

Helping Applicants with a Criminal History Obtain Affordable Housing in Massachusetts

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Be strategic about where you apply

Generally,

- Intensive screening for public housing and multi-family subsidized housing
- Less Public Housing Authority (PHA) screening for Section 8 vouchers (but owner will also screen)
- Even less screening for Continuum of Care programs (permanent supportive housing programs for homeless); and special population voucher programs (e.g. VASH, EHV)

Be strategic about where you apply

For federal public housing and Section 8 vouchers, there are HUD required reasons for denial including if applicant or any household member ---

- Is sex offender subject to a lifetime registration requirement anywhere
- In last 3 years, evicted from federally assisted housing for drug-related criminal activity (permissive exceptions if rehab or no longer household member)
- Current users of illegal drugs as defined by federal law (so includes marijuana)
- Was convicted of manufacturing meth. in federally assisted housing

First 3 are the same for multi-family subsidized housing

See 24 CFR 960.204; 24 CFR 982.553; 24 CFR 5.854 and 5.856

Be strategic about where you apply

- For many federal housing programs (public housing, Section 8, multi-family subsidized programs), PHA/owner should have a reasonable lookback

24 CFR 5.855 (b); 24 CFR 960.203; 24 CFR 982.553; 42 USC 13661 (c)

- For state public housing, there are no mandatory reasons for denials but no lookback time limit either.
- See chart from Legal Tactics that summarizes the mandatory and discretionary (CORI and other) reasons for denial from various housing programs

Sources of Law

Federal :

42 USC 1437d (q) *records* 42 USC 1437n (f) *meth.*
42 USC 13661 42 USC 13663 *sex offenders*
24 CFR Part 5, Subparts I and J
HUD PIH Notice 2015 – 19 (Nov 2, 2015)

State

MGL. c. 121B, section 32, par.7
760 CMR 5.08 *exclusive list of reasons for denial*
MRVP Administrative Plan

Applications and Inquiries About Criminal History

- Need to be truthful about what's said. False statement can be basis for later denial, termination or eviction.
- If not sure, SAY SO. Applicant may not know if case is felony or misdemeanor, if case resulted in a conviction, or what "continued without a finding" means
- Can say "no record" if sealed (MGL c. 276, sec. 100A, paragraph 5 – effective Oct. 13, 2018)
- Remember: public housing authorities will obtain CORI that shows all convictions and open cases

Be Proactive

Be proactive while waiting to reach top of waiting list (which is when screening will be done). This means

- Get own CORI & review for accuracy;
- Get court docket sheets to find out details and see if CORI is accurate (and if not, ask probation to correct the CORI);
- Close out defaults or pending cases if possible;
- Seal what can be sealed.

Don't Volunteer to Provide Own CORI

- Applicant's own CORI may have offenses that owners or housing authorities don't receive & do not know about
 - * Again, PHAs/owners will get record of convictions and pending cases (including defaults and filed), but should NOT get dismissed, not guilty, or juvenile cases.
- Credit reporting agencies, private landlord screening services, and anyone else may get information on arrests from in-person review of actual court paper files.
- Landlord cannot request or require applicant to provide own (Massachusetts) CORI. 803 CMR 2.10

Defaults & other Pending Cases

- Wise in most cases to remove defaults and wrap up pending cases. However, there may be risks and best to contact criminal defense attorney first.
- Remember CWOFF (continued without a finding) to X date is an open case until X so may want to try to delay applying until close to the CWOFF period is over and the case dismissed (depending on how fast a particular wait list moves)
- If, at the time of screening there are open cases, you can ask PHA/owner to delay screening until cases resolved.

Pre-Adverse Action

PHAs/owners shall request CORI as the final step in the application process. 803 CMR 5.04 (2) and 5.05 (3).

Then, before taking an adverse action on the application based on CORI (i.e. before denial), the PHA/owner needs to notify applicant of potential adverse action and provide copy of CORI & chance to dispute accuracy. 803 CMR 5.14

If denied, find out the basis and appeal

1/ FACTS: Find out what the PHA or owner has as a basis to deny you. If do not already have, ask to see the information they received (CORI) or find out where a report was obtained and contact that agency to get the report.

- Advocate should obtain a signed release from the applicant that specifically authorizes the PHA/owner to release the CORI to the advocate (if that is the basis for the denial)
- PHA required to provide the actual CORI to advocate with release. 803 CMR 5.02; 5.11(5)

If denied, find out basis and appeal

2/ LAW: Get a copy of the PHA or owner's policy that spells out the reasons for denial.

- There are federally mandated reasons for denial but the discretionary reasons will vary by PHA/owner and program.
- PHA/owner shall identify the info. that is the basis for the potential adverse action (which should mean that must specify which particular offenses on the CORI are the basis for the denial) 803 CMR 5.14 (1)(f) and (2)(f).

Relevant Written Policies

- For federal public housing: PHA's Admissions and Continued Occupancy Plan (or similar name)
- For state public housing: DHCD regulations at 760 CMR 5.08
- For federal (tenant-based) Section 8 voucher: PHA's Section 8 Administrative Plan
- For federal multi-family subsidized housing: each owner's tenant selection plan; MassHousing tenant selection plan if MassHousing is involved

Reasonable Look Back Periods

- Review the Plan/Policy/Regulations for the look back period (e.g. 3 years, 5 years, 10 years, or “reasonable”)
- Even if owner/PHA hasn’t established a specific lookback period in policy, argue for it and suggest 5 years
 - 66 FR 28776, 28779 (May 24, 2001) – HUD considers that 5 years may be a reasonable period for serious offenses but owners/PHA may disagree
 - DHCD decision (1989): evidence of events more than 5 years old is generally discouraged and relevance is generally minimal

Arrests not sufficient

- Do not need to have a conviction to be denied housing
- Standard is that the person “more likely than not” engaged in certain conduct (where a conviction requires “beyond a reasonable doubt”)
- However, just being arrested is not enough to deny an applicant (federally assisted) housing.
 - * See HUD PIH Notice 2015-19 (11/2/2015)
 - * HUD’s FAQs for PIH Notice 2015-19
 - * Office of HUD’s general counsel guidance on application of fair housing standards to use of criminal records (4/4/16)

Juvenile Delinquent Offenses

PHAs and owners may learn of juvenile delinquency proceedings from other sources (should not learn from CORI).

Conduct of a juvenile is still considered “criminal activity.” *CMJ Management Company v. Wilkerson*, 91 Mass. App. Ct. 276 (2017) which involved an eviction for criminal activity

Plea Bargains

- Pleas can be used against applicant (one of the collateral consequences defenders need to be aware of).
- Applicant can explain why they entered into the guilty plea or admission of sufficient facts to warrant a finding of guilty and deny the wrongful acts, but decision makers are likely to be skeptical absent corroborating evidence.
 - See lower court decision in *Costa v. Fall River Housing Authority*, 71 Mass. App. Ct. 269, 283 (2008) where the court states that a plea of guilty is not conclusive of the factual issues and lists the reasons why someone may plead guilty

Sex Offenses

- Even though federal regulations only require a bar for lifetime registration, often owners/PHAs will be concerned if non-barred Level 2/Level 3.
- Applicant can seek reclassification or to be relieved of duty to register.
- Note that registration period begins only after probation, etc. wraps up, so can be significantly after offense.
- Important to explore initial facts and mitigating circumstances
- There is an (untested) legal argument that there is no such thing as a lifetime registration requirement under Mass. law (based on case law interpreting MGL c. 6, section 178G and SORB practices)

Extenuating Circumstances

Extenuating circumstances may help to explain why the offense occurred (context) and why not likely to reoccur

Mitigating Circumstances

1. Show relationship between criminal activity and past drug addiction, past alcohol use, and/or untreated/undiagnosed mental health
 - Review the police report (often in court file)
 - Review the terms of probation or release (e.g. drug evaluation)
 - Review the docket sheet (e.g. sent for mental health evaluation)

Mitigating Circumstances

2. Show what's changed in person's life so that behavior not likely to re-occur

- Participation in or completion drug/alcohol treatment
- Participation in mental health treatment
- Information about new medications taken or anger management program to address a prior problem with violent outbursts

Mitigating Circumstances

- Show rehabilitation and favorable future prospects from counselors, social service agencies, etc. to meet concerns about past activity that would otherwise affect tenancy.
- Might be able to obtain support letter from probation officer (practice varies)
- Letter from criminal defense attorney might be helpful
- More will need to be shown if the activity is relatively serious, shows a repeated pattern, is recent, or if only recently discharged from custody.

Reasonable Accommodation (RA) and CORI-Related Denial of Admission

- Separate from mitigating circumstances, but related where applicant is person with disabilities.
- Duty of owner/PHA to consider RA request, but it would not allow waiver of essential eligibility requirements.
- No duty to accommodate current illegal drug use, but past history could be discounted.
- Interactive process

Domestic Violence (DV)

Violence Against Women Act (VAWA) – for federally assisted programs, PHA or owner cannot deny applicant for conduct related to status as victim of domestic/dating violence.

* 24 CFR 5.2005 (b)(1)

Domestic Violence (DV)

- For state public housing, see DHCD Notice PHN 2020-39 (11/19/2020)
 - as mitigating circumstances, an applicant may show that she was a victim of DV and that the abuser caused the violation (e.g. damage, disturbance, nonpayment)

Helping Tenants with a Pending Criminal Case Prevent Loss of Section 8/Public Housing

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Tenant Based Section 8 Terminations

CORI-related reasons why a PHA may seek to terminate mobile Section 8 voucher (before any conviction):

- Drug related criminal activity (anywhere)
- Violent criminal activity (anywhere)
- Criminal activity that is a serious violation of the lease
- If sole occupant is in jail/prison and so absent from the unit for more than the PHA specified time frame (up to 180 days - 24 CFR 982.312)

Tenant Based Section 8 terminations

- The PHA must provide the tenant with written notice of the proposed termination and an opportunity to request a hearing.
- If the hearing is timely requested (i.e. appeal is pending), the PHA must continue making subsidy for the current unit (but can deny the person the ability to lease up in a new unit) 24 CFR 982.555 (a)(2)
- At the hearing, the tenant can show the PHA extenuating circumstances, mitigation, RA, VAWA defenses & also offer to remove the offender from the household

Section 8 – other consideration

If there is no pending termination proceeding, a tenant with a pending criminal case may want to remain within that PHA's area of operation and not move to another PHA's area (as the move will likely trigger a CORI check by the new PHA and the discovery of the pending criminal case).

Tenant Based Section 8 Evictions

- PHA must terminate Section 8 voucher for a family evicted from a Section 8 HCV apartment for a serious lease violation which could include criminal acts. 24 CFR 982.552(b)(2)
 - Separate administrative procedure at PHA
 - Argue that “evicted” means physically evicted (*DeProfio v. Waltham Housing Authority*, 2007 WL 2367594 (Mass. Super.))
- Rather than risk loss of the apartment and voucher, many tenants settle a court eviction with a move out agreement (with an express provision that there is no finding of fault) but that is not a guarantee that PHA won’t try to terminate voucher
- If at the notice to quit stage, consider an out of court agreement to avoid a public record of a court eviction

Public Housing Evictions

- PHA may start the eviction process for tenant's criminal activity in violation of the lease
 - Federal public housing leases vary by PHA
 - State public housing leases are mandated by DHCD (so are all the same)
- PHA does not need to wait for a conviction and can proceed with the eviction while a criminal case is pending.

Public Housing Evictions

- There is an informal/private conference followed by grievance hearing (before panel or hearing officer) BEFORE an eviction can be started in court
- CORI related exceptions to the above pre-court administrative process

for state: See MGL c. 121B, sec 32, par 7

for federal: see 24 CFR 966.51 (a)(2)

Public Housing Evictions

- During the administrative process (if offered), the tenant can present defenses such as extenuating circumstances, mitigation, RA, VAWA
- For state public housing, the tenant may raise the “innocent tenant” defense if a household member or guest engaged in the criminal act and the tenant had no knowledge or control.
- *HUD v. Rucker*, 535 US 125 (2002) eliminated the “innocent tenant” defense for federal public housing BUT the PHA still has to show that it exercised its discretion in bringing the eviction

Questions?