Courts Consider Landlord Defenses to Source of Income Laws*

Over the past two years, courts have decided numerous cases where Section 8 voucher holders have sought enforcement of state and local laws that prohibit landlords from discriminating against tenants and applicants based upon source of income. Many of these cases have upheld local source of income statutes, rejecting landlord claims that local source of income laws are preempted.[1] On what is usually the threshold question, courts have evaluated whether the state and local anti-discrimination protection covers the receipt of Section 8 assistance. Frequently, these cases have also addressed defenses raised by landlords that the rejection of a tenant with a Section 8 voucher was not discriminatory, but instead based upon legitimate reasons, such as burdensome program requirements, poor credit or insufficient income. The courts have usually rejected such claims as inadequate. This article briefly reviews these recent cases, as well as prior precedents addressing source of income issues where necessary.

Do Local Source of Income Laws Apply to Section 8 Vouchers?

New York City

The New York City Administrative Code provides that landlords receiving local property tax abatements for affordable housing may not discriminate against voucher holders.[2] In 2008, the New York City Council amended the Administrative Code to further prohibit housing discrimination by all landlords, except for owners of buildings containing fewer than six units, based on lawful source of income, defined to include income derived from Social Security, or any form of federal, state, or local public assistance or housing assistance including Section 8 vouchers.[3] A recent New York trial court decision held that this provision applied to both current residents and new applicants with Section 8 vouchers and that the local law was not preempted by federal law.[4]

District of Columbia

The D.C. Human Rights Act prohibits owners of housing accommodations from refusing to rent to someone on the basis of source of income, which includes "federal payments."[5] In *Bourbeau v. Jonathan Woodner Co.*,[6] a federal district court, in rejecting the landlord's motion to dismiss, found that a Section 8 voucher applicant had stated a claim that the landlord's refusal to rent to her because of her Section 8 status could violate the local source of income law. In so doing, it dismissed the landlord's characterization that the local law effectively mandates participation in the Section 8 program. It noted that "landlords remain free not to rent to voucher holders provided they do so on other legitimate, non-discriminatory grounds, such as an applicant's rental history or criminal history," or the need to charge rents higher than allowed under the program.[7] The court also rejected the landlord's related attempt to frame a federal conflict preemption defense, relying on the strong line of prior cases to that effect.[8]

California

The California Fair Employment and Housing Act (FEHA) makes it unlawful "for the owner of any housing accommodation to discriminate against…any person because of the…source of income…of that person."[9] FEHA defines "source of income" as "lawful, verifiable income

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[1]*See States Uphold Source of Income Discrimination Laws Protecting Voucher Holders*, 38 Hous. L. Bull. 11 (Jan. 2008) (reviewing the *Montgomery County*, *Sullivan II* and *DiLiddo* decisions mentioned *infra*). The preemption argument frequently made by landlords, which asserts that the voluntary character of the federal Section 8 program displaces any state or local power that might mandate participation in certain cases, has been repeatedly rejected by the courts. The decision with the most comprehensive discussion of the preemption issue is Commission on Human Rights & Opportunities v. Sullivan Assocs., 250 Conn. 763, 739 A.2d 238 (1999) (*Sullivan I*). *Sullivan I* has been cited in subsequent source of income cases rejecting the preemption argument. *See* Rosario v. Diagonal Realty, LLC, 9 Misc. 3d 681, 689, 803 N.Y.S. 2d 343 (N.Y. Sup. Ct. 2005), *aff'd*, 32 A.D. 3d 739 (App. Div. 2006) and 872 N.E.2d 860 (N.Y. 2007); Bourbeau v. Jonathan Woodner Co., 549 F.Supp. 2d 78 (D.D.C. 2008); Montgomery County v. Glenmont Hills Assocs., 402 Md. 250, 272-273, 936 A. 2d. 325 (Md. 2007), *cert. denied* 2008 LEXIS 4793 (U.S. June 8, 2008). The preemption argument is not addressed in this article.

[2]Administrative Code of the City of N.Y. § 11-243K. New York City's J-51 program prohibits covered landlords from discriminating against tenants who receive, or are eligible to receive, Section 8 assistance.

[3]Administrative Code of the City of N.Y. § 8-101 et seq., as amended in March 2008. The text of the Ordinance is available at: http://www.nyc.gov/html/cchr/html/ammend08.html. The small building exception does not apply if the units are subject to rent control laws or if the owner or agent rents at least six units in any one building, regardless of the size of its other holdings.

[4]Matter of Rizzuti v. Hazel Towers Co. LP, 2008 N.Y.Misc. LEXIS 2176, 239 N.Y.L.J. 63 (N.Y. Sup. Ct., March 27, 2008). *See also* Rosario v. Diagonal Realty, LLC, 872 N.E.2d 860 (N.Y. 2007) (holding that landlord's acceptance of Section 8 is a "term and condition" of lease within meaning of local rent stabilization law, so that renewal lease must contain that term. Moreover, it held that federal law requiring good cause for eviction only during Section 8 lease term does not preempt tenant's right to renewal lease that includes landlord's acceptance of Section 8 nor the nondiscrimination provisions of NYC's J-51 tax abatement program).

[5]D.C. Code § 2-1402.21; definition of source of income at D.C. Code § 2-1401.02(29). Another 2002 local law had clarified that voucher assistance constituted a source of income for purposes of the D.C. Human Rights Act. D.C. Code § 42-2851.06. *See* Bourbeau v. Jonathan Woodner Co., 549 F. Supp. 78, 89 (D.D.C. 2008).

[6]Bourbeau v. Jonathan Woodner Co., 549 F. Supp. 78 (D.D.C. 2008).

[7]*Id.*, at 87.

[8]*Id.*, at 87-89. *See also* cases cited in note 1, *supra*.

[9]Calif. Gov. Code § 12955(a).

paid directly to a tenant or paid to a representative of a tenant."[10] In addition, where a rent subsidy is involved, another FEHA provision prevents landlords making eligibility decisions from using income standards not based upon the tenant's share of the rent.[11] A California trial court has recently found that the California legislature did not intend to include Section 8 as income,[12] but this issue is now on appeal.[13]

In addition to holding that "lawful rent payment" clearly encompassed Section 8, Franklin *rejected the landlord's argument that refusal to accept Section 8 because of the program's administrative burdens was not illegally discriminatory.*

Landlord Claims that Rejection Was Based Upon Poor Credit or Insufficient Income

New Jersey

The New Jersey courts have issued several decisions exploring the interrelationship between the state's source of income protection and landlord practices that seek to utilize credit history to deny applications from certain voucher holders. The New Jersey Law Against Discrimination (LAD), passed in 1981 and revised in 2002, has been interpreted to prohibit discrimination because of status as a Section 8 recipient, and at least one court has held that the refusal to rent based on alleged poor credit was pretextual. Some cases also suggest that the LAD prohibits discrimination for reasons necessarily related to Section 8 voucher receipt, such as the program's alleged administrative burdens, or for reasons such as credit problems that are unrelated to an applicant's ability to satisfy the applicant's actual rent obligations.

The initial version of the LAD prohibited discrimination "because of the source of any lawful income received by the person or the source of any lawful rent payment to be paid for the house or apartment."[14] However, it also initially included an exception permitting landlords to refuse to rent "because of…creditworthiness."[15] In September 2002, the original LAD was repealed and reenacted without the explicit "creditworthiness" exception. The LAD now makes it unlawful to "refuse to sell, lease, assign, or sublease or otherwise deny to or withhold" any real property "because of the source of any lawful income received by the person or the source of any lawful rent payment to be paid for the real property."[16]

In 1999, the New Jersey Supreme Court had construed the initial version of the source of income protections in *Franklin Tower One, L.L.C. v. N.M,* holding that a landlord's refusal to accept Section 8 from a current tenant who became program-eligible constituted unlawful discrimination.[17] The court's reasoning was based on the plain language and legislative intent[18] of the LAD, as well as the state's policy of protecting low-income tenants.[19] The court found further support in the New Jersey Governor's press release, characterizing the act's purpose to protect "tenants receiving governmental rental assistance."[20]

In addition to holding that "lawful rent payment" clearly encompassed Section 8, *Franklin* rejected the landlord's argument that refusal to accept Section 8 because of the program's administrative burdens was not illegally discriminatory. The court noted that the program requirements were not overly burdensome, particularly considering the numerous rental property regulations already imposed on landlords by the state.[21]

Two years later, a New Jersey trial court revisited the original source of income law, finding that a landlord's denial of a Section 8 recipient's application based on allegedly poor credit was a pretext for illegal source of income

[10]*Id.* § 12955(p). While the statute also states that a landlord is not considered such a representative, the tenant has argued that, in the context of Section 8 vouchers, the PHA is the tenant's representative, thus indicating that the statute remains applicable.
[11]*Id.* § 12955(o).
[12]Sabi v. Donald T. Sterling Corp., No. BC313345 (Order Re: Plaintiff's Source of Income Claims, etc., Feb. 7, 2008).
[13]Sabi v. Donald T. Sterling Corp., No. B205279 (Cal. Ct. App., 2d Dist., pending 2008).
[14]N.J.S.A. 2A:42-100.
[15]Franklin Tower One, L.L.C. v. N.M., 304 N.J. Super. 586, 589-90, 701 A.2d 739 (N.J. Super. 1997), *citing* N.J.S.A. 2A:42-100 (repealed).
[16]N.J.S.A. 10:5-12 (g)(4) (2002). Separate provisions make it unlawful for landlords and real estate agents "to refuse to sell, lease, assign or sublease or otherwise deny to or withhold," or to advertise "any limitation, specification or discrimination," or to discriminate in any related "terms, conditions, or privileges," based on "source of lawful income used for rental or mortgage payments." *Id.*, § 10:5-12 (g)(1)-(3) and (5), (h)(1)-(5). *See also id.*, § 10:5-4.
[17]Franklin Tower One, L.L.C. v. N.M., 157 N.J. 602, 619, 725 A.2d 1104 (1999).
[18]The court noted the state assembly's statement of the LAD's purpose "to prohibit[] a landlord from refusing to rent to a person merely because of objections to the source of the person's lawful income." *Id.*, at 605, *citing* Assembly Commerce, Industry and Professions Committee, Statement to A. 944 (May 1, 1980).
[19]The existence of the New Jersey Anti-Eviction Act requiring good cause for termination of a tenancy demonstrated the state's strong public policy of tenant protections. *Id.*, at 614. The court distinguished *Knapp v. Eagle Property Mgmt. Corp.*, 54 F.3d 1272 (7th Cir. 1995), which had held that the Wisconsin source of income law did not cover Section 8 recipients, noting that Wisconsin's protections based on "lawful source of income" differed from New Jersey's specific prohibition of discrimination based on "lawful rent payment." *Id.*
[20]*Id.* at 605-06, *citing* News Release, Office of the Governor, at 1 (Dec. 9, 1981).
[21]*Id.* at 621.

discrimination.[22] In that case, an unemployed Section 8 voucher holder also receiving other public assistance applied for an apartment for herself and her twelve-year-old daughter. After initially rejecting her application "due to credit," the landlord claimed she was rejected due to unemployment and a poor credit report, which reflected two unpaid medical bills totaling $434.[23] Subsequently, the landlord alleged that her application was denied because of poor credit and insufficient income.[24]

The court found that creditworthiness only relates to landlords' "legitimate concern that a prospective tenant has a reliable and steady source of income to fund rent payments and satisfy the other financial requirements of a lease."

In response to the discrimination claim, the landlord argued that denial based on poor credit fell within the original statutory exception for denials based on "creditworthiness," a term which landlords could define under their "business judgment."[25] Although the first version of the LAD permitted denials based on "creditworthiness," the court was careful to ensure that landlords could not simply define the term to their advantage.[26] The court noted that as a remedial statute, the LAD's protections must be construed liberally and the exception for lack of creditworthiness construed narrowly.[27] In so doing, the court found that creditworthiness only relates to landlords' "legitimate concern that a prospective tenant has a reliable and steady source of income to fund rent payments and satisfy the other financial requirements of a lease."[28]

Using this definition, the court then examined the landlord's assessment of the applicant as credit unworthy, rejecting the landlord's reliance on the cursory credit report showing small debts for necessary medical expenses, and noting that it never contacted past landlords and did not apply uniform and objective application standards.[29] Although Landmark West withdrew its allegation of insufficient income, the court found it significant that at trial the manager expressed concern that the applicant would be unable to pay rent if she lost her voucher.

Because the applicant's Section 8 voucher ensured her ability to pay rent, and because she was able to pay the security deposit, the court concluded that the landlord had not established "any rational relationship between the plaintiff's credit report and Landmark West's legitimate concern that plaintiff has the means to pay the rent."[30] Accordingly, the court found that the applicant's allegedly poor credit was a pretext for denial on the basis of "economic status, including her unemployment, lack of sufficient income and her participation in the Section 8 program."[31] Holding that Landmark West thus illegally discriminated based on "the source of … lawful rent payment," the court required it to enter into a lease and comply with all reasonable Section 8 program requirements.

A subsequent decision, *Pasquince v. Brighton Arms Apartments*,[32] clarified the circumstances in which credit-related denials may be nondiscriminatory and thus legitimate. In *Pasquince*, a landlord had denied a disabled Section 8 recipient's rental application based on his credit report, which included unpaid utility bills, an eviction for nonpayment of rent and a $2,922 debt owed to a prior landlord. The landlord informed the applicant that he could contact the credit reporting agency to dispute his credit report.[33] Although the New Jersey Legislature revised the LAD between the *T.K.* decision and the 2005 *Pasquince* decision to delete the creditworthiness exception, the court found no evidence that this revision was intended to prevent landlords from ever denying applicants based on poor credit.

The *Pasquince* court held that lack of creditworthiness was not a pretext for illegal discrimination based on the "source of any lawful rent payment."[34] Key to distinguishing *T.K.* factually were that Brighton Arms applied written application standards, presented consistent reasons for rejecting Pasquince's application, exempted Section 8 applicants from the minimum income requirements, and rented to other Section 8 tenants. Moreover, Pasquince's unpaid utility bills and eviction for nonpayment supported a conclusion that he was not creditworthy.[35] In

[22]T.K. v. Landmark West, 353 N.J. Super. 353, 802 A.2d 609 (N.J. Super. Ct. App. Div. 2001).
[23]*Id.* at 361.
[24]*Id.* at 357-58.
[25]*Id.* at 359, *citing* N.J.S.A. 2A:42-100 (since repealed).
[26]*See id.* at 359-60, analogizing to Comm'n on Human Rights & Opportunities v. Sullivan Assocs., 739 A.2d 238, 253 (1999), *reh'g denied*, 742 A.2d 364 (1999) (noting that it was inconsistent with the remedial nature of the Connecticut source of income statute to allow landlords "*carte blanche* authority to define the term [creditworthiness] so as to qualify for the exception").
[27]T.K. v. Landmark West, *supra* at 359. In the absence of a statutory definition, the court construed the term by referencing the dictionary definition, as well as the legislative intent not to "deny or interfere with a landlord's legitimate considerations of *sufficiency of income or reliability of rent payment*." *Id.* at 360, *citing* Assembly Commerce, Industry and Professions Committee, Statement to Assembly No. 944, May 1, 1980 (emphasis in opinion).
[28]*Id.* at 360.
[29]*Id.*
[30]*Id.* at 362.
[31]*Id.* at 363.
[32]Pasquince v. Brighton Arms Apartments, 378 N.J. Super. 588 (N.J. Super. Ct. App. Div., 2005).
[33]*Id.*, at 592.
[34]N.J.S.A. 10:5-12, 10:5-4 (2002). The court noted, however, that denials based on poor credit may be pretextual if landlords alter their standards for Section 8 tenants. Pasquince v. Brighton Arms Apartments, 378 N.J. Super. 588, 601 (N.J. Super. Ct. App. Div., 2005).
[35]*Pasquince*, at 600-01.

discussing the significance of past rent nonpayment, the court rejected an unpublished opinion holding that landlords may not consider a tenant's creditworthiness where a voucher would pay at least 50% of the monthly rent.[36] The court noted that voucher recipients must still pay their portion of the rent, and that past nonpayment reasonably suggests they will be unable to do so in the future,[37] certainly sound reasoning if the past nonpayment accrued during a subsidized voucher tenancy.

In another more recent case, *Miller v. Brookside at Somerville, LLC*,[38] the court addressed similar issues in affirming the lower court's denial of a preliminary injunction. The tenant claimed that the landlord violated the statute and public policy when it used a point-based formula to deny his application based on an erroneous credit report and wrongfully refused to examine the tenant's actual credit history.

The court again affirmed that it is lawful for landlords to use creditworthiness as a selection criterion for Section 8 tenants and that rejection based on a poor credit history did not violate the LAD. As to whether the trial court should have required the landlord to consider the accuracy of the credit history, the court found no abuse of discretion by the trial court in refusing the injunction,[39] because the tenant had no legal claim to require the owner to use accurate credit reports. However, the court did provide some guidance for the lower court as the case proceeds, stating that "the lawsuit relating to plaintiff's allegedly successful dispute over the security deposit and his landlord's action to regain possession of his rental unit for personal occupancy do not appear to pertain to the applicant's prior ability or inclination to pay rent. Accordingly, reliance on those items would provide little insight into an individual's creditworthiness."[40] The court also suggested that the tenant could obtain a copy of the report from the credit agency and dispute its accuracy under the Federal Fair Credit Reporting Act.[41] In addition the court suggested the option of joining the reporting agency as a party.[42]

Although the decision in *Franklin Tower One* clarified that New Jersey's source of income definition covers Section 8 vouchers and is not preempted, the subsequent decisions in *T.K.*, *Pasquince* and *Miller* suggest that courts are more likely to find that denials based on poor credit are nondiscriminatory if landlords consistently use written screening standards and make consistent statements regarding applicants' rejection. Similarly, whereas outstanding debts due to medical expenses are likely inadequate to show poor credit that would justify rejection, evictions and debts related to prior tenancies may be found nondiscriminatory, especially if they also involved subsidized tenancies, even though vouchers make apartments more affordable to recipients.

The Connecticut source of income statute has been interpreted as prohibiting landlords from rejecting applicants for reasons related to their receipt of Section 8.

Connecticut

Like the New Jersey law, the Connecticut source of income statute has been interpreted as prohibiting landlords from rejecting applicants for reasons related to their receipt of Section 8, including program requirements, and related to income requirements that do not consider voucher participants' personal share of the rent. Connecticut law prohibits landlords from refusing to rent or offering different terms, conditions, or privileges based on "lawful source of income," and from advertising any such preferences or limitations.[43] The statute defines source of income as "income derived from Social Security, supplemental security income, housing assistance, child support, alimony or public or state-administered general assistance."[44] The statute further specifies that its provisions "shall not prohibit the denial of full and equal accommodations solely on the basis of insufficient income."[45]

Back in 1999, in *Commission on Human Rights and Opportunities v. Sullivan Associates*,[46] the Connecticut Supreme Court had held that a landlord's reluctance to accept the terms of the Section 8 lease was not a legitimate basis for denial,[47] and that a landlord may only consider a voucher holder's personal rent obligation and other reasonable rental expenses when assessing sufficiency of income. In that case, Sullivan had denied applications from two Section 8 recipients, citing their failure to meet Sullivan's minimum income requirements, and noting that the required security deposit exceeded the maximum

[36]*Id*. at 598, *citing* Reed v. Rustic Village Apartments, No. DC-4136-02M (N.J. Super. Ct. Law Div. Jan. 14, 2003).
[37]*Id*. at 598.
[38]2008 WL 351338 (N.J. Super. Ct. App. Div., Feb. 11, 2008) (unpublished).
[39]*Id*., at slip op. 5.
[40]*Id*.
[41]15 U.S.C. §§ 1681-1681t (2008).
[42]Miller v. Brookside at Somerville, LLC, 2008 WL 351338 (N.J. Super. Ct. App. Div., Feb. 11, 2008), slip op. at 5.
[43]Conn. Gen Stat. § 46a-64c(a).
[44]*Id*. § 46a-63.
[45]*Id*. § 46a-64c(b)(5).
[46]Commission on Human Rights & Opportunities v. Sullivan Assocs., 250 Conn. 763, 739 A.2d 238 (1999) (*Sullivan I*).
[47]At the time of the denial in 1994, federal regulations required prospective Section 8 renters and landlords to use a standardized lease and addendum in order to participate in the Section 8 program. 24 C.F.R. § 882.209(j)(1) (1994).

allowed by Section 8.[48] In response to the Commission's discrimination allegations, Sullivan argued that its objections to terms in the standardized Section 8 lease[49] constituted a non-discriminatory basis for denial. Sullivan further argued that its policy of denying applicants whose weekly incomes were not equal to a month's rent was authorized by the statutory exception for denials based on insufficient income.

In addressing the Commission's complaint, the court first noted that the law "makes mandatory landlord participation" in Section 8,[50] while acknowledging that landlords may deny applicants for non-discriminatory reasons.[51] To determine whether the statute was intended to allow denials if landlords objected to the Section 8 lease, the court examined the statute's legislative history. It held that to read such an exception into the statute would undermine the legislature's intent to provide low-income families access to the rental market, citing the legislature's awareness of Section 8 requirements at the time of enactment, as well as two failed attempts to amend the statute explicitly to include such an exception.[52]

The court then evaluated Sullivan's argument that denials based on its minimum income requirements, which considered the entire rental obligation, were permissible under the statute's exception for "insufficient income." Since both the statute and its legislative history were silent, the court turned again to the statute's purpose and the law dictionary to support its conclusion that this exception allowed landlords to determine only whether applicants lack "sufficient income to give the landlord reasonable assurance that the tenant's portion of the stipulated rental will be paid promptly and that the tenant will undertake to meet the other [tenancy] obligations…."[53] The case was remanded to allow the landlord the opportunity show that applicants did not have sufficient income, considering their income, personal rental obligation, foreseeable utility expenses, and so forth.

Although *Sullivan I* did not ultimately resolve whether the applicants' income was insufficient within the meaning of the exception, the court revisited the issue early in 2008 in a separate case against the same landlord. In *Commission on Human Rights and Opportunities v. Sullivan (Sullivan II)*,[54] the court affirmed its *Sullivan I* holdings, and considered whether the landlord's denial of voucher holders, allegedly based on "insufficient income, bad credit, or bad attitude" were credible and non-discriminatory.

Applying a mixed-motives analysis to the landlord's defense, *Sullivan II* upheld the trial court's determination that Sullivan failed to prove it would have denied applicants even if they had not been Section 8 participants.[55] Significantly, the court held that Sullivan's denial was not based on the applicant's ability to pay only their monthly portion of the rent, and that alleged poor credit was not a credible basis of denial, because it appeared as an afterthought and was based on a stale application that listed only a delinquent student loan.[56]

As the *Sullivan* decisions make clear, the Connecticut source of income law prevents landlords from circumventing its protections by denying applications based on inherent Section 8 program requirements or based on alleged insufficient income or bad credit, where such reasons fail to account for the voucher subsidy or are not proven to be legitimate and non-discriminatory.

Courts Reject Landlords' Claim that Section 8 Program Is Burdensome

Montgomery County, MD

The source of income protections of the Montgomery County, Maryland, fair housing law also encompass Section 8 vouchers and, as interpreted by the Maryland Court of Appeals,[57] set a high standard for landlords to prove that Section 8 administrative burdens are a viable defense to allegations of discrimination. Montgomery County law prohibits certain landlords from refusing to rent to any person based on "source of income," defined as including "any lawful source of money, paid directly or indirectly to a renter or buyer of housing, including income from… any government or private assistance, grant, or loan program,"[58] and the county interprets "source of income" as including Section 8 vouchers.[59]

The landlord, Glenmont, had a policy of rejecting vouchers, confirmed by its refusal to rent an apartment to a Section 8 participant. After an administrative finding that Glenmont had unlawfully discriminated based on source of income was invalidated by a lower court, the Maryland Court of Appeals addressed two issues: (1) whether Section 8 was a source of income under local law; and (2) if so, whether landlords' objections to the administrative burdens of the program constituted a valid basis for denial.

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[48] *Sullivan I, supra,* at 771. Sullivan also denied two fair housing testers posing as Section 8 recipients. *Id.*

[49] Sullivan objected to Section 8 lease provisions that set maximum allowable security deposits and regulated lease termination by a landlord. *Id.*

[50] *Id.* at 765.

[51] *Id.* at 776.

[52] *Id.* at 782.

[53] *Id.* at 790 (emphasis added).

[54] 285 Conn. 208, 939 A.2d 541 (2008) (*Sullivan II*). *See also States Uphold Source of Income Discrimination Laws Protecting Voucher Holders*, 38 Hous. L. Bull. 11 (Jan. 2008).

[55] *Sullivan II,* at 228-230.

[56] *Id.* at 231.

[57] Montgomery County v. Glenmont Hills Assocs., 402 Md. 250, 936 A. 2d. 325 (Md. 2007), *cert. denied* 2008 LEXIS 4793 (U.S. June 8, 2008). *See also States Uphold Source of Income Discrimination Laws Protecting Voucher Holders*, 38 Hous. L. Bull. 11 (Jan. 2008).

[58] Montgomery County Code §§ 27-6 and § 27-12.

[59] Montgomery County v. Glenmont Hills Assocs., 402 Md. 250, 260, 936 A. 2d. 325 (Md. 2007).

In considering whether the law's source of income definition covered Section 8, the court noted that the definition includes both government assistance, which unquestionably includes Section 8, and money "paid directly or indirectly to a renter."[60] The court reasoned that although Section 8 Housing Assistance Payments are paid to the landlord rather than the tenant, the payment is "clearly and identifiably on behalf of the tenant," and "therefore constitutes money paid indirectly to the tenant."[61] Therefore, the court concluded that the source of income definition encompassed Section 8 vouchers.

Analyzing the landlord's administrative burdens defense, the court noted the administrative body's determination that the program requirements complained of by the landlord[62] were not unduly burdensome and therefore did not unduly interfere with the landlord's property rights.[63] The court affirmed that administrative burden was not a proper defense in any event, because "if a landlord could avoid the mandate of the County's fair housing law with the defense of 'administrative burden,' then landlords could easily thwart the Council's intent underlying the law."[64] The fact that most courts addressing the administrative burden defense have rejected it was also persuasive,[65] as was the fact that the alleged burdens did not constitute a taking or a violation of due process.[66] While also rejecting the owner's implied preemption claim, Montgomery County thus makes it harder for those landlords who seek to evade source of income protections for voucher holders by citing allegedly burdensome Section 8 program requirements.

Massachusetts

Going further than other states to preclude an administrative burden defense, the Massachusetts legislature has enacted a source of income law explicitly prohibiting discrimination based on the requirements of any housing subsidy program. Massachusetts law currently prohibits discrimination by "any person furnishing…rental accommodations" against "tenant[s] receiving federal, state, or local housing subsidies, including rental assistance or rental supplements, because the individual is such a recipient, or because of any requirement of such public assistance, rental assistance, or housing subsidy program."[67]

A prior version of the law had prohibited discrimination "solely on the basis of the tenant's status as a Section 8 recipient."[68] In 1987, the Supreme Judicial Court of Massachusetts construed that version of the statute as allowing denials because of objections to Section 8 program requirements. In *Attorney General v. Brown*, the court had held that a landlord's refusal to rent to a Section 8 participant because of objections to a standardized lease did not violate the anti-discrimination law, because although it was related to the requirements of the Section 8 program," the denial was not "solely" on the basis of the tenant's status as a Section 8 recipient."[69] In response to this unfavorable ruling, the state legislature amended the statute in 1990, eliminating the word "solely," and adding language prohibiting discrimination against housing subsidy recipients "because of any requirement of such …program."[70]

In 2007, in *DiLiddo v. Oxford Street Realty*,[71] the Supreme Judicial Court construed the amended source of income law. Reversing the lower court, the court held that a lease term mandated by a state housing voucher program was a program requirement, making unlawful the landlord's refusal to execute a lease based on objections to the lease terms.[72] The court declined the landlord's request to read into the statute an exception allowing landlords to reject participants in any program that would cause a landlord "substantial economic harm," finding it without statutory support.[73] The court noted that in light of the 1990 statutory amendment, the legislature had clarified that "both kinds of housing discrimination that this court had parsed so carefully in *Brown* were now unlawful," regardless of any alleged non-discriminatory reasons.[74]

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[60] *Id.* at 264.
[61] *Id.* at 264-65.
[62] Glenmont complained of the following provisions of the HUD lease addendum: (1) PHA failure to pay its portion of the rent does not constitute a breach of the lease; (2) tenant is allowed to engage in profit-making activities incidental to the primary use as a residence; (3) the addendum prevails over the standard lease terms and cannot be changed by the landlord or tenant. Glenmont also complained of the following Section 8 Housing Assistance Payment contract terms: (1) PHA may terminate assistance to tenant on various grounds, and if so, the lease will automatically terminate without notice to the landlord; (2) if HAP contract terminates for another reason, the lease terminates without notice to the landlord. Glenmont also complained that program participation requires the apartment to satisfy HUD Housing Quality Standards, requiring a PHA inspection. *Id.* at 275.
[63] *Id.* at 276.
[64] *Id.*
[65] *Id.* at 276 (citing Comm'n on Human Rights v. Sullivan Assocs., 739 A.2d 238 (Conn. 1999), Godinez v. Sullivan-Lackey, 815 N.E.2d 822, 828 (Ill. App. 2004), and Franklin Tower One, L.L.C., v. N.M., 725 A.2d 1104 (N.J. 1999)).
[66] *Id.*
[67] Mass. Gen. Laws Ann. ch. 151B, § 4(10) (Westlaw Oct. 22, 2008) (emphasis added).
[68] DiLiddo v. Oxford Street Realty, Inc., 876 N.E.2d 421, 427 (Mass. 2007). *See also States Uphold Source of Income Discrimination Laws Protecting Voucher Holders*, 38 Hous. L. Bull. 11 (Jan. 2008).
[69] Attorney General v. Brown, 511 N.E.2d 1103, 1109 (Mass. 1987).
[70] *See* DiLiddo v. Oxford Street Realty, Inc., 876 N.E.2d 421, 429 (Mass. 2007) (citing Mass. Gen. Laws ch. 151B, § 4(10)).
[71] DiLiddo v. Oxford Street Realty, Inc., 876 N.E.2d 421 (Mass. 2007).
[72] *Id.* at 427.
[73] *Id.* at 430.
[74] *Id.* at 429.

Conclusion

For those jurisdictions that have determined that Section 8 is covered by local laws preventing source of income discrimination, the litigation has now become focused upon the landlord defenses that a family may be rejected for other factors, including poor credit or insufficient income, or that its basis for rejecting applicants is non-discriminatory because the program is burdensome. While recent decisions have unanimously found that Section 8 program requirements alone are insufficient to justify rejection of Section 8 applicants, the issues of whether a landlord may reject assisted applicants for poor credit or insufficient income continue to evolve. In most cases, courts are requiring a demonstrated relationship between a poor credit report and a legitimate concern about the tenants' ability to make future payments of their share of the rent. Other related issues remain unresolved, such as how to handle erroneous and unreliable credit reports. These recent cases also demonstrate that determining the specific policies and practices at issue in each case, as well as the actual reasons for rejection, will always be critically important. ■

Using HUD's Updated Physical Inspection Scores to Preserve Threatened Multifamily Properties

One vital aspect of affordable housing preservation is ensuring the proper physical and financial maintenance of projects to avoid loss of the property. The Department of Housing and Urban Development (HUD) created its current inspection standards for multifamily properties a decade ago, as part of its 2020 Management Plan.[1] HUD also created the Real Estate Assessment Center (REAC) and the Enforcement Center, both located in HUD Headquarters, to address problems presented by noncomplying properties. The REAC evaluates the financial and physical condition of all HUD-funded public and assisted housing developments. The Enforcement Center takes action against troubled developments that fail the financial and physical inspection standards.[2] Enforcement actions may include termination of the project-based contract. Understanding the standards and enforcement can help advocates take action to preserve affordable housing.

REAC's physical condition standards help determine if a development is decent, safe, sanitary and in good repair. Inspectors review the site, building exterior, building systems, dwelling units, common areas, and health and safety concerns.[3] The standards neither include state or local housing codes, nor do they supersede or preempt them.[4] While the REAC process also encompasses financial and management issues, physical conditions create the most common risk of enforcement action that could lead to precipitous termination of the project-based Section 8 contract and displacement of the residents.

Under the REAC physical inspection scoring system, all multifamily housing properties are rated on a 100-point scale, resulting in rankings as either a Standard 1 (90 points or higher), Standard 2 (80 to 89 points), or Standard 3 (fewer than 80 points) performing properties. Standard 1 performing properties are required to undergo physical inspection only once every three years; Standard 2 performing properties, once every two years; Standard 3 performing properties are inspected annually.[5] The regulations also require that Standard 1 and 2 performing properties address any health and safety

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[1]24 C.F.R. Part 200, subpt. P (2007). *See also* 63 Fed. Reg. 35,649 (June 30, 1998).
[2]Notice of New HUD Field Structure, 62 Fed. Reg. 62,478 (Nov. 21, 1997); HUD 2020 Management Reform Plan, 62 Fed. Reg. 43,212 (Aug. 12, 1997).
[3]24 C.F.R. § 5, Subpt. G (2007) (Physical Condition Standards and Inspection Requirements).
[4]*Id*. § 5.703(g)(2007).
[5]*Id*. § 200.857(b) (2007).