

Select Low Income Housing Legal Issues: Multifamily Occupancy, Restrictions and Preservation

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Select Low-Income Housing Legal Issues: Multifamily Occupancy, Restrictions, and Preservation



September 8, 2020

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Agenda

1. Owners' responsibilities to the governmental agency providing financing or subsidies
2. Section 8 rent subsidies—many different programs, all referred to as “Section 8”; how they vary in terms of tenant eligibility, rent setting, longevity, etc.
3. The resident eligibility and occupancy rules under the federal low-income housing tax credit and the interaction with the HUD programs
4. An introduction to strategies to preserve multifamily properties through the low-income housing tax credit
5. State rent restrictions and the interplay with these federal programs and New York rent regulation statutes
6. Thinking through these issues in not so normal times/CARES Act

Owners' responsibilities to the governmental agency providing financing or subsidies

Owners' responsibilities

Federal v. State v. Local

Through some trial and error, certain spheres have fallen to state and local government housing initiatives.

Federal housing program operates through financial arrangements and contractual agreements—loans, mortgage insurance, grants, rent subsidy—tied together with mortgages, notes, financing agreements, use agreements, regulatory agreements, and rent subsidy contracts—William Ebenstein, *The Law of Public Housing*, University of Minnesota Law School (1939); See, e.g., *United States v. Certain Lands in the City of Louisville*, 78 F.2d 684 (6th Cir. 1935).

Nonprocurement government contracting. 2 C.F.R. Section 180.970; Implementation of OMB Guidance on Nonprocurement Debarment and Suspension, 72 Fed. Reg. 73484 (December 27, 2007).

Section 8 Rent Subsidies



Section 8 Rent Subsidies

Forms of project-based Section 8

Item	PBV	PBRA
Appropriations	“Tenant-Based Rental Assistance” account	“Project-Based Rental Assistance” account
Rent Setting	Not to exceed the lesser of reasonable rent 110% FMR minus utilities (for RAD capped at current PIH funding)	Generally set to “market” with exceptions (for RAD capped at current PIH funding, not to exceed 120% FMR)
Contract Administration	Sec 8 Contract and funding administered by PHA (component of PHA’s Housing Choice Voucher program), with admin fees	Sec 8 Contract and funding administered by HUD Multifamily (often through PBCA)
Contract Term	15–20 years	Up to 20 years
Inspections	Housing Quality Standards (performed by PHA or independent entity)	UPCS (performed by REAC)
Choice Mobility	Household may request voucher after one year	Generally no choice mobility, with exception for RAD PBRA
Rent Adjustments	Tied to increases in FMRs or rent reasonableness, except RAD PBV, which are adjusted by OCAF	OCAF, budget-based rent increase or rent comparability
Other	Under RAD, PBV competitive selection, income-mixing, and PBV program cap requirements do not apply	

Section 8 Rent Subsidies

Forms of tenant-based Section 8

Item	HCV	EV/TPV
Appropriations	“Tenant-Based Rental Assistance” account	“Tenant-Based Rental Assistance” account
Rent Setting	Not to exceed the lesser of reasonable rent 110% FMRs	Generally set to “market”
Contract Administration	Administered by PHA	Administered by PHA
Contract Term	Annual	Annual
Inspections	Housing Quality Standards (performed by PHA or Independent Entity)	HQS
Mobility	Household may request voucher after one year	Household can move, but when they leave property where originally assisted then converts to “regular” HCV payment standard
Rent Adjustments	Tied to increases in FMRs or rent reasonableness	Tied to increases in market
Other		Can be project-based with tenant consent, competition for PBVs, at discretion of PHA

Resident eligibility and occupancy rules under the federal low-income housing tax credit and the interaction with the HUD programs



Resident eligibility and occupancy rules under the federal low-income housing tax credit

Income restrictions—housing credits

- 26 USC Section 42—low-income housing tax credit
- Minimum set-aside election of:
 - 20% of units at 50% of Area Median Income (“AMI”);
 - 40% of units at 60% of AMI; or
 - New alternative—“income averaging”
- Election upon placement in service
- Must meet minimum set-aside by end of first credit year
- HUD publishes area income figures annually

Income averaging

- Consolidated Appropriations Act of 2018 makes it possible for units to qualify as “low-income units” with incomes as high as 80% of Area Median Income (“AMI”)
- Under the new rules, at least 40% of the low-income units must **average** 60% of AMI, provided that no low-income unit’s occupants may exceed 80% of AMI
- An owner will literally designate units at any of the following percentages: 20, 30, 40, 50, 60, 70, or 80, provided that all of the units taken together will **average** out to not more than 60%
- Floor size does **not** affect this computation

Federal Housing Credit Restrictions

Rent restrictions

- Rent (including utilities) cannot exceed 30% of qualifying income for assumed family size; based on bedrooms per unit
- Rent limits change annually with publication of new area median incomes
- Rent will not decrease below original floor
- Gross rent does not include Section 8 (or similar rental subsidies)
- Gross rent must include utility allowance for tenant-paid utilities (i.e., deduct from rent to owner)

An introduction to strategies to preserve multifamily properties through the low-income housing tax credit (LIHTC)



Housing Credits/Housing Bonds

4% credit for acquisition

- Based on the acquisition cost of an existing building
- Purchase from an unrelated party (50% related party rule)
- Ten-year rule
- Certain placements in service ignored
 - Carryover basis
 - Acquired from decedent
 - Placement in service by governmental unit or nonprofit entity
 - Foreclosure
 - *Projects substantially assisted, financed, or operated under HUD or RHS housing programs or similar state housing programs for buildings placed in service after 7/30/08 (replaces the Treasury waiver)*

Using LIHTC to preserve HUD-assisted housing

The 4% LIHTC is frequently used to finance the preservation of older HUD-assisted housing—either through a refinancing by existing ownership (with certain disaffiliation rules) or acquisition by a new owner.

In either case there will typically be a substantial rehabilitation of the property to extend its useful life.

Some of the older HUD programs that are frequently combined with LIHTC include: Section 8, Section 236, Section 202, and public housing.

Since income limitations in the HUD programs vary from LIHTC it is possible that not all units will qualify for tax credits.

Owners are responsible for compliance with both the HUD and LIHTC occupancy rules.

State rent restrictions and the interplay with these federal programs and New York and D.C. rent regulation statutes



Rent Control Laws

- John W. Willis, “Short History of Rent Control Laws”, 36 Cornell Law Review 54 (Fall 1950)
- Alexander von Hoffman, “History Lessons for Today’s Housing Policy, The Political Processes of Making Low-Income Housing Policy”, Joint Center for Housing Studies, Harvard University (August 2012)

NYS Rent Regulation and HUD/LIHTC

The NYS rent regulation statutes apply to all multifamily (six or more units) properties built prior to 1974, or any properties built since then that have been provided with certain governmental benefits (financing, real property tax abatements, etc.)

The statutes have narrow carve-outs, such as for FHA-insured properties, but neither HUD-assisted or LIHTC properties are exempt.

Rent increases are set by local rent guidelines boards for one- and two-year leases, and can be as low as zero.

For properties with rental assistance (such as project-based Section 8), owners have worked with the NYS and NYC agencies to provide flexibility so that the owner is not prohibited from accessing additional subsidy available under the rules of HUD programs.

NY State 2019 Law

Housing Stability and Tenant Protections Act of 2019

- Unlike previous extensions of the law, there is no expiration.
- Any owner of a rent-stabilized apartment in New York must register a maximum legal rent (the “Legal Rent”) with the New York State Division of Housing and Community Renewal. Renewals are capped by a locally set percentage.
- Preferential Rents. Owners can elect to charge tenants a rent below the Legal Rent—a so-called “preferential rent.” Under the prior law, owners could increase the rent on a rent stabilized unit to the Legal Rent upon lease renewal. The Act provides that an owner must offer rent-stabilized tenants a renewal lease at a rent no greater than the prior preferential rent as increased by the local rent guidelines board.

NY State 2019 Law

- **IAIs/MCIs**—The Act also modifies two concepts relating to improvements and rehabilitation: individual apartment improvements (“IAI”) and major capital improvements (“MCI”). The Act imposes more stringent conditions/limits on the costs of rehabilitation that may be charged to future tenants by owners and operators in the form of increased rent. For example: for an MCI, the rent increase maximum has been lowered to 2%; IAIs are capped at an aggregate of \$15,000 over a 15-year period with a significant reduction in the related rent increases.
- **Carve-out for Section 8 properties**—Tenant’s rent contribution has a federally established floor and ceiling and rent increases typically are paid for from the subsidy. The carve-out is limited to project-based subsidy and the interplay with tenant-based subsidy is more fluid.

New York—tenant rights

- NY State—precedent requiring owners to accept Section 8 vouchers. *Rosario v. Diagonal Realty, LLC*, 872 N.E. 2d 850 (NY 2007).
- Tenants have broad right to residency even in violation of HUD requirements. *Greene v. Carson, et al.*, 256 F. Supp. 3d 411 (SDNY 2017)

District of Columbia

Rental Housing Act of 1985 (§43-3501.01 et seq.)

- Rent stabilization applies to any non-exempt unit—exemptions include federal or DC subsidized, built after 1975, fewer than five units owned by a natural person, vacant when the law took effect.
- Rent increases limited to rent plus allowed increase, 12 months since last rent increase. At vacancy rents can be raise 10 percent more, or to the level of a substantially identical unit in the building up to 30 percent.
- TOPA—a whole other topic, as are conversions and sales
- Eviction protections apply to all tenants

Thinking through these issues in not so normal times/CARES Act



Changes due to COVID

NY—Tenant Safe Harbor Act prohibits residential evictions during the COVID emergency. The NY court system has issued a moratorium until Oct 1st, and the Governor's executive order prohibits evictions until September 20th.

DC—Provides a 90-day (at least) mortgage forbearance and corresponding eviction moratorium for nonpayment of rent—can't charge late fees, processing fees, etc. Instead the landlord must make a payment plan deferring rents for at least a year after the emergency ends. No rent increase during the emergency and for 30 days after.

Federal Mortgage Forbearance Update

- CARES ACT
- Section 4023—Three 30-day requests, 90-day total
- A federally backed multifamily mortgage loan (FannieMae, Freddie Mac, or FHA-insured, guaranteed, supplemented, or assisted in any way, by any officer or agency of the federal government or HUD or “related program administered by any other such officer”)
- Current as of February 1, 2020
- Oral or written request
- Experiencing a financial hardship during the COVID–19 emergency
- Authority exists only from March 27, 2020, and the sooner of end of this emergency as declared by the president or December 31, 2020
- Foreclosure moratorium

Federal Eviction Moratorium Update

CARES Act--Section 4024 eviction moratorium—expired. Applied to wide range of federal programs (low income housing tax credit, Section 8 rental subsidy, FHA, Fannie, Freddie, rural vouchers, HOME, HOPWA.

- Prohibits noticing or filing for eviction for nonpayment of rent
- Prohibits assessing penalties/fees
- Applies to tenants with or without leases;
- DOES NOT prevent evictions for reasons other than nonpayment of rent, in process when the Act was passed.
- DOES NOT change the fact that rent is owed

Federal Eviction Moratorium—CDC Order

The Center for Disease Control and Prevention (CDC) ORDER is effective upon publication and expires Dec 31st.

Section 361 of the Public Health Service Act (42 U.S.C. 264)

42 CFR 70.2

Nature of the Order—and order, not a rule

Enforcement of the Order— Violators subject to civil and criminal penalties

Carve out for any State, local, territorial, or tribal area with a more restrictive moratorium

COVID-19 presents a historic threat to public health.

Federal Eviction Moratorium Update (cont'd)

Restricts eviction—by an party that has the legal right to pursue eviction or possessory action

- Eviction means any action for possession
- Applies to tenants, lessees or residents of residential property
- Does not relieve the obligation to pay rent. Does not prevent fees, penalties, interest.
- Declaration must be completed by “each adult listed on the lease, rental agreement, or housing contract should likewise complete and provide a declaration.”

CDC Order Form Declaration

- best efforts to obtain all available government assistance for rent or housing;
- earn no more than \$99,000 in annual income for Calendar Year 2020 (or no more than \$198,000 if filing a joint tax return), was not required to report any income in 2019 to the U.S. Internal Revenue Service, or received an Economic Impact Payment (stimulus check) pursuant to Section 2201 of the CARES Act;
- unable to pay full rent due to substantial loss of household income or extraordinary out-of-pocket medical expenses;
- using best efforts to make timely partial payments, as much as possible based on circumstances;
- if evicted would likely become homeless or move into a shelter or shared residence who live in close quarters;
- acknowledge rent, fees, etc., owed, and have to comply with any other obligations..
- acknowledge this moratorium is due to end December 31, 2020, and the housing provider may require payment in full for all amounts owed failure to pay may be cause for eviction under State and local law.

QUESTIONS?



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