MILLER & STARR
REAL ESTATE NEWSALERT

Reprinted in part from
Volume 23, Number 2, November 2012
(Article starting on page 111 in the actual issue)

ARTICLE

Section 8 Housing: Safety Net or Tangled Web? An Overview of Section 8 Tenancy Termination and Related Due Process Issues

By Katie R. Jones*

There is no question that the federal government's Section 8 housing assistance rent subsidy provides an invaluable safety net to impoverished, elderly, and disabled members of our community. The Department of Housing and Urban Development (HUD) assists more than 2 million households by providing either "project-based" or "tenant-based" rent subsidies through its Section 8 housing assistance program. With the continued downturn in the economy, the waitlists for tenants to receive Section 8 housing subsidies are rapidly growing. The federal government has attempted to alleviate some of this burden by relaxing various regulations to encourage landlords to participate in Section 8 housing programs. However, many landlords remain skeptical about subjecting themselves to the additional administrative burdens accompanying the Section 8 housing program, particularly in those jurisdictions with rent control ordinances.

Despite the need for Section 8 housing, landlord participation in the Section 8 program is not required. Once a landlord ventures into the realm of Section 8, however, there are numerous administrative challenges associated with exiting the program. Accordingly, when weigh-

* Katie R. Jones is a litigation associate in the Walnut Creek office of Miller Starr Regalia.

WEST®

ing the decision of whether or not to become involved as a landlord in the Section 8 program, it is important from the outset to consider the requirements imposed on a landlord in entering into or terminating a Section 8 lease.

This article is intended to highlight a few of the procedural hurdles and hidden traps associated with terminating Section 8 tenancies, as well as related Section 8 housing assistance contracts, as illustrated in a handful of California and Ninth Circuit cases decided over the past few years.

OVERVIEW OF THE SECTION 8 HOUSING PROGRAM.

In 1974, Congress added the Section 8 housing program to the United States Housing Act of 1937 to provide rental assistance for low and moderate income families, the elderly, and the disabled. As codified at 42 U.S.C.A. §1437f, the stated purpose of the Section 8 program is to aid low-income families in obtaining a decent place to live and promote economically mixed housing.

Under the Section 8 program, HUD provides the housing assistance funds to be administered by State or local government public housing agencies (PHAs) pursuant to an annual contributions contract (ACC). The ACC sets the maximum monthly rent to be paid to the property owner, requires the PHA to achieve a certain economic mix of recipients, and mandates that the PHA incorporate certain contractual provisions in all agreements with a private landlord participating in the Section 8 program.[1] HUD then pays the PHA pursuant to the ACC, both for use as rent subsidies and to compensate the PHA for its management expenses.[2] The PHA, in turn, distributes the funds, implements the relevant legal mandates, and oversees the landlords and tenants.[3]

There are primarily two forms of Section 8 assistance, "project-based" assistance and "tenant-based" assistance.[4] Project-based assistance involves rental assistance specific to the housing unit; whereas tenant-based assistance is specific to the tenant and follows the tenant to whichever housing unit he or she elects to rent.

A "project" is defined under HUD regulations as "a single building, multiple contiguous buildings, or multiple buildings on contiguous parcels of land."[5] Under project-based assistance, the PHAs allocate vouchers to the housing owner if the owner agrees to either rehabilitate or construct new units or agrees to set aside a portion of the units in an existing development for Section 8 housing. Section 8 requires

that no more than 25 percent of the dwelling units in any project receive project-based assistance.[6] In more recent years, there has been a greater trend towards tenant-based assistance, pursuant to which the tenant receives a Section 8 housing voucher, chooses the rental unit and retains the rental subsidy when he or she moves to another Section 8 housing unit.[7]

Under both forms of assistance, the tenant pays a "tenant rent", which is typically the greater of 30 percent of "adjusted income" or 10 percent of gross income.[8] The government then pays the balance of the rent to the owner pursuant to a housing assistance payment (HAP) contract. The HAP contract specifies the total amount of rent to be paid to the owner of the housing unit, which ordinarily cannot exceed 110% of a local "fair market rental" value established by HUD, and also establishes the allocation of the payment of rent between the tenant and the PHA.[9] Even if a housing unit is not subject to rent control, the rent for that unit still must be "reasonable in comparison with other units in the market area that are exempt from local rental control provisions."[10] The HAP contract also requires the landlord to maintain the housing unit in compliance with HUD's Housing and Quality Standards (HQS).[11] The PHA is required to inspect the unit to ensure it meets the HQS.

The HAP contract also sets forth the grounds for termination of the Section 8 tenant's lease. These grounds include the HUD regulations prohibiting the housing owner from terminating the tenancy except for serious or repeated violations of the terms and conditions of the lease, for violation of applicable Federal, state, or local law, or for other "good cause."[12]

PROPERTY OWNERS ARE NOT REQUIRED TO ACCEPT SECTION 8 VOUCHERS.

Despite the overriding need for supply of Section 8 housing, the federal government has not gone so far as to compel landlords to participate in the Section 8 program. Over the past few decades, Congress has enacted numerous revisions to Section 8 regulations in an effort to ease some of the burdens imposed on landlords to comply with Section 8 and incentivize landlords to participate in the program. For example, in 1996, Congress repealed the "take one, take all" provisions of Section 8, which effectively provided that once a landlord elected to accept a Section 8 tenant, it could not turn away subsequent Section 8 tenants.[13]

More recently, the Ninth Circuit and California Second District Court of Appeals confirmed that Congress did not intend to mandate participation in Section 8 housing.[14] In *Sabi v. Sterling*, the California appellate court held that the landlord did not violate California laws prohibiting discrimination by refusing to participate in Section 8 housing.[15]

Sabi v. Sterling involved a claim by an elderly woman suffering from several physical and psychological disabilities who became eligible for federal Section 8 tenant-based housing assistance to help subsidize her rent controlled apartment. After her landlord refused to participate in the Section 8 program, the tenant sued, claiming that the landlord violated state laws prohibiting discrimination. Specifically, the tenant claimed that the landlord violated the Fair Employment and Housing Act.[16] This California statute prohibits discrimination because of a person's "source of income."[17] The tenant asserted that her Section 8-based housing assistance was a "source of income." However, the court disagreed and concluded that Section 8 rent subsidies are not a source of *tenant* income because the subsidy is paid directly by the PHA to the landlord.

In holding that the tenant failed to establish that the landlord violated any state anti-discrimination laws by refusing to participate in the Section 8 housing program, the court noted that while some may believe it is sound social policy to call for inclusion of Section 8 assistance payments as a tenant's source of income, so far, the legislature does not agree. The court explained that nothing in either 1999 or 2004 amendments to the operative provision of Section 8 indicates that the legislation was intended to compel the landlord's participation in the Section 8 program.

TERMINATION OF A SECTION 8 TENANCY CAN BE TRICKY.

Before deciding whether to participate in the Section 8 tenant-based or project-based assistance program, landlords must consider, among other things, the obstacles associated with exiting the Section 8 program. Although Congress has amended regulations so as to incentivize property owners to participate in the Section 8 program, the courts have not ignored one of the overriding goals of the program, which is to protect low-income tenants.

When a defendant is a tenant of federally subsidized housing, federal law must be followed in addition to state law in an eviction proceeding.[18] Pursuant to HUD regulations, an eviction notice must state

the cause for eviction and permits an owner to terminate a Section 8 lease only for "serious or repeated violation of the terms and conditions of the lease, for violation of the applicable federal, state, or local law, or for other good cause."[19] The current HUD regulations provide that "other good cause" may include a business or economic reason for termination of the tenancy, such as sale of the property, renovation of the unit, or desire to lease the unit at a higher rental.[20] However, a landlord may not terminate for business or economic reasons during the initial lease term, which must be for a period of at least one year.

PHAs also have the right to terminate Section 8 housing assistance when a family receiving assistance violates the lease terms or other Section 8 regulations. These regulations require a landlord to provide the tenant and the PHA with written notice at least one year in advance before terminating any HAP contract, other than a HAP contract for tenant-based assistance. Otherwise, the requisite notice required before terminating a Section 8 tenancy is generally left to state law.

TERMINATION OF TENANCIES RECEIVING PROJECT-BASED ASSISTANCE.

Although *Sabi v. Sterling* makes clear that there is no obligation for landlords to participate in the Section 8 program, as demonstrated in the more recent case of *Park Village Apt. Tenants v. Mortimer Howard Trust*, once the landlord enters the program, certain Section 8 regulations can leave the landlord with no viable alternative but to continue participation in the program.[21]

Park Village involves yet another nuance of Section 8 project-based assistance referred to as "enhanced vouchers." In the late 1990s, Congress created an enhanced voucher program to combat the growing number of Section 8 project owners terminating or refusing to renew their HAP contracts. The enhanced vouchers apply only to those tenants receiving project-based assistance.

Section 8 enumerates certain "eligibility" events under which a tenant may be entitled to receive an enhanced voucher. Those events include the following with respect to a multifamily housing project: (1) the prepayment of the mortgage; (2) the voluntary termination of the insurance contract for the mortgage; (3) the termination or expiration of the HAP contract; or (4) the transaction under which the project is preserved as affordable housing that results in the housing project being eligible of enhanced voucher assistance.[22]

Provided that the tenant continues residing in the same project in which he or she was residing on the date of the above-described eligibility event, the tenant is entitled to continue residing in the same project, and if the applicable rent exceeds the amount pursuant to the HUD regulations, the government will pay the difference between the tenant's share of rent and the market-rate rent.[23] However, the total rent charged by the owner still must be reasonable in comparison with rents charged from comparable dwelling units in the private, unassisted local market.

In *Park Village* the owner of an apartment complex developed in 1978 with the assistance of Section 8 project-based rental subsidies attempted to opt out of the Section 8 program after the owner's final project-based HAP contract with HUD expired. The landlord provided the tenants and HUD with the requisite one-year notice, requiring the tenants to vacate or commence paying the full amount of rent at the end of the one year period. At the expiration of the notice-period, the landlord raised the rents to market rates, refused to accept the tenants' vouchers and refused to enter into a new HAP contract. The landlord then attempted to evict those tenants for failure to pay the full amount of rent.

The tenants claimed that under the enhanced voucher program, they were entitled to remain in the same project. The landlord argued, to the contrary, that the Section 8 regulations allowing the tenant to remain in the same project after the occurrence of an eligibility event effectively force the landlord to enter into a HAP contract with the PHA in contravention of Congress' stated intent to allow owners to opt out of Section 8.

The *Park Village* court rejected the landlord's argument, explaining that a landlord can refuse to enter into a HAP contract and accept the reduced amount of tenant rent, forgoing collection of the rent subsidy from the PHA, but the landlord cannot raise the rent charged to the Section 8 tenant to market levels, nor can the landlord evict Section 8 tenants who continue to pay rent at the level permitted by Section 8. In other words, a property owner is not required to enter into another HAP contract, but it is nonetheless required to allow the tenant to remain in the housing unit and pay only a reduced share of rent.

Although *Park Village* concerns only project-based Section 8 assistance, this case is a cautionary tale for landlords considering to forego renewal of their HAP contract following an eligibility event. The land-

lord must weigh the costs associated with continued participation in Section 8 with the benefits of receiving market-based rents. As a practical matter, the landlord may only have the "choice" of extending or renewing the HAP contract or suffering an ongoing rental deficit without a corresponding payment from HUD—which often is the same as no choice at all.

TERMINATION OF TENANCIES RECEIVING TENANT-BASED ASSISTANCE.

In California, a landlord generally must provide a tenant with 60 days prior written notice to terminate a residential lease for a periodic tenancy, such as month to month tenancy,[24] unless the tenant has resided in the unit for less than one year, in which case 30 days notice is sufficient.[25] However, in *Wasatch Property Management v. Degrate*, the California Supreme Court confirmed that in order for a landlord to terminate a lease with a tenant receiving Section 8 voucher assistance, the landlord must provide the tenant with *90 days* written notice under Civil Code section 1954.535.[26] This section specifically provides that "[w]here an owner terminates or fails to renew a contract or recorded agreement with a governmental agency that provides for rent limitations to a qualified tenant, the tenant shall be given at least 90 days' written notice of the effective date of the termination…."[27] The Court held that this 90 day notice period applies regardless of whether the landlord directly terminates the lease with the tenant or terminates the HAP contract with the government.

The facts of *Wasatch* are relatively straightforward. A Section 8 landlord served its tenant with a written 60-day notice to terminate the tenancy. The tenant claimed that under Civil Code section 1954.535, the tenant was entitled to receive 90 days notice before termination. The landlord argued that section was inapplicable because it applies only in jurisdictions that have enacted rent control ordinances. The trial court agreed with the landlord and entered judgment in its favor.

The parties appealed the judgment. In a published decision, the Court of Appeal reversed the judgment, holding that the 90-day notice provision in Civil Code section 1954.535 applies in all jurisdictions, regardless of whether a rent control ordinance has been enacted, and further held that the Termination Notice was inadequate because the landlord failed to provide the tenant with notice of good cause to terminate her lease.

The California Supreme Court granted review to clarify the proper interpretation of Civil Code section 1954.535, but declined to review the appellate court's alternate holding that the Termination Notice was inadequate. After confirming that the 90-day notice period is required regardless of whether the jurisdiction has enacted a rent control ordinance, the Court addressed the issue of whether a landlord must provide 90 days notice to the tenant when the landlord seeks to terminate the tenancy directly with the tenant, as opposed to terminating the HAP contract with the government.

Although Civil Code section 1954.535 refers only to terminating a contract with the government agency, federal regulations provide that the HAP contract terminates if the lease is terminated by the owner or the tenant.[28] The Court explained that the 90-day notice period must also apply if the owner terminates the lease with the tenant, thereby knowingly terminating the agreement with the government. To hold otherwise, would give the owner a choice between providing a 90-day notice or 30-day notice based upon which contract was terminated first. The reason being that termination of the HAP contract operates to terminate the lease and vice versa.

In light of the *Wasatch* decision, a landlord (or potential landlord) must be aware that it is required to provide a tenant with a 90-day notice if it intends to terminate the tenancy or terminate the HAP contract. Unfortunately, *Wasatch* leaves open the issue of whether the 90-day notice provision applies when a landlord attempts to terminate a Section 8 lease "for cause", such as in the case of a breach of the terms of the rental agreement.

Arguably the 90-day notice provision will apply under any circumstances since the statute does not appear to address the basis for terminating the HAP contract or lease. This unresolved issue gives rise to extreme concern if a landlord is expected to wait 90 days before filing an eviction action in the event of a material breach of lease. Not only would a landlord be precluded from recovering any monetary amounts owing for several months, but the housing unit could be in danger of waste or other damage during that 90-day period.

TERMINATION OF SECTION 8 TENANCIES MUST COMPLY WITH LOCAL RENT CONTROL LAWS.

In recognizing the need to provide owners with an incentive to participate in the Section 8 program, Congress has attempted to provide property owners with the flexibility to opt out of the program. It is for this reason that Congress ended what was commonly referred to as the

"endless lease" in 1996. Prior to that enactment, Section 8 landlords could not refuse to renew a Section 8 lease absent "good cause." As a result, owners are no longer required to provide good cause for their refusal to renew a lease agreement and may also terminate a lease for business reasons, such as the sale of the unit, renovation, or the desire to lease the unit at a higher rate.[29]

Notwithstanding the relaxing of some federal regulations, Section 8 landlords remain constricted by any additional requirements imposed by local rent control ordinances. Accordingly, landlords in rent control jurisdictions still must be mindful of those rent control ordinances to the extent that they are not preempted by Section 8.

The Ninth Circuit first tackled the issue as to whether HUD's regulation allowing termination of a Section 8 lease for "good cause" preempts Los Angeles' local eviction control ordinance in *Barrientos v. 1801-1835 Morton LLC*.[30] In *Barrientos*, the landlord served several tenants with a notice of the landlord's intent to remove the housing units from the Section 8 housing program and rent the units at market rents. The local PHA advised the landlord that the HAP contracts could be terminated only upon lawful eviction of the tenants under state and local law. Accordingly, the landlord withdrew the termination notices and served the tenants with 90-day notices to terminate the tenancy pursuant to the Section 8 regulation allowing a landlord to terminate the rental agreement for a business or economic reason including the desire to opt out of the Section 8 program and/or the desire to lease the unit at a higher rental rate.[31]

The tenants objected to the proposed eviction on the grounds that the rental units are subject to the Los Angeles Rent Stabilization Ordinance ("LARSO"), which restricts possible grounds for eviction to thirteen specific reasons, none of which include the expiration of the lease term or the desire to raise rent to current market levels. The landlord argued that the HUD regulations allowing termination for good cause conflicts with LARSO and therefore, LARSO is preempted by the HUD regulations.

The Ninth Circuit disagreed, holding that the HUD regulation merely creates a floor of protection for the tenants, which local laws may enhance. The court further held that LARSO and the HUD regulation allowing termination for "good cause" are not in conflict because a landlord could comply with both laws at the same time. Accordingly, the HUD regulations did not preempt LARSO. In other words, a land-

lord is still required to comply with rent control laws in order to terminate a Section 8 lease.

More recently, in *Crisales v. Estrada*, the Appellate Division of the Los Angeles Superior Court addressed the same issue and chose to follow the reasoning of *Barrientos*.[32] In *Crisales*, the plaintiff landlord sought to terminate a Section 8 tenancy subject to LARSO. The landlord served its tenant with a 90-day notice to terminate the lease for "business and economic reasons." Specifically, the 90-day notice stated that the landlord intended to terminate the lease due to "difficulty dealing with Section 8 requirements, paperwork, inspections and attempt to obtain a rent increase. Failure by Section 8 agents in returning phone calls. Constant waste of time to obtain any information. …"[33] Thereafter, the landlord served the tenant with a three-day notice to pay or rent or quit. The tenant tendered its reduced rent and the PHA paid its rent subsidy. The landlord rejected both payments and filed an unlawful detainer action against the tenant.

During trial, the landlord testified that despite repeated attempts over the period of eight years to secure approval from the local PHA for yearly three-percent rent increases authorized under LARSO, the landlord was never able to secure approval for a single rent increase.

The trial court found in favor of the tenant, holding that the termination of the tenancy can be accomplished only for those reasons sanctioned by LARSO, and that the "business reason" offered by the landlord was not permitted under LARSO. The Appellate Division affirmed the trial court's decision. Although the Appellate Division was not bound by the reasoning in *Barrientos*, it nonetheless agreed with the Ninth Circuit's "well-reasoned" decision and upheld the judgment in favor of the tenant.

While the burdens associated with renting apartments subject to rent control ordinances present a whole host of issues well beyond the scope of this article, *Barrientos* and *Crisales* present yet another issue for landlords to consider before entering into the world of Section 8 housing. Presumably the problems with the Section 8 program experienced by the property owner in *Crisales* are not unique. As discussed above, the acceptance of Section 8 housing vouchers requires an additional agreement beyond the lease directly with the local PHA. The practical effect of *Barrientos* and *Crisales* is that a landlord in a rent control jurisdiction will face greater challenges if it decides to terminate that relationship.

CONCLUSION.

The web of Section 8 regulations can be overwhelming to navigate, particularly in light of the fact that many of the potential challenges are not readily apparent from the face of the regulations. While the federal government does not compel property owners to participate in the Section 8 program, the regulations make termination challenging once a relationship has been initiated. State court decisions have made it even more difficult in some cases. The myriad of procedural hurdles to terminate a Section 8 tenancy may serve the purpose of protecting the tenant's right to due process, but at what consequences? In a market where apartment rental rates are quickly on the rise, it seems unlikely that landlords would be willing to subject themselves to such administrative constraints.

NOTES

1. 42 U.S.C.A. §1437f(c), (d).
2. 42 U.S.C.A. §1437f(b), (c); 24 C.F.R. §882.104(a) (1985).
3. 24 C.F.R. §§882.116(c), (d), 882.209(a), (b) (1985).
4. Section 8 also provides assistance to purchase homes, which is not discussed in this article.
5. 42 U.S.C.A. §1437f(*o*)(13)(D).
6. 42 U.S.C.A. §1437f(*o*)(13)(D).
7. *See* 42 U.S.C.A. §1437f(*o*), (r); 24 C.F.R. §§982.1(b)(1), 982.314, 982.353, 982.355.
8. 42 U.S.C.A. §1437f(*o*)(2); *see also id.* §1437a(a)(1).
9. *See Id.* §1437f(c), (*o*)(1)(2).
10. 42 U.S.C.A. 1437f(*o*)(10)(C).
11. 42 U.S.C.A. 1437f(*o*)(8)(A)-(B); 24 C.F.R. §982.401 (2008).
12. 42 U.S.C.A. §1437f(d); 24 C.F.R. §882.215(c)(1) (1985).
13. Id.
14. See *Sabi v. Sterling*, 183 Cal. App. 4th 916, 107 Cal. Rptr. 3d 805 (2d Dist. 2010) ("*Sabi*") and *Park Village Apartment Tenants Ass'n v. Mortimer Howard Trust*, 636 F.3d 1150 (9th Cir. 2011), cert. denied, 132 S. Ct. 756, 181 L. Ed. 2d 482 (2011) ("*Park Village*").
15. *Sabi, supra*, 183 Cal. App. 4th 916.
16. Gov. Code, §§12900 et seq.
17. Gov. Code §12955, subd. (a).
18. United States Housing Act of 1937, §2 et seq., 42 U.S.C.A. §1437 et seq. *Housing Authority of City of New Haven v. DeRoche*, 112 Conn. App. 355, 962 A.2d 904 (2009).
19. 42 U.S.C.A. §1437f(*o*)(7)(C); *Mitchell v. Poole*, 203 Cal. App. 3d Supp. 1, 249 Cal. Rptr. 842 (App. Dep't Super. Ct. 1988).
20. 24 C.F.R. §982.310(d)(1)(iv).
21. *Park Village, supra*, 636 F.3d 1150.
22. 42 U.S.C.A. §1437f (t)(2).
23. 42 U.S.C.A. §1437f (t)(1).
24. Civ. Code, §1946.1, subd. (b).
25. Civ. Code, §1946.1, subd. (c).
26. *Wasatch Property Management v. Degrate*, 35 Cal. 4th 1111, 29 Cal. Rptr. 3d 262, 112 P.3d 647 (2005), as modified, (July 27, 2005) ("*Wasatch*").
27. Civ. Code, §1954.535.

28. 24 C.F.R. §982.309(b)(2)(i) (2004).
29. 24 C.F.R. §982.310(d)(1)(iv).
30. *Barrientos v. 1801-1825 Morton LLC*, 583 F.3d 1197 (9th Cir. 2009).
31. 24 C.F.R. §982.310(d)(1)(iv).
32. *Crisales v. Estrada*, 204 Cal. App. 4th Supp. 1, 139 Cal. Rptr. 3d 780 (App. Dep't Super. Ct. 2012) ("*Crisales*").
33. *Crisales, supra*, 204 Cal. App. 4th Supp. at 3.

Miller & Starr Real Estate Newsalert

Managing Editor:	**Karl E. Geier**
Executive Editor:	**Karen Turk**
Editor Emeritus:	**Edmund L. Regalia**
Founding Editors:	**Harry D. Miller & Marvin B. Starr**
Attorney Editor:	**John Frey**
Production Assistant:	**Cortney Carter**
Design & Layout:	**Specialty Composition/Rochester DTP**

Miller & Starr Real Estate Newsalert (USPS # pending) is issued six times per year, published and copyrighted by Thomson Reuters, 610 Opperman Drive, P.O. Box 64526, St. Paul, MN 55164-0526. Application to mail at periodic rate is pending at St. Paul, MN. POSTMASTER: Send address changes to: Miller & Starr Real Estate Newsalert, 610 Opperman Drive, P.O. Box 64526, St. Paul, MN 55164-0526.

The law firm of Miller Starr Regalia, founded by Edmund Regalia, Marvin Starr, and Harry Miller is headquartered in Walnut Creek. Members of the firm have been writing and editing the treatise, Miller & Starr, since shortly after the firm was founded in 1964. Karl E. Geier, a shareholder of the firm, is the current editor-in-chief of the treatise.

MILLER STARR
REGALIA