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Subject: PH Due Process Determination: Oregon

December 3, 1991

HUD DUE PROCESS DETERMINATION

FOR THE

STATE OF OREGON

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ANALYSIS

- I. Jurisdiction: State of Oregon.
- II. Elements of Due Process.

Section 6(k) of the United States Housing Act of 1937 (42 U.S.C. 1437d (k), as amended by section 503(a) of the National Affordable Housing Act of 1990, Pub. L. 101-625, approved November 28, 1990), provides that:

For any grievance concerning an eviction or termination of tenancy that involves any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises of other tenants or employees of the public housing agency or any drug-related criminal activity on or near such premises, the agency may . . . exclude from its grievance procedure any such grievance, in any jurisdiction which requires that prior to eviction, a tenant be given a hearing in court which the Secretary determines provides the basic elements of due process

The statutory phrase "elements of due process" is defined by HUD at 24 CFR § 966.53(c) as:

. . . an eviction action or a termination of tenancy in a State or local court in which the following procedural safeguards are required:

- (1) Adequate notice to the tenant of the grounds for terminating the tenancy and for eviction;
- (2) Right of the tenant to be represented by counsel;

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- (3) Opportunity for the tenant to refute the evidence presented by the PHA including the right to confront and cross-examine witnesses and to present any affirmative legal or equitable defense which the tenant may have; and
- (4) A decision on the merits.

HUD's determination that a State's eviction procedures satisfy this regulatory definition is called a "due process determination."

The present due process determination is based upon HUD's analysis of the laws of the State of Oregon to determine if an action for forcible entry or detainer under Oregon law requires a hearing which comports with all of the regulatory "elements of due process" as defined in § 966.53(c).

HUD finds that the requirements of Oregon law governing an action for forcible entry and detainer in the Oregon District Courts include all of the elements of basic due process, as defined in 24 CFR 966.53(c). This conclusion is based upon requirements contained in the Oregon Revised Statutes (ORS), case law and court rules.

III. Overview of Oregon Eviction Procedures.

Under the laws of the State of Oregon, an action to recover possession of real property may be commenced in the Oregon District Courts.¹ ORS 105.110.2 The substantive requirements

1ORS 105.110 provides that "when a forcible entry is made upon any premises, or when an entry is made in a peaceable manner and possession is held by force, the person entitled to the premises may maintain in the county where the property is situated an action to recover the possession of the premises in the District Court or before any justice of the peace of the county." However, "except as provided in ORS 46.026(4) which postpones the establishment of certain district courts each justice district in the county organized under ORS 46.025 is abolished; and all . . . causes, actions and proceedings . . . before justice courts in all such county seats are transferred to the district court for the county." ORS 51.030.

2" In a county with no District Court, the circuit court has jurisdiction to hear all matters otherwise assigned to the district court." ORS 46.060(2). This determination applies to

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concerning an action for recovery of possession of real property brought under the Oregon forcible entry and detainer provisions are governed by ORS sections 90.100 through 90.940,³ and sections 105.110 through 105.155.

The procedural requirements concerning an action for recovery of possession of real property brought under the Oregon forcible entry and detainer statute are governed by the Oregon Rules of Civil Procedure (ORCP), Evidence Code (OEC) (ORS 40.010 to 40.585), and statutes. Oregon Rules of Civil Procedure govern the "procedure and practice in all circuit and district courts of the state . . . for all civil actions . . . except where a different procedure is specified by statute or rules." ORCP 1(A).

An action for recovery of possession of real property brought in an Oregon District Court provides for a pre-eviction hearing containing all of the elements of due process as defined by HUD regulations where the grounds for terminating the tenancy or eviction arise from:

- (a) a material noncompliance with the rental agreement; or
- (b) a material noncompliance with the tenant obligations set forth in ORS 90.3254 which materially affect health and safety; or
- (c) the commission of any act which is outrageous in the extreme by the tenant or someone in the tenant's control.

eviction decisions in a Circuit Court in a county with no District Court.

3The Oregon Residential Landlord and Tenant Act.

Unlawful holding by force under the Residential Landlord and Tenant Act includes but is not limited to cases when the person in possession is holding contrary to any valid condition or covenant of the rental agreement or ORS 90.100 to 90.940. ORS 105.115(2).

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ORS 90.325 provides a list of tenant obligations which require the tenant to ". . . (7) conduct the tenant and require other persons on the premise with the consent of the tenant to conduct themselves in a manner that will not disturb the neighbors' peaceful enjoyment of the premises."

Outrageous in the extreme is defined as including, but not limited to, an act which the tenant or person in the tenant's control has in fact committed and which has resulted in service of written notice to the landlord, under any State statute or local ordinance, of drug manufacturing or delivery, gambling or prostitution activity at the premises occupied by the tenant. ORS 91.400(3)(d).

IV. Analysis of Oregon Eviction Procedures for Each of the Regulatory Due Process Elements.

- A. Adequate notice to the tenant of the grounds for terminating the tenancy and for eviction (24 CFR 966.53(c)(1)).

Termination Notice

Under the Oregon Residential Landlord and Tenant Act:

if there is a material noncompliance by the tenant with the rental agreement or with ORS 90.325 (Tenant Obligations) materially affecting health and safety, the landlord must deliver a written notice to the tenant terminating the tenancy for cause . . . The notice shall specify the acts and omissions constituting the breach and shall state that the rental agreement will terminate upon a date not less than 30 days after receipt of the notice. ORS 90.400(1)(a).

In addition, if the tenant or someone in the tenant's control commits any act which is "outrageous in the extreme" the landlord, after 24 hours' written notice specifying the causes, may immediately terminate the rental agreement" ORS 90.400(3)(d).

Notices may be served by personal delivery or by first class mail. ORS 90.910(1) First class mail does not include certified or registered mail, or any other form of mail that may delay or hinder actual delivery of mail to the tenant. Id. For additional provisions concerning service of a termination notice, see ORS 105.120.

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Pleadings

In the State of Oregon, a civil action for the recovery of possession of premises under the forcible entry and detainer statute is commenced when the person seeking possession files a complaint for recovery with the clerk of the proper court. ORS 105.125. The complaint filed in an action brought under the forcible entry and detainer provisions must meet the pleading requirements set forth in ORS 105.25(a) through (d):

- (a) A description of the premises with convenient certainty;
- (b) That the defendant is in possession of the premises;
- (c) That the defendant entered upon the premises with force or unlawfully holds the premises with force; and
- (d) That the plaintiff is entitled to possession of the

premises.

A summons with a copy of the complaint must be mailed first class by the clerk of the court to the defendant at the premises. ORS 105.135(3)(a). In addition,

the process server shall serve the defendant with a . . . copy of the summons and complaint at the premises by personal delivery to the defendant or, if the defendant is not available for service, by attaching a . . . copy of the summons and complaint in a secure manner to the main entrance to that portion of the premises of which the defendant has possession." Id. at 105.135(3)(b).

Notice to Tenant -- Conclusion

Under Oregon law, adequate notice of the grounds for terminating the tenancy and for eviction is required in those cases where the grounds for terminating the tenancy or eviction arise from (a) a material noncompliance with the rental agreement, or (b) the tenant obligations set forth in ORS 90.325 which materially affect health and safety, or (c) any act which is outrageous in the extreme committed by the tenant or someone in the tenant's control.

- B. Right to be represented by counsel
(24 CFR 966.53(c)(2)).

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A tenant has the right to be represented by counsel. ORS 105.137(3): "An attorney at law shall be entitled to appear on behalf of any party"

- C. Opportunity for the tenant to refute the evidence presented by the PHA, including the right to confront and cross-examine witnesses (24 CFR 966.53(c)(3)).

The Oregon Evidence Code (OEC) applies generally to all civil actions. ORS 40.015(2) (OEC 101(2)). (ORS 40.010 to 40.585 constitutes the Oregon Evidence Code.) The tenant has the opportunity to refute the evidence presented by the PHA, including the right to confront and cross-examine witnesses.

To refute the plaintiff's case, the tenant may cross-examine the plaintiff's witnesses, including cross-examination on matters affecting the credibility of the witness. ORS 40.370(2) (OEC 611(2)). Ordinarily leading questions are permitted on cross-examination. ORS 40.370(3) (OEC 611(3)). A party may interrogate a hostile witness or adverse party by leading questions. Id. The court's control over the "mode and order" of interrogating witnesses and presenting evidence is intended "to make the interrogation and presentation effective for the ascertainment of the truth" ORS 40.370(1) (OEC 611(1)).

The defendant has full opportunity to attack credibility of the plaintiff's witnesses. The credibility of a witness may be attacked by any party. ORS 40.345 (OEC 607). The credibility of a witness may be refuted by evidence concerning the witness' character or conduct. ORS 40.350 (OEC 608). Evidence of a person's character is admissible when it is an essential element of the defense. ORS 40.170 (OEC 404(1)). With respect to an action tried to a jury, the evidence rules note "the right of a party to introduce before the jury evidence relevant to weight or credibility." ORS 40.030(5) (OEC 104(5)).

In addition to attacking credibility and force of plaintiff's evidence, the defendant may present other evidence and witnesses to refute the case presented by the housing authority. This opportunity is subject only to the normal judicial control over the "mode and order" of presenting evidence. ORS 40.370(1) (OEC 611(1)). Admissible evidence may only be excluded on grounds of prejudice, confusion or undue delay. ORS 40.160 (OEC 403). Unless otherwise provided in the evidence code or law, "all relevant evidence is admissible." ORS 40.155 (OEC 402).

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The tenant may use a subpoena to obtain the production of witnesses or documentary evidence at trial. The District Court has the power to issue subpoenas. See ORCP 1(A); ORCP 55(A) through (C). A subpoena may be issued to require attendance before the court, or at the trial of an issue therein. ORCP 55(C). Such subpoena may be issued in blank by the clerk of the court in which the action is pending or if there is no clerk, by the judge of such court, or "by an attorney of record of the party to the action in whose behalf the witness is required to appear, subscribed by the signature of such attorney." *Id.* ORCP Rule 58A, 58B.1, and 58B.3 provide explicitly that a defendant may introduce evidence rebutting the plaintiff's case in chief.

Under Oregon law, a tenant has ample opportunity to refute evidence presented by the PHA.

- D. Opportunity to present any affirmative legal or equitable defense which the tenant may have (24 CFR 966.53(c)(3)).

Unless stated to the contrary, the District Court has jurisdiction to hear and determine, preserve and enforce all rights brought before it, including all cases in equity when pleaded as a defensive matter. Under the Oregon Residential Landlord and Tenant Act, an action includes suits in equity and any other proceeding in which rights are determined, including an action for possession. ORS 90.100(1).

Under the Oregon forcible entry and detainer statute, an unrepresented defendant may plead any available grounds of defense. ORS 105.137(6)(b). No restrictions are placed on a

defendant's opportunity to present any affirmative equitable or legal defenses. See ORCP Rule 19 (setting forth the general pleading requirements for defenses and affirmative defenses). Tenants have explicit statutory defenses with respect to many types of landlord conduct. ORS 90.360, 90.365, 90.375, 90.380 and 90.385. "Every defense, in law or fact, to a claim for relief in any pleading . . . shall be asserted in the responsive pleading thereto." ORCP Rule 21.A.

Thus HUD concludes that a tenant has the opportunity to present any available legal or equitable defense.

E. A decision on the merits (24 CFR 966.53(c)(4)).

A judgment is a final determination of the rights of the parties in an action. ORCP Rule 67.A. In an action tried by the court without a jury, a judgment is rendered by the court based

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upon its determination, after hearing the evidence, that the complaint is either true or is not true. ORS Sec. 105.145 If any party to a civil action tried by the court demands special findings of fact before the trial, the court must make such findings, and must state separately its conclusions of law concerning the facts. ORCP Rule 62.A.

A judgment for the plaintiff implies that determinations were made in plaintiff's favor from the evidence adduced at trial bearing upon the plaintiff's pleadings. To sustain a judgment on appeal in a case not tried to juries, there must be some substantial evidence to support the court's findings, and, the findings must support the judgment. *Ryland v. Ryland*, 214 Or. 548, 330 P.2d 175, 176; *Morrison v. State*, 225 Or. 178, 357 P.2d 389, 391.

Under Oregon law, the tenant has the opportunity for a determination on the merits, based upon the facts and the law.

V. Conclusion.

In an action for forcible entry and detainer in the Oregon District Court for (a) a material noncompliance with the rental agreement, or (b) a material noncompliance with the tenant obligations set forth in ORS 90.325 which materially affect health and safety, or (c) commission of any act which is outrageous in the extreme by the tenant or someone in the tenant's control, Oregon law requires that the tenant have the opportunity for a pre-eviction hearing in court which provides the basic elements of due process as defined in 24 CFR 966.53(c) of the HUD regulations.

By virtue of this determination by HUD under section 6(k) of the U.S. Housing Act of 1937, a PHA in Oregon may evict a public housing tenant pursuant to a District Court decision in an action

for forcible entry and detainer that involves any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises of other tenants or employees of the PHA or any drug-related criminal activity on or near such premises. The PHA is not required to first afford the tenant the opportunity for an administrative hearing on any such eviction.