

## Tenant Selection Plan Guidance

Each property funded through the City of Saint Paul should have a tenant selection plan. Below is information that may assist housing providers in creating a plan. Project funding sources and jurisdictions may also impose tenant selection plan requirements. This is not intended to be a complete list or to supersede those requirements. You should consult with an attorney to ensure your tenant selection plan complies with all applicable laws and regulations, program requirements, the Fair Housing Act, the Minnesota Human Rights Act and the Saint Paul Legislative Code.<sup>1</sup>

### General Considerations

1. **Written Tenant Selection Plan.** Housing providers should have a written tenant selection plan. The plan should be made available to applicants before they apply and/or pay an application fee.
2. **Wait List.** The tenant selection plan should spell out any wait list process.
3. **Eligibility.** The tenant selection plan should provide clear information on eligibility criteria such as income restrictions and any program-specific requirements. It should also clearly state the processes and criteria that will be used to evaluate applications. If the development is intended to serve a specific population, such as individuals eligible for supportive housing or senior housing, the tenant selection plan must clearly convey the intended population and applicable evaluation criteria.
4. **Tenant Background/Credit Reports.** Many housing providers use consumer reports, such as tenant background or credit reports, as part of the application process. The Federal Trade Commission (FTC) provides [guidance for housing providers](#) who use such reports.<sup>2</sup> The FTC notes that when a housing provider takes an adverse action based on information in a consumer report, the housing provider must provide a notice to the applicant that includes:
  - a. The name, address and telephone number of the Credit Reporting Agency (CRA) that supplied the consumer report, including a toll-free telephone number for CRAs that maintain files nationwide;
  - b. A statement that the CRA that supplied the report did not make the decision to take the adverse action and cannot give the specific reasons for it; and
  - c. A notice of the applicant's right to dispute the accuracy or completeness of any information the CRA furnished, and the applicant's right to a free report from the CRA upon request within 60 days.<sup>3</sup>
5. **Notice of Denial.** Housing providers should give applicants a prompt written notice of denial that states the criteria the applicant failed to meet and any process to appeal. (Minn. Stat §5048.173)

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<sup>1</sup> It is City of Saint Paul's policy to affirmatively further fair housing in all programs so that individuals of similar income levels have equal access to its programs, regardless of race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance, disability, familial status, or sexual orientation. Property owners and managers are expected to comply with laws, ordinances and regulations prohibiting housing discrimination when creating and implementing a tenant selection plan, including Saint Paul Legislative Code, Chapter 183.06.

<sup>2</sup> Federal Trade Commission, Using Consumer Reports: What Landlords Need to Know, available at <https://www.ftc.gov/tips-advice/business-center/guidance/using-consumer-reports-what-landlords-need-know>.

<sup>3</sup> If the rejection is based on a credit score, the housing provider must also inform the applicant of the numerical score used as well as information on the basis of the score. For more information, see 15 U.S.C. §§ 1681m(a), 1681g(f).

6. **Appeal Process.** Some programs require housing providers to offer unsuccessful applicants an appeal. Minnesota Housing recommends that all housing providers offer an appeal process. The appeal process is an opportunity for applicants to provide mitigating information or correct inaccurate background check results. Housing providers should review the mitigating information to determine if grounds for denial are reliable indication of future tenancy performance. The appeal process and timeline should be clearly stated in the tenant selection plan. The notice of denial should inform applicants how to seek an appeal and how to submit mitigating factors.
7. **Domestic Violence.** A number of federal programs are subject to the Violence Against Women Act (VAWA), which provides that an applicant “may not be denied admission...on the basis that the applicant...is or has been a victim of domestic violence, dating violence, sexual assault, or stalking, if the applicant or tenant otherwise qualifies for admission”.<sup>4</sup> Similarly, adverse eligibility factors such as criminal activity or other adverse credit or rental history related to abuse should not be considered. ~~Those~~ Housing providers that are not subject to VAWA restrictions may consider adopting similar terms. In addition to VAWA protections, because the overwhelming majority of domestic violence survivors are women, they are protected by the federal Fair Housing Act’s prohibition on sex discrimination. Therefore, these policies and practices that target or otherwise discriminate against women because of their status as domestic violence survivors are likely unlawful under federal law.
- a. Examples of circumstances that are related to abuse include:
- Poor credit history resulting from the perpetrator using the victim’s name to open credit card accounts, loans, utilities and failing to pay, unpaid medical bills resulting from the abuse, forcing the victim to work without pay.
  - Poor rental history attributable to the perpetrator’s actions as property damage, noise complaints, and missed or late rent or utilities, drug activity.
  - Criminal ground due to the perpetrator forcing the victim to engage in criminal behavior such as sex work, drug use or sale, crimes committed by the victim to defend themselves or a third party from the abuse
8. **Applicants with Disabilities.** Housing providers should provide a reasonable accommodation process and make that information readily available to applicants.<sup>5</sup> Housing providers should also make sure that tenant selection plans do not raise barriers to individuals with disabilities, such as imposing requirements that applicants be able to “live independently”.
9. **Tenant-Based Rental Assistance.** As a condition of funding through Saint Paul HRA, housing providers are not permitted to refuse to lease a unit to, or discriminate against, a prospective resident because the prospective resident has a Housing Choice Voucher or any other form of tenant-based assistance. In addition, research has shown that tenant-based rental assistance improves housing outcomes.

## Criminal Background Screening

HUD issued new guidance ([HUD Guidance](#)) in April 2016 regarding the Fair Housing Act and the use of criminal history in tenant screening.<sup>7</sup> The guidance set out the following considerations, which are relevant to all properties funded by the City of Saint Paul.<sup>8</sup>

1. **Arrests.** HUD indicates that a policy that rejects applicants because of arrests (without conviction) would not be acceptable.
2. **Convictions.**
  - a. While a conviction is usually evidence of criminal conduct, HUD encourages housing providers to distinguish between convictions for criminal conduct that indicates a demonstrable risk to resident safety and/or property and criminal conduct that does not.<sup>9</sup>
  - b. In addition, HUD suggests a tenant screening policy take into account:
    - i. The **nature and severity** of a conviction; and
    - ii. The **amount of time that has passed** since the criminal conduct occurred.<sup>9</sup>
3. **Mitigating Factors.** The HUD guidance suggests a policy that considers mitigating information (as opposed to a policy with strict time limit exclusions) is less likely to be discriminatory.<sup>10</sup> HUD suggests that housing providers consider the following factors:
  - a. The **facts or circumstances** surrounding the criminal conduct;
  - b. The **age** of the individual at the time of the conduct;
  - c. Evidence that the individual has maintained a **good tenant history** before and/or after the conviction or conduct; and
  - d. Evidence of **rehabilitation** efforts.

<sup>4</sup> 42 USC § 14043e(b)(1); 24 CFR § 5.2001. Housing providers subject to VAWA should review HUD regulations and policies regarding how to fully comply with the requirements.

<sup>5</sup> See, e.g., Minn. Stat. § 363A.10 (“[D]iscrimination includes . . . a refusal to make reasonable accommodations in rules, policies, practices, or services, when accommodations may be necessary to afford a disabled person equal opportunity to use and enjoy a dwelling.”); 42 U.S.C. § 3604(f)(3)(B); Joint Statement of the Department of Housing and Urban Development and the Department of Justice, Reasonable Accommodation Under the Fair Housing Act (May 17, 2004), available at <http://www.hud.gov/offices/fheo/library/hud DOJstatement.pdf>.

<sup>5</sup> See Saint Paul Legislative Code, Chapter 183.06

<sup>7</sup> U.S. Department of Housing and Urban Development, Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Reports by Providers of Housing and Real Estate-Related Transactions (Apr. 4, 2016), available at [http://portal.hud.gov/hudportal/documents/huddoc?id=HUD\\_OGCGuidAppFHASandCR.pdf](http://portal.hud.gov/hudportal/documents/huddoc?id=HUD_OGCGuidAppFHASandCR.pdf) [HUD Guidance].

<sup>8</sup> Some funding sources incorporate additional criminal screening requirements. Housing providers should consult with an attorney to ensure their plan complies with all program requirements.

<sup>9</sup> HUD makes clear that the Fair Housing Act does not prohibit housing providers from rejecting applicants with convictions of the illegal manufacture or distribution of the controlled substances listed in section 102 of the Controlled Substances Act, 21 U.S.C. 802. HUD Guidance at 8. HUD stresses that the limitation applies only to convictions for manufacturing or distribution of those substances, and does not apply to arrests (without conviction) for those offenses or to convictions for drug possession. Id.

4. **Consistent Application of Tenant Screening Policy.** HUD stresses the importance of applying the standards consistently to all applicants.<sup>11</sup>

In addition to the HUD guidance, recent research by the Wilder Foundation, examining over 10,000 households in affordable housing properties, found:

1. 11 of 15 criminal offense categories examined have no significant effect on housing outcomes;
2. The effect of prior criminal offense on a resident's housing outcomes declines over time. Felonies that occurred more than five years prior to move in having no significant effect on housing outcomes; for misdemeanors, there are no significant effects after only two years, and
3. The level of impact that criminal backgrounds may have on housing success is small in comparison to other factors such as the make-up of the household and presence of a rental subsidy.

### Supportive Housing

The City of Saint Paul is committed to the goal of housing stability for all Saint Paul residents. Preventing and ending homelessness is crucial to that goal. Supportive housing programs are intended to house people who often have poor credit, poor rental histories, or criminal backgrounds *or other barriers*. Such programs are successful in serving the people for whom they are designed only when these issues do not raise insurmountable barriers to accessing housing.

To the extent permitted by the rules and regulations related to the type of housing, housing providers are encouraged to adopt lenient and flexible criteria regarding these common barriers when creating a tenant selection plan.

If a development receives funding during the Saint Paul selection process to provide units for individuals eligible for supportive housing or senior housing the tenant selection must (1) be structured to adequately reach those populations; and (2) provide an appeal process for unsuccessful applicants.

1. **Eligible Criteria and Referral Source.** The tenant selection plan must clearly state the intended population and, if applicable, the referral source for supportive housing units.
2. **Appeal Process and Mitigating Factors.** The tenant selection plan must include an opportunity for unsuccessful applicants to appeal and provide mitigating information. In addition to the factors related to criminal history set forth above, housing providers should consider the following mitigating factors.

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<sup>9</sup> The HUD Guidance cites research "reporting that after six or seven years without reoffending, the risk of new offenses by persons with a prior criminal history begins to approximate the risk of new offenses among persons with no criminal record." HUD Guidance at 7 fn 34, citing Megan C. Kurlycheck et al., *Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?*, 5 CRIMINOLOGY & PUB. POL'Y 483 (2006). That research also refers to studies showing that recidivism decreased significantly if the individual avoided engaging in criminal activity for two years. Kurlycheck at 7.

<sup>10</sup> HUD notes that by "delaying consideration of criminal history until after an individual's financial and other qualifications are verified, a housing provider may be able to minimize any additional costs that such individualized assessment might add to the applicant screening process." HUD Guidance at 7.

<sup>11</sup> HUD Guidance at 9 ("For example, the fact that a housing provider acted upon comparable criminal history information differently for one or more individuals of a different protected class . . . is strong evidence that a housing provider was not considering criminal history information uniformly or did not in fact have a criminal history policy.").

3. **Appeal Process and Mitigating Factors.** The tenant selection plan must include an opportunity for unsuccessful applicants to appeal and provide mitigating information. In addition to the factors related to criminal history set forth above, housing providers should consider the following mitigating factors.
- Consider the facts or circumstances surrounding any negative factor related to rental or credit history to determine if it is a reliable indicator of future tenancy performance.
  - Poor credit history or outstanding debt may not be a reliable indicator if related to a previous lack of affordable housing or services supports, or unrelated to housing, such as medical debt.
  - A poor rental history may be due to previous unaffordability or other relevant circumstances. An unlawful detainer action that is dismissed or settled is likely not, without more evidence, a reliable indicator of tenancy performance.
  - Consider the extent to which supportive services will help alleviate the identified negative factors or credit history may not be a reliable indication of future behavior.
4. **Record Retention.** Saint Paul HRA encourages records retention as a best practice. Providers have found it beneficial to track outcomes to ensure the process is effective for tenant success. To help ensure that tenancy determination and appeal processes are being conducted in a non-discriminatory manner, housing providers should retain records regarding applicant denials and appeals. Housing providers are encouraged to periodically review such records for consistency and to identify areas where the process could be improved.

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The HUD Guidance notes the relationship between criminal backgrounds and homelessness, citing research explaining “how the increasing numbers of people leaving carceral institutions faced an increased risk for homelessness and, conversely, how persons experiencing homelessness are vulnerable to incarceration.” HUD Guidance at 1 fn 7 (citation omitted).