC scores between inspections, so that changes of thirty or forty points from one to the next are not uncommon. Thus, properties with current or prior scores lower than sixty, or those that do not substantially exceed the sixty-point threshold, remain very much at risk.

Suggested Advocacy Steps

- Advocates should evaluate the data for properties in their area, and consider setting priorities for properties with scores less than thirty, as presenting imminent enforcement risks, or even below sixty, since referral remains probable and final owner-DEC compliance plans may never be successfully negotiated.
- Advocates who are not familiar with the property or properties should consider visiting the site by contacting tenants who may be former clients and arranging an informational meeting with residents to discuss the problems, their goals and possible strategies.
- Advocates should obtain the physical inspection report from the owner or manager. Evaluate the report, and talk to the owner and HUD about any remedial efforts. Ask the owner to provide a copy of any technical review request submitted to HUD concerning the inspection, any corrective action plan submitted to DEC, or any DEC compliance plan.

¹³24 C.F.R. § 200.857(h) (2007).

¹⁴*Id.*, § 200.857(i) (within thirty days).

¹⁵Memo from Beverly J. Miller, Director, HUD Office of Asset Management, to All Owners, Agents and Contract Administrators, Re: Properties with Inspection Scores Under 60 Points (Jan. 16, 2003) (refers to procedures effective November 1, 2002).

¹⁶Pub. L. No. 110-161, § 220, 121 Stat. 2436 (Dec. 26, 2007) (“Schumer Amendment,” largely reenacting a policy first adopted in 2005 as part of the FY 2006 HUD Appropriations Act).

- Working with the tenants, advocates can determine the viability of a strategy that emphasizes preservation. If contract termination or foreclosure is not imminent, this strategy may include taking action against the owner to enforce compliance with the lease and housing quality standards. Preservation should also include investigating the possibility of transferring the property to a new owner that has the capacity to undertake rehabilitation while retaining the assistance contract. If preservation proves undesirable or infeasible, advocates should work to ensure adequate tenant protections for all currently assisted households, such as replacement vouchers and other relocation benefits.

For further information on addressing troubled properties in your area, please contact Jim Grow at NHLP's Oakland office at jgrow@nhlp.org. ■

State Court Hands Down Disappointing Preemption Ruling

A New York state appellate court recently invalidated a New York City local preservation law that gives tenants the first right to purchase a building in which an owner is opting out of a project-based Section 8 contract.¹ The court based its decision on an improper analysis of federal preemption law. While this decision sets back the New York City preservation law, its reach need not extend further than New York state and should be limited for reasons further discussed below.

Background

Federal law governing properties with project-based Section 8 contracts permits most owners to withdraw from the program when their fixed-term contracts expire.² This framework allows the owner to convert the property into a market-rate operation. Recognizing that the unregulated ability to withdraw from the program could lead to a severe reduction in affordable housing, several localities have passed laws designed to induce preservation of the building's affordability. In 2005, New York City Council enacted one such law—Local Law 79.³ This law enables a tenant association to exercise a right to purchase or a right of first refusal to purchase a building when an owner intends to sell or take other action that would result in the owner withdrawing from an assisted rental housing program.⁴ If tenants assert and execute their right to purchase the property, it will remain affordable.

In March 2006, the owner of Mother Zion Apartments issued notice of its intent to opt out of the project-based Section 8 program, thus triggering Local Law 79. A month later, in April 2006, the Mother Zion Tenant Association invoked its right to purchase the property. Instead of convening a panel to appraise the value of the property as required by the local law, the New York City Department of Housing Preservation and Development (HPD) and the owners of Mother Zion challenged the tenants' right in

¹Mother Zion Tenant Ass'n v. Donovan, 865 N.Y.S.2d 64 (2008) (hereinafter *Mother Zion*).

²See Multifamily Assisted Housing Reform and Affordability Act of 1997 (MAHRAA), Pub. L. No. 105-65, Title V, 111 Stat. 1343, 1384 (Oct. 27, 1997), codified at 42 U.S.C.A. § 1437f (Historical and Statutory Notes, "Multifamily Housing Assistance") (West, Westlaw through P.L. 110-449 approved 11-21-08).

³Local Law 79, N.Y.C. Admin. Code 60.4, *et seq.* (1990); *see also* NHLP, *New York City Enacts Preservation Purchase Law*, 36 HOUS. L. BULL. 45, 45 (Feb. 2006).

⁴*Id.*