Legal Basics: Subsidized Housing Rents

NATIONAL CENTER ON LAW & ELDER RIGHTS

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The National Housing Law Project (NHLP) is a non-profit legal advocacy and resource center focused on increasing, preserving, and improving affordable housing; expanding and enforcing the rights of low-income tenants and homeowners; and increasing housing opportunities for underserved communities. NHLP provides technical assistance and policy and litigation support on a range of housing issues to legal services and other advocates in California and nationwide.

Introduction

This Chapter Summary summarizes the methods for setting tenant rents in the major low-income housing programs subsidized by the Department of Housing and Urban Development (HUD) and the U.S. Department of Agriculture's Rural Housing Service (RHS), and in the Low-Income Housing Tax Credit program administered by the United States Department of Treasury. A detailed discussion of rents in these programs is contained in Chapter 4 of HUD Housing Programs: Tenants Rights (known as the "Green Book") 5th ed. 2018, published by the National Housing Law Project.

Key Lessons

1. The rules for setting rents in federally subsidized housing vary from program to program.
2. It is important to understand which charges, amenities, and services are included as part of the rent and which are not, to ensure that a landlord is complying with applicable rent limits.
3. For income-based rents, programs vary in how they calculate household income as a basis for setting rents.

Section 1: Determining the Applicable Program and Rent-Setting Method

In order to identify the applicable rules and calculate the appropriate rent, advocates must determine which program or programs a tenant is participating in. Many programs use income-based rents, with the rent set as a percentage of household income. In some cases, though, rents are established using other methods. These include statutory minimum rents, flat rents, and formula rents set as a percentage of area median income (AMI).

Federally subsidized housing is provided through a collection of public agencies, private landlords, and non-profit organizations. Public housing authorities (PHAs) are established by state law to administer affordable housing programs for low-income people and other vulnerable populations, including older adults. Though HUD administers or oversees many affordable housing programs, PHAs run most of the programs locally. PHAs determine eligibility, own and manage public housing, enter into agreements with private owners to provide affordable housing, and provide vouchers to tenants to rent private properties.

HUD housing or rental assistance programs fall into the following general categories:

- **Public Housing** is owned and managed by a local PHA. Rents in public housing are generally income-based, although minimum rents, flat rents, and, more rarely, welfare rents also come into play. *Key regulations*: 24 C.F.R. §§ 5.603, 5.609, 5.611, 5.615, 5.628, 5.630, 5.634, 960.255.

- **Project-based Section 8 programs** involve contracts between HUD and private landlords for an extended term to subsidize units in a specific project or building. Rents in these programs are generally income-based, although minimum rents and, more rarely, welfare rents also come into play. *Key regulations*: 24 C.F.R. §§ 5.603, 5.609, 5.611, 5.628, 5.630, 5.634, 5.653-5.661.
- **Tenant-based Section 8—Housing Choice Voucher (HCV)** provides vouchers for eligible individuals to rent private homes and apartments. Landlords enter into payment contracts with PHAs and sign leases with tenants. Rents in public housing are generally income-based, although minimum rents and, more rarely, welfare rents also come into play. If the contract rent for a unit exceeds the payment standard set by the local PHA, tenants can end up paying for the difference. *Key regulations*: 24 C.F.R. §§ 5.603, 5.609, 5.611, 5.615, 5.617, 5.628, 5.630, 5.634, 982.503, 982.505.
- **Sections 202 and 811 Programs for the Elderly or Persons with Disabilities:** HUD administers several multifamily programs that provide loans, subsidies, mortgage insurance, or loan guarantees to develop or rehabilitate rental properties. The Section 202 program has funded development of affordable housing for elderly households. The Section 811 program provides non-profit organizations with funding to provide supportive housing for low-income individuals with disabilities. Rents are income-based except in very few cases. Newer Section 202 and 811 units may have rents set based on operating costs, but generally receive additional rental assistance subsidies to allow for the income-based rents. *Key regulations:* 24 C.F.R. Part 891.

Other major housing programs include:

- **RHS programs**: USDA operates its housing programs through the Rural Housing Service (RHS) in towns and areas of 20,000 or fewer people. USDA programs include the Rural Development Voucher Program, which operates like the Section 8 voucher program, and the Section 515 Program, which has provided low-interest loans to construct, purchase, or rehabilitate properties to provide affordable rental housing or cooperatives to low-income families, including older and disabled adults. Rents are set based on operating costs and debt service, but many residents receive rental assistance subsidies that allow for income-based rents. *Key regulations:* 7 C.F.R. Part 3560 (Section 515), 78 Fed. Reg. 36,520 (RD Voucher Program).
- **Low-Income Housing Tax Credit (LIHTC):** LIHTC is an IRS program that incentivizes the construction or rehabilitation of low-income housing units. Under the program, state allocating agencies award federal tax credits to developers of new or rehabilitated affordable housing. Rents are not based on tenants' actual household incomes; entities utilizing the credits agree to charge rents at or below 30% of a specified income figure based on area median incomes (AMI). Although LIHTC does not provide true income-based rents, many renters who qualify use Section 8 vouchers to afford LIHTC units that would otherwise be unaffordable to them. *Key regulation:* 26 C.F.R. § 1.42.

PRACTICE TIP

If a tenant is receiving assistance through more than one program, the advocate will need to determine which program's rent rules apply, if they are in conflict. For example, if a tenant lives in a LIHTC property but has a Section 8 voucher, the tenant's rent contribution will be determined under the voucher rules, and the landlord may be able to charge rent that exceeds the LIHTC maximum rent limit if it complies with voucher rules.

To determine which program(s) are involved, advocates can speak to the local PHA, non-profit affordable housing providers, or consult state and local government agencies' housing departments or websites. Additional information can be obtained from the following sources:

- National Housing Preservation Database: Searchable by location and/or type of federal assistance.
- NOVOGRADAC LIHTC Mapping Tool: Information about properties subsidized by federal tax credits.
- USDA Multi-family Housing Rentals Map: Information about subsidies for rural properties, searchable by location.

Section 2: Utility Allowances and Other Charges

For most programs, "rent" covers the unit itself, as well as reasonable utilities. When utilities are tenant-paid, tenants receive a credit against their rent contribution in the form of an allowance for reasonable consumption of utilities (a "utility allowance"). If a utility allowance exceeds the amount a tenant is required to contribute toward the rent, the tenant should receive a utility reimbursement.

Additional charges for other services or amenities need to be reviewed carefully to determine if they are permitted. Tenants should not be subject to mandatory charges for essential services or equipment such as pest control or stoves, or for services that they are required to have in the unit. When landlords are permitted to charge for optional services or amenities, such as cable television or parking, or for excess consumption of utilities or tenant-caused damage to a unit, those charges are not considered "rent."

Detailed discussions of utility allowances and additional charges can be found in Chapter 5 and Chapter 6, respectively, of *HUD Housing Programs: Tenants Rights* (known as the "Green Book") 5th ed. 2018, published by the National Housing Law Project.

Section 3: Determining Annual and Adjusted Income

In order to calculate tenant rent for housing programs using income-based rents, the first step is to determine "annual income." Annual income is total household income after excluding certain items. By regulation and by notices periodically published in the Federal Register, HUD excludes certain items from being counted as part of annual income. For public housing, and for persons with disabilities in certain other programs, there are special earned income disregards which require the exclusion of increases in earned income in certain circumstances.

Common issues across programs include whether and how annual income can be projected, and whether certain assistance to the household can be considered as income. A household that is not receiving all of the income anticipated or that has sporadic income can raise special concerns. Additional questions include how to treat the income of absent household members, net family assets, and lump-sum awards. If income is derived in part from welfare assistance, special rules may also apply.

After "annual income" is determined, the second step is to subtract permitted deductions to yield "adjusted income." Both annual and adjusted income are used in determining income-based rents.

For programs utilizing income-based rents, the rules for calculating tenant income are very complicated. Also, tenant circumstances may change over time. Thus, especially where a tenant is having trouble paying the rent or if there is a dispute, it will be very important to double-check the calculations underlying the determination by reviewing the tenant's income certification form.

A detailed discussion of income calculations can be found in Section 4.3 of Chapter 4 in *HUD Housing Programs: Tenants Rights* (known as the "Green Book") 5th ed. 2018, published by the National Housing Law Project.

Conclusion

Evaluating whether a tenant is being charged the correct rent for a given unit can be complicated since it frequently involves determining the applicable program rules, calculating a client's annual and adjusted income, finding the applicable utility allowances, and identifying the applicable area median income figures. We hope this summary and the accompanying webinar will help advocates identify the key steps in such an evaluation and locate the additional resources they need.

Additional Resources

- U.S. Department of Housing and Urban Development (HUD):
  - » HUD Occupancy Requirements of Subsidized Multifamily Homes
  - » Housing Choice Voucher Guidebook
  - » Public Housing Guidebook
- USDA Rural Housing Service (RHS):
  - » Housing Voucher FAQ
- Publications
  - » National Housing Law Project, HUD Housing Programs: Tenants Rights (the "Green Book") 5th ed. 2018
  - » Novogradac, Low-Income Housing Tax Credit Handbook, 2018 ed.
- Organizations
  - » National Housing Law Project
  - » National Low Income Housing Coalition
  - » LeadingAge

Case consultation assistance is available for attorneys and professionals seeking more information to help older adults. Contact NCLER at ConsultNCLER@acl.hhs.gov.

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