



**VERMONT  
LEGAL  
AID**

**WORKING TOGETHER FOR JUSTICE**

# HOUSING FOR ALL:

HELPING CLIENTS WITH CRIMINAL RECORDS AND  
SUBSTANCE USE DISORDER ACCESS HOUSING

Presented by:

Jessica Radbord, Esq., Vermont Legal Aid

10/25/2021

# A bit of history

- Rise in the use of criminal record & SUD screening by HUD:
  - 1975: Federal regs instruct PHAs to consider criminal history of applicants. PHAs adopt broad screening policies rejecting applicants with records.
  - 1988: Anti Drug Abuse Act called for strictly denying or terminating people based on drug-related criminal activity.
  - 1996: “One Strike, You’re Out,” 3 year ban after eviction for drug-related offenses, encouraged “stringent screening.”
- Fair Housing Act (1968): Protects against disability discrimination, but specifically excludes active SUD.

# And a few findings

---

- U.S. DOJ: 1 in 3 adults has either an arrest or conviction record.
- NIMH: 20% of U.S. population is affected by SUD.
  - Of those with SUD, 60% have a mental health condition.
- People with stable housing are more likely to successfully reintegrate into society and less likely to reoffend.
  - There is no sociological research establishing a relationship between a criminal record and an unsuccessful tenancy.
- Stable housing helps people recover from SUD, and housing instability and homelessness leads to increased misuse of substances.
  - Housing First seen as the best model.
  - Some studies find there is likely no “one-size-fits-all” housing solution for people with SUD.

# Things are starting to change

- HUD guidance/notices:
  - 2011, Donovan letter to PHAs: Encouraged PHA use of discretion to allow for offender reentry.
  - Notice PIH 2015-19: Backs away from one-strike, can't deny/terminate based on arrest records.
  - 2016, HUD General Counsel guidance: Overly restrictive bans on people with criminal histories may violate fair housing law.
- Permanent supportive housing: HEARTH Act (2009).
- Support Act (2020): Pilot initiative to target housing to people with SUD.
- PHA re-entry pilot programs: Burlington; Baltimore; Oakland; Philadelphia; LA; NYCHA, etc.
- Local ordinances preventing discrimination against people with criminal records: Seattle, WA; San Francisco, CA; Newark, NJ; D.C. etc.



# Eligibility for federally subsidized housing and housing subsidies

- General guidance! Some programs do not have these limits: LIHTC, Shelter Plus Care, PSH, HOPWA.
- Bases for denial we'll be discussing today:
  - Convicted for production of meth in federally assisted housing
  - Lifetime registered sex offenders
  - Evicted from federally assisted housing for drug-related criminal activity within the last 3 years (but see exceptions)
  - Other criminal activity:
    - Drug-related criminal activity,
    - Violent criminal activity,
    - Other criminal activity that would adversely affect the health, safety, or right to peaceful enjoyment of the premises by other residents, the owner, employees, or agents of the owner.

# Lifetime Registered Sex Offender

- Bar for lifetime registered sex offenders. Can be on any state registry, not just Vermont.
- Challenging a denial:
  - Is the person actually a **lifetime** registrant?
  - If not a lifetime registrant:
    - PHA should analyze the time, nature, and circumstances of the offense.
      - E.g.: How many years ago did the crime happen?
    - Applicant can try to show mitigating circumstances and/or rehabilitation.
      - Examples: Crime occurred a long time ago, consensual relationship with partners a few years younger, no subsequent problems, indecent exposure related to substance use disorder now in remission, etc.

# Previously Evicted for Drug-Related Activity

- Mandatory ban for 3 years for eviction from federally assisted housing for drug-related criminal activity.
- Challenging a denial:
  - Statutory exceptions:
    - Successful completion of an approved, supervised rehab program.
    - Circumstances have changed: E.g., HH member who committed the crime died, HH member who committed the crime is in prison, person who committed the crime is terminally ill and too sick to use, etc.
  - Was the eviction from federally-assisted housing? If not, it can't be used for the 3 year mandatory ban regulation.
  - VAWA: Drug-related criminal activity linked to DV.

## Other Criminal Activity: Only some crimes count!

- PHAs/owners may reject applicants for **some** types of other criminal activity that occurred within a **reasonable** period of time.
- Challenging a denial:
  - Arrest alone is not enough: PIH 2015-19.
  - Conviction was not for a covered crime: Must be drug-related, violent, or would threaten health/safety/peace for residents or staff.
    - Examples of what should NOT count: A simple assault in a bar fight, petit larceny from a store, trespassing while experiencing homelessness, etc.



# Other Criminal Activity

## Scenario 1

Jack has been experiencing homelessness for about 6 years. Prior to being in the GA emergency housing program, he picked up the following convictions: (1) trespassing for violating a no trespass order for the only pharmacy in his town; (2) burglary for breaking into a restaurant after-hours and sleeping there after helping himself to food; and (3) 4 petit larceny convictions for stealing supplies for camping, food, and personal items. He's denied based on his record.

- This isn't violent criminal activity or crimes that demonstrate a hazard to others. It's an impermissible denial.

## Other Criminal Activity (cont.): Time-limited look-back periods

- The look-back period for criminal activity is supposed to be “reasonable”.
- Challenging a denial:
  - The look-back period must be specifically stated in the housing provider’s admissions plan.
  - “Reasonable” is not defined in regs, but HUD guidance suggests shorter periods than what we sometimes see:
    - Shouldn’t be permanent unless statutorily required (like for lifetime registered sex offenders and meth).
    - Suggestions from HUD memos/guidance: 12 months for drug-related, 24 months for violent criminal activity, 5 years for most serious offenses. PIH 2015-10, 2015-19, 66 FR 28776.

## Other Criminal Activity Scenario 2

Mark was convicted of an aggravated assault in 1999, when he was 40 and struggling with alcohol. He also picked up a petit larceny in 2018 when he stole about \$300 worth of supplies from the drug store. He's denied based on his criminal record.

- The 2018 conviction isn't violent criminal activity or a crime that demonstrates a hazard to others.
- Although federal regulations don't define "reasonable period of time," 22 years seems quite unreasonable.

# Other Criminal Activity (cont.): Mitigating circumstances

- Challenging a denial: Mitigating circumstances
  - Seriousness of the offense and degree of the applicant's participation in the criminal activity.
  - Effect denial would have on the rest of the family (e.g., effect on children)
  - Effect denial would have on the rest of the community (e.g., person is experiencing homelessness, person will end up in hospital without stable housing, etc.)
  - Evidence of rehabilitation (programs completed, working, etc.)
  - Applicant took responsibility/took steps to prevent or mitigate harm
  - Mitigating circumstances related to the disability of a family member
  - Participation in social service or counseling programs

# Other Criminal Activity (cont.): Reasonable Accommodations

- Challenging a denial: Reasonable Accommodations
  - A reasonable accommodation is a change in a rule, policy, practice, or service that may be necessary to allow a person with a disability the equal opportunity to use and enjoy a dwelling. 42 USC 3604(f).
  - Reasonable: No undue financial/administrative burden on housing provider, doesn't "fundamentally alter" the program. 24 CFR 8.11.
  - Exception for "direct threats." Direct threat assessments must be based on objective evidence, assessing nature and severity of risk, probability of injury, if RA could mitigate risk.

# Other Criminal Activity (cont.): Reasonable Accommodations

- Challenging denials: Reasonable Accommodations (cont.)
  - Housing provider can request verification of disability, if non-obvious
    - From healthcare provider, peer support group, non-medical service agency, other reliable 3rd party. From individual, too, if credible. (HUD/DOJ Joint Statement 2004, p. 13-14)
  - Nexus: Must demonstrate link between the disability and the criminal activity.
    - E.g., *Simmons v. TM Assocs. Management, Inc.*: Woman allowed to add her son to her lease when his criminal activity occurred while he was off his psychiatric medications and was directly related to his mental health symptoms.

## Other Criminal Activity Scenario 3

Suzanne has been diagnosed with advanced COPD and is on an oxygen machine. Six months ago, she was convicted of aggravated assault after she beat her son-in-law in the head and trunk with her portable tank because, she reports, “he’s got no respect,” but she was not required to serve time. You gave the housing provider a note from her doctor to document her disability, but she’s denied. Is that proper?

- There’s no documentation of a nexus between the disability and the criminal activity.
- You can still try to show mitigating circumstances.

## **Other Criminal Activity (cont.): Reasonable Accommodations for SUD/Alcohol**

- Challenging a denial: Reasonable accommodations (cont.)
  - SUD in recovery is a covered disability.
    - Current users of illegal controlled substances are not considered “disabled” for reasonable accommodation purposes. 42 USC 12210(b).
    - Current use includes that which has “occurred recently enough to indicate that the individual is actively engaged in such conduct.” 29 CFR 1630.3.
    - Anyone who is currently in or has completed a drug rehab program is covered, as are persons who are otherwise able to show that they have been “rehabilitated successfully.” 29 USC 705(20)(C)(i).
  - Alcohol misuse is a covered disability, even if active.
    - May need to demonstrate that applicant will not threaten the health, safety, welfare or other tenants, or interfere with peaceful enjoyment.



# Other Criminal Activity (cont.): Other excuses

- Other bases for challenging denials:
  - VAWA: Convictions related to DV.
    - E.g., abuser forced survivor to act as a drug mule, or the abuser committed the crime and the abuser is no longer part of the household.
  - Criminal record is incorrect or has been expunged.
    - Housing providers should not gather criminal record information from the newspapers. Some previously publicized convictions may have since been expunged.

# What about private landlords?

- No VT law bars landlords from rejecting an applicant based on a criminal record.
  - Possible FHA argument if there's a disparate impact.
- Reasonable accommodations under the FHA:
  - Criminal activity must be directly-related to a covered disability.
- Reasonable accommodations based on VT fair housing law, 9 VSA 4503:
  - Criminal activity must be directly related to a covered disability.  
In VT, active substance use disorder is a covered disability.
- VT fair housing law covers DV/SA: If criminal activity is directly related to status as a DV survivor, applicant could argue that they are protected under 9 VSA 4503.

# Advocacy Opportunities

- Federally subsidized properties:
  - PHA five year and annual plans
  - Con Plan (DHCD)
  - Qualified Allocation Plan (VHFA)
  - Requests to housing providers to amend admissions policies.
- Private landlords:
  - Local or state ordinances preventing discrimination against people with criminal records. (Nothing that I know of yet!)
  - Homeless Bill of Rights

# Got questions?

---

Jessica Radbord

802-383-2208

[jradbord@vtlegalaid.org](mailto:jradbord@vtlegalaid.org)

