Pro Bono Housing Law

Co-Sponsored by:

The Bar Association of the City of Richmond Bar
and
Legal Aid Justice Center

Tuesday, December 6, 2011
4:00 p.m. – 7:30 p.m.

Location:

Williams Mullen
200 South 10 Street, 16th Floor
Richmond, Virginia 23219

Schedule:

4:00 – 5:00 p.m.  Landlord/Tenant Law
Christie E. Marra, Esquire
Virginia Poverty Law Center

5:00 – 6:00 p.m.  Virginia Procedure in Housing Law
Marcellinus L.M.B. Slag, Esquire
Legal Aid Justice Center

6:00 – 6:30 p.m.  Break and Dinner

6:30 – 7:30 p.m.  Federally Subsidized Housing Law
Martin D. Wegbreit, Esquire
Central Virginia Legal Aid Society
Virginia State Landlord Tenant Law

An overview of state statutes relevant to representing tenants in disputes with their landlords
Three Key Acts

- **Virginia Residential Landlord and Tenant Act**: Governs many, but not all, residential tenancies in Virginia.
- **Manufactured Home Lot Rental Act**: Governs most rentals of lots in mobile home parks; incorporates much of the VRLTA.
- **Landlord Tenant Act**: Governs private tenancies exempted from the VRLTA and MHLRA that do not involve any federal subsidy.
VRLTA

- Applies to all residential tenancies entered into after July 1, 1974 except those that are expressly exempt in the VRLTA
- Exemptions should be read narrowly
- Even otherwise exempt tenancies may be covered by the VRLTA IF the lease expressly provides
Tenancies Exempt from VRLTA

- Tenancies in single family homes owned by natural persons IF the owner owns no more than ten rental properties OR no more than four if located in cities or counties with certain forms of government (ie some suburban counties)
  Exception: This exemption does NOT apply to early termination of rental agreements by military personnel
- Tenancies where tenant pays no rent (ie is a guest of the owner)
- Tenancies governed by HUD where the HUD regulations conflict with the VRLTA
Tenancies exempt from VRLTA

- Business, commercial or agricultural tenancies
- Occupancy by an owner of a condominium unit or cooperative unit
- Tenancies in which right to occupancy is conditioned on employment in and about the premises or ex-employee whose occupancy continues less than 60 days
Tenancies exempt from VRLTA

- Tenancies in hotels, motels, vacation cottages, boardinghouses or similar lodging except when such a tenancy continues for more than thirty consecutive days
- Occupancy in a fraternal or social organization in the portion of the structure operated for the benefit of the organization
Tenancies exempt from VRLTA

- Residence at a public or private institution for medical, geriatric, educational, counseling, religious or similar services
Landlord Obligations (VRLTA)

- **Duty to Inspect and Provide Damages List:**
  - Within 5 days of occupancy, LL must provide tenant with written, itemized list of damages to unit existing at time of occupancy.
  - Tenant must note any inaccuracies within five days or list deemed correct.
  - LL may have policy allowing tenant to prepare list (in which case LL has five days to object) or for them to do it jointly.
Landlord Obligations (VRLTA)

- **Disclosure of Mold in Dwelling Unit:**
  - LL must disclose visible evidence of mold as part of move-in inspection.
  - Written report of “no mold” deemed correct unless tenant objects in writing within 5 days.
  - If LL discloses visible evidence of mold, tenant may accept unit “As Is” or terminate the tenancy.
Landlord Obligations (VRLTA)

- **Duty to Maintain Fit Premises:**
  - LL must comply with building and housing code regarding health and safety; make necessary repairs; maintain appliances and heating, cooling and plumbing systems in good working order, etc. (55-248.13)
  - Remedies for LL’s Noncompliance include: Termination of lease/damages; tenant’s assertion; defense to non-payment of rent; injunction; damages and rent abatement/substitute housing
Landlord’s Obligations (VRLTA)

- **Security Deposit**
  - Limited to two months’ rent
  - Upon termination, must be applied to rent, late fees, damages or other things specified in lease
  - LL must return security deposit within 45 days of lease termination; if there are deductions, LL must provide written accounting
Landlord’s Obligations (VRLTA)

- **Security Deposit:** LL may withhold additional money for bill owed by tenant to a third party utility provider, as long as he gives notice to tenant, an opportunity for tenant to pay, and evidence that he (LL) has paid the bill.
Security Deposit:

LL must make reasonable efforts to notify tenant of his/her right to be present at move-out inspection.

If Tenant advises the LL in writing of his/her desire to be present at move-out inspection, LL must notify tenant of time and date of inspection (held within 72 hours of termination).

LL must furnish Tenant a list of itemized damages.
Landlord’s Obligations (VRLTA)

- **Security Deposit:**
  - If LL willfully fails to comply with requirements, court must order the return of the security deposit and interest, along with actual damages and reasonable attorneys’ fees, less any rent owed by the tenant.
Landlord’s Obligations (VRLTA)

- **Locks and Peepholes:**
  - LGA may provide, by ordinance, that a LL who rents 5 or more dwelling units in one building must provide locks and peepholes on exterior doors and windows.
  - LL must install a new lock (or allow tenant to do so) where tenant presents a copy of a protective order; LL cannot provide new key to person excluded from premises by Protective order.
Landlord Obligations (VRLTA)

- **Additional Disclosures:**
  - Pesticide Use: LL must provide at least 48 hours’ written notice of pesticide application (unless tenant requests or agrees to shorter notice)
  - Properties near US Master Jet Base: LL must provide prospective tenant written disclosure that property located in a noise/accident potential zone
Limitation of Liability:
- If LL sells premises to a BF purchaser, LL relieved of liability from there forward
- BF Purchaser assumes liability for return of tenant’s security deposit
Landlord’s Liability

- **If rental unit is sold:**
  - Sale only affects who owns property, not who occupies property
  - Lease runs with the land and not the property owner
  - Lease is as binding on the new owner as it was on the old owner
  - New owner takes ownership subject to the lease with the prior owner
Landlord’s Liability

- **If rental unit is sold:**
  - New owner steps into the shoes of the old owner and has the same rights and duties under the lease that the old owner had.
  - If new owner wants possession, he or she must file unlawful detainer in court.
  - Tenants do not have to vacate at sale.
Landlord Obligations (VRLTA):

- **Abuse of Access:**
  - Tenant may seek injunctive relief or terminate lease if LL makes unlawful entry onto premises or enters in an unreasonable manner.

- **Damage or Renter’s Insurance:**
  - LL may require tenant to pay for damage insurance or renter’s insurance; such payments are treated as rent.
Protecting Tenants at Foreclosure Act

- **Federal law requires the following in event of foreclosure of rental property:**
  - New owners must honor existing lease as long as tenant is deemed a "bona fide tenant"
  - Tenants with more than 90 days remaining on the lease may not be evicted until the end of their lease
  - Tenants with less than 90 days remaining on their lease nonetheless must receive 90 days notice of termination
Protecting Tenants at Foreclosure Act

- Exception to right of tenant to remain until end of lease term is when new owner will occupy the unit as his or her primary residence; then lease may terminate with 90 days notice
- Tenants must keep paying rent and should deposit rent into a separate bank account to use later
- Tenants do NOT have to vacate at foreclosure
Landlord References and Release of Information

- If tenant has NOT given written consent, landlord may NOT release information about the tenant unless it is:
  - A matter of public record
  - A summary of the tenant’s rent payment record
  - A remediable breach notice that was not remedied
  - A non-remediable breach notice
Landlord References and Release of Information:

- **Additional information about the tenant landlord may release without tenant’s written consent:**
  - Information requested by law enforcement or by subpoena
  - Information requested by a purchaser of the property
  - Information needed in an emergency
Tenant Obligations (VRLTA)

- **Duty to Maintain Dwelling Unit:**
  - Tenant has obligation to do his or her part to comply with code regarding health and safety; keep things clean and safe; use utilities, etc. in reasonable manner; keep all utilities paid for by tenant on at all times; not deliberately damage premises or permit others to do so (guest liability); maintain a smoke detector in accordance with USBC standards, etc.
Tenant Obligations (VRLTA):

- **Rules and Regulations:**
  
  Tenant is obligated to follow reasonable rules of the landlord (see section 55-248.17) as long as the rule is reasonably related to its purpose, applies to all tenants fairly, is clear, does not evade the LL’s obligations and the tenant was provided a copy of it when he entered into the lease or when the rule was adopted.
Tenant Obligations (VRLTA):

- **Access by LL:**
  - LL can enter to inspect, make necessary repairs, supply necessary services, or show unit to prospective tenants, purchasers or workers.
  - Can enter only at reasonable times and with prior notice except in the event of emergency when LL can enter unit without consent.
Tenant Obligations (VRLTA):

- **Use and Occupancy by Tenant:**
  - Unless otherwise agreed, tenant must use the premises only as a residence.

**Surrender Possession of Unit:**

  Tenant must promptly vacate at termination of tenancy or LL can sue for possession, damages and attorneys fees.
Eviction:

- Tenant does NOT have to move just because:
  - Landlord says so, orally or in writing
  - Landlord files a summons for unlawful detainer in court
  - Landlord gets judgment for possession
  - Landlord gets a writ of possession
  - Writ of possession is served on the tenant
Eviction:

- **Tenant must move ONLY if:**
  - Landlord files an unlawful detainer;
  - Landlord gets a judgment for possession; and
  - Landlord gets a writ of possession which is served on the tenant
  - The Sheriff waits at least 72 hours after service of the writ of possession on the tenant before coming back to evict
Landlord Remedies:

- **Landlord may NOT:**
  - Lock tenant out
  - Cut-off utilities
  - Use self-help eviction
Landlord Remedies (VRLTA):

- **Tenant Noncompliance with Lease:**
  - **Remediable Breach**
    - Material violation of lease
    - Violation of Code materially affecting health or safety
    - Written 21/30 day notice from LL
    - If remedied within 21 days, lease continues
    - If tenant intentionally commits similar breach, lease terminates with 30 days written notice from LL
Landlord Remedies (VRLTA):

- **Tenant Noncompliance with Lease:**
  - Nonpayment of rent
    - 5 day written “pay or quit” notice must be delivered by LL to tenant
    - If tenant does not pay the rent owed within the 5 day period, LL may terminate lease and obtain possession
Landlord Remedies (VRLTA):

- **Tenant Noncompliance with Lease:**
  - **Non-remediable breach**
    - LL may serve written notice on tenant terminating tenancy not less than 30 days from notice.
    - If breach constitutes criminal or willful act that threatens health or safety of other tenants, LL may terminate lease IMMEDIATELY and initial hearing on LL's claim for possession must be heard within 15 days from date of service on tenant (earlier in emergency).
    - (note: Tenant is held liable for criminal activity of guests and invitees except for special rule when criminal activity is domestic violence committed against tenant)
Landlord Remedies (VRLTA):

- **Tenant Noncompliance with Lease**
  - **Illegal Drugs**
    - If tenant, tenant’s authorized occupant, guest or invitee engages in illegal drug activity involving controlled substance, such activity is a non-remediable breach
    - LL can terminate without criminal conviction if proves case by P of E
    - Tenant presumed to have knowledge of illegal drug activity by guest or invitee (rebuttable by P of E)
Landlord Remedies (VRLTA):

- **Tenant’s Noncompliance with Lease:**
  - Possible defenses to nonpayment -
    - Refusal of payment (estoppel)
    - Failure to send pay or quit
    - Conditions – paying rent into escrow
    - Waiver (ie sent second pay or quit)
  - Redemption (payment of all rent owed, late fees, interest, costs and attorneys fees on or before first return date OR submission of redemption tender and subsequent payment)
Landlord Remedies (VRLTA):

- **Tenant’s Noncompliance with Lease:**
  - Possible defenses to other breaches -
    - Conduct didn’t occur/not tenant’s fault
    - Not material
    - Lack of proper termination notice
    - Failure to reserve rights by LL (waiver)
    - Conditions
    - Retaliatory/Discriminatory

*This is NOT an exhaustive list - be creative!!!
Landlord Remedies (VRLTA)

- **Remedy After Termination:**
  - LL may have claims for rent, possession and actual damages from breach
  - LL cannot sue for accelerated rent; can only seek rent as it becomes due and owing
  - LL may simultaneously receive judgment for possession and money
Landlord Remedies (VRLTA):

- **No Self-Help Evictions:**
  - LL cannot recover possession by willfully interrupting gas, electric, water or other essential services required by the lease, or by denying tenant access to the unit unless pursuant to court order.

**Waiver of Right to Terminate:**

If LL accepts rent after termination notice is given, and he has not provided tenant written notice that rent is accepted with reservation (either in the termination notice or in a separate notice within 5 days of acceptance of rent), LL waives his right to evict tenant. This holds true even for rent accepted after order of possession entered.
Landlord Remedies (VRLTA):

- **Barring Guest or Invitee of Tenant**:
  - LL can send written notice to guest and to tenant barring guest for conduct committed on premises that violates lease, local ordinance, state or federal law.
  - Tenant can challenge the bar notice through a tenant’s assertion.
  - LL may treat Tenant’s allowing barred guest to return to premises as material non-compliance with lease.
Landlord Remedies (VRLTA)

- **Remedy by repair; Emergency:**
  - Applies to breach which materially affects health or safety but can be remediated by repair, replacement or cleaning.
  - Tenant must take necessary action within 14 days of written notice by LL.
  - If not, LL may enter premises, have the work done and submit itemized bill for actual and reasonable costs as rent on next rent due date.
  - In emergency, LL may enter unit, have work done and submit itemized bill for actual and reasonable cost on next due date.
Landlord Remedies (VRLTA)

- **Tenant Abandonment, Absence, Nonuse:**
  - If lease requires notice of absence of more than 7 days and tenant doesn’t provide, LL can get damages.
  - If LL can’t tell if unit abandoned, shall serve written notice on tenant requiring notice within 7 days that tenant wants to stay on premises.
  - If no written notice back to LL within 7 days, rebuttable presumption of abandoned premises.
Notice of Termination of Tenancies

- Week to week tenancies may be terminated with written notice served at least 7 days before the next rent due date.
- Month to month tenancies may be terminated by serving a written notice at least 30 days before the next rent due date.
- Landlord may include in lease liquidated damages not to exceed amount equal to per diem of monthly rent, for each day tenant remains in unit after date specified in notice.
Landlord Remedies (VRLTA)

- **Disposal of Property Abandoned by tenant:**
  - LL can dispose of personal property left in unit after possession transferred if he has given tenant notice that:
    - Property left after termination would be disposed of 24 hrs after termination
    - Property left would be disposed of after 7 days (in case of abandonment) OR
    - Property would be disposed of 10 days after notice given
Landlord Remedies (VRLTA)

- **Disposal of Property After Court Order**

  - After judgment for possession entered, sheriff places the personal property of tenant in public way or at LL’s request in storage area designated by LL.

  - Tenant has 24 hours to retrieve property (or can retrieve at other reasonable times until LL disposes of property).
Late Fees

- No express statutory cap on late fees for late rental payment
- Late fees are generally set forth in lease and must be “reasonable”
- What is considered a “reasonable” late fee can vary widely from jurisdiction to jurisdiction
- Courts generally treat a per diem late fee as impermissible/unreasonable
Tenant Remedies

- In Virginia:
  - There is no rent withholding when landlord fails to meet his obligations
  - There is no “repair and deduct”
Tenant Remedies (VRLTA):

- **Material Noncompliance by Landlord:**
  - Tenant may serve notice on LL saying lease will terminate in 30 days if specified breach isn’t remedied in 21 days.
  - If LL breach non-remediable, tenant gives notice of breach and that lease will terminate in 30 days.
  - If LL intentionally commits breach for which he has previously received 21/30 notice, tenant can send notice terminating lease in 30 days.
Tenant Remedies (VRLTA):

- Early termination by military personnel:
  - Following members of US armed forces or VA National Guard may terminate lease upon 30 days’ notice:
    - FT duty, received permanent change 35 or more miles away
    - Temporary duty order of 35 or more miles away for more than 3 months
    - Discharged
    - Ordered to live in government-supplied quarters
Tenant Remedies (VRLTA)

- LL failure to deliver possession:
  - If LL willfully fails to deliver possession -
    - Rent abates until delivery of possession
    - Tenant can terminate rent agreement with 5 days written notice
    - Tenant can demand performance and maintain action for possession against LL
Tenant Remedies (VRLTA):

- **Wrongful Failure to Supply Essential Services:**
  - If LL, contrary to lease, willfully or negligently fails to supply essential service (ie water, heat, electricity), tenant may serve a notice on LL and after reasonable time for LL to remedy may get damages or move and not pay rent OR tenant can seek injunction
  - Tenant can also seek actual damages and attorneys fees
Tenant Remedies (VRLTA)

- **Tenant’s Assertion:**
  - Remedy for LL material noncompliance with lease or law constituting fire hazard or serious threat to life, health or safety
  - Tenant must serve LL written notice advising him of the condition unless LL is notified of the condition by appropriate agency
  - If LL doesn’t remedy within reasonable time after notice, tenant can file Tenant’s Assertion
Tenant Remedies (VRLTA)

**Tenant’s Assertion:**
- To file, tenant must be current on rent
- Tenant must pay rent into court after filing
- Initial hearing held within 15 days of service
- Possible relief includes termination of rental agreement, awarding money in escrow to tenant, rent abatement, continued payment of rent into escrow until conditions remedied
Tenant Remedies (VRLTA)

- **Fire or Casualty Damage:**
  - If damage is substantial, tenant may immediately vacate and serve notice on LL within 14 days (termination effective as of date of vacating); rent abatement or termination
  - If repairs can only be made if tenant vacates, tenant can terminate and serve notice within 14 days OR LL can terminate by giving tenant 30 days’ notice
  - LL must return prepaid rent and security deposit
Tenant Remedies (VRLTA)

- **LL’s Noncompliance as Defense to Action for Possession for Unpaid Rent:**
  - Tenant may assert serious threat to health or safety as defense IF
    - He has served LL written notice of the condition(s) or LL notified by building inspector before action for possession
    - LL didn’t remedy condition(s)
    - Tenant paid rent into court
Tenant Remedies

- **Fictitious Name Defense:**
  - Any person, partnership, LLC or corporation transacting business in VA under a fictitious name must record a fictitious name certificate in the Circuit Court where business is conducted.
  - Failure to comply with this requirement prior to entry of a final judgment makes the judgment void.
Tenant Remedies

- **Legal Aid Notice in Public Housing**
  - **Termination Notices:**
    - Notice to terminate public housing tenancy is NOT effective unless it contains on its first page the name and phone number of the local legal aid society.
Prohibited Provisions

- A lease cannot include a provision through which the tenant waives any right or remedy under the VRLTA.
- Any such prohibited provisions are unenforceable and if LL brings an action to enforce tenant can recover actual damages and reasonable attorney’s fees.
Manufactured Home Lot Rental Act - Some Key Parts

- Requires park owners to offer all year-round tenants a one year lease
- One year leases automatically renew for one year unless LL gives notice of termination or change 60 days prior to termination of lease
- Limits reasons tenants can be evicted
- Allows evicted tenant right to leave home in the park for up to 90 days in some circumstances
- If LL rents both lot and home may be covered by VRLTA; incorporates much of VRLTA (55-248.48)
Landlord/Tenant Act

**Key Provisions:**
- Appointment of resident agent by nonresident property owner (55-218.1)
- Notice to terminate tenancy (55-222)
- Failure to vacate at end of term (55-223)
- Failure to pay after 5 days notice (55-225)
- Remedies for LL’s unlawful diminution of services (55-225.2)
- Right of Redemption (55-243)
- Tenant’s Assertion (55-225.11)
- Right to terminate for landlord’s material breach (55-225.12)
III.

VIRGINIA RESIDENTIAL LANDLORD TENANT JUDICIAL PROCEDURES

Section III of these training materials focuses on the types of procedures legal aid attorneys usually confront in landlord tenant cases: (A) Unlawful Detainer actions; (B) Warrants in Debt and Motions for Judgment; (C) Tenant's Assertions; (D) Detinue actions; and (E) Injunctions and Declaratory Judgments.

Aside from the statutes and Supreme Court rules cited herein, much Virginia procedure is still determined by the practices of local courts. Therefore, this outline should be used as a reference while you discover - through discussions with local attorneys, judges and court clerks - what your courts' local customs and procedures are.

A. UNLAWFUL DETAINER

Whether the Landlord May Evict the Tenant

An action for unlawful entry and detainer ("UD") is a statutory civil action brought by a plaintiff who claims the right to possession of real property against a defendant who enters and detains the real property forcefully or who unlawfully retains possession of that real property after the defendant's legal right to possession has ended. See § 8.01-124. Although the statute speaks in terms of actions in circuit court, most residential landlords file unlawful detainer cases in general district court under § 8.01-126, so the remainder of this discussion will reflect that reality.


The unlawful detainer action is intended to maintain the status quo relative to possession of premises, and to avoid the breaches of the peace that can occur when one who has the right of possession is forced to use self-help remedies. The unlawful detainer plaintiff must allege and prove that the defendant is unlawfully detaining the premises in derogation of the plaintiffs right of possession. An unlawful detainer action filed before the plaintiffs right to possession accrues is prematurely filed and should be dismissed. See Kincheloe v. Tracewells, 52 Va. 587 (1854); cf. Nelson v. Triplett, 81 Va. 236 (1885), Jennings v. Gravely, 92 Va. 377, 23 S.E. 763 (1895) Casselman v. Bialas, 112 Va. 57, 70 S.E. 479 (1911), Merryman v. Hoover, 107 Va. 485,59 S.E. 483 (1907)(plaintiff in ejectment action must have legal title and present right to possession at the time of commencement of action). This defense might arise in legal aid practice, for
example, where a landlord files a UD before the five days allowed by the five day pay or quit notice have elapsed, or where a landlord files a UD before the 30 day termination notice has elapsed. Effective 7/1/05, § 8.01-128 will allow a landlord to obtain a judgment for possession, be issued a writ of possession, and continue the case for up to 90 days in order to obtain a judgment for final rent and damages. The judgment for possession is immediately appealable, however, and if that is appealed, the entire case will be appealed to circuit court.

2. Filing.

An unlawful detainer action is initiated in general district court by filing a statement under oath consisting of facts which authorize the removal of the defendant. Upon filing, the court issues a Summons in Unlawful Detainer. § 8.01-126. The filing fee will be approximately $44 (plus $12 service for each defendant).

In order to take a default judgment, the plaintiff must also file and serve on the defendant a copy of any document by which the landlord notified the tenant of the termination of the tenancy e.g., a "5 day pay or quit" notice under § 55-225 or § 55-248.31, a 21/30 day notice, or a notice of non-remediable breach under § 55-248.31), and a copy of an accounting for any rent allegedly owed. §§ 8.01-28, 16.1-88. Unlawful detainer cases involving residential premises where the plaintiff claims rent and damages in excess of $15,000 must be filed in circuit court. § 16.1-77(3).

The signature of a party or an attorney on any pleading is a certification that the allegations therein are well grounded in fact and warranted in law, subject to sanction by the court. § 8.01-271.1.


The suit must be filed in the name of a plaintiff who is entitled to possession of the premises. This is usually the owner of the premises, but can include a lessee from the owner or other person who has the right to immediate possession, including the grantees and assignees of the landlord from whom the tenant initially rented the premises. See §§ 55-217, 55-218. Nonresidents of Virginia renting out four or more units in a town or county must have filed a designation of a resident agent in order to maintain a suit. The resident agent and the agent's address must be designated in the lease and must be recorded in the office of the clerk of court for the jurisdiction where the property lies in the deed's room with the fictitious names index. § 55-218.1.

An unlawful detainer summons may be filed by an individual plaintiff himself, or by a licensed real estate professional or resident manager on behalf of the owner, and these parties may obtain a default judgment in
GDC for possession and/or rent or damages. § 55-246.1. If the plaintiff is a corporation or partnership, a nonlawyer may file an unlawful detainer or other action (and can probably take default judgments), but he cannot file or argue other pleadings or motions, examine witnesses, or otherwise act as legal counsel in litigation for the landlord. §16.1-88.03. A partnership filing must be signed by a general partner. A corporation's filing must be signed by a corporate officer or other officer or employee authorized by the board of directors. Id.

4. Service of Summons.

Service must be obtained by the usual means in civil cases, see § 8.01-285, et seq., usually through personal service under § 8.01-296 by a sheriff's deputy or a disinterested adult. § 8.01-293. The clerk will assume that the plaintiff wishes to have the sheriff effect service unless the party indicates otherwise.

Unless otherwise agreed by the parties, the defendant must be served at least 10 days before the return date. § 8.01-126.23. Defective service fails to give the court personal jurisdiction over the defendant, Earle v. McVeigh, 91 U.S. 503 (1875), and the case must be re-filed or the summons reissued and served anew (an "alias summons"). The court can exercise jurisdiction over a defendant who has actual notice of the action, even if service is defective. § 8.01-288. However, appearance and contesting service does not itself waive a defective service. Fowler v. Mosher, 85 Va. 421, 7 S.E. 542 (1888).

5. The Return Date.

The return date is the date listed on the summons for the first appearance of the case on the court's docket. In most courts, a docket sheet listing each case to be heard on a particular day is prepared and posted in the courthouse lobby or outside the courtroom door on that day.

(a) Default Judgments

A default judgment can be entered if the defendant or her representative does not appear at the return date, and if a request is made in person by the plaintiff, her counsel or a "bona fide" employee. Rules 7B:7, 7B:8. In an unlawful detainer case, the plaintiff may be granted a default judgment for possession and damages when the defendant has not appeared to contest liability if the plaintiff has filed an affidavit, statement of account, and a copy of any required notices on which his claim for possession is based, provided that the affidavit and statement of account and notice were served upon the defendant as a part of the legal process. § 8.01-28. Failure
to file and serve these documents should be grounds to vacate a default judgment as void due to lack of personal jurisdiction. See King v. Davis, 137 F. 198 (W.D. Va. 1903), affd sub nom. Blankenship v. King, 157 F. 676 (4th Cir. 1906).

(b) Right to Redeem

The return date is also important because it is the last date on which the tenant may exercise his right to redeem his tenancy once in a calendar year by fully compensating the landlord. §§ 55-243 and 55-248.34:1.

If the tenant pays or tenders all rent, late charges, attorneys' fees and court costs at or before the first return date and he has not done so previously during the previous 12 month period, then the UD proceeding shall cease. Id. This is called the tenant's right of redemption.

The tenant may present a redemption tender, that means a written commitment to pay all rent due as of the return date, including late charges, attorney’s fees and court costs, by a local government or non-profit entity within 10 days of the return date.

(c) Caveat Regarding the Initial Return Date

Some courts prefer to hear cases on the return date, although Virginia law gives both plaintiffs and defendants the right to a continuance in contested cases. Other courts routinely schedule contested cases for trial at a later date. On its own motion or on motion of either party, the court may also refer the case, or portions of it, for mediation under the procedures of § 8.01-576.4, et seq.


Some courts maintain a motions docket and a party can request the clerk to place the case on the motions docket. In other courts, you simply wait for the case to be called and state your motion to the judge. Written motions aren't usually required in general district court, but are helpful if you have the time to prepare them. Check with the clerk for the procedure in your courts. There are usually insufficient facts available to file and argue substantive motions on the return date, and courts generally prefer to hear all the facts before rendering a final substantive decision. If you feel you have an arguable substantive defense, have the case set for trial, request pleadings and do discovery.

Most general district courts prefer to reserve "motions practice" for high dollar or complex cases, and prefer to hear motions on the date set for trial. Generally, notice of the intent to argue a motion should be given to the
other party or his counsel in writing at least five days before the hearing on the motion. Notice can be served by mailing, faxing, or delivering to plaintiff or her counsel the notice, along with a copy of the written motion setting out the facts and law supporting the motion. See Rule 7A: 1O.

7. Venue.

Unlawful detainer actions are subject to "category A, or preferred venue," and therefore should be filed only in the jurisdiction in which the real estate involved in the action is located. Any other venue is subject to objection. § 8.01-261 (3)(g). However, venue is not jurisdictional, and incorrect venue will not automatically result in the dismissal of the case. §§ 8.01-258, 8.01-264. Venue objections are waived unless raised on or before the day of trial. § 8.01-264.

If venue is incorrect, a written motion for change in venue should be filed stating the basis for the objection, identifying the correct venue, and including an order transferring the case to the correct venue. See also Rule 7B:11. Upon proper objection, transfer is mandatory. The court may award costs and attorney's fees to the party prevailing on a venue motion, and such an award should be requested in the motion, if appropriate. § 8.01-266.

8. Pleadings.

Other than the initial unlawful detainer summons or motion for judgment, no formal pleadings are required by statute or court rules. Filing of pleadings may be ordered in the court's discretion, and can be requested by the parties through an oral or written motion. The usual pleadings in general district court are the bill of particulars and grounds of defense. The bill of particulars is filed by the plaintiff on or before a date set by the court. It sets out in detail why the plaintiff has the right to the relief sought. Some courts may also order that plaintiff deliver certain documents to defendant or specifically address some aspect of the case about which the defendant raises questions.

The grounds of defense is a written response filed by the defendant. It should respond to each of the allegations in the bill of particulars and set out any and all affirmative defenses. It must be served on plaintiff and filed with the court on or before the date set by the court (there is no three day extension for mailed service), and can and should be combined with any counterclaims and cross-claims.

Failure to timely file a bill of particulars or grounds of defense can lead to the entry of summary judgment against the defaulting party. The court may also exclude evidence of matters not raised in the pleadings. Rule 7B:2.

Counterclaims are claims filed by the defendant against the plaintiff in the same case that the plaintiff initiated. They are authorized by § 16.1-88.01 (see also Rules 7B:3 and 7B:10) and can (1) raise any affirmative claim for monetary relief you have against all plaintiffs; (2) be consolidated in the same pleadings with the grounds of defense; and 3) be severed for trial at the court's discretion. No pleading in response to a counterclaim is required unless ordered by the court. Counterclaims must be within the $25,000 jurisdictional limits of the general district court. No filing fee is required to file a counterclaim in general district court.

If a counterclaim is based on the same transaction or occurrence on which plaintiffs affirmative claim is based, the statute of limitations on the counterclaim is tolled by the filing of plaintiffs initial claim. § 8.01-233.

10. Crossclaims.

A crossclaim is a claim against a fellow defendant in the unlawful detainer action, and can be filed pursuant to § 16.1-88.02 (see also Rule 7B:10). Allowable crossclaims must arise out of any matter pleaded in plaintiffs initial summons or motion for judgment and must be within the jurisdictional limits of the court. No filing fee is required to file a crossclaim in general district court.

11. Discovery.

The only formal method of discovery in ODC is the subpoena duces tecum, § 16.1-89; Rule 4:9(c), which is a request for documents to be presented for inspection and copying. The request should contain a list of the documents and things to be produced, state a time and place for production, and include a certificate of service on the other party. Without leave of court, a request must be filed at least 15 days before trial. Rule 7A:12. It can be served on parties or non-parties and can be used to require production of documents for use at trial. Other parties must be served copies of the request for a subpoena duces tecum. Rule 7A:10.

Subpoenas directing witnesses to appear at trial can be requested by letter or a form in the clerk's office and, without leave of court, must be requested at least 10 days before trial. Rule 7A:12(a)(1). Even friendly witnesses should be subpoenaed since absence of a key witness who has not been subpoenaed will not be grounds for a continuance. If the case is continued while the witnesses are in court, have them recognized and directed to return on the continuance date to avoid the need to re-subpoena them. § 16.1-90.

13. Continuances.

A plaintiff or defendant is entitled to a continuance if the defendant disputes liability orally on the return date or in a writing filed on or before the return date. § 8.01-28; Rule 7B:4(b). However, under § 55-248.25:1, in a UD case where a tenant seeks either a continuance or asks to set the case for trial, the landlord may request that the court order the tenant to pay the rent due into escrow. If the court finds that the tenant has a good faith defense, however, the tenant will not be required to pay the rent into escrow. If the court does not find that the tenant has asserted a good faith defense, the tenant will be required to pay an amount determined by the court into escrow in order for the case to be continued or set for trial. The court may give the tenant up to one week to make payment of the court-ordered amount, but if the tenant fails to do so, the court may enter judgment for the landlord and enter an order of possession. The court may also order that, if the tenant fails to pay future rent into escrow, and the landlord so requests, judgment for possession may be entered for the landlord.

Note, too, that, effective 7/11/05, § 8.01-128 will allow the landlord to obtain a judgment for possession, be issued a writ of possession, and continue the case for up to 90 days in order to obtain a judgment for final rent and damages. At least 15 days prior to the continuance date, the landlord must mail a notice to the tenant, at the tenant's last known address, advising the tenant of the continuance date and of the amounts of final rent, damages and fees claimed for which judgment is sought.

14. Trials.

Unlawful detainer cases in general district court are tried like any civil case heard without a jury. The principles of law and equity apply, and when they conflict, the principles of equity should be applied. § 16.1-93. Thus, although the court cannot ordinarily apply equitable remedies, it can acknowledge equitable doctrines ("equity abhors a forfeiture," "unclean hands," "equitable estoppel" and the like).
The plaintiff has the burden of proof of all allegations of right to possession by the landlord, unlawful detainer by tenant, and the amount of damages and other charges claimed. The essential element of the possession claim is that the defendant unlawfully withholds possession. Fore v. Campbell, 82 Va. 808, 1 S.E. 180 (1887). Defendant has the burden of proof for any affirmative defenses.

After hearing the evidence, the judge generally orally announces her decision and enters a notation of the decision on the unlawful detainer form. The court may wish to enter a more thorough written order, and, if so, will direct counsel for one of the parties to draft the order. Counsel may also wish to draw up and submit a proposed order if the case may set good local precedent for use in future cases. § 16.1-94. Such orders usually must be endorsed by all counsel of record, unless all counsel of record receive copies and notice of when the draft order will be presented to the court. Rule 7A: 11.

15. Motions to Rehear or for Retrial.

A motion to rehear or for a new trial must be filed within 30 days and decided within 45 days of entry of the judgment. § 16.1-97.1. The clerk has a form for filing this motion. The motion should generally request a stay of execution of any writ of possession which has been issued.

Typical grounds for such a motion include clear legal errors, deceit by a landlord in obtaining the judgment, good reasons the tenant failed to appear at the return date (e.g. hospitalization, etc.), and improper service of process.

If excessive bond is set, the appellant can apply to the general district court or circuit court for a reduction in the bond amount. Possible grounds for such a reduction include: 1) the circuit court docket allows for an early trial of the appeal; 2) a subsidized tenant's bond should be based on only the tenant's portion of rent because the government will continue to pay the balance of the rent until the tenant is evicted; 3) any reasonable argument that the landlord will not be injured by the delay in execution pending the appeal; and 4) client has or will immediately move out and only wants to contest plaintiffs right to (or the amount of any) monetary judgment.

16. Appeals.

Parties to a general district court case have the absolute right to appeal an order or final judgment of the court to the circuit court of the jurisdiction. § 16.1-106, et seq. A notice of appeal must be filed in writing within ten days of entry of the order or judgment appealed from. (See also Rule 7A: 13). The clerk has a form for this purpose. The notice is served on
opposing parties by the clerk. The ten day limit may not be waived by the
general district or the circuit court. The appeal is tried de novo, which means
the findings and decision of the district court are without any effect. Circuit
court discovery rules apply. No additional pleadings are required unless
222, 227 S.E.2d 695 (1976). A jury trial is available. §§ 16.1-113, 16.1-
114.1, and 8.01-129.

In addition to the notice of appeal, the unlawful detainer
defendant/appellant must also tender the writ tax (circuit court filing fees)
and a bond within ten days of the entry of the order or judgment appealed
from. § 8.01-129. The filing fees may be waived on account of the indigence
of the appellant. §16.1-107, § 17.1-606. In all civil cases, except trespass,
ejectment or any action involving the recovering rents, no indigent person
shall be required to post an appeal bond.

The bond must be for all rent which has or may accrue upon the
premises, but not more than one year's rent, and all "damages" which have
or may accrue from the unlawful use and occupation of the premises for a
period not exceeding three months. § 8.01-129. The appeal bond amount is
usually set by local courts in terms of some set number of months' rent. Bail
bondsmen will usually not issue bonds in these cases, and tenants rarely
own sufficient real estate in the jurisdiction to qualify for a property bond.
Therefore, the bond will usually have to be posted in cash. Some Northern
Virginia courts allow tenants to post bond in the form of an undertaking to
pay rent as it becomes due pending the appeal.
Finally, if the district court enters an order for rent or damages, but not
possession, the defendant can ask the court to amend the pleadings from an
unlawful detainer to a warrant in debt. See Rule 1:8. If the request is
granted, it may serve to reduce the bond required and to give your client
more time (30 days) to file the fees and bond.

17. Motions to Set Aside Default Judgments.

On motion and reasonable notice to the opposing party, a default
judgment may be set aside within two years for fraud on the court, and at
any time if the judgment is void or an accord and satisfaction had been
reached. § 8.01-428. The court also has equitable power to maintain
independent actions to set aside earlier judgments, upon appropriate
grounds. § 8.01-428.D.


When a party obtains a judgment from a court, she literally gets
nothing but a piece of paper establishing her legal rights. If the adverse
party refuses to recognize those rights, the prevailing party must begin a
separate set of procedures to enforce the judgment.
When the landlord prevails in a UD on the issues of the right to possession and entitlement to recompense in money, enforcement typically involves retaking physical possession of the dwelling unit and collecting any monetary judgment granted by the court.

(a) Possession of the Premises

The plaintiff's order of possession is enforceable by a writ of possession, which must be issued within one year of entry of the judgment for possession. § 8.01-471. The writ orders the sheriff to return possession of the premises to the plaintiff. If the tenant is unwilling or unable to move his possessions from the premises after the order of possession is entered, the landlord applies to the court for a writ of possession. § 8.01-470. He pays extra court costs (ultimately chargeable as court costs to the tenant) for this legal order.

If the court enters a default judgment for nonpayment of rent or in a case arising out of a trustee’s deed following foreclosure, the landlord may obtain a writ of possession immediately after obtaining a judgment for possession. § 8.01-129. Otherwise, the writ of possession normally cannot be issued until at least 10 days after the judgment is entered, unless the court order specifies differently. § 8.01-129. This ordinarily allows the tenant the opportunity to file post-trial motions and perfect his appeal.

The sheriff cannot execute the writ unless the sheriff first serves the tenant 72 hours' written notice of intent to execute, with a copy of the writ attached. § 8.01-470. Courts should stay an eviction unless this notice has been properly served. Many sheriffs' offices do not execute writs of possession on or near holidays or in inclement weather. If the writ is not executed within 30 days of issuance, it must be reissued. § 8.01-471.

The writ is usually carried out by a sheriff's deputy supervising the landlord's removal of the tenant's goods from the premises onto a "public way. Unless the jurisdiction has designated a storage area under § 8.01-156, § 55-248.38:2 provides that the tenant has the right to remove his property from the public way, or from any storage area designated by the landlord, during the 24 hours following the eviction. At the expiration of the 24 hour period, the landlord may dispose of the items. If the landlord receives any money from the sale of the items, he must apply the funds to the tenant's account, including the costs of storage and sale; any remaining balance, after application to the tenant's account, must be treated as security deposit. § 55-248.38:2. If the landlord fails to allow the tenant reasonable access to remove his belongings during the relevant period, the tenant has a right to injunctive or other relief. § 55-248.38:2.

If a jurisdiction designates a place of storage for the evicted tenant's goods, the sheriff must remove the goods to that area for storage. The
tenant can recover the goods after paying costs of the removal and storage. If the goods are not redeemed within thirty days, they may be sold after notice. § 8.01-156. Only one jurisdiction, Alexandria, is reported to have designated such a storage area.

The filing of a notice of appeal should automatically stop execution of the writ. Any motion to rehear a case or to vacate the judgment should include a request that the court quash or delay execution of the writ, pending a decision on the motion.

Also note that if the landlord has accepted rent payments following the entry of the judgment for possession, without reservation of rights, no writ of possession shall be issued. §§ 8.01-471, 55-248.34: 1.B. The reservation of rights notice must be given in a separate written notice given by the landlord within 5 business days of receipt of the money. Id.

(b) Rent, Damages, Costs, Attorney's Fees

Awards of rent, damages, costs, and attorneys' fees are enforceable through the usual debt collection procedures. Before or after final judgment, the landlord's lien on the tenants' goods on the premises may also be enforced through the distress procedure, if appropriate. §§ 55-230, et seq. Poor debtor's and homestead exemptions apply, and may protect most of a legal aid client's assets from seizure. See, § 34-1, et seq.

B. WARRANTS IN DEBT and MOTIONS FOR JUDGMENT

What Damages the Landlord May Properly Claim Against the Tenant

(a) Use by Landlords

The warrant in debt or motion for judgment for damages in general district court is designed as a simple, low cost way to establish a judgment for money damages. The general district court's jurisdiction in such cases is limited to $25,000.00. § 16.1-77. A claim in excess of $25,000.00 must be filed in circuit court. This section deals only with general district court procedures.

The warrant in debt or motion for judgment for damages is used by the landlord/plaintiff in landlord/tenant cases to collect rent owed or damages for lease violations where there is no claim for possession of the premises. This may be because the tenant/defendant has already vacated the premises, allegedly owing rent, or the tenant has moved before the end of a lease term, and the landlord does not "accept the surrender" (common law), is unable to re-rent the premises for the remainder of the term (i.e., inability to mitigate under the VRLTA), or claims damages or other amounts in excess of the security deposit.
(b) Use by Tenants

Tenants might use the warrant in debt or motion for judgment to obtain a judgment for damages caused by the landlord's violations of the lease or landlord/tenant law (including return of rent paid for a period when the unit was uninhabitable), to recover illegally withheld security deposits, for violations of the Consumer Protection Act, or for the landlord's wrongful conversion of the tenant's goods. If a rental manager fails to disclose ownership, he can be treated as the landlord's agent for the purpose of service on the undisclosed landlord under both the VRLTA, § 55-248.12.D, and MHLRA, § 55-248.41.

A warrant in debt can be filed by filling out a Warrant in Debt or Application for Warrant in Debt form available from the general district court clerk. The filing fee is approximately $44 (plus $12 service per defendant), but may be waived upon proof of plaintiffs indigence through an in forma pauperis ("IFP") motion and affidavit. §16.1-107, § 17.1-606. The clerk should be consulted on local IFP procedures.

A complaint should be used when the issues are complicated or the claims are numerous. Use pleadings similar to those filed in circuit court civil actions, with appropriate changes to reflect the different court in which they are filed.

(c) Warrant in Debt vs. Unlawful Detainer

The procedure for warrants in debt or complaints for damages are much like unlawful detainer proceedings, except that (1) possession of the premises is not at issue; (2) the court will be less jealous of continuances because only money, and not the right to possession of premises, is at stake; (3) while the notice of appeal must still be filed within ten days of judgment, the writ tax (or filing fees) and bond must be filed within 30 days of entry of judgment (as opposed to 10 days for appeal of a UD). §§ 16.1-106, 16.1-107; (4) the appeal bond for a warrant in debt, unlike one for a UD, need only be sufficient to satisfy the judgment as rendered and costs and damages which may be awarded on appeal in circuit court. § 8.01-129; 16.1-107.

C. TENANT'S ASSERTION AND COMPLAINT

What Tenant Remedies and Defenses Are Available; When Maya Tenant Successfully Assert Affirmative Rights Against the Landlord

The Tenant's Assertion and Complaint is an action in general district court filed by a tenant, affirmatively alleging that there are conditions upon the rental premises which constitute a material noncompliance with the lease or law, or which, if not immediately corrected, may result in fire or other serious threat to health and safety, including but not limited to, lack of heat or hot or cold running water, lack of light, electricity or adequate sewage disposal, infestation of rodents, the existence of lead paint. § 55-248.27, § 55-225.12 Preprinted forms are available at the clerk's office. The filing fee will be approximately $44 (plus $12 service for each defendant). The tenant's assertion is a statutory remedy, so the relevant statute should be consulted closely before filing. Conditions precedent to application for the remedies provided include:

• a written notice to the landlord by the tenant of the conditions, or notice of such conditions by a violation or condemnation notice from an appropriate state or municipal agency, and reasonable opportunity for landlord to cure but he has failed to remedy the problem;
• payment of rent into court within five days of the rent due date.

Under the statute, landlords have the following defenses:

• the condition alleged does not exist or has been removed or remedied;
• the condition was caused by the tenant or his family, invitees or licensees; or
• the tenant has unreasonably refused the landlord access to make the repairs.

2. Procedure.

The procedures for tenant's assertions are the same as those for summons in unlawful detainer and warrants in debt, except that:

• trial must be held within fifteen days of the date of service of process, but can be held earlier if emergency conditions require;
• if the tenant proceeds under this section, he cannot take any other action under the VRLTA with regard to this breach; and
• possible remedies available to the court include terminating the rental agreement or ordering the premises surrendered to the landlord; ordering all escrowed monies paid to the landlord or to the tenant; abatement of the rent due to the conditions; disbursing the escrowed monies to the landlord or to a contractor in order to make repairs; referral to a state or municipal agency for investigation; disbursing escrowed funds to pay a mortgage to stay a foreclosure; disbursing escrowed funds to pay a creditor to prevent or satisfy a bill to enforce a mechanic's or material man’s lien; awarding six months' of accumulated escrow monies to tenant if landlord has not made reasonable attempts to remedy the conditions. § 55-248.27.C, § 55-225.12 C.

Practice tips in tenant's assertion cases include:
• get the local building inspector's office, fire marshal’s office or health department involved early and often, and subpoena them and their records to trial;
• use dramatic photographs as evidence -- they are much more convincing than dry factual recitations and descriptions;
• file the case before the landlord files an unlawful detainer action – this shows that your client is serious and is not just trying to avoid paying rent;
• don't let the restrictions on the severity of actionable conditions intimidate you; note that possible future danger is sufficient, and that serious building code violations come with their own presumption of dangerousness of defects; and
• carefully review the statutory conditions and defenses with your client to be sure there are grounds to bring a successful tenant's assertion action; if the tenant files the tenant assertion form pro se, review the form with him to assure completeness and sufficiency of the allegations.

D. DETINUE

An action in detinue, authorized by §§ 8.01-114, et seq., may be used by a tenant to recover personal property unlawfully withheld by the landlord, or, in the alternative, the value of that property.' Typically, this occurs when the landlord legally or illegally locks the tenant out of his apartment (thus locking the tenant's goods inside), but may also be used where the landlord illegally removes the tenant's goods from the premises. The action can be filed by motion for judgment or by completing a warrant in detinue form, available from the clerk's office.

When Pretrial Seizure of Property Authorized

Pretrial seizure of the property at issue is authorized upon petition requesting that relief and describing the property and its value, the basis of plaintiffs claim to possession, and an allegation that the defendant: (1) is a foreign corporation or non-resident of Virginia; (2) is about to leave Virginia with the intent to change his domicile; (3) is about to remove the plaintiff’s goods or the proceeds of those goods outside Virginia; or (4) is selling or about to sell the goods. § 8.01-534. Pretrial recovery of the goods is also authorized if the plaintiff can allege that the goods will be sold, removed, secreted or otherwise disposed of by the defendant or will be destroyed or damaged by the defendant. In either case, a bond must be filed by plaintiff, but the defendant may recover possession of the goods by filing a sufficient bond. §§ 8.01-115, 8.01-116, 8.01-537.1. A hearing to review the issuance of the pretrial order must be held promptly on petition of either party, and, in any event, within 30 days of its issuance. § 8.01-119.
Aside from the pretrial procedure, the action proceeds as any other action in general district court. After final judgment for a plaintiff, the court disposes of the property or the proceeds of the property to the parties. The defendant may choose to surrender either the goods themselves or the value of them. § 8.01-121. As in a conversion, damages are limited to the value of the property at the time the landlord began detaining the goods, and are not measured by replacement value.

The detinue action is designed for and usually used for speedy recovery of secured property upon a defendant's default in an agreement to repay money lent. An alternative remedy for the tenant whose goods are illegally detained by a landlord is a tort action in conversion, filed as a warrant in debt or motion for judgment. The action in conversion has the disadvantage that recovery of the specific property is not a remedy available through the court (although it certainly is a possibility as part of a settlement). On the other hand, since conversion is a tort cause of action, punitive damages are available if the landlord's conduct is outrageous.

E. INJUNCTIONS AND DECLARATORY JUDGMENTS

Aside from the rare unlawful detainer case initiated in or appealed to the circuit court, the most frequent circuit court actions in residential landlord tenant matters are injunctions.

Circuit court injunctive relief is authorized by §§ 8.01-620, et seq. generally, and by § 55-248.40 in VRLTA and MHLRA cases (see § 55-248.48).

Preliminary injunctions are usually sought by residential tenants to stop illegal lockouts and utility shutoffs by the landlord, or by residential landlords to stop waste (severe intentional damage to the premises) by tenants. However, an injunction can be obtained to enforce other rights under the VRLTA or MHLRA or a tenant's lease when a damages remedy will not make plaintiff whole or if emergency conditions require expeditious relief.

The grounds for granting preliminary injunctive relief in Virginia have been characterized as similar to the grounds required in federal court. Capital Toll & Mnfg. Co. v. Maschinenfabrik Herkules, 837 F.2d 171 (4th Cir. 1988). These include inadequacy of relief at law, the likelihood that plaintiff will be irreparably damaged if relief is not granted, balancing of the equities based on potential damage to the parties if the injunction is granted, plaintiffs likelihood of success on the merits, and the public interest. See Blackwelder Furniture Co. v. Seilig Mnfg. Co., 550 F.2d 189 (4th Cir. 1977).
However, since injunctive relief is explicitly authorized by § 55-248.40 of the VRLTA, no showing of inadequate relief at law should be required. See Illinois Bell Telephone Co. v. Illinois Commerce Commission, 740 F.2d 566, 571 (7th Cir. 1984)(no showing of irreparable harm necessary to invoke injunctive relief to prevent violation of statute that specifically provides for injunctive relief). The possibility of filing an unlawful detainer action may not always constitute adequate relief at law. See Benoit v. Baxter, 196 Va. 360, 83 S.E.2d 442 (1954).

Equity clearly has jurisdiction to issue both mandatory and prohibitory injunctions based on the breach of lease covenants under appropriate circumstances, Southern Ry. v. Franklin & P. R. Co., 96 Va. 693, 32 S.E. 485 (1899), but, at least in common law tenancies, the applicant for an injunction must prove the traditional common law requisites for an injunction, like irreparable injury. Bradlees Tidewater v. Walnut Hill Investment, 239 Va. 468, 391 S.E.2d 304 (1990).

Under either the common law or the Acts, an indigent tenant may have no realistic way of accessing the remedies under law in situations where conditions at a dwelling present an immediate threat to the health and safety of the tenant and her family. Some tenants cannot afford to move or make repairs themselves in order to assure their family's safety, without assurance of prompt recovery through the courts. Under those circumstances, any relief at law is inadequate as a practical matter, and the damage to the tenant and his family outweighs any damage to the landlord from requiring repairs; therefore, injunctive relief should be available under traditional equitable principles.

Injunctive relief is sought by filing a complaint in the circuit court. Filing fees vary ($84 in Richmond City in 2011, plus $12 service fee per defendant), but will generally be significantly greater than the general district court filing fees. However, if you file an affidavit of indigence and an IFP order, the court may waive filing fees for indigent plaintiffs. § 17.1-606. Generally, the clerk will issue a subpoena in chancery which is served on the defendant by the sheriff or a private process server pursuant to §§ 8.01-293 and 8.01-296. However, since the plaintiff generally will have chosen this procedure for its speed and since preparation of the subpoena and service by the sheriff may take too long to assure immediate relief, the tenant/plaintiff should be prepared to file a motion for a decree granting ex parte temporary relief. To enhance the chances of obtaining the necessary relief, through an injunction if necessary, the tenant's attorney should take the following steps:
• If timely and feasible, deliver a written demand to the landlord demanding that she correct the problem and warning that suit will be filed promptly if she does not. If time does not allow for a written demand, at least call the other side to make the demand and issue the warning. This may resolve the problem. If not, it will assure the court that all other options have been exhausted before the initiation of legal action. It will also help establish that the landlord's actions were willful for the purpose of obtaining attorney's fees and (possibly) punitive damages;
• Call the court to set the earliest possible hearing time and to determine filing fees and bond requirements;
• Prepare a notice of the hearing time and place and make all reasonable efforts to deliver that notice to the defendant or his attorney as soon as possible. Plaintiff should at least be prepared to certify that he attempted to deliver such a notice without success and that he telephoned the landlord or his attorney's office to try to notify them orally. See § 8.01-629;
• Include in your Complaint a specific request for preliminary relief and file a Motion for Temporary Injunction;
• Gather the client, witnesses, documents, and other evidence and make sure the client and witnesses will attend the hearing;
• Carefully consider and focus on the scope of the immediate relief your client needs.
Other issues, like damages and attorney's fees, can be adjudicated later after the initial injunctive relief is obtained;
• Prepare an in forma pauperis petition, affidavit and order, if necessary;
• Prepare arguments on why it a large bond is not warranted. See § 8.01-631.
Tenant’s Right to Prevent Eviction for Non-payment of Rent by Paying All Amounts Owed (Redemption) or by Offering to Pay All Amounts Owed (Redemption Tender)

If your landlord wants to evict you for not paying rent, the landlord must give you a written notice to either move or pay rent in 5 days. If you pay the rent in 5 days, you get to stay. If you do not pay, the landlord can start an unlawful detainer action (an eviction) in General District Court (GDC) by filing a Summons for Unlawful Detainer. You do not have to move just because your landlord has given a written notice, or because your landlord has filed in court.

If the court finds you do owe rent, you can be evicted. However, you may be able to prevent eviction by paying all amounts owed, or by offering to pay all amounts owed, if there are no other reasons stated for eviction.

How do I prevent eviction for non-payment of rent by paying all amounts owed?

Virginia law says the unlawful detainer lawsuit must stop if you pay all amounts owed in the manner explained on this sheet. These amounts owed are: (1) all rent and arrears due as of the filing of the unlawful detainer, (2) all late charges and attorney’s fees contracted for in a written lease and due as of the filing of the unlawful detainer, (3) interest and (4) court costs. The Summons for Unlawful Detainer lists all rent, late charges, attorney’s fees, interest and court costs. The landlord has claims.

If you agree with these amounts claimed by the landlord, you must pay everything on or before your first court return date. The Summons for Unlawful Detainer lists your return date and time. You may pay these amounts owed to your landlord, your landlord’s attorney, or the court. This is called a “redemption.”

If you pay these amounts owed, get a written receipt and bring it to court on the first court date. You also may complete and file the attached form “Notice of Redemption” with the court.

When must I pay all amounts owed to prevent eviction for non-payment of rent?

You must pay these amounts owed on or before your first court date to prevent eviction. Paying all or some of these amounts owed after your first court date will not stop the eviction process. After the first court date, landlord can accept your payment of amounts owed and still proceed with eviction unless you have paid everything you owe and entered into a new rental agreement with the landlord.
How do I prevent eviction for non-payment of rent by offering to pay all amounts owed?

If a local government or a non-profit entity has promised to pay, then you can give to the court their written commitment to pay. This is called a “redemption tender.” The redemption tender must promise to pay – within 10 days after the first court date – (1) all rent and arrears due as of the first court date, (2) all late charges and attorney’s fees contracted for in a written lease and due as of the first court date, (3) interest and (4) court costs.

When must I give the court the “redemption tender”?

You must give the redemption tender to the court at the first court date.

When must the amounts promised be paid to prevent eviction for non-payment of rent?

After you give the court the redemption tender, the court must continue (or postpone) the unlawful detainer for 10 days. If the 10th day falls on a Saturday, Sunday, or legal holiday, then the unlawful detainer is continued to the next business day.

On the next court date, if the landlord has received all of the money promised in the redemption tender, the court must dismiss the case.

On the next court date, if the landlord has not received all of the money promised in the redemption tender, the court must grant the landlord a judgment for immediate possession and for all amounts due.

This means it is very important that you come to court on the next court date with written proof that the landlord received all of the money promised in the redemption tender.

How often can I use a “redemption” or a “redemption tender”?

If an unlawful detainer is filed, you can prevent eviction only once every 12 months that you continue to live in the same place, either by paying a redemption or by offering a redemption tender and then having the redemption paid.
VIRGINIA:

IN THE GENERAL DISTRICT COURT

OF THE CITY / COUNTY OF ____________________________

__________________________, *

v.

__________________________, *

Plaintiff, * FILE NO. __________

v. *

RETURN DATE ______

Defendant. *

NOTICE OF REDEMPTION

Code of Virginia §§55-243, 248.34:1(C)

Plaintiff has brought this unlawful detainer action on the basis of a default in timely payment of rent, and has sought:

$_________ Rent due for the following period __________________________

$_________ Late fees as provided for in a written agreement

$_________ Attorney’s fees as provided for in a written agreement

$_________ Court costs

Defendant has tendered to: [ ] Plaintiff or [ ] Plaintiff’s attorney a total of $_________ on ____________________ to redeem the tenancy. Defendant has not previously used the redemption provision of the Code within the past twelve months (tendering rent, etc. after expiration of a 5 day pay or quit notice and filing of an unlawful detainer action).

WHEREFORE the Defendant respectfully requests that all further proceedings in this action cease.

__________________________

Defendant

Subscribed and sworn to before me this

______ day of ____________, 20__.

__________________________

[ ] Deputy Clerk [ ] Notary Public

Registration No. ______________________

My Commission Expires: ___________________
2010-2011 Virginia Substantive Landlord Tenant Update

Appeal Bond

VA Code 16.1-107:

In cases of unlawful detainer against a former owner based upon a foreclosure against that owner, a person who has been determined to be indigent pursuant to Virginia Code 19.2-159 guidelines shall post an appeal bond within 30 days from the judgment date.

Security Deposits

VA Code 54.1-2018:

When there is a tenant residing in a residential dwelling unit at the time of a foreclosure sale of that residential dwelling unit, the holder of the landlord’s interest at the time of the termination of the tenancy must return to the tenant any security deposit and accrued interest that is owed to the tenant. The obligation to return the security deposit and accrued interest exists regardless of whether the security deposit is transferred to the third party with the landlord’s interest in the property and regardless of any contractual agreements between the landlord and his successors in interest. The landlord can still make lawful deductions from the security deposit.

VA Code 55-248.15:1:

A landlord may withhold a “reasonable portion” of the security deposit to cover a balance due on a water, sewer or other utility account that the tenant is obligated to pay a third party provider, provided:

1. The landlord provides the tenant with prior written notice of his rights and obligations under the statute in (a) a termination notice to the tenant; (b) a vacating notice to the tenant; (c) a separate written notice to the tenant at least fifteen days prior to the disposition of the security deposit.

2. The landlord provides written confirmation to the tenant that he has paid the outstanding utility bill within ten days of payment, along with payment to the tenant of any balance due to the tenant.

3. The tenant may provide the landlord written confirmation of payment of the final water, sewer or other utility bill, in which case the landlord shall refund the security deposit, unless there are authorized deductions, within the 45 day period. If the tenant provides this written confirmation of payment after the expiration of the 45 day period, the landlord shall refund any remaining balance of the security deposit.
4. If the landlord receives confirmation of payment of the final water, sewer or other utility bill by a third party, the landlord shall refund the security deposit to the tenant, unless there are other authorized deductions, within the 45 day period.

Utility Ratio Billing

VA Code 55-226.2(c)

Where the cost of utilities is billed to the landlord, the landlord may use a mathematical formula to allocate these costs among the tenants in the building. The landlord may charge and collect from the tenant additional service charges, including but not limited to monthly billing fees, account set-up fees or account move-out fees, to cover actual expenses of the landlord, provided such changes are agreed to by the tenant in the lease. If the tenant does not pay the portion of the utilities allocated to him when they are due, the landlord may charge a late fee of $5 and the late fee will be defined as rent under the VRLTA.

Redemption

VA Code 55-243 (VLTA)

VA Code 55-248.34:1 (VRLTA)

In unlawful detainer cases for the nonpayment of rent, a tenant may present to the court a “redemption tender” at or before the first court date. A “redemption tender” is a written commitment to pay all rent due and owing as of the return date, including late charges, a return date. If a tenant presents a redemption tender to the court on the return date, the court must continue the return date for 10 days. As long as the landlord receives full payment within the ten days, the action is dismissed. If however, the landlord does not receive full payment by the new return date, the court will (“shall”) grant the landlord immediate possession and judgment for all amounts due. A tenant may invoke the rights under this section no more than once during any consecutive 12 month period.

Tenant’s Assertion (VLTA)

VA Code 55-225.11

Adds the tenant’s assertion remedy to the Landlord and Tenant Act by creating this new section

VA Code 55-225.12

Adds to the Landlord and Tenant Act the right of a tenant to terminate a lease agreement if the landlord commits a material, non-remediable breach, or fails to remedy a material, remediable breach after receiving written notice of the same from the tenant by creating this new section.
VA Code 55-225.13

Adds to the Landlord and Tenant Act the right of a landlord to ask a court to order a tenant to pay rent into escrow if the tenant continues or sets for trial an unlawful detainer action seeking possession and, if the court orders such escrowed rent and the tenant fails to pay it, the court must order judgment for the landlord upon the landlord’s request. However, a court can decline to order the rent escrowed if the court finds that the tenant has asserted a good faith defense.

Notice to Tenant in Event of Foreclosure

VA Code 55-225.10

A. Provides tenants with the right to terminate a rental agreement with five days’ written notice to the landlord if the landlord fails to provide notice to the tenant of a mortgage default, mortgage acceleration or foreclosure sale within five business days after written notice from the lender is received by the landlord.

B. Requires landlords to disclose in writing to any prospective tenant whether he’s received any notice of mortgage default, mortgage acceleration or foreclosure sale relative to the loan on the dwelling unit.

General District Court Jurisdiction

As of July 1, 2011, there is no longer a jurisdictional limit for unlawful detainer cases filed in general district court.
BASIC VIRGINIA EVICTION DEFENSES –
“How TO BE LUCKY ALWAYS”

prepared for Central Virginia Legal Aid Society
& Legal Aid Justice Center
Pro Bono Housing Law Training – January 2011

Martin Wegbreit, Senior Managing Attorney
Central Virginia Legal Aid Society
P.O. Box 12206, Richmond, VA 23241
804-200-6045 (V) & 804-649-8794 (F)
marty@cvlas.org (E-mail)

“Today we were unlucky, but remember we only have to be lucky once.
You will have to be lucky always.”  – October 1984 message sent to British Prime
Minister Margaret Thatcher after she narrowly avoided injury in an IRA attack.

I. Procedural Defenses

A. Procedural defenses under the Landlord and Tenant Law (non-VRLTA tenancies)

(1) Proper party did not sue.  Suit must be filed in the name of a plaintiff who is entitled to

“A grantee or assignee of any land let to lease, or of the reversion thereof, and his heirs,
personal representative or assigns shall enjoy against the lessee, his personal
representative or assigns, the like advantage, by action or entry for any forfeiture or by
action upon any covenant or promise in the lease, which the grantor, assignor or lessor, or
his heirs, might have enjoyed.”

(2) Proper party improperly sued under assumed name (assumed name defense).  Any person,
partnership, limited liability company or corporation which transacts business in Virginia under
an assumed or fictitious name must file a fictitious name certificate in the Circuit Court, see,
Code of Virginia §59.1-69; and a limited partnership, limited liability company or corporation
also must file with the SCC, see, Code of Virginia §59.1-70.  Until the certificate has been filed,
entity cannot maintain an action in Virginia courts.  Code of Virginia §59.1-76.  Failure to
comply renders judgment void.

See, City of Norfolk v. Stephenson, 185 Va. 305, 38 S.E.2d 570 (1946); Phlegar v.

(3) Landlord did not give tenant a proper “5 day pay or quit” notice (gave less than 5 days
notice) if non-payment of rent is an issue.  Code of Virginia §55-225.

“If any tenant or lessee of premises in a city or town, or in any subdivision of suburban
and other lands divided into building lots for residential purposes, or of premises
anywhere used for residential purposes, and not for farming or agriculture, being in
default in the payment of rent, shall so continue for five days after notice, in writing,
requiring possession of the premises or the payment of rent, such tenant or lessee shall
thereby forfeit his right to the possession.”

(4) Notice was not received. Presumption of receipt only if properly addressed and mailed.

See, Manassas Park Development Co. v. Offutt, 203 Va. 382, 124 S.E.2d 29 (1962);

(5) Notice did not give tenant option of paying or leaving. Code of Virginia §55-225.

“If any tenant or lessee of premises in a city or town, or in any subdivision of suburban
and other lands divided into building lots for residential purposes, or of premises
anywhere used for residential purposes, and not for farming or agriculture, being in
default in the payment of rent, shall so continue for five days after notice, in writing,
requiring possession of the premises or the payment of rent, such tenant or lessee shall
thereby forfeit his right to the possession.”

(6) Notice was not for a “sum certain.”

See, Johnston v. Hargrove, 81 Va. 118 (1885); Proutt v. Roby, 82 U.S. 471, 21 L.Ed. 58
(1872).

(7) Notice included late fees that were not authorized by lease and/or were not reasonable. If late
fees reasonably related to landlord’s loss, then proper liquidated damages. If not, then a penalty
and unenforceable.

Bruchel, 109 Va. 676, 64 S.E. 982 (1909).

(8) Notice included court costs which had not yet been incurred. Code of Virginia §55-225.

(9) Notice included attorneys’ fees that were not authorized by lease and/or were not earned
and/or were not reasonable.


(10) Tenant paid to landlord all sums due prior to landlord filing unlawful detainer. Code of
Virginia §55-225.

(11) Landlord did not give tenant a proper “30 day notice to vacate” (gave less than 30 days
notice) if grounds other than non-payment of rent are an issue. Code of Virginia §55-222.

“A tenancy from month to month may be terminated by either party giving 30 days' notice in writing, prior to the next rent due date, of his intention to terminate the same.”
(12) Landlord did not give tenant a termination notice 30 days prior to the end of the month. Code of Virginia §55-222.

“...A tenancy from month to month may be terminated by either party giving 30 days' notice in writing, prior to the next rent due date, of his intention to terminate the same.

(13) Landlord did not give at least 90 day notice of termination to tenant in foreclosed property pursuant to the Protecting Tenants at Foreclosure Act. Public Law #111-22, §§701-704 (5/20/09).

“In General – In the case of any foreclosure on a federally-related mortgage loan or on any dwelling or residential real property after the date of enactment of this title, any immediate successor in interest in such property pursuant to the foreclosure shall assume such interest subject to –

(1) the provision, by such successor in interest of a notice to vacate to any bona fide tenant at least 90 days before the effective date of such notice; and

(2) the rights of any bona fide tenant, as of the date of such notice of foreclosure –

(A) under any bona fide lease entered into before the notice of foreclosure to occupy the premises until the end of the remaining term of the lease, except that a successor in interest may terminate a lease effective on the date of sale of the unit to a purchaser who will occupy the unit as a primary residence, subject to the receipt by the tenant of the 90 day notice under paragraph (1); or

(B) without a lease or with a lease terminable at will under State law, subject to the receipt by the tenant of the 90 day notice under subsection (1),

except that nothing under this section shall affect the requirements for termination of any Federal- or State-subsidized tenancy or of any State or local law that provides longer time periods or other additional protections for tenants.”

(14) Landlord did not give 120 day notice of termination due to rehabilitation or conversion of a building containing 4 or more dwelling units. Code of Virginia §55-222.

“In addition to the termination rights set forth above, and notwithstanding the terms of the lease, the landlord may terminate the lease due to rehabilitation or a change in the use of all or any part of a building containing at least four residential units, upon 120 days' prior written notice to the tenant.

(15) Landlord filed unlawful detainer prior to expiration of notice period and had no present right to possession at the time of commencement of action.

B. Additional procedural defenses under the Virginia Residential Landlord-Tenant Act (VRLTA tenancies)

(16) Landlord gave “30 day non-remediable violation” notice when alleged violation was remediable. Code of Virginia §55-248.31.

“A. Except as provided in this chapter, if there is a material noncompliance by the tenant with the rental agreement or a violation of §55-248.16 materially affecting health and safety, the landlord may serve a written notice on the tenant specifying the acts and omissions constituting the breach and stating that the rental agreement will terminate upon a date not less than 30 days after receipt of the notice if the breach is not remedied in 21 days, and that the rental agreement shall terminate as provided in the notice.

B. If the breach is remediable by repairs or the payment of damages or otherwise and the tenant adequately remedies the breach prior to the date specified in the notice, the rental agreement shall not terminate.”

(17) Landlord did not give proper notice to tenant in a hotel/motel for more than 30 days. Code of Virginia §55-248.5(A)(4).

“A. Except as specifically made applicable by §55-248.21:1, the following conditions are not governed by this chapter:

4. Occupancy in a hotel, motel, vacation cottage, boardinghouse or similar lodging held out for transients, unless let continuously to one occupant for more than thirty days, including occupancy in a lodging subject to taxation as provided in §58.1-3819”

(18) Landlord did not give tenant a termination notice at least 30 days prior to the next rent due date. Code of Virginia §55-248.37.

“The landlord or the tenant may terminate a week-to-week tenancy by serving a written notice on the other at least seven days prior to the next rent due date. The landlord or the tenant may terminate a month-to-month tenancy by serving a written notice on the other at least 30 days prior to the next rent due date.”

(19) Landlord accepted rent without giving a prior notice accepting rent “with reservation.” Code of Virginia §55-248.34(A).

“A. Provided the landlord has given written notice to the tenant that the rent will be accepted with reservation, the landlord may accept full payment of all rent and receive an order of possession from a court of competent jurisdiction pursuant to an unlawful detainer action filed under Chapter 13 (§8.01-374 et. seq.) of Title 8.01. Such notice shall be included in a written termination notice given by the landlord to the tenant in accordance with §55-248.31 or in a separate written notice given by the landlord to the tenant within five business days of receipt of the rent. Unless the landlord has given such
notice in a termination notice in accordance with §55-248.31, the landlord shall continue to give a separate written notice to the tenant within five business days of receipt of the rent that the landlord continues to accept the rent with reservation in accordance with this section until such time as the violation alleged in the termination notice has been remedied or the matter has been adjudicated in a court of competent jurisdiction.

(20) Landlord did not give tenant a proper “less than 30 day notice to vacate” if grounds of criminal or willful act, which is not remediable and which poses a threat to health or safety are an issue. Code of Virginia §55-248.31.

“Notwithstanding anything to the contrary contained elsewhere in this chapter, when a breach of the tenant's obligations under this chapter or the rental agreement involves or constitutes a criminal or a willful act, which is not remediable and which poses a threat to health or safety, the landlord may terminate the rental agreement immediately and proceed to obtain possession of the premises.”


C. Additional procedural defenses under the Virginia Manufactured Home Lot Rental Act (VMHLRA)

(21) Landlord did not give 60 day notice to tenant in mobile home park with lease of 60 days or longer. Code of Virginia §55-248.46(A).

“Either party may terminate a rental agreement which is for a term of 60 days or more by giving written notice to the other at least 60 days prior to the termination date; however, the rental agreement may require a longer period of notice.”

(22) Landlord did not give 180 day notice of termination due to rehabilitation or conversion of a mobile home park. Code of Virginia §55-248.46(B).

“If the termination is due to rehabilitation or a change in the use of all or any part of a manufactured home park by the landlord, a 180-day written notice is required to terminate a rental agreement.”

D. Additional procedural defenses in federally subsidized housing

(23) Notice to public housing tenant did not state name, address and phone number of local legal aid program. Code of Virginia §55-248.6(E).

“No notice of termination of tenancy served upon a tenant by a public housing authority organized under the Housing Authorities Law (§36-1 et. seq.) of Title 36 shall be effective unless it contains on its first page, in type no smaller or less legible than that
otherwise used in the body of the notice, the name, address and telephone number of the legal services program, if any, serving the jurisdiction wherein the premises are located.”


“The notice of lease termination to the tenant shall state specific grounds for termination.”

(25) Landlord relying upon grounds not specified in the termination notice. See, 24 C.F.R. §880.607(c)(3).

“In any judicial action instituted to evict the family, the owner may not rely on any grounds which are different from the reasons set forth in the notice.”

(26) Landlord did not give tenant a proper “14 day pay or quit” notice if non-payment of rent is an issue (conventional public housing only). See, 24 C.F.R. §966.4(l)(3)(i)(A).

“The PHA must give written notice of lease termination of: (A) 14 days in the case of failure to pay rent.”

II. Substantive Defenses

A. Substantive defenses under the Landlord and Tenant Law (non-VRLTA tenancies)

(27) Landlord refused tender of rent or other payment.


(28) Landlord waived timely payment of rent or waived other lease breach.


(29) Landlord accepted rent after serving a notice of termination and created a new tenancy – novation. The legal principle is that a new agreement is created when the landlord takes an action (acceptance of rent) which is inconsistent with the prior notice of termination. A landlord can avoid the possibility of creating a novation only by issuing a written reservation of the right to evict.

(30) Tenant has redeemed tenancy by paying all rent & arrears, rent contracted for in a written lease, attorneys’ fees contracted for in a written lease, interest and court costs, on or before the first court return date. Code of Virginia §55-243.

“If any party having right or claim to such lands shall, at any time before the trial in such ejectment, or at or before the first court return date in an action of unlawful detainer seeking possession of a residential dwelling based upon a default in rent, pay or tender to
the party entitled to such rent, or to his attorney in the cause, or pay into court, all the rent and arrears, along with any reasonable attorney fees and late charges contracted for in a written rental agreement, interest and costs, all further proceedings in the ejectment or unlawful detainer shall cease.”

(31) Tenant presents a redemption tender – a written commitment from a local government or nonprofit entity to pay all rent due & owing as of the return date, late fees, attorneys’ fees and court costs within 10 days of the return date. Code of Virginia §55-243(C).

“In cases of unlawful detainer for the nonpayment of rent of a tenant from a rental dwelling unit, the tenant may present to the court a redemption tender for payment of all rent due and owing as of the return date, including late charges, attorney fees, and court costs, at or before the first return date on an action for unlawful detainer. For purposes of this section, "redemption tender" means a written commitment to pay all rent due and owing as of the return date, including late charges, attorney fees, and court costs, by a local government or nonprofit entity within 10 days of said return date.

(32) Conduct did not occur or tenant not responsible.

(33) Tenant not responsible for conduct of persons on premises without consent of tenant. See, Code of Virginia §55-248.16(A)(7) (tenant responsible for conduct of persons on premises with consent of tenant).

(a) However, see, Department of Housing and Urban Development v. Rucker, 535 U.S. 125, 122 S.Ct. 1230, 152 L.Ed.2d 258 (2002),

(b) However, Rucker has been limited by subsequent case law in various circuits. Many jurisdictions have pointed out that Rucker does not mandate an eviction, it simply states that PHAs may use their discretion in determining an eviction. See, Oakwood Plaza Apartments v. Smith, 800 A.2d 265, 267 (N.J. Super. A.D. 2002). Therefore, the court can rule the PHA abused his/her discretion, in which case the court would most likely rule on equitable principles and the totality of the circumstances as discussed supra. Rucker’s strict liability standard does not apply to all statutory requirements, only lease provisions. See, New York City Housing Authority v. Grillasca, 852 N.Y.S.D. 610 (N.Y. City Civ. Ct. 2007). As such there may be room to argue the innocence of the tenant when it is the conduct of a guest. Lastly, Rucker does not necessarily extend to criminal conduct not involving drugs. See, Lowery v. Housing Authority of City of Terre Haute, 826 N.E.2d 685, 690 (Ind. App. 2005).

(34) Lease breach is minor or a remediable breach that has been cured and has not recurred. See, Neale v. Jones, 232 Va. 203, 349 S.E.2d 116 (1986); Code of Virginia §16.1-93.

“Every action or other proceeding in a court not of record shall be tried according to the principles of law and equity, and when the same conflict the principles of equity shall prevail.”
(35) Landlord is attempting to enforce an illegal lease clause, e.g., charging tenant in multi-family dwelling for utilities without individual sub-metering. See, Code of Virginia §55-226.2.

“If energy submetering equipment, water and sewer submetering equipment, or energy allocation equipment is used in any building, the owner, manager, or operator of the building shall bill the tenant for electricity, natural gas or water and sewer for the same billing period as the utility serving the building, unless the rental agreement or lease expressly provides otherwise. The owner, manager, or operator of the building may charge and collect from the tenant additional service charges, including, but not limited to, monthly billing fees, account set-up fees or account move-out fees, to cover the actual costs of administrative expenses and billing charged to the building owner, manager, or operator by a third-party provider of such services, provided that such charges are agreed to by the building owner and the tenant in the rental agreement or lease. The building owner may require the tenant to pay a late charge of up to $5 if the tenant fails to make payment when due, which shall not be less than 15 days following the date of mailing or delivery of the bill sent pursuant to this section.”

(36) Landlord is attempting to enforce an ambiguous lease provision, which should be construed against the drafter, i.e., the landlord. Under Virginia common law, a writing is construed against the party who prepared it.


(37) Landlord is attempting to enforce an unconscionable lease clause. Under Virginia law, an inequitable and unconscionable bargain has been defined to be “one that no man in his senses and not under a delusion would make, on the one hand, and as no fair man would accept, on the other.” The inequality must be so gross as to shock the conscience.


(38) Landlord & tenant entered new lease resulting in new tenancy after old tenancy breached.

(39) Landlord’s eviction is discrimination based upon race, color, religion, national origin, gender, age (elderliness), familial status (having minor children) or disability, and violates Fair Housing Law. Code of Virginia §§36-96.1 to 36-96.23.

(40) Landlord is not accommodating a disability. In 1988 Congress expanded the protections of the Fair Housing Act to prohibit discrimination against persons with disabilities in the sale or rental of a dwelling. 42 U.S.C. § 3601-3619. Discrimination is defined to include as a prohibited activity “a refusal to make reasonable accommodation in rules, policies, practices, or services, when such accommodations may be necessary to afford such persons equal opportunity to use and enjoy a dwelling.” 24 C.F.R. §100.204. The reasonable accommodation provision applies to
evictions. In order to be covered under this provision of the Fair Housing Act, a tenant must either have a disability (a physical or mental impairment which substantially limits one or more major life activities) or be regarded (perceived) as having a disability.

(a) A request for a reasonable accommodation need not be in writing; and, in the context of an eviction action, there is no final deadline, prior to an actual eviction cutting off the opportunity to make such a request. A request needs to be reasonable and it must be required because of or to ameliorate the effect(s) of a disabling condition. A landlord who either denies or fails to respond to a request for reasonable accommodation may commit an act of discrimination, in violation of the federal statute. A violation of law can be enforced, at the option of the tenant, by filing suit in state or federal court, or by filing an administrative complaint with the U.S. Department of Housing and Urban Development. A Fair Housing Act violation may also be asserted as a defense in an unlawful detainer action.

(b) A ground of defense under the Fair Housing Act in an eviction action would be an affirmative defense containing assertion of three elements: 1) the requested accommodation is related to the disability; 2) the accommodation is necessary for occupancy of the housing; and, 3) the request is possible to implement. If a prima facie showing (existence of these three elements) is made, the burden shifts to the landlord to demonstrate that the requested accommodation is unreasonable. A request may be unreasonable if it fundamentally alters the nature of the program (administration of the rental housing) or if it imposes undue financial or administrative burdens.

B. Additional substantive defenses under the Virginia Residential Landlord-Tenant Act (VRLTA tenancies)

(41) Tenant has properly withheld rent from landlord due to poor housing conditions. Code of Virginia §55-248.25.

“In an action for possession based upon nonpayment of rent or in an action for rent by a landlord when the tenant is in possession, the tenant may assert as a defense that there exists upon the leased premises, a condition which constitutes or will constitute, a fire hazard or a serious threat to the life, health or safety of occupants thereof, including but not limited to a lack of heat or running water or of light or of electricity or adequate sewage disposal facilities or an infestation of rodents, or a condition which constitutes material noncompliance on the part of the landlord with the rental agreement or provisions of law. The assertion of any defense provided for in this section shall be conditioned upon the following:

1. Prior to the commencement of the action for rent or possession, the landlord or his agent was served a written notice of the aforesaid condition or conditions by the tenant or was notified by a violation or condemnation notice from an appropriate state or municipal agency, but that the landlord has refused, or having a reasonable opportunity to do so, has failed to remedy the same. For the purposes of this subsection, what period of time shall be deemed to be unreasonable delay is left to the discretion of the court except
that there shall be a rebuttable presumption that a period in excess of thirty days from receipt of the notification by the landlord is unreasonable; and

2. The tenant, if in possession, has paid into court the amount of rent found by the court to be due and unpaid, to be held by the court pending the issuance of an order under subsection C.”

(42) Lease breach is not material noncompliance with the lease or a noncompliance materially affecting health or safety. Code of Virginia §§55-248.16 & 55-248.31.

“In addition to the provisions of the rental agreement, the tenant shall:

1. Comply with all obligations primarily imposed upon tenants by applicable provisions of building and housing codes materially affecting health and safety”

(43) Landlord is not accommodating victim of domestic violence. Code of Virginia §55-248.31(D). Applies to tenants who are victims of family abuse under Code of Virginia §16.1-228. Applies where the tenant has had an act of family abuse committed against her in the dwelling unit or on the premises and the perpetrator has been barred by a preliminary protective order or final protective order or by the landlord based upon information provided by the tenant.

(a) Prohibits termination of the tenant’s lease due solely to the act of family abuse. However, it does not prohibit the landlord from terminating the tenant’s lease for reasons other the abuse itself (i.e. nonpayment of rent).

(b) Does not apply if the tenant does not provide the landlord written documentation of her status as a victim of family abuse and the exclusion of the perpetrator from the premises within 21 days of the act of family abuse.

(c) Does not apply if the perpetrator returns to the premises in violation of a bar notice, and the tenant fails to notify the landlord of the perpetrator’s return within 24 hours, unless the tenant proves she did not have actual knowledge that the perpetrator returned. If it is not possible for the tenant to notify the landlord within 24 hours, she must do so as soon as possible, but in any event within seven days.

(44) Landlord’s eviction is retaliatory. Code of Virginia §55-248.39.

“Except as provided in this section, or as otherwise provided by law, a landlord may not retaliate by increasing rent or decreasing services or by bringing or threatening to bring an action for possession or by causing a termination of the rental agreement pursuant to §55-222 or §55-248.37 after he has knowledge that: (i) the tenant has complained to a governmental agency charged with responsibility for enforcement of a building or housing code of a violation applicable to the premises materially affecting health or safety; or (ii) the tenant has made a complaint to or filed a suit against the landlord for a violation of any provision of this chapter; or (iii) the tenant has organized or become a
member of a tenants' organization; or (iv) the tenant has testified in a court proceeding against the landlord.”

C. Additional substantive defenses under the Virginia Manufactured Home Lot Rental Act (VMHLRA)

(45) Tenancy not terminated for one of five statutory reasons: (1) nonpayment of rent; (2) violation of building & housing code caused by tenant; (3) violation of federal, state or local ordinance detrimental to health, safety or welfare of other residents; (4) violation of any rule materially affecting health, safety or welfare; (5) two or more violations of lease or rule within a six month period. Code of Virginia §55-248.50:1.

D. Additional substantive defenses in federally subsidized housing

(46) Landlord did not properly calculate tenant’s share of rent. See, 24 C.F.R. §5.628.

Determining total tenant payment (TTP). Total tenant payment is the highest of the following amounts, rounded to the nearest dollar:

(1) 30 percent of the family's monthly adjusted income;
(2) 10 percent of the family's monthly income;
(3) If the family is receiving payments for welfare assistance from a public agency and a part of those payments, adjusted in accordance with the family's actual housing costs, is specifically designated by such agency to meet the family's housing costs, the portion of those payments which is so designated; or
(4) The minimum rent, as determined in accordance with §5.630.”

(47) Tenant did not commit one or more substantial violations of the rental agreement, or repeated minor violations of the rental agreement which: disrupt the livability of the project, adversely affect the health or safety of any person, adversely affect the right of any tenant to the quiet enjoyment of the leased premises and related project facilities, interfere with the management of the project, or have an adverse financial effect on the project. See, 24 C.F.R. §880.607(b)(3)

Material noncompliance with the lease includes:
(A) One or more substantial violations of the lease; or
(B) Repeated minor violations of the lease that disrupt the livability of the building; adversely affect the health or safety of any person or the right of any tenant to the quiet enjoyment of the leased premises and related facilities; interfere with the management of the building or have an adverse financial effect on the building.

(48) During initial lease term of voucher, landlord does not have good cause for eviction based on something unless based on something family did or failed to do. See, 24 C.F.R. §§982.310(d)(2).
“During the initial lease term, the owner may not terminate the tenancy for ‘other good cause’, unless the owner is terminating the tenancy because of something the family did or failed to do.”

(49) Landlord is suing for subsidized portion of rent. A §8 agent’s withholding of the housing assistance payment does not give the landlord the right to evict the tenant for nonpayment of rent. See, 24 C.F.R. §§982.310(b) & 982.451(b)(4)(iii).

“(b) Nonpayment by PHA: Not grounds for termination of tenancy. (1) The family is not responsible for payment of the portion of the rent to owner covered by the housing assistance payment under the HAP contract between the owner and the PHA.

(2) The PHA failure to pay the housing assistance payment to the owner is not a violation of the lease between the tenant and the owner. During the term of the lease the owner may not terminate the tenancy of the family for nonpayment of the PHA housing assistance payment.”

(50) Landlord is suing for tenant portion of rent that is unauthorized (suing for under the table payments). In the voucher program, the tenant’s contribution is limited to 30% of adjusted income, plus the amount by which the §8 approved “reasonable rent” exceeds the applicable local voucher payment standard.


(51) Landlord may not evict for failure to report information, or for reporting accurate information unless landlord shows that the tenant had notice of the reporting requirement at issue and the consequences of failure to report.

Introduction

Federally subsidized housing issues typically are encountered in State court in the context of an unlawful detainer or other eviction case. Unlike private landlord-tenant cases, federally subsidized landlord-tenant cases are set against a backdrop of extensive federal regulations which determine, among other things, admissions, rents, lease provisions, and in many situations, pre-eviction grievance hearing rights. Some familiarity with the array of federal regulations is needed to understand the underlying issues which may arise in a federally subsidized landlord-tenant eviction case.

Tenants in federally subsidized housing have important legal rights not enjoyed by tenants in private housing:

(1) Landlords’ discretion concerning admission of tenants is limited to some degree.

(2) Many subsidized housing tenants pay only 30% of their income for rent and utilities, and in all cases, the total rent landlords can charge is government regulated.

(3) Usually, subsidized tenancies do not have time limited terms. As long as the tenant does not materially violate the lease or the law, the tenant is entitled to continued occupancy and may be evicted only for good cause.

(4) Subsidized tenants often must be given specific notices of, and the opportunity to have, some type of pre-termination meeting with management or administrative hearing to contest the reasons for admission denial or subsidy termination.

Federally Subsidized Housing: Unit-Based

I. Types of Unit-based Federally Subsidized Housing – Assistance is tied to the housing unit.
A. Public Housing. Conventional public housing is owned and operated by a public housing authority (PHA). The program began with the passage of the Housing Act of 1937, which established a system of public ownership of low income rental housing through state created housing authorities. See, Code of Virginia §36-1 et. seq. The U.S. Department of Housing and Urban Development (HUD) pays the PHA’s operating expenses over and above tenant rental payments (30% of tenant income) through an Annual Contributions Contract (ACC). See, 42 U.S.C. §1437 et. seq.; 24 C.F.R. Parts 5, 912, 913, 960 and 966.

B. FHA Programs (§221(d)(3) and §236 programs). Both of these programs usually are privately owned, multi-family rental housing insured and subsidized by the Federal Housing Administration (FHA). The §221(d)(3) program began in 1961, and was replaced by the §236 program in 1968. FHA insures and subsidizes the developer’s mortgage, which results in lower interest rates (as low as 1% interest) and operating costs. For the §221(d)(3) program, see, 12 U.S.C. §1713; 24 C.F.R. §221.536. For the §236 program, see, 12 U.S.C. 1715z-1; 24 C.F.R. §236.75 - 236.760. For both, see, 24 C.F.R. §245.247.

C. Farmer’s Home Administration (FmHA) §515 Rural Rental Housing. As with the §221(d)(3) and §236 programs, this program usually is privately owned, multi-family rental housing, with the insurance and subsidy provided by what formerly was called FmHA and now is known as the Rural Housing Service, Rural Economic and Community Development, U.S. Department of Agriculture. This program operates only in rural areas outside of a Standard Metropolitan Statistical Area (SMSA). See, 12 U.S.C. §1485; 7 C.F.R. Part 1930, Subpart C, Exhibit B (Multiple Housing Management Handbook).

D. §8 Unit-based Programs. Section 8 of the Housing and Community Development Act of 1974 created the §8 New Construction, §8 Substantial Rehabilitation, and §8 Moderate Rehabilitation programs. Usually these are privately owned, multi-family rental housing, with the insurance and subsidy provided by HUD. See, 42 U.S.C. §1437f, 24 C.F.R. Parts 880 and 881.

E. Identifying Programs. Usually it is not difficult to identify whether a tenant is a resident of unit-based federally subsidized housing. Most tenants will be aware if their landlord is a housing authority, or if they live in subsidized housing, because they know that their rent is based on their income and that they are subject to recertification requirements. Often, it is more difficult to determine the program under which the tenant is subsidized. There is no systemic way to address this. The following are suggestions:

1. If the lease and notices identify the housing authority as a lessor, the tenant is likely to live in conventional public housing.

2. If the project is private and a subsidy is involved, but the tenant dealt only with the project management in obtaining the unit and the subsidy, then the project is likely to be an FHA, FmHA §515, or §8 Unit-based project. Sometimes these projects can be differentiated by notations on leases and notices, which identify the program involved. The project management should know which program applies, and may be willing to inform the advocate or tenant. The HUD regional office in Richmond, the RECD state and district offices, and the Virginia Housing
Development Authority (VHDA) all maintain lists of the properties they oversee and the programs which apply to each.

F. **Common Themes.** All these unit-based federally subsidized housing programs have certain things in common. All of them must follow federal regulations about admissions, rents, leases, grievances and evictions.

II. Admissions.

A. **Applications.** In conventional public housing, applications usually are made at the PHA. See, 24 C.F.R. §960.201 et. seq. Other unit-based applications are made at the management office for the project.

B. **Waiting Lists.** In all programs, the application must be accepted, unless the waiting list is so long there is no reasonable possibility that new applicants will be housed promptly – often defined as within one year.

1. While landlords have some discretion to admit tenants preferentially based on income or preference eligibility, they cannot accept applications only from applicants who fit within certain income ranges or from applicants with certain preference eligibilities.

2. Once an application is accepted, the applicant’s name is entered on a waiting list. At the time of taking the application, the applicant must be advised of the availability of any applicable preferences for admission. The landlord may require applicants on a waiting list periodically to reaffirm interest in admission, and may remove applicants who fail to do so.

3. Program waiting lists usually are kept by number of bedrooms needed, and also may be separated by the existence of validly promulgated local preferences.

4. When a vacancy occurs, the landlord must offer the unit to eligible applicants in the order of bedroom size, preferences, and date & time of application.

C. **Mandatory Eligibility Criteria.**

1. **Income.** Income eligibility is limited in all programs. For public housing, FHA, or §8 Unit-based projects, the tenant’s income can be no more than 80% of area median income. See, 24 C.F.R. §5.603(b). For FmHA §515 projects, the tenant’s income can be no more than 95% of area median income.

2. **Resources.** There is no resource eligibility limitation. However, for assets in excess of $5,000, the greater of actual income earned on assets, or a presumed return, is included in income. See, 24 C.F.R. §5.609(b)(3).

3. **Ability to pay rent.** Minimum income requirements cannot be imposed. However, FHA, FmHA §515, and §8 Unit-based landlords may consider objective inability to pay basic subsidized rent, without an additional subsidy, in determining admissions.
4. Families. Both single individuals and families are eligible for admission. See, 24 C.F.R. §5.403. Some FmHA §515 units are reserved for elderly and handicapped families.

5. Citizenship. Only U.S. citizens and eligible immigrants may be admitted. A noncitizen must have eligible immigration status under one of the six categories set forth in 42 U.S.C. §1436a. (See, 24 C.F.R. §5.500 et. seq. for the implementing regulations.) These are:

a. Aliens lawfully admitted for permanent residence.

b. Aliens who entered the U.S. prior to June 30, 1948, have continuously maintained U.S. residence, and are deemed to be lawfully admitted for permanent residence.

c. Aliens lawfully present pursuant to an admission for asylum.

d. Aliens lawfully present as a result of the exercise of discretion by the Attorney General for emergent reasons.

e. Aliens lawfully present as a result of the Attorney General withholding deportation.

f. Aliens lawfully admitted for temporary residence.

D. Other Selection Criteria.

1. PHA’s must have written tenant selection criteria. These written criteria must be posted where applications are taken and copies must be provided upon request. See, 24 C.F.R. §960.204. Written criteria are strongly suggested, but not required, for other subsidized landlords.

2. The PHA’s selection criteria must avoid concentration of very low income tenants, must avoid admitting tenants whose habits and practices may be detrimental to other tenants, and must establish reasonable and objective admission policies.

3. Tenant selection criteria shall be reasonably related to individual attributes and behaviors, and shall not be related to attributes and behaviors which may be imputed to groups or categories of persons. See, 24 C.F.R. §960.205.

4. The PHA may consider all information relevant to family behavior and suitability for tenancy, including, but not limited to:

a. Past performance in meeting financial obligations, especially rent.

b. A record of disturbance of neighbors, destruction of property, or living or housekeeping habits at prior residences adversely affecting health, safety or welfare of other tenants.
c. A history of criminal activity involving crimes of physical violence to persons or property, and other criminal acts adversely affecting health, safety or welfare of other tenants.

5. PHA’s and subsidized landlords may not discriminate against an applicant based on having filed bankruptcy or having failed to pay discharged debts. See, 11 U.S.C. §525(a).

6. In the event of receipt of unfavorable information, consideration shall be given to the time, nature and extent of conduct, and to factors which might indicate a reasonable probability of favorable future conduct or financial prospects. (See, 24 C.F.R. 960.205(d.)) Examples include:

a. Evidence of rehabilitation.

b. Evidence of participation or willingness to participate in social service and counseling programs, and the availability of such programs.

c. Evidence of willingness to increase income, and the availability of training or employment programs.

E. Preferences. The PHA may adopt a system of local preferences for selection of families admitted to conventional public housing, based on local housing needs and priorities. See, 24 C.F.R. §960.206. These local option preferences include:

1. Preference for working families (head of household, spouse, or sole member is employed), provided this preference is given if head of household and spouse, or sole member, is age 62 or older, or is a disabled person.

2. Preference for families which include a disabled person, provided there is no preference for a person with a specific disability.

3. Preference for families which include victims of domestic violence.

4. Preference for single persons who are elderly (age 62 or older), displaced, homeless or disabled.

5. Residency requirements are prohibited; however, a residency preference is permitted; provided such a preference does not discriminate based on race, religion, national origin, sex, handicap, or age. Applicants who are working, or notified they are hired to work, in a residency preference area, must be treated as residents of the residency preference area. A residency preference must not be based on how long an applicant has lived or worked in a residency preference area.
F. Discrimination. PHA’s and subsidized landlord may not discriminate because of race, religion, national origin, sex, marital status, source of income, handicap, or age (unless it is a project reserved for the elderly or handicapped). See, 24 C.F.R. §6.4.

G. Unit Size Issues. As a general rule, occupancy is based upon two persons per bedroom. However, this rule has many exceptions based on room size, the age and sex of the tenants, and other factors. Within these guidelines, families should be able to choose to some extent the size dwelling they need in light of both family composition and waiting list size. Families with absent members, including children in foster care (but excluding active duty military personnel) must be given a sufficient number of bedrooms to house the entire family. Pregnant women should be given a unit size appropriate for the family after the birth of the child.

H. Denials - Procedure. All applicants whose applications are denied are entitled to prompt written notice of the denial. There is greater procedural protection for applicants denied admission to conventional public housing than to other subsidized housing. See, 24 C.F.R. §960.208.

1. In conventional public housing, the notice of denial must give reasons for the denial and notify the applicant of the right to a hearing and the right to have counsel at the hearing. The hearing requires a decision maker who did not make the initial decision, which must be based solely on the evidence presented at the hearing. There should be a written decision giving reasons for the decision.

2. In FHA and §8 Unit-based projects, rejected applicants generally must be notified in writing of the reasons for the denial and advised of their right to respond in writing or to meet with management if requested within 14 days. The meeting, if any, must be held with someone other than the person who made the decision. A written notice of the landlord’s decision based on the meeting must be provided within 5 days and the notice must inform the applicant of the availability of HUD review of the decision.

3. In FmHA §515 projects, rejected applicants have access to a more formal grievance procedure, as long as they are not clearly ineligible based on required statutory criteria such as income eligibility. See, 7 C.F.R. §1944.551 et. seq.

III. Rents. All tenants in subsidized housing pay a rent less than the rent they would pay for comparable housing on the private market. There are significant differences in the rent obligations of tenants depending upon their type of housing and their subsidy.

A. Conventional Public Housing. Once a year, the PHA must give each family the choice between two methods of determining tenant rent. Except for financial hardship cases, the family may not be offered this choice more than once a year. Regardless of whether the family pays flat rent or income-based rent, the family must pay at least minimum rent.

1. Flat rent. Under this method, rent is based on the market rent charged for comparable units in the private unassisted rental market, and is equal to the estimated rent for which the PHA promptly could lease the unit. See, 24 C.F.R. §960.253(b).
a. The flat rent is designed to encourage self-sufficiency and to avoid creating disincentives for continued residency by families attempting to become economically self-sufficient.

b. If a family chooses to pay a flat rent, the PHA does not pay any utility reimbursement.

2. Income-based rent. Under this method, tenants pay as their portion of the rent and utilities the higher of 30% of family adjusted monthly income, 10% of family gross monthly income, or that portion of a state welfare grant designated to meet housing costs. (No part of a welfare grant is designated by the Virginia Department of Social Services to meet housing costs.) See, 24 C.F.R. §960.253(c).

a. Annual income is anticipated total income from all sources received by any household member. See, 24 C.F.R. §5.609. It also includes all net income derived from assets, and if net assets exceed $5,000, income can be imputed to those assets at the passbook savings rate.

b. Certain receipts are excluded from income, such as temporary, sporadic or non-recurring income, gifts, medical insurance reimbursements, inheritances, insurance payments for personal or property losses, educational scholarships, earned income of children under 18, foster care payments, Food Stamps, fuel assistance, and other types of income specifically excluded by federal law.

c. Deductions are made from gross annual income to reach adjusted annual income. See, 24 C.F.R. §5.611(a). These are:

1) $480 for each dependent;

2) $400 for any elderly or disabled family (head of household or spouse at least 62 or receives Social Security or SSI disability benefits);

3) the sum of the following, to the extent that the sum exceeds 3% of annual income: (a) unreimbursed medical expenses of any elderly or disabled family, and, (b) unreimbursed reasonable attendant care expenses for each disabled member of the family to the extent necessary to enable any member of the family to be employed.

4) any reasonable child care expenses necessary to enable a member of the family to be employed or further his or her education.

5) any additional deductions which the PHA wishes to adopt by written policy.

d. The adjusted annual income is divided by 12 to reach the net monthly income. The tenant’s rent and utility liability is based on 30% of that figure, except in the
unusual case where 10% of gross monthly income is greater. This is the total monthly tenant payment. See, 24 C.F.R. §5.628.

e. Where all utilities (except phone) are supplied by the PHA, total monthly tenant rent equals total monthly rent payment. Where some or all are not supplied by the PHA, total monthly tenant rent equals total monthly tenant payment minus the monthly utility allowance. See, 24 C.F.R. §5.634.

f. If the tenant pays for utilities, a utility allowance is deducted from the total monthly tenant payment. If the utility allowance exceeds the total monthly tenant payment, the tenant pays no rent and receives a monthly check equal to the amount of the difference. An allowable utility allowance is a reasonable consumption of utilities by an energy conservative household of modest circumstances consistent with the requirements of a safe, sanitary and healthful living environment, and should be in an amount that excess consumption which may result in a surcharge should be reasonably within the control of a tenant or household to avoid. See, 24 C.F.R. §965.501 et. seq. Generally, the utility allowance must be reviewed annually and adjusted to reflect utility rate increases that cumulate to 10% or more. Request for relief from surcharges for excess consumption may be granted by the PHA on reasonable grounds, such as special needs of elderly, ill, or disabled residents. See, 24 C.F.R. §965.508.

B. §8 Unit-based Projects. Income-based rent, as set in conventional public housing, is charged in §8 unit-based projects. See, 24 C.F.R. §§5.634 and 880.201.

C. FHA and FmHA §515 Projects. Tenants in these projects who do not receive any other form of subsidy pay rent at the higher of a “base rent” or 30% of their net income, up to a maximum of the “note rate” or the “market rate.” These rates are set by HUD and RECD based on operating costs.

D. Recertifications and Reporting. To assure that tenants are paying the correct amount of rent and occupy the appropriate unit size, all subsidized housing tenants must undergo regular and interim recertifications of relevant family information. See, 24 C.F.R. §960.257.

1. The family must report changes in family composition and income as may be necessary for the landlord to make determinations with respect to rent, eligibility and unit size. If the landlord receives such information, he must make any adjustment determined to be appropriate.

2. Failure to timely report increases in income or changes in family composition, or false reporting of such information, can be grounds for termination of the tenancy.

3. All increases or decreases in regular income should be reported immediately, but small changes may not lead to changes in tenant rent. For example, RECD regulations only require recertification when income increases by $40 or more per month, or decreases by $20 or more per month.
4. Rent increases become effective the first day of the second month after an increase in income or decrease in deductions. Rent decreases become effective the first day of the month after the events causing a reported decrease in income or increase in deductions.

5. If change in family size require a different unit size, the family must accept a move to an appropriately sized unit if and when offered by the landlord.

6. If the appropriate rent adjustments are not made due to the fault of the tenant, the tenant must repay any underpayments, and is not entitled to any repayment of overpayments. Tenant repayment is unnecessary and tenant refunds are appropriate if the over or underpayments were caused by the landlord after the tenant reported the relevant change in circumstance.

E. Lump Sum Income. With one statutory exception, lump sum payments for the delayed start of periodic payments – including annuities, insurance policies, retirement funds, pensions, disability or death benefits – are considered income. However, a lump sum payment may be counted either as future income to determine future rent, or as back income to determine back rent. In almost all cases, it will be more advantageous to count the lump sum income as back income to determine back rent. A statutory change excludes from income lump sum payments for the delayed start of Social Security disability benefits which otherwise might be included in rental calculations. See, 42 U.S.C. §1437a(b)(4) and 24 C.F.R. §5.609(c)(14).

IV. Leases – The subsidized landlord must have a written lease, which says certain things. Among these things are: the amount of rent, when rent is due, the PHA’s duty to keep the housing decent, the tenant’s rights and duties, the way to handle grievances, and the way to handle evictions.

A. Prohibited Clauses. The following clauses cannot be contained in any subsidized housing lease: 1) waiver of notice of lease termination, 2) distraint for rent and other charges, 3) landlord exculpatory clauses, 4) jury trial waiver, 5) confession of judgment, 6) waiver of legal proceedings, 7) waiver of appeal rights, and 8) tenant chargeable with legal costs regardless of outcome of case. See, 24 C.F.R. §§880.606(b)(2)(ii) and 966.6.

B. Reasonableness. All program leases must be reasonable. As to the reasonableness of lease clauses, see, Richmond Tenants Organization v. Richmond Redevelopment and Housing Authority, 751 F.Supp 1204, 1205 (E.D. Va. 1990), aff’d, 947 F.2d 942 (4th Cir. 1991) (42 U.S.C. §1437d(l)(1) requires lease provisions to be rationally related to a legitimate housing purpose and not overbroad for that purpose). RTO v. RRHA gave broad PHA discretion to formulate reasonable lease provisions to deal with local problems, but invalidated a lease provision making all off-premises criminal behavior grounds for eviction and prohibiting all weapons from units. The court also approved lease clauses providing for: 1) a ten-day notice of transfer to appropriate unit size, 2) a system of citations for trash on premises, 3) 24 hour eviction notices for health & safety violations, 4) evictions for others’ behavior and automatic termination for repeated violations after notice and opportunity to cure, and 5) a ten-day guest limitation without written permission from management.
C. Public Housing. Lease requirements for public housing are set forth at 24 C.F.R. §966.4. Proposed lease revisions must be provided to tenants and tenant organizations for comment at least 30 days before they become effective. The PHA must take tenant comments into consideration in making revisions.

D. FHA and §8 Unit-based Projects. HUD Handbook 4350.3 contains a model lease which must be used in most unit-based §221(d)(3), §236, and §8 projects. Other subsidized housing leases also must be reasonable, and must be approved by FHA, RECD or the PHA. Subsidized housing lease amendments also must be approved by one of these agencies, and tenants must be given at least 30 days notice before they go into effect.

E. FmHA §515 Projects. Lease requirements for FmHA §515 projects are set forth at 7 C.F.R. Part 1930, and project leases also must be approved by RECD on a case by case basis. Changes in FmHA §515 leases also must be approved by the agency and implemented through a prescribed notice procedure. See, 7 C.F.R. Part 1930, Subpart C, Exh. B, ¶VIII(F).

F. Excess Charges. In all programs, landlords are allowed to charge tenants reasonable amounts for additional services or maintenance, which may include late fees, damage and repair charges, utility surcharges, security deposits, and mandatory meals in an elderly project. See, 24 C.F.R. §966.4(b)

G. Security Deposits. In all programs, security deposits are limited by regulation, usually to the higher of a minimal set amount (such as $50.00) or the tenant portion of the rent. In public housing, the PHA may collect the security deposit in up to three monthly installments at the beginning of the lease. See, 24 C.F.R. §966.4(b)(5). All programs must make some provision for joint landlord and tenant move-in and move-out inspections, and landlord retention of a statement of the condition of the premises at the outset of the tenancy.

H. Maintenance. All subsidized landlords have the duty to keep the premises in a decent, safe and sanitary condition. PHA’s must repair all damages to the premises caused by ordinary wear and tear. PHA leases must contain a provision giving the tenant the right to alternative accommodations, if available, or an abatement of rent where the tenant’s unit, without tenant fault, contains conditions hazardous to the life, safety or health of the occupants. See, 24 C.F.R. §966.4(h). Generally, other subsidized housing leases also will contain landlord covenants to keep the premises in good repair, and these covenants are enforceable by tenants under state law.

V. Community Service. Each PHA must develop a local policy for administering the community service and economic self-sufficiency requirements for conventional public housing tenants. See, 24 C.F.R. §960.600 et. seq.

A. General Requirements. Except for exempt individuals, each adult resident of conventional public housing must contribute 8 hours per month of community service, or participate for 8 hours per month in an economic self-sufficiency program, or some combination thereof.
B. Exemptions. Exempt individuals are: (1) 62 years of age or older, (2) blind or disabled, (3) a primary caretaker of a blind or disabled individual, (4) is engaged in work activities, (5) those is exempted from a Welfare-to-Work program, or (6) those engaged in a Welfare-to-Work program. See, 24 C.F.R. §960.601(b).

VI. Grievances. In most, but not all, subsidized housing, a tenant who has a problem with the landlord’s action may ask, in writing, for a grievance hearing. This is held in front of an unbiased person. Under this procedure, the tenant may look at the landlord’s records, have a representative, present evidence, question the landlord’s evidence, and have a written decision.

A. Public Housing. Tenants must be given the opportunity administratively to air their grievances based on the PHA’s acts or failure to act which adversely affect tenant rights. See, 24 C.F.R. §966.50 et. seq.

1. Exclusions. The PHA may exclude from the grievance procedure any grievance concerning a termination of tenancy that involves (a) any criminal activity that threatens the health, safety or right to peaceful enjoyment of the premises of other tenants or PHA employees, or (b) any drug-related criminal activity on or near the premises. In addition, the grievance procedure is not applicable to disputes between tenants not involving the PHA or to class grievances. See, 24 C.F.R. §966.51(2)(i).

2. Steps in Procedure.

    a. Adverse action. Unless excluded, a tenant may grieve any dispute which a tenant may have with respect to PHA action or failure to act in accordance with the individual tenant’s lease or PHA regulations which adversely affects the individual tenant’s rights, duties, welfare or status.

    b. Informal conference. This must be personally presented, either orally or in writing, to the PHA so the grievance can be discussed informally and settled without a hearing. A summary of such discussion shall be prepared within a reasonable time and given to the tenant, with a copy retained in the tenant’s file. The summary shall specify the names of the participants, dates of meeting, nature of the proposed disposition of the complaint and specific reasons therefor, and the procedures by which a hearing may be obtained. See, 24 C.F.R. §966.54.

    c. Request for Hearing. This must be requested within a reasonable time after receipt of the summary of the informal conference, and shall specify reasons for the grievance and the action or relief sought. See, 24 C.F.R. §966.55(a).

    d. Selection of Hearing Officer/Panel. A grievance hearing shall be conducted by an impartial person or persons appointed by the PHA, other than a person who made or approved the PHA action under review, or a subordinate of such person. See, 24 C.F.R. §966.55(b).
e. Escrow deposit. In a grievance involving the amount of rent, the tenant must pay rent (including the disputed amount) into escrow; although this must be waived in cases of financial hardship. See, 24 C.F.R. §966.55(e).

f. Hearing rights. The hearing must be scheduled promptly by the hearing officer/panel for a time and place reasonably convenient to both the tenant and the PHA. The tenant shall be afforded a fair hearing, which shall include: opportunity to examine relevant PHA records before the hearing, the right to be represented at the hearing, the right to a private hearing, the right to present evidence and arguments, the right to controvert PHA evidence, the right to confront and cross-examine all PHA witnesses, and a written decision based solely on the evidence. See, 24 C.F.R. §§966.55(f) and 966.56.

g. Hearing conduct. The hearing shall be conducted informally and pertinent evidence may be received without regard to admissibility under rules of evidence applicable to judicial proceedings. See, 24 C.F.R. §966.56(f).

h. Hearing decision. Within a reasonable time after the hearing, the hearing officer/panel shall prepare a written decision with the reasons therefor, which shall be given to the tenant, with a copy retained in the tenant’s file. The decision shall be binding on the PHA, which shall take all actions, or refrain from all actions, necessary to carry out the decision; unless the PHA’s Board of Commissioners determines within a reasonable time that: (a) the grievance does not concern PHA’s action or failure to act in accordance with the individual tenant’s lease or PHA regulations, which adversely affects the individual tenant’s rights, duties, welfare or status, or (b) the decision is contrary to applicable federal, state or local law, HUD regulations, or requirements of the annual contributions contract between HUD and the PHA. See, 24 C.F.R. §966.57.

i. No waiver of tenant’s rights. A decision in favor of the PHA shall not constitute a waiver of, nor affect in any manner whatever, the tenant’s rights to a trial de novo or judicial review in any judicial proceedings brought thereafter. See, 24 C.F.R. §966.57(c).

B. FHA and §8 Unit-based Projects. Tenants in these programs have no formal grievance rights other than those for tenancy termination disputes. In these case, a complaint to HUD sometimes is effective in resolving disputes between the landlord and tenant. There is no formal procedure, but such administrative complaints should be in writing, fully set forth the facts and law related to the dispute, and request that the agency resolve the dispute within a designated reasonable time.

C. FmHA §515 Projects. Tenants in these projects have grievance rights similar to public housing tenants, except that all tenancy termination decisions are excluded from the grievance procedure. Tenants may use the grievance procedure to deal with a number of other issues such as maintenance, security, guests and visitors, and the amount of rent owed, without going to court. See, 7 C.F.R. §1944.551 et. seq.
VII. Evictions – All subsidized housing landlords must have a good reason to evict a tenant, such as not paying rent, not obeying the lease, damaging property, or causing a danger to health or safety.


B. Notice Requirements.

1. Content. A statement of the specific grounds for termination, giving factual bases for the conclusion that termination is warranted, is required. The statements must be sufficient to allow the tenant to prepare a defense. Vague accusations and unsupported references to alleged violations of lease provisions are insufficient. Notices to terminate must include a statement of any right to review the decision, how that right can be exercised, and any time limits on accessing the right to review. Notices to terminate also must state the proposed termination date.

a. Public housing termination notices also must include notice of the tenant’s right to reply and right to examine relevant documents. If a grievance hearing is not available, the notice must contain a statement as to why it is not, what judicial eviction procedure will be used, and that HUD has approved that procedure as complying with due process. See, 24 C.F.R. §966.4(l)(3). Under state law, public housing termination notices also must advise the tenant of the name, address and telephone number of the legal aid program serving the area. Code of Virginia §55-248.6(D).

b. Other subsidized housing termination notices also must include statements that the landlord must use court procedures to evict the tenant, that the tenant has the right to present defenses, and that the landlord can rely only on the grounds for eviction stated in the notice, unless the landlord was unaware of those grounds when the notice was served.

c. FmHA §515 housing regulations provide for a two-step notice process. First, the landlord gives the tenant a notice of lease violation. In addition to a specific statement of the alleged violations, the notice also must: 1) refer to relevant provisions of the lease, 2) state that the tenant or household member will be expected to correct the lease violation by a specific date, 3) advise of the right to meet with the landlord to discuss the matter before the correction date, and 4) that if the violation is not corrected, the owner may bring an eviction action and, in that event, the tenant has the right to present a defense. Second, if the violation is not remedied within the time given in the notice of violation, the landlord must give the tenant a notice of termination. This notice must include: 1) a statement that the tenancy is terminated and that the
landlord will proceed with an eviction action, 2) the reason for the termination, and 3) the location & regular office hours where the tenant can review and copy information in his/her file.

2. **Timeliness.**

   a. **Public housing.** In public housing, notices to terminate based on nonpayment of rent must provide 14 days to pay or quit. When the alleged violation concerns the creation or maintenance of a threat to the health or safety or other tenants or PHA employees, the notice must be given in a reasonable time under the circumstances. In all other cases, including termination for failure to pay excess charges, the public housing tenant must be given 30 days notice. *See*, 24 C.F.R. §966.4(l)(3).


C. **Grounds for Termination of Tenancy.** Public and subsidized housing tenancies may be terminated only based on some good cause. *See*, 24 C.F.R. §966.4(l)(2).

1. **Good cause requirement.** In all programs, good cause is defined as serious or repeated noncompliance with material lease terms; serious or repeated violation of federal, state or local law placing obligations upon tenants; or other good cause.

   a. Good cause is a factual question.

   b. Emphasis should be placed on serious consequences of the loss of subsidized housing for the tenant. A subsidized housing tenant is “by definition, one of a class who cannot afford acceptable housing so that he is condemned to suffer grievous loss” if that benefit is lost. *See*, *Caulder v. Durham Housing Authority*, 433 F.2d 988, 1003 (4th Cir. 1970).

   c. Emphasis also should be placed on the need for serious wrongdoing on the part of the tenant, the need for tenant fault, and that the tenant should not be penalized for circumstances beyond the tenant’s control.

   d. If the conduct of guests or other third parties is involved, the tenant should not be evicted for the conduct of others that the tenant could not foresee or control.

   e. Emphasis also should be placed on facts showing the tenant has cured the situation and should be allowed to remain, as well as apparent landlord failures to comply with regulatory procedural requirements.

2. **Material violation of lease or law.** This generally means: (a) one or more substantial violations of the rental agreement, or (b) repeated minor violations of the rental agreement which disrupt the livability of the project, adversely affect the health or safety of any
person, adversely affect the right of any tenant to the quiet enjoyment of the leased premises and related project facilities, interfere with the management of the project, or have an adverse financial effect on the project.

a. Rent-related defaults. Nonpayment of rent is always a material violation of the lease. However, in subsidized tenancies, not all charges may be considered rent. Late charges, premise damage charges, repair assessments, utility surcharges, and other excess charges are not treated as “rent” under any public or subsidized housing program. Therefore, they cannot be asserted as grounds for termination of tenancy for nonpayment of rent, and a longer notice period or opportunity to cure may be required than the 14 day (or 5 day) pay or quit period for nonpayment of rent claims.

1) A defense to an eviction based on nonpayment of rent can be based on landlord’s failure to promptly recertify a tenant after notice of a decrease in income or increase in deductions.

2) Landlord’s failure to receive the government portion of the rent due to landlord’s improper termination of the tenant’s subsidy should be a sufficient defense.

3) Repeated late payment may be grounds for eviction, but not if the late payments are caused by innocent late receipt of income.

4) Like private tenants, public and subsidized housing tenants may assert defenses to rent and possession based on the condition of the premises. However, a condition precedent to the assertion of this defense is that prior to the commencement of the action, the landlord received written notice of the conditions from the tenant or from an appropriate agency, the landlord refused after reasonable opportunity to correct the conditions, and the tenant, if in possession, pays rent found to be due into court. See, Code of Virginia §55-248.25.

b. Unauthorized residents. Most public and subsidized housing leases also provide for tenancy termination when the dwelling is used as a residence for persons not listed as household member on the lease. At the same time, tenants have the right to reasonable accommodation of guests and visitors. The differences between a permanent resident and a temporary guest lie along a continuum. There is no bright line. In determining where a set of circumstances falls along that continuum, courts have considered the following factors, among others: the intended length of stay, any monetary payment, moving in belongings such as clothes and furniture, receipt of mail at the tenant’s address, the guest’s regular receipt of other guests at the premises, and whether the alleged resident has an actual place of regular abode other than the tenant’s dwelling.

c. Failure to comply with reporting requirements. Proper assessment of tenant rents and occupancy requirements in public and subsidized housing depends on accurate and timely reporting of changes in tenant income or family circumstances. Thus, a tenant’s failure to make such reports accurately or timely can lead to termination of tenancy. Such termination will be justified when inaccurate reporting is due to tenant fraud. However,
negligent failures to report, or to report accurate information, are insufficient for termination or eviction. *See, Ellis v. Ritchie, 803 F.Supp 1097 (E.D. Va. 1992).* The tenant must be shown to have notice of the reporting requirements at issue and the consequences of failure to report.

d. Poor housekeeping and premise damages. Tenant housekeeping habits which do not pose a threat to the health or safety of others should not be a grounds for eviction. These type of cases often raise fair housing and Americans with Disabilities Act (ADA) issues of reasonable accommodations of handicaps which make thorough housecleaning and tenant maintenance difficult.

e. Tenant responsibility for acts of others. A PHA or subsidized landlord may evict the entire family for criminal or severely disruptive acts of one family member or a guest, but only if the tenant knew or should have known of the possibility that the conduct was occurring or might occur (*i.e.*, the conduct was foreseeable), and failed to do everything reasonably within his/her power to stop it (*i.e.*, the tenant acquiesced to the conduct). Evidence that the wrongdoer was not invited onto the premises by the tenant or household member also has been a successful defense.

f. Drug and crime cases. Public housing leases must contain a provision that the tenant shall be obligated to assure that the tenant, any member of the household, a guest, or any other person under the tenant’s control, shall not engage in: (a) any criminal activity that threatens the health, safety or right to peaceful enjoyment of the premises of other tenants or PHA employees, or (b) any drug-related criminal activity on or near the premises. Drug-related criminal activity means the illegal manufacture, sale, distribution, use or possession with intent to manufacture, sell, distribute or use, of a controlled substance. Although drug-related criminal activity is grounds for eviction, HUD and U.S. Justice Department efforts to secure pre-hearing forfeitures of public and subsidized housing leases on premises allegedly used for drug trafficking consistently have been rejected. *See, Richmond Tenants Organization v. Kemp,* (E.D. Va. 1990), *aff’d,* 956 F.2d 1300 (4th Cir. 1992).

1) Public housing. In public housing lease terminations, the PHA has discretion to consider all the circumstances of the case, including the seriousness of the offense, the extent of family member participation in the offense, the effect of termination on other family members, the possibility of continuing the subsidy for non-offending family members, excluding only the offending family member from the premises, and continued occupancy upon proof of completion of a treatment program. *See, 24 C.F.R. §966.4(l)(5)(i).* These are the same factors that the courts have applied in determining whether a family member or guest’s activities justify termination under the lease provisions. When a PHA evicts an individual for drug-related criminal activity, the PHA shall notify the local post office that such individual no longer resides in the unit. *See, 24 C.F.R. §966.4(l)(5)(ii).*

2) FHA and §8 Unit-based housing. Leases must contain a provision providing for eviction for any criminal activity that threatens the health, safety or right to peaceful enjoyment of their residences by persons residing in the immediate vicinity of the premises. *See, 42 U.S.C. §1437f(d)(1)(B)(iii) and 24 C.F.R. §880.607(b)(1)(iii).*
3) **FmHA §515 housing.** RECD regulations specifically provide that drug-related crimes are grounds for termination. Unlike HUD’s statutes and regulations, no specific provision is made for violent crimes. See, 7 C.F.R. Part 1930, Subpart C, Exh. B, ¶¶VIII and XIV.

3. **Other good cause.** Regulatory provisions which allow a public or subsidized landlord to terminate a tenancy for other good cause should be viewed as limitations on permissible grounds for termination. Public landlords may not evict for arbitrary, discriminatory, or other manifestly improper reasons. In addition, state law requires prior notice of and an opportunity to cure most grounds for eviction. See, Code of Virginia §55-248.31.

**D. Other Issues in Judicially Litigated Evictions.**

1. **Fair housing defenses.** Fair housing and civil rights laws are fully applicable to all public and subsidized housing tenancies. Both HUD and RECD have the duty to assure nondiscrimination under Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d. HUD also has the duty to affirmatively further fair housing under the federal Fair Housing Act, 42 U.S.C. §3608. All these programs also are covered by §504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, and the Americans with Disabilities Act (ADA), which prohibit recipients of federal funds from discriminating against the handicapped.

2. **Waiver.** Continued acceptance of government subsidies can amount to a waiver of the landlord’s right to terminate for a prior breach. See, 1991 Va.A.G. 240 (acceptance of payment for full amount of rent without notice of reservation of right under Code of Virginia §55-248.32 waives breach). A waiver of breach of contract by the tenant also may be implied from the landlord’s repeated acceptance of deviating performance.

3. **First Amendment/Retaliation.** Public and subsidized housing evictions also have been successfully defended on grounds of retaliation and First Amendment rights to free speech. See, *Holt v. Richmond Redevelopment and Housing Authority*, 266 F.Supp 397 (E.D. Va. 1966).

4. **Bankruptcy.** A tenant may be able to stay an eviction and reinstate the lease through bankruptcy. Government entities, including PHA’s, may not discriminate on the basis of a tenant having filed bankruptcy.

5. **Appeal bonds.** Bonds required to appeal a case from General District Court to Circuit Court should be based only on the tenant’s share of the rent. Under all the programs, the landlord will continue to receive any government subsidy as long as the tenant remains in residence, so a bond based on the total rent payment is excessive.

**Federally Subsidized Housing: Tenant-Based**

**I. Program Description**

A. In 1974, Congress enacted §8 of the revised United States Housing Act of 1937 as the
primary means for the federal government to provide assistance for low-income housing. See, 42 U.S.C. §1437f. The Housing Choice Voucher Program, as revised and reauthorized in 1998, swallowed up the former §8 Certificate program, and all outstanding certificates were converted to Vouchers. See, Pub L. #105-276, §514 (10/21/98), rewriting 42 U.S.C. §§1437d(c)(4)(A)(I) and 1437f(d)(1)(A).

B. Under the Housing Choice Voucher Program, public housing authorities (PHAs) or any state or local agency authorized to administer §8 tenant-based assistance, apply for Voucher funds from the U.S. Department of Housing and Urban Development (HUD). These §8 agents advertise the program to landlord and tenants, and take applications from tenants to determine eligibility under statutory and HUD guidelines and their administrative plans.

C. Low-income families apply with the §8 agent for assistance. Those determined eligible receive a Voucher or a place on the waiting list. Unlike the former Certificate program, the total tenant contribution for a rental unit (unit + utilities) may be up to 40% of adjusted monthly income at initial lease-up.

D. Once the participant has the Voucher, that person must locate a unit in the private market that meets federal housing quality standards for decent, safe and sanitary housing. See, 42 U.S.C. §1437f(o)(8)(B). When the participant finds both a suitable unit and a willing landlord, the landlord and tenant ask the §8 agent to approve the leasing of the unit under the program. See, 24 C.F.R. §982.302. The §8 agent then determines whether the rent is reasonable, whether the lease conforms to federal requirements, whether the landlord is suitable, and whether the unit meets housing quality standards. See, 24 C.F.R. §982.305.

E. If everything is approved, the landlord and tenant execute the lease, and the §8 agent and landlord enter into a Housing Assistance Payments (HAP) contract. Under the HAP contract, the §8 agent will pay the landlord the difference between the family’s contribution and the approved contract rent, up to the applicable payment standard. See, 24 C.F.R. §982.451.

F. Although for many years landlords could not terminate Voucher tenancies without cause at the end of the lease, in 1998, Congress enacted legislation eliminating this good cause requirement. See, Pub. L. #105-276, §545 (10/21/98). The HAP contract runs for the term of the lease and requires no renewal.

G. When participating in the §8 program, the landlord has the obligation to continue to maintain the housing in conformity with the housing quality standards. The §8 agent has a duty to ensure that the landlord meets these maintenance requirements by inspecting each unit at least annually and more often if a tenant brings specific complaints to the §8 agent. See, 24 C.F.R. §982.405. If, after trying, the §8 agent cannot secure the needed repairs from the landlord, it has the power to suspend or reduce HAP payments. If that does not bring about the needed repairs, the §8 agent may terminate the HAP contract, and if it does, it must issue the family a new Voucher. See, 24 C.F.R. §982.404 & §982.314.

H. The major sources of tenants’ rights under the Voucher program are:
II. Eligibility

A. Maximum income limits are “low-income” – 80% of area median income (AMI), “very low-income” – 50% of area median income (AMI), and “extremely low-income” – 30% of area median income (AMI). These are available in a convenient 271 page document at this link - http://www.huduser.org/datasets/il/index_il2009.html. As an illustration, in the Richmond, VA area:

- **Extremely low-income (30% of AMI)**:
  - 1 person: $15,350
  - 2 people: $17,550
  - 3 people: $19,750
  - 4 people: $21,950

- **Very low-income (50% of AMI)**:
  - 1 person: $25,600
  - 2 people: $29,300
  - 3 people: $32,950
  - 4 people: $36,600

- **Low-income (80% of AMI)**:
  - 1 person: $41,000
  - 2 people: $46,850
  - 3 people: $52,700
  - 4 people: $58,550

B. All extremely low-income and very low-income families are eligible. Low-income families must also be continuously assisted, or displaced by certain housing conversion or home ownership programs, or meet additional criteria in the §8 Agency’s Administrative Plan. See 24 C.F.R. §982.201.

C. There are no limitations on family assets for purposes of eligibility; however, assets may affect income eligibility by their impact on income. If total countable assets exceed $5,000, amount included in annual income is actual income from the assets, or a HUD-prescribed imputed income, whichever is greater. A household’s disposition of an asset for less than fair market value during the two years prior to admission does not affect eligibility, but does affect the amount of rent the family will pay after admission.

D. Annual income is the family’s gross annual income, not adjusted income. See 24 C.F.R. §§5.609, 5.653(e), and 960.201(b).

E. Both “single individuals” and “families” are eligible. See 42 U.S.C. §1437a(b)(3)(A). No federal definition limits a family to individuals who are related by blood, marriage or operation of law. See 24 C.F.R. §5.403.

F. Although the remaining member of a tenant family usually is eligible for voucher assistance, this is not automatically true in Virginia. See, *Carter v. Meadowgreen Associates*, 268 Va. 215, 597 S.E.2d 82 (2004).

F. Only citizens and seven categories of non-citizens are eligible:

- Aliens lawfully admitted for permanent residence.
• Aliens who entered the U.S. prior to June 30, 1948, have continuously maintained U.S. residence, and are deemed to be lawfully admitted for permanent residence.
• Aliens lawfully present pursuant to an admission for asylum.
• Aliens lawfully present as a result of the exercise of discretion by the Attorney General for emergent reasons.
• Aliens lawfully present as a result of the Attorney General withholding deportation.
• Aliens lawfully admitted for temporary residence.
• Aliens who are lawful residents under compact between the U.S. and the Marshal Islands, Micronesia and Palau.

III. Preferences

A. Residency requirements are barred. See, 24 C.F.R. §§5.655(c)(1)(i), 960.206(b)(1)(i), and 982.207(b)(1)(i). Residency preferences are permitted, as long as they do not have the purpose or effect of delaying or denying admission based on race, religion, national origin, age, gender or disability. See, 24 C.F.R. §§5.655(c)(1)(v) and 982.207(b)(1)(iv).

B. Preferences may be granted for:

• Working families. See, 24 C.F.R. §§5.655(c)(2) and 982.207(b)(2).
• Elderly, displaced, homeless and disabled. See, 24 C.F.R. §§5.655(c)(5) and 982.207(b)(5).
• Former federal preferences – i.e., persons involuntarily displaced, residents in substandard housing, and persons facing rent overburden paying more than 50% of income for rent. See, 24 C.F.R. §§5.655(c)(5) and 982.207(b)(5).

C. Public housing residents applying for vouchers may not be denied a preference or otherwise excluded merely because they are public housing residents. See, 42 U.S.C. §1437f(s) and 24 C.F.R. §982.207(a)(4).

IV. Targeting Very Low-Income & Extremely Low-Income Applicants

A. The §8 agent must make 75% of the new and turnover vouchers available to extremely low-income (ELI) families. See, 42 U.S.C. §1437n(d) and 24 C.F.R. §982.201(b)(2).

B. The §8 agent must skip over higher-income families to meet voucher targeting requirements. See, 24 C.F.R. §982.207(d).

V. Screening

A. The §8 agent may consider factors such as an applicant’s prior rent paying history, history of disturbance of other tenants or destruction of property, and history of criminal activity. See, 24 C.F.R. §982.307.
B. The §8 agent may not discriminate against families if members are unwed parents, recipients of public assistance, have children born out of wedlock, or are members of a protected class (race, religion, national origin, age, gender or disability). See, 24 C.F.R. §982.202(b)(3).

C. The §8 agent must consider whether a family member is currently engaging in criminal activity or has engaged in criminal activity during a reasonable period of time before issuance of the voucher. See, 24 C.F.R. §982.553(a)(2)(ii).

D. The §8 agent may reject an applicant who has been evicted from federally assisted housing in the past five years. See, 24 C.F.R. §982.552(c)(1)(ii).

E. The §8 agent may reject an applicant who owes a debt to that §8 Agency or any agency administering a federally assisted housing program. See, 24 C.F.R. §982.552(c)(1)(v) and (vi).

F. The §8 agent may reject an applicant who was terminated from the voucher program. See, 24 C.F.R. §982.552(c)(1)(ii).

VI. Unit Size

A. The §8 agent must establish a local policy about the relationship between family size and number of bedrooms, and must balance the limiting of subsidies needed to house a family with avoiding overcrowding. See, 24 C.F.R. §§982.4 and 982.402(b)(1).

B. It is consistent with the Housing Quality Standards to allow for two persons per living room and/or bedroom. See, 24 C.F.R. §982.402(d). However, except for the very young, children of the opposite sex cannot be required to share a bedroom. See, 24 C.F.R. §982.402(d)(2)(ii).

C. The §8 agent may grant an exception to the local unit size rules if justified by age, sex, health, handicap, relationship of family members or other personal circumstances. See, 24 C.F.R. §982.402(b)(8).

VII. Search Time

A. The §8 agent must grant an initial voucher term of at least 60 days, and has full discretion to increase the initial search time beyond 60 days and may allow for any number of extensions. See, 24 C.F.R. §982.402(b)(8).

B. The voucher holder is not entitled to a hearing upon the §8 agent’s refusal to grant an extension of the voucher search term. See, 24 C.F.R. §982.554(c)(4).

VIII. Eligible Unit

A. Certain units are ineligible for voucher assistance, including units in public housing, unit-based §8 housing, units where the voucher holder owns or has an interest in the unit, or if the
unit is owned by a close relative or member of the voucher household. See, 24 C.F.R. §982.352(a).

B. The §8 agent may disqualify a unit because the landlord has violated HUD rules, state or local housing codes, failed to pay state or local taxes, or refused to terminate the tenancy of other federally subsidized tenants who engaged in illegal drug activity or violent criminal activity. See, 24 C.F.R. §982.306(c).

IX. Rent for the Unit

A. There is a limit on the amount of rent that a new participant in the voucher program may pay for the unit, known as the 40% cap.

B. The §8 agent also must determine if the rent for the unit is reasonable

X. Portability & Mobility

A. Voucher holders may use their vouchers nationwide, as long as there is a §8 agent administering a program for the jurisdiction where the unit is located.

B. The §8 agent may restrict portability for up to one year if the family getting the voucher for the first time does not have a legal domicile in the jurisdiction at the time of application. See, 42 U.S.C. §1437f(r)(1)(B)(i) and 24 C.F.R. §982.353(b) & (c).

C. The initial §8 agent must give the family information about portability and how to contact the receiving §8 agent. The initial §8 agent determines screening, preferences and the initial term of the voucher. See, 24 C.F.R. §982.355(c)(6) & (c)(10).

D. The receiving §8 agent determines income-eligibility, unit size, payment standard and the decision to extend the voucher. See, 24 C.F.R. §982.355(c)(6) & (c)(7)

E. The §8 agent must give the family information on how portability works and for those families living in a high poverty census tract, an explanation of the advantages of moving to an area with a low poverty concentration. See, 24 C.F.R. §982.301(a)(3) & (b)(4).

F. The §8 agent may adopt different payment standards for areas within the jurisdiction to improve mobility. See, 24 C.F.R. §982.503(b)(ii) & (e).

XI. Nondiscrimination Against Voucher Holders

A. Owners who participate in the low-income housing tax credit (LIHTC) program, the Home Investment Partnerships program (HOME), the §17 Rental Rehabilitation & Redevelopment program, the Housing Development Action Grant (HoDAG) program, Mark-to-Market Restructuring plans, or who purchased HUD-owned developments cannot discriminate against applicants because they are participating in the Voucher program. See, Pub. Law #103-
B. However, in 1998 Congress repealed two statutes that prohibited discrimination against voucher holders by all §8 landlords whose property contained more than four units.

C. Virginia’s Fair Housing Law, Code of Virginia §36-96.1, does not prohibit discrimination on the basis of income status, source of income, or receipt of public assistance.

XII. Waiting Lists

A. Because the demand for affordable housing far exceeds the supply, the §8 agent must maintain a waiting list.

B. For the voucher program, the opening and closing of the waiting list is an element of the annual plan submitted to HID, and must state if the waiting list is close, if closed how long it has been closed, and whether it will be opened in the coming year.

C. When opening the waiting list, the §8 agent must give public notice stating where and when to apply, and listing any limitations on who may apply. The notice must be published in a newspaper of general circulation and in minority media. See, 24 C.F.R. §982.206.

D. According to HUD instructions, voucher waiting lists of 12 to 24 months may be reasonable.

E. The §8 agency must include in the Administrative Plan the rules for removing families from the waiting list. See, 24 C.F.R. §982.54. If a notice is sent that an applicant has been removed from the waiting list, a request for informal review must be filed within a reasonable time from the date of notice.

F. If failure to respond to a request for information or an update was due to a family member’s disability, the §8 agent must make a reasonable accommodation and reinstate the family to the former position on the waiting list. See, 24 C.F.R. §982.204(c).

XIII. Tenant Rents

A. Voucher tenants receive a housing subsidy based on the tenant’s income but which is unrelated to the actual rent charged. See, 42 U.S.C. §1437f(o)(2) and 24 C.F.R. §982.1(a)(4)(ii). Voucher landlords may charge any rent, as long as it is reasonable in comparison with rents charged for comparable dwelling units in the private unassisted local market as determined by the §8 agent. The tenant makes up the difference between the contract rent and the maximum subsidy the §8 agent can authorize. Each §8 agent must have a rent reasonableness policy under which it evaluates contract rents. See, 42 U.S.C. §1437f(o)(10)(A) and 24 C.F.R. §§982.4, 982.54(d)(15), 982.158(f)(7) & 982.507.
B. For first time voucher tenants, the contribution toward contract rent and tenant-paid utilities may not exceed 40% of adjusted monthly income, or else the §8 agent cannot approve the lease-up. Tenants who remain in place with a voucher are not subject to a 40% of income limitation where there are subsequent changes in the contract rent. See, 42 U.S.C. §1437f(o)(3) and 24 C.F.R. §§982.305(a) & 982.508.

C. The landlord must notify the §8 agent of any change in the amount of the contract rent at least 60 days before any such changes go into effect. See, 24 C.F.R. §980.308(g)(4). The §8 agent must determine that the rent is “reasonable” in comparison to the rent for comparable unassisted units. See, 24 C.F.R. §§980.308(g)(4) and 982.507(a)(2)(i). If the §8 agent will not approve the rent as “reasonable,” the family cannot rent the unit under the voucher program. It does not matter that the family is willing to pay what the §8 agent will approve and what the landlord wants to charge. However, the §8 agent must offer assistance, where requested by the family, is negotiating a reasonable rent with the landlord. See, 42 U.S.C. §1437f(o)(10)(B) and 24 C.F.R. §982.506.

D. The tenant’s rent subsidy is based on a payment standard, or maximum monthly subsidy payment set by each §8 agent. See, 42 U.S.C. §1437f(o)(1) and 24 C.F.R. §§982.4, 982.503 & 982.508. This is based on, but not necessarily the same as, the §8 fair market rent (FMR) set annually by HUD and effective on October 1 of each year. The FMR usually is set at the 40th percentile of the standard units for the area (excluding public housing, newly built units and substandard units), but may be as high as the 50th percentile.

E. The §8 agent usually sets the payment standard at an amount no less than 90% nor more than 110% of the FMR. The process for setting and revising payment standards must be set forth in each §8 agency’s annual plan and §8 administrative plan. See, 42 U.S.C. §1437c-1(b)(14) and 24 C.F.R. §§903.7(d) & 982.54(d)(14).

F. The tenant’s contribution toward the subsidized portion of the rent – usually is the difference between the payment standard and 30% of the tenant’s adjusted income. The amount of the payment standard does not vary with the rent charged for the unit. If the contract rent for the unit is greater than the payment standard, the tenant must pay out of pocket to cover the difference, in addition to the normal income-based contribution.

G. To determine the income-based contribution, annual income is determined, and deductions are subtracted to determine adjusted income.

H. Annual income is anticipated total income from all sources received by all household members. It includes, wages, tips, self-employment income, Social Security, SSI, pensions, insurance benefits, unemployment compensation, workers’ compensation, TANF, child support, spousal support, military payments, interest, dividends, and earnings (actual or imputed) from most assets. See, 24 C.F.R. §5.609(b).

I. Annual income does not include any amounts not actually received by the family, but does include all amounts – whether monetary or not – which go to or are on behalf of household members. See, 42 U.S.C. §1437a(b)(4) and 24 C.F.R. §5.609(a)(1).
J. Certain types of income are excluded from annual income for rent-setting purposes, including employment income from children; student loans & all forms of student financial assistance; lump sum additions to family assets such as inheritances, settlements for personal injury or property loss, and retroactive awards of Social Security & SSI; temporary, nonrecurring or sporadic income including gifts; medical insurance reimbursements; foster care payments; Food Stamps; fuel assistance; and other types of income specifically excluded by federal law.

K. Deductions are made from gross annual income to reach adjusted annual income. See, 24 C.F.R. §5.611(a). These are:

1) $480 for each dependent;

2) $400 for any elderly or disabled family (head of household or spouse at least 62 or receives Social Security or SSI disability benefits);

3) any reasonable child care expenses, for care of children under the age of 13, necessary to enable a member of the family to be employed or further his or her education.

4) the sum of the following, to the extent that the sum exceeds 3% of annual income: (a) unreimbursed medical expenses of any elderly or disabled family, and (b) unreimbursed reasonable attendant care expenses for each disabled member of the family to the extent necessary to enable any member of the family to be employed.

L. The adjusted annual income is divided by 12 to reach the net monthly income. The tenant’s rent and utility liability is based on 30% of that figure, except in the unusual case where 10% of gross monthly income is greater. This is the monthly tenant payment. See, 42 U.S.C. §1437a(a) and 24 C.F.R. §5.628.

M. Where all utilities (except phone) are supplied by the landlord, monthly tenant contribution equals monthly tenant payment. Where some or all are not supplied by the landlord, monthly tenant contribution equals monthly tenant payment minus the monthly utility allowance. See, 24 C.F.R. §5.634.

N. If the tenant pays for utilities, a monthly utility allowance is deducted from the monthly tenant payment. If the monthly utility allowance exceeds the monthly tenant payment, the tenant pays no monthly tenant contribution and receives a monthly check equal to the amount of the difference.

XIV. Utility Allowances

A. The monthly utility allowance must be based on the normal patterns of consumption for the community as a whole and current utility rates. The §8 agent must consider the typical cost of utilities and services paid by energy conservative households that occupy housing of
similar size and type in the same locality. It must take into account the unit size, structure type
(high-rise, row house, detached unit, etc.), and fuel type. See, 24 C.F.R. §982.517(b)(1) & (2).

B. The §8 agent must provide a higher utility allowance as a reasonable accommodation
for families that include a disabled member who may require the additional use of utilities, such
as heat or air conditioning. See, 24 C.F.R. §982.517(e).

C. The §8 agent must review its utility allowance at least annually, and must adjust the
utility allowance schedule when there has been a change of 10% or more in utility rates or fuel
costs since the last revision. See, 24 C.F.R. §982.517(c).

XV. Initial Certification, Annual Recertification and Interim Recertification

A. Voucher tenants must have initial and regular annual certifications of income and
family composition. See, 24 C.F.R. §982.516. On a one-time basis, the household must supply
Social Security numbers and verification of the same for all household members age 6 or older.
Similar information is needed if a new household member is added. In addition, on a one-time
basis, the household must supply declarations of their status as U.S. citizens, permanent
residents, or eligible non-citizens, and verification of the same for all household members.
Similar information is needed if a new household member is added.

B. HUD has not established clear requirements for how annual recertification is to be
done in the voucher program, but left this up to individual §8 agencies. The recertification
process should be set forth in the §8 administrative plan. There also should be written notice to
participants of their program responsibilities. See, 24 C.F.R. §982.516.

C. To ensure that tenants pay rents commensurate with their ability to pay, as well as to
comply with the statutory mandate based on adjusted monthly income, tenants are required to
report changes in household income and composition which occur between regularly scheduled
recertifications. Again, there are no explicit HUD requirements, and what must be reported is
left up to the individual §8 agency.

D. Because most voucher families are not aware of the §8 administrative plan, HUD
requires that the §8 agent give written notice to the families of their obligations, including a
written description of the grounds on which the §8 agent may deny or terminate assistance
because of family action or failure to act. See, 24 C.F.R. §982.552(d)(1) & (2).

1) Failure to timely report increases in income or changes in family composition,
or false reporting of such information, can be grounds for termination of the tenancy.

2) All increases or decreases in regular income should be reported immediately,
but small changes may not lead to changes in tenant rent.

3) Rent increases become effective the first day of the second month after an
increase in income or decrease in deductions. Rent decreases become effective the first
day of the month after the events causing a reported decrease in income or increase in deductions.

4) If the appropriate rent adjustments are not made due to the fault of the tenant, the tenant must repay any underpayments, and is not entitled to any repayment of overpayments. Tenant repayment is unnecessary and tenant refunds are appropriate if the over or under-payments were caused by the §8 agent after the tenant reported the relevant change in circumstance.

XVI. Extra Charges

A. Extra items. Voucher landlords may not charge tenants for extra items, such as stoves and refrigerators, that customarily are provided at no additional cost to unsubsidized tenants. See, 24 C.F.R. §983.262(c).

B. Late fees. Voucher leases usually contain a provision where the tenant agrees to pay a given amount as a late fee for the tardy payment of rent. This usually takes the form of a flat charge, regardless of the length of the delinquency. In Virginia, this either is 5% or 10% of the delinquent amount, depending upon the locality.

C. Damage charges. Because the §8 voucher lease addendum, the VRLTA §55-248.13, and Code of Virginia §55-225.3, make the landlord responsible for maintenance, repairs, and damages caused by ordinary wear & tear, tenants are responsible only for reasonable charges for tenant caused damages beyond reasonable wear & tear.

D. Court costs and attorney’s fees. The §8 voucher lease addendum does not specifically set forth prohibited lease clauses, except to the extent the landlord may not charge the tenant extra amounts not customary in residential landlord-tenant relationships in the locality. In Virginia, lease agreements to pay court costs and attorney’s fees are enforceable.

E. Under the table payments. In the voucher program, the tenant’s contribution is limited to 30% of adjusted income, plus the amount by which the §8 approved “reasonable rent” exceeds the applicable local voucher payment standard. See, 42 U.S.C. §1437a(a)(1) and 24 C.F.R. §982.507(a). Voucher landlords are prohibited from collecting amounts in excess of the tenant’s authorized rent. See, 24 C.F.R. §982.451(b). The §8 agent has no authority to terminate the tenant from the program for making unauthorized payments to the landlord. See, 24 C.F.R. §982.551.

XVII. Security Deposits

A. Voucher landlords are allowed, but not required, to collect security deposits. The §8 agent is allowed, but not required, to prohibit security deposits that exceed private market practice or are greater than the amounts charged to unassisted tenants. See, 24 C.F.R. §982.313. Under the VRLTA, Code of Virginia §55-248.15:1, the security deposit cannot exceed two months rent.
B. The §8 agent must conduct a pre-occupancy inspection of the dwelling unit, prepare a report of the conditions, and retain it in the §8 files for later use in the event of a subsequent landlord claim that the damages were tenant caused. See, 24 C.F.R. §§982.158(d), 982.305(a)(2) and 982.405(a). The §8 agent must notify the tenant of the inspection determination and must inspects units annually. See, 24 C.F.R. §§982.305(d) and 982.405.

C. When the tenant vacates, the landlord must provide the tenant with a written list of any deductions from the security deposit and promptly refund the unused balance. See, 24 C.F.R. §982.313(c); Code of Virginia §55-248.15:1.

D. The landlord may not claim reimbursement for damages from the §8 agent or for any vacancy loss after the tenant has vacated, but must seek to collect the balance from the tenant. See, 24 C.F.R. §982.313(e). Vacancy loss payments no longer are required or allowed. See, 24 C.F.R. §§982.311.

XVIII. Maintenance

A. Voucher landlords may develop their own leases, provided they are in writing, contain certain minimal information, and include the HUD prescribed tenancy addendum. The HUD prescribed tenancy addendum must be attached to every lease, cannot be changed by agreement of the parties, prevails in case of conflict with any other lease provision, and is enforceable against the landlord. See, 24 C.F.R. §982.308.

B. The HUD prescribed tenancy addendum requires the landlord to maintain the property and provide utilities sufficient to comply with the housing quality standards (HQS). See, 24 C.F.R. §982.401. These standards encompass sanitary facilities, food preparation and refuse disposal, space and security, heating and cooling systems, illumination and electricity, structure and materials, interior air quality, water supply, absence of lead-based paint, access, site and neighborhood, sanitary condition, and smoke detectors.

C. Before approving a lease, the §8 agent must inspect the unit for compliance with HQS. If there are deficiencies to be correct, the §8 agent must notify the landlord of the work to be done. If the landlord takes remedial action, the §8 agent reinspects the units before execution of a HAP contract with the landlord. After initial approval, the §8 agent continually supervises the unit through required annual inspections or special inspections upon complaint. See, 24 C.F.R. §§982.305 and 982.405.

D. If there are serious deficiencies that present an immediate danger to the health and safety of the family (such as lack of heat in the winter), the §8 agent must require the landlord to correct the deficiency within 24 hours. If the deficiencies otherwise violate the HQS, the §8 agent must require the landlord to correct the deficiency within 30 days. See, 24 C.F.R. §982.404(a)(3). If the landlord fails to provide required maintenance or correct deficiencies, the §8 agent must take prompt and vigorous enforcement action, which can include reduction, suspension (abatement) or termination of housing assistance payments or termination of the HAP contract. See, 24 C.F.R. §982.404(a)(2).
E. HUD has clarified the voucher regulations to say that a §8 agent’s withholding of the housing assistance payment does not give the landlord the right to evict the tenant for nonpayment of rent. See, 24 C.F.R. §§982.310(b) & 982.451(b)(4)(iii).

F. Voucher tenants are responsible for HQS violations caused by failure to pay for tenant-paid utilities, failure to provide or maintain any tenant-supplied appliances, and damages beyond ordinary wear and tear caused by any household member or guest. The tenant has 24 hours to correct any life-threatening breach and 30 days to correct others. See, 24 C.F.R. §982.404(b)(2). If the tenant breaches these obligations, the §8 agent can terminate the voucher. See, 24 C.F.R. §§982.404(b)(3) & 982.551(c).

XIX. Leases

A. The HUD voucher regulations do not expressly prohibit unreasonable lease clauses. The Virginia Residential Landlord Tenant Act (VRLTA), Code of Virginia §55-248.9, prohibits the following provisions in leases:

- Agreeing to waive or forego rights or remedies under the VRLTA.
- Agreeing to waive or forego rights or remedies pertaining to the required 120-day conversion or rehabilitation notice.
- Confessing judgment on a claim arising out of the rental agreement.
- Agreeing to pay the landlord’s attorney’s fees except as provided in the VRLTYA.
- Agreeing to the exculpation or limitation of any liability of the landlord to the tenant arising under law or to indemnify the landlord for that liability or the costs connected therewith.
- Agreeing as a condition of tenancy in public housing to a prohibition or restriction of any lawful possession of a firearm within individual dwelling units unless required by federal law or regulation.
- Agreeing to a security deposit in excess of two months rent.

B. Voucher landlords may develop their own leases, provided they are in writing, contain certain minimal information, and include the HUD prescribed tenancy addendum. The minimal information includes the names of the parties, the identification of the unit rented, the term of the lease, any renewal provisions, the amount of the monthly rent and a specification of what utilities and appliances are supplied by the landlord and by the tenant. See, 24 C.F.R. §§982.308(d).

C. The HUD prescribed tenancy addendum provides these basic tenant protections:

- The rent is limited to the reasonable rent approved by the §8 agent.
- Charging or collecting other payments from the tenant or any other source is prohibited.
- The tenant is not responsible for the HAP payment and cannot be evicted for nonpayment of the HAP.
- The landlord cannot require the tenant to pay extra for furniture, meals, supportive services, or anything else customarily included in the rent.
- The landlord must maintain the premises and provide utilities sufficient to comply with the housing quality standards.
• The landlord must give 60 days notice to the §8 agent of any rent changes.
• The parties must give each other written notice for any actions under the lease, and agreed changes to the lease must be in writing and provided to the §8 agent.
• During the term of the lease, the landlord may terminate tenancy only for specified good cause, preceded by notice and executed through court action.
• The landlord must provide an itemized list of charges against the security deposit and promptly refund any balance.
• The landlord may not discriminate on the basis of race, religion, national origin, age, gender, familial status, or disability.

D. The HUD prescribed tenancy addendum imposes these basic tenant responsibilities:

• The tenant must promptly report any birth or judicial custody award, and obtain prior written approval from the landlord and the §8 agent of any other additions to the household.
• The tenant must live in the voucher unit and not use it for profit-making activities, unless it is purely incidental.
• The tenant may not sublease, assign or transfer the unit.
• The tenant must pay that portion of the rent not covered by the assistance payment.
• The tenant must notify both the landlord and the §8 agent before vacating the unit.
• The tenant must allow the landlord to collect any balance owing under the lease in excess of the security deposit.
• The parties must give each other written notice for any actions under the lease.
• The lease automatically terminates if the HAP contract or if the §8 agent terminates the voucher.

E. Barred notices. Under Virginia law, to bar a tenant’s guest or invitee, a landlord must give a notice in compliance with §55-248.31:01. This must be a written notice served personally upon the guest or invitee for conduct on the landlord’s property. The conduct must violate the terms and conditions of the rental agreement, a local ordinance, or a state or federal law. A copy of the notice must be served upon the tenant. The notice must describe the conduct of the guest or invitee which is the basis for the landlord’s action. The tenant may file a tenant's assertion, in accordance with Code of Virginia §55-248.27, requesting that the General District Court review the landlord’s action to bar the guest or invitee.

F. Landlord access. Under Virginia law, Code of Virginia §55-248.18, the tenant shall not unreasonably withhold consent to the landlord to enter into the dwelling unit in order to inspect the premises, make necessary or agreed repairs, decorations, alterations or improvements, supply necessary or agreed services or exhibit the dwelling unit to prospective or actual purchasers, mortgagees, tenants, workmen or contractors. The landlord may enter the dwelling unit without consent of the tenant in case of emergency. The landlord shall not abuse the right of access or use it to harass the tenant. Except in case of emergency or if it is impractical to do so, the landlord shall give the tenant notice of his intent to enter and may enter only at reasonable times. Unless impractical to do so, the landlord shall give the tenant at least 24-hours’ notice of routine maintenance to be performed that has not been requested by the tenant.

H. The Virginia Consumer Protection Act (VCPA), Code of Virginia §59.1-196 *et. seq.*, excludes any aspect of a consumer transaction which is subject to the Landlord and Tenant Act, Code of Virginia §55-217 *et. seq.* or the VRLTA, Code of Virginia §55-248.2 *et. seq.*, unless the act or practice of a landlord constitutes a misrepresentation or fraudulent act or practice under §59.1-200.

I. Unconscionability can be used to invalidate or prevent enforcement of shockingly unreasonable lease clauses. Under Virginia law, an inequitable and unconscionable bargain has been defined to be “one that no man in his senses and not under a delusion would make, on the one hand, and as no fair man would accept, on the other.” The inequality must be so gross as to shock the conscience. *See, Management Enterprises, Inc. v. Thorncroft Co.*, 243 VA. 469, 473, 416 S.E.2d 229, 232 (1992), citing, *Smyth Brothers v. Beresford*, 128 Va. 137, 170, 104 S.E. 371, 382 (1920).

XX. Administrative Procedures – Informal Review & Informal Hearing

A. The voucher program has both an “informal review” process available to aggrieved applicants, and an “informal hearing” process available to aggrieved participants. Under HUD regulations, participants are families who have received a voucher and who have had the §8 agent execute the first HAP contract with a landlord on their behalf. All others are applicants. *See, 24 C.F.R. §982.4.*

B. Notice to applicant. All applicants whose applications are denied are entitled to prompt written notice of the denial, containing a brief statement of the reasons, that the applicant may request an informal review of the decision, and how to obtain the informal review. *See, 24 C.F.R. §982.554.*

C. Informal review: when required. Pursuant to 24 C.F.R. §982.552(a)(2), informal review is required in the following cases:

- The applicant is denied a listing on the waiting list (assuming the waiting list is open).
- The applicant is denied a voucher or has a voucher withdrawn.
- The §8 agent refuses to execute a HAP contract or to approve a unit.
- The §8 agent refuses to provide assistance under the portability program.

D. Informal review: when not required. Pursuant to 24 C.F.R. §982.554(c), informal review is not required in the following cases:

- Discretionary administrative determinations.
- General policy issues or class grievances.
● Determination of family unit size.
● Determination not to approve an extension or suspension of a voucher term.
● Determination not to grant approval of the tenancy.
● Determination that a unit does not meet Housing Quality Standards.
● Determination that a unit is not in accordance with Housing Quality Standards because of family size or composition.

E. Informal review: procedures. The review is conducted by an impartial person appointed by the §8 agent, other than a person who made or approved the decision under review, or a subordinate of such person. The applicant must be given the opportunity to present written or oral objections to the decision, and must be notified in writing of the final decision after informal review, including a brief description of the reasons for the final decision.

F. Notice to participant. All families whose housing assistance is terminated are entitled to prompt written notice of the termination, containing a brief statement of the reasons, that the applicant may request an informal hearing on the decision, how to obtain the informal hearing, and the deadline by which to request an informal hearing. See, 24 C.F.R. §982.555.

G. Informal hearing: when required. An informal hearing is required in the following cases:

● Determination of the family’s annual or adjusted income and the use of such income to compute the housing assistance payment.
● Determination of the appropriate utility allowance (if any) for tenant paid utilities from the utility allowance schedule.
● Determination of the family unit size under the subsidy standards.
● Determination that a family is living in a unit with a larger number of bedrooms than appropriate for the family unit size.
● Determination to terminate assistance for a participant family because of the family’s action or failure to act.
● Determination to terminate assistance because the participant family has been absent from the assisted unit longer than the maximum period permitted.

H. Informal hearing: when not required. Pursuant to 24 C.F.R. §982.555(b), an informal hearing is not required in the following cases:

● Discretionary administrative determinations.
● General policy issues or class grievances.
● Establishment of the utility allowance schedule.
● Determination not to approve an extension or suspension of a voucher term.
● Determination not to grant approval of the unit or tenancy.
● Determination that a unit does not meet Housing Quality Standards. However, an informal hearing is available for a decision to terminate assistance for a breach of the HQS alleged to be caused by the family.
● Determination that a unit is not in accordance with Housing Quality Standards because of family size or composition.
• Determination to exercise or not to exercise any right or remedy against the landlord under the HAP contract.


1) **Adverse action.** Unless excluded, a tenant may request a hearing to dispute any §8 agent decision relating to the individual circumstances of the family and whether it is in accordance with the law, HUD regulations, and §8 agent policies.

2) **Selection of Hearing Officer.** An informal hearing is conducted by an impartial person designated by the §8 agent, other than a person who made or approved the PHA action under review, or a subordinate of such person. *See*, 24 C.F.R. §982.555(e)(4)

3) **Discovery.** The family must be given the opportunity to examine before the hearing any §8 agent documents directly relevant to the hearing. *See*, 24 C.F.R. §982.555(e)(2).

4) **Hearing rights.** The family must be given the opportunity to be represented at the hearing, the right to present evidence and arguments, the right to question any witnesses, and a written decision based solely on the evidence. Evidence may be considered without regard to admissibility under the rules of evidence applicable to judicial proceedings. *See*, 24 C.F.R. §982.555(e)(5).

5) **Hearing decision.** The hearing officer must issue a written decision stating briefly the reasons for the decision, with factual determinations based on a preponderance of the evidence. *See*, 24 C.F.R. §982.555(e)(6).

6) **Effect of Decision.** The decision is binding on the §8 agent, unless: (a) it concerns a matter for which a hearing is not required or that otherwise exceeds the authority of the hearing officer, or (b) it is contrary to HUD regulations or requirements or to federal, state or local law. If the §8 agent determines it is not bound by a hearing decision, it promptly must notify the family of that determination and of the reasons therefor. *See*, 24 C.F.R. §982.555(f).

XXI. Voucher Termination

A. **Grounds for Termination of Assistance.** The §8 agent may terminate assistance because of certain kinds of conduct. *See*, 24 C.F.R. §§982.552 & 553. For all these grounds, except the first four, the §8 agent has discretion to consider circumstances, including the seriousness of the offense, the extent of participation or culpability of individual family members, mitigating circumstances related to the disability of a family member, and the effects of denial on other family members who were not involved in the action or failure.

1) If a family is evicted from housing assisted under the voucher program.
2) If any member of the family fails to sign and submit consent forms for obtaining information.

3) If the family fails to submit required evidence of citizenship or eligible immigrant status.

4) If any member of the family fails to meet the eligibility requirements concerning individuals enrolled at an institution of higher education.

5) If the family violates any family obligations under the program, see, 24 C.F.R. §982.551, infra.

6) If any member of the family has been evicted from federally assisted housing in the past five years.

7) If a §8 agent ever has terminated assistance under the program for any member of the family.

8) If any member of the family commits drug-related criminal activity or violent criminal activity. However, the denial may not be based on mere possession of drugs occurring more than one year prior to the decision on the application.

9) If any member of the family has committed fraud, bribery, or other corrupt or criminal act in connection with any federal housing program.

10) If the family currently owes rent or other amounts to any §8 agent.

11) If the family has not reimbursed any §8 agent for amounts paid to a landlord under a HAP contract for rent, damages to the unit, or other amounts owed by the family under the lease.

12) If the family breaches an agreement with the §8 agent to pay amounts owed to the §8 agent.

13) If a family participating in the Family Self Sufficiency (FSS) program fails to comply, without good cause, with the family’s FSS contract of participation, see, 24 C.F.R. Part 984.

14) If the family has engaged in or threatened abusive or violent behavior toward personnel of the §8 agent.

15) If a welfare-to-work (WTW) family fails, willfully and persistently, to fulfill its obligations under the welfare-to-work voucher program.

B. Family Obligations. The obligations of a participant family (breaches of which are grounds for termination of assistance) are set forth at 24 C.F.R. §982.551:
1) To supply required recertification information.

2) To establish eligible citizenship or immigration status.

3) To disclose Social Security numbers.

4) To sign consent forms needed to secure wage, income and claim information.

5) To provide true and complete information.

6) Not to cause a breach of the Housing Quality Standards.

7) To allow inspection of the unit by the §8 agent.

8) Not to commit any serious or repeated violation of the lease.

9) To notify the §8 agent and the landlord before moving out or terminating the lease.

10) To give the §8 agent a copy of any landlord eviction notice.

11) To use the assisted unit for residence only by the family.

12) To notify the §8 agent of the birth, adoption or court ordered custody of a child.

13) To obtain approval from the §8 agent to add any other person to the household.

14) To promptly notify the §8 agent if any family member no longer resides in the unit.

15) Not to sublease, assign or transfer the unit.

16) Not to be absent from the unit longer than permitted.

17) Not to own or have any ownership interest in the unit.

18) Not to commit fraud, bribery, or other corrupt or criminal act in connection with the program.

19) Not to engage in any drug-related or violent criminal activity.

20) Not to abuse alcohol in a way that threatens the health, safety, or right of peaceful enjoyment of other residents and persons in the immediate vicinity.
21) Not to receive duplicate assistance.

C. **Eviction as grounds for termination of voucher.** The landlord’s commencement of the eviction action alone is not grounds to terminate the tenant’s voucher or to stop making the assistance payments. *See, 24 C.F.R. §§982.311(b) and 982.314(b)(2).* Instead, the §8 agent must continue the payments until the eviction has become final because the court has issued a final judgment and all appeal rights have been exhausted.

**XXII. Eviction**

A. To evict, the landlord must take the tenant to court. During the term of the lease, the landlord must have a reason which is based upon good cause. As with any eviction, landlord must give the tenant a written 5-day pay or quit notice, or a written 30-day notice to vacate, and wait the required notice period, before filing the unlawful detainer action.

B. **Procedural Law.** The landlord may evict only by instituting court action. Before doing so, the landlord must give the tenant whatever notice is required under state law, and must provide the §8 agent a copy of the notice given to the tenant. The landlord’s failure to comply with the requirement that the eviction notice to the tenant also be sent to the §8 agent provides a procedural defense to the eviction action.

C. **Substantive Law.** During the term of the lease, the landlord may not terminate the tenancy except on the grounds of:

1) serious violation (including but not limited to failure to pay rent or other amounts due under the lease) or repeated violation of the terms and conditions of the lease,

2) violation of federal, state or local law that imposes obligations on the tenant in connection with the occupancy or use of the premises, or

3) other good cause.

D. **Drug-related and criminal activity.** Pursuant to 24 C.F.R. §982.310(c):

1) The lease must provide that drug-related criminal activity engaged in, on or near the premises by any tenant, household member, or guest, or such activity engaged in on the premises by any other person under the tenant’s control, is grounds for the owner to terminate tenancy. The lease must provide that the owner may evict a family when the owner determines that a household member is illegally using a drug or when the owner determines that a pattern of illegal use of a drug interferes with the health, safety, or right to peaceful enjoyment of the premises by other residents.

2) The lease must provide that the owner may terminate tenancy for any of
the following types of criminal activity by a covered person:

a) any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other residents (including property management staff residing on the premises);

b) any criminal activity that threatens the health, safety, or right to peaceful enjoyment of their residences by persons residing in the immediate vicinity of the premises; or

c) any violent criminal activity on or near the premises by a tenant, household member, or guest, or any such activity on the premises by any other person under the tenant's control.

3) The lease must provide that the owner may terminate the tenancy if a tenant is fleeing to avoid prosecution, or custody or confinement after conviction, for a crime, or attempt to commit a crime, that is a felony under the laws of the place from which the individual flees (or is a high misdemeanor in New Jersey), or is violating a condition of probation or parole imposed under Federal or State law.

4) The landlord may seek to evict a family for criminal activity by a covered person, regardless of whether the covered person has been arrested or convicted for such activity and without satisfying the standard of proof used for a criminal conviction.

E. Other good cause. Pursuant to 24 C.F.R. §982.310(d), “other good cause” for termination of tenancy by the landlord may include, but is not limited to:

1) Failure by the family to accept the offer of a new lease or revision;

2) A family history of disturbance of neighbors or destruction of property, or of living or housekeeping habits resulting in damage to the unit or premises;

3) The landlord’s desire to use the unit for personal or family use, or for a purpose other than as a residential rental unit; or

4) 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).

F. During the initial lease term, the landlord may not terminate the tenancy for “other good cause” unless the landlord is terminating the tenancy because of something the family did or failed to do. During this period, the landlord may not terminate the tenancy for “other good cause” based on any of the following grounds: failure by the family to accept the offer of a new lease or revision; the landlord’s desire to use the unit for personal or family use, or for a purpose other than as a residential rental unit; or a business or economic reason for termination of the tenancy.
G. Voucher landlords may terminate the lease without cause at the end of both the initial lease term and any renewal term. See, 42 U.S.C. §§1437f(d)(1)(B) and 1437f(o)(7)(C) & (D) and 24 C.F.R. §982.310.

XXIII. Conclusion

Vouchers have more in common with public benefit programs such as Social Security, unemployment compensation, or workers’ compensation than it does with private landlord-tenant law. Vouchers are heavily regulated, and have many due process protections, and underlying constitutional issues. Because the voucher is indeterminate in length, a case potentially may involve a benefit which is worth tens of thousands of dollars, and may be substantially above the jurisdictional limit of the General District Court. Accordingly, these cases deserve heightened attention from both attorneys and the judiciary.
### APPENDIX I – RICHMOND AREA HOUSING CHOICE VOUCHER AGENCIES

<table>
<thead>
<tr>
<th>Agency</th>
<th>Area served</th>
</tr>
</thead>
<tbody>
<tr>
<td>Central Virginia Resource Corporation</td>
<td>Cities of Colonial Heights, Hopewell, Petersburg &amp; Richmond and Counties of Amelia, Caroline, Charles City, Chesterfield, Dinwiddie, Goochland, Hanover, Henrico, King and Queen, King William, New Kent &amp; Powhatan</td>
</tr>
<tr>
<td>4009 Fitzhugh Avenue, Suite 100</td>
<td></td>
</tr>
<tr>
<td>Richmond, VA. 23230</td>
<td></td>
</tr>
<tr>
<td>804-353-6503 (V) &amp; 804-353-5606 (F)</td>
<td></td>
</tr>
<tr>
<td>Chesterfield – Colonial Heights Department of Social Services</td>
<td>City of Colonial Heights and County of Chesterfield</td>
</tr>
<tr>
<td>9854 Lori Road, Suite 100</td>
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<tr>
<td>P.O. Box 430</td>
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<tr>
<td>Chesterfield, VA. 23832</td>
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<tr>
<td>804-717-6832 (V) &amp; 804-717-6833 (F)</td>
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<tr>
<td>Goochland County Department of Social Services</td>
<td>County of Goochland</td>
</tr>
<tr>
<td>1800 Sandy Hook Road, Suite 200</td>
<td></td>
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<tr>
<td>Goochland, VA. 23063</td>
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<tr>
<td>804-556-5880 (V) &amp; 804-556-4718 (F)</td>
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<tr>
<td>Hanover Community Services Board</td>
<td>County of Hanover</td>
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<tr>
<td>12300 South Washington Highway</td>
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<tr>
<td>Ashland, VA. 23005</td>
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<tr>
<td>804-365-6622 (V) &amp; 804-365-6639 (F)</td>
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<tr>
<td>Henrico Area Mental Health &amp; Retardation Services</td>
<td>Counties of Charles City, Henrico &amp; New Kent</td>
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<tr>
<td>10299 Woodman Road</td>
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<tr>
<td>Glen Allen, VA. 23060</td>
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<tr>
<td>804-261-8612 (V) &amp; 804-261-8469 (F)</td>
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<tr>
<td>Hopewell Redevelopment &amp; Housing Authority</td>
<td>City of Hopewell</td>
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<tr>
<td>350 East Poythress Street</td>
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<tr>
<td>Hopewell, VA. 23860</td>
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<tr>
<td>804-458-5160 (V) &amp; 804-458-3364 (F)</td>
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<tr>
<td>Petersburg Redevelopment &amp; Housing Authority</td>
<td>City of Petersburg</td>
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<tr>
<td>128-A Sycamore Street</td>
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<tr>
<td>Petersburg, VA. 23803</td>
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<tr>
<td>804-733-2200 (V) &amp; 804-733-2229 (F)</td>
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<tr>
<td>Prince George Housing Office</td>
<td>County of Prince George</td>
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<tr>
<td>6400 Administration Drive - P.O. Box 68</td>
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</table>
Prince George, VA. 23875
804-733-2688 (V) & 804-733-2683 (F)

Richmond Redevelopment & Housing Authority
901 Chamberlayne Parkway
Richmond, VA. 23220
804-780-4361 (V) & 804-644-1445 (F)

Richmond Residential Services, Inc.
1000 North Thompson Street
Richmond, VA. 23220
804-358-2211 (V) & 804-355-6759 (F)

City of Richmond