

Each property that receives funding from Minnesota Housing must 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 different or additional tenant selection plan requirements. This guidance is not intended to be a complete list or to supersede those requirements. Consult with an attorney to make sure your tenant selection plan complies with all applicable laws and regulations, program requirements, the Fair Housing Act, and the Minnesota Human Rights Act.<sup>1</sup>

### General Considerations

1. **Written Tenant Selection Plan.** Housing providers must have a written tenant selection plan. The plan must be readable and accessible to applicants and must be made available to applicants before they apply and/or pay an application fee.
2. **Waiting List.** The tenant selection plan must describe any waiting list process.
3. **Eligibility.** The tenant selection plan must provide clear information on eligibility criteria such as income restrictions and any program-specific requirements. It must also clearly state the processes and criteria that will be used to evaluate applications. If the development receives funding to serve a specific population, such as individuals eligible for supportive housing or senior housing, the tenant selection plan's evaluation criteria must be structured in a way to take into account the specific barriers faced by these households.
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 must give applicants a prompt written notice of denial that states the criteria the applicant failed to meet and the process to appeal.<sup>4</sup>

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<sup>1</sup> It is Minnesota Housing'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 and regulations prohibiting housing discrimination when creating and implementing a tenant selection plan.

<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).

<sup>4</sup> See Minn. Stat. § 504B.173.

6. **Appeal Process.** Minnesota Housing requires that all housing providers offer an appeal process. The appeal process must allow an opportunity for applicants to provide information of mitigating circumstances or information that would demonstrate their ability to be a successful tenant, or correct inaccurate background check results. Housing providers must review all information provided to determine if the grounds for denial are a reliable indication of future tenancy performance. The appeal process and timeline must be clearly stated in the tenant selection plan. The housing provider must notify the applicant of the outcome of the appeal in writing.
7. **Domestic Violence.** A number of federal programs, including HOME, Section 811 and the Low Income Housing Tax Credit (LIHTC) program, are subject to the restrictions outlined in the Violence Against Women Act (VAWA). VAWA 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>5</sup> Similarly, adverse eligibility factors such as criminal activity or other adverse credit or rental history related to the abuse should not be considered.

Housing providers that aren’t subject to VAWA restrictions are encouraged to adopt 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, policies and practices that target or otherwise discriminate against women because of their status as domestic violence survivors are likely unlawful under federal law. Examples of circumstances that are related to abuse include:

- a. 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, or forcing the victim to work without pay.
  - b. Poor rental history attributable to the perpetrator’s actions such as property damage, noise complaints, missed or late rent or utilities, or drug activity.
  - c. Criminal grounds due to the perpetrator forcing the victim to engage in criminal behavior such as sex work, drug use or sale, or crimes committed by the victim to defend themselves or a third party from the abuse.<sup>6</sup>
8. **Applicants with Disabilities and Reasonable Accommodations.** Housing providers must make sure that tenant selection plans do not raise barriers for individuals with disabilities, such as imposing requirements that applicants be able to “live independently.” Additionally, housing providers must have a written reasonable accommodation policy and process for handling accommodation requests at application. The housing provider’s tenant screening plan must state that the policy will be made available to applicants upon request.<sup>7</sup>
  9. **Tenant-based Rental Assistance.** As a condition of receipt of funding through Minnesota Housing, housing providers are not permitted to refuse to lease a unit to, or discriminate against, a

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<sup>5</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>6</sup> U.S. Department of Housing and Urban Development, Violence Against Women Act (VAWA) Reauthorization Act of 2013 – Additional Guidance for Multifamily Owners and Management Agents (July 30, 2017) available at: <https://www.hud.gov/sites/documents/17-05HSGN.PDF>

<sup>7</sup> See, e.g., Minn. Stat. § 363A.10 (“[Discrimination 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/huddojstatement.pdf>.

prospective resident because the prospective resident has a housing choice voucher (HCV) or any other form of tenant-based rental assistance. In addition, research has shown that tenant-based rental assistance improves housing outcomes.<sup>8</sup> This requirement must be reflected in the tenant selection plan.

10. **Records Retention.** Minnesota Housing encourages records retention as a best practice. Providers have found it beneficial to track outcomes to help ensure the process is effective for tenant success. To help ensure that tenancy determinations and appeal processes are being conducted in a non-discriminatory manner, housing providers should retain records regarding applicant denials and appeals in addition to tenant records. Housing providers are encouraged to periodically review such records for consistency and to identify areas where their retention process could be improved.

## Criminal Background Screening

In 2016, HUD issued guidance that provides considerations for housing providers related to the use of criminal history in tenant screening and the Fair Housing Act.<sup>9</sup> The [guidance](#) includes the following considerations, which are relevant to all properties funded by Minnesota Housing.<sup>10</sup>

1. **Arrests.** HUD makes it clear that a policy that rejects applicants because of arrests (without conviction) is not valid under fair housing laws.
2. **Convictions.**
  - a. While a conviction is usually evidence of criminal conduct, HUD states that a housing provider's screening policy cannot simply exclude all applicants with convictions. Instead, in order to avoid liability under fair housing laws, the policy must accurately distinguish between convictions for criminal conduct that indicate a demonstrable risk to resident safety and/or property and those that do not.<sup>11</sup>

In addition, HUD recommends 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>12</sup>
3. **Mitigating Factors.** The HUD guidance advises a policy that considers mitigating information (as

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<sup>8</sup> Warren, Cael. *Success in Housing: How Much Does Criminal Background Matter?* Wilder Research 16 (January 2019), available at [https://drive.google.com/file/d/1HwYOBfJ\\_k98C6TT99w2o7ryk2CnAGvgo/view](https://drive.google.com/file/d/1HwYOBfJ_k98C6TT99w2o7ryk2CnAGvgo/view) [Wilder Research].

<sup>9</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>10</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>11</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.

<sup>12</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.

opposed to a policy with blanket exclusions) is less likely to be in violation of fair housing laws.<sup>13</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.
4. **Consistent Application of Tenant Screening Policy.** HUD stresses the importance of applying the standards consistently to all applicants.<sup>14</sup>

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

- a. Eleven of 15 criminal offense categories examined have no significant effect on housing outcomes;
- b. The effect of a prior criminal offense on a resident's housing outcome declines over time. Felonies that occurred more than five years prior to move-in have no significant effect on housing outcomes; for misdemeanors, there are no significant effects after only two years; and
- c. 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 the presence of a rental subsidy.<sup>15</sup>

Minnesota Housing encourages housing providers to read and consider both the HUD guidance and the Wilder Foundation study before developing and submitting a tenant screening policy for review.

## Supportive Housing

Minnesota Housing is committed to the goal of housing stability for all Minnesotans. Preventing and ending homelessness is crucial to that goal. Supportive housing programs are intended to house people who often have poor credit histories, poor rental histories, criminal histories, 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 Minnesota Housing selection process to provide units for individuals eligible for supportive housing or senior housing, the tenant selection plan must: (1) be structured to adequately reach those populations; and (2) provide an appeal process for

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<sup>13</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>14</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.").

<sup>15</sup> Warren, Cael. *Success in Housing: How Much Does Criminal Background Matter?* Wilder Research 16 (January 2019), available at [https://drive.google.com/file/d/1HwYQBFJ\\_k98C6TT99w2o7ryk2CnAGvgo/view](https://drive.google.com/file/d/1HwYQBFJ_k98C6TT99w2o7ryk2CnAGvgo/view) [Wilder Research].

unsuccessful applicants that takes into consideration the specific barriers faced by the targeted populations.

1. **Eligibility 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:
  - a) 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.
    - i) Poor credit or outstanding debt may not be a reliable indicator if related to a previous lack of affordable housing or service supports, or if unrelated to housing such as medical debt.
    - ii) 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.
    - iii) Consider the extent to which **supportive services** will help alleviate the identified negative factors.