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Subject: PH Due Process Determination: Alaska

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HUD DUE PROCESS DETERMINATION

for the

STATE OF ALASKA

ANALYSIS

I. Jurisdiction: State of Alaska. 1

II. Elements of due process 1

III. Overview of the Alaska Forcible Entry and Detainer (FED) action . . 2

 A. FED Statute 2

 B. Procedure and jurisdiction. 3

 C. State Constitution -- due process clause. 4

IV. Analysis of the Alaska FED Statute under each of the regulatory
due process elements. 4

 A. Adequate notice to the tenant of the grounds for
terminating the tenancy and for eviction
(24 CFR Section 966.53(c)(1)) 4

 B. Right to be represented by counsel
(24 CFR Section 966.53(c)(2)) 5

 C. Opportunity for the tenant to refute the evidence
presented by the PHA, including the right to confront
and cross-examine witnesses
(24 CFR Section 966.53(c)(3)) 6

 D. Opportunity to present any affirmative legal or
equitable defense which the tenant may have
(24 CFR Section 966.53(c)(3)) 7

 E. A decision on the merits
(24 CFR Section 966.53(c)(4)) 7

V. Conclusion. 8

ANALYSIS

I. Jurisdiction: State of Alaska.

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

For this purpose, HUD must determine that local law requires a court hearing with the basic "elements of due process". Under HUD regulations, the following are the basic "elements of due nprocess"

- (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;
- (3) Opportunity for the tenant to refute the evidence presented by the [public housing agency], 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.

The same definition of due process elements is stated in the regulations for the regular public housing program at 24 CFR Section 966.53(c), and in the regulations for the Indian housing program at 24 CFR Section 905.340(a)(3)(ii).

HUD's determination that eviction procedures satisfy this regulatory definition is called a "due process determination." The present due process determination is based on HUD's analysis of the laws of the State of Alaska to determine if an action for forcible entry and detainer under those laws requires a hearing which comports with all of the "elements of due process".

HUD finds that the requirements of Alaska law governing an action for forcible entry and detainer ("FED") under Alaska Stat. Section 09.45.060 - 09.45.160 ("FED Statute") include all of the elements of due process (as defined in 24 CFR Section 966.53(c) and Section 905.340(a)(3)(ii)).

III. Overview of the Alaska Forcible Entry and Detainer (FED) action

A. FED Statute

Alaska's FED Statute states that "recovery of possession from a tenant shall be made under AS 09.45.060-09.45.160". Alaska Stat. Section 09.45.630

(1983). In summary, the FED Statute contains the following elements:

- Authorizes an FED action. Section 09.45.070.
- Defines unlawful holding by force. Section 09.45.090. Holding by force includes continuing in possession "contrary to a condition or covenant in the lease". Section 09.45.070(2).
- Requires a written ten day notice to quit. Section 09.45.100.
- Authorizes commencing an FED action within ten days after serving the notice to quit. Section 09.45.110. Applies to actions against a tenant holding possession contrary to the lease.
- Requires that the summons and complaint must be served not less than two days nor more than four days before the date of the trial. Section 09.45.120.

Alaska's Uniform Residential Landlord and Tenant Act ("Landlord/Tenant Act") states requirements for terminating a tenancy. Alaska Stat. 34.03.010-34.03.380 (1990). In *McCall v. Fickes*, 556 P. 2d 535 (Alaska 1976), the court held that the Landlord/Tenant Act, as a matter of statutory construction, should be harmonized with the FED Statute and that the FED procedures should be used where not in conflict with the Landlord/Tenant Act.

B. Procedure and jurisdiction

The Alaska Rules of Civil Procedure, specifically Civil Rule 85, governs practice and procedure in a FED action. Civil Rule 85(a) states:

In an action for possession of any land, tenement or other real property brought under the Forcible Entry and Detainer provision of law, the practice and procedures shall be as in other civil actions, subject to the following:

1. Description of Premises. The premises claimed shall be described in the complaint with such certainty that the defendant will be distinctly advised of their location so that possession thereof may be delivered according to that description.
2. Summons. Summons shall be served not less than two days before the day of trial. The date set for trial shall be not more than 15 days from the date of filing of the complaint unless otherwise ordered by the court.

Civil Rule 93 provides that the state Supreme Court has the constitutional authority to promulgate rules. Such rules may supersede the procedural requirements of the statute. Accordingly, Civil Rule 85(a)(2), in establishing that a trial date shall be set within 15 days from date of filing of the complaint unless otherwise ordered by the court, supersedes the statutory provision that service shall be made not more than four days prior to trial. See Alaska Stat. Section 09.45.120 (1983).

The Superior Court has original jurisdiction of all civil cases. Under Alaska Stat. Section 22.15.030(a)(6) (1988), the District Court has jurisdiction of FED actions where the value of the arrears and damage to the

property does not exceed thirty-five thousand dollars (\$35,000). Alaska Stat. Section 22.10.020(a) requires that, with stated exceptions, an action falling within the concurrent jurisdiction of both Courts may not be filed in the Superior Court, and "may be referred into a district court when the amount does not exceed the jurisdiction of district court".

C. State Constitution -- due process clause

Any action or proceeding under the FED Statute must comply with Article I, Section 7 of the Alaska State Constitution (entitled "Due Process"). Article I, Section 7 provides that:

[n]o person shall be deprived of life, liberty, or property, without due process of law. The right of all persons to fair and just treatment in the course of legislative and executive investigations shall not be infringed.

The following analysis shows that Alaska law governing a FED action requires a pre-eviction hearing which meets all elements of HUD's regulatory due process definition.

- IV. Analysis of the Alaska FED Statute under 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 Section 966.53(c)(1))

Civil Rule 85 governs the practice and procedure for actions under the FED Statute. Subpart (a) of Civil Rule 85 states that the practice and procedures shall be as in other civil actions subject to certain exceptions as described in Section III above.

Civil Rule 85(a)(2) requires that the summons must be served not less than 2 days before the date of the trial. Civil Rule 4(d) requires that the summons and complaint must be served together. Civil Rule 3(a) states that a civil action is commenced by filing a complaint. To be accepted for filing, the complaint "must be accompanied by a completed case description on a form provided by the clerk of court". Civil Rule 8(a) states that a pleading (including the complaint) shall contain "a short and plain statement of the claim showing that the pleader is entitled to relief" Alaska Statute Section 34.03.285 (1990) (Landlord/Tenant Act) refers to the procedures under Civil Rule 85 for service of the summons and complaint.

The FED Statute also requires notice of the possessory action, both by service of a notice to quit prior to commencement of the action, and by service of a summons at commencement of the action. The owner must serve a written notice to quit. The notice to quit must be served on the tenant or person in possession at least ten days before commencement of the action (an additional three days is added if notice is mailed). The notice to quit must be served either by delivery to the tenant or person in possession, by being left at the premises in case of absence from the premises, or by mailing by registered or certified mail. Alaska Stat. 09.45.100 (1983). In an action for forcible entry and detainer, the summons must be served not less than two or more than four days before the date of trial. Alaska Stat. 09.45.120 (1983).

Adequate notice of the grounds for eviction is required by the due

process clause of the Alaska State Constitution. Article I, Section 7.

A. Right to be represented by counsel
(24 CFR Section 966.53(c)(2))

Alaska statutes and court rules do not explicitly state that there is a right to representation by counsel in civil proceedings. However, many provisions imply a right of representation by counsel. The following are some examples:

-- Civil Rule 77(a) on motions states that:

[a]ll motions, orders to show cause, petitions, applications and every other such matter shall be served upon the adverse party, or, after the adverse party has appeared by counsel, upon counsel for the adverse party.

-- Civil Rule 81 generally governs requirements for attorneys practicing law in the state of Alaska.

-- Civil Rule 80(e) on bonds and undertakings states that:

every . . . bond, stipulation or undertaking hereinafter presented to the clerk or a judge for approval shall have appended there a certificate of an attorney, if a party is represented by an attorney . . .

-- Civil Rule 46 on the conduct of trials and the examination of witnesses, states that:

(d) [u]nless otherwise ordered by the court, no more than one attorney on each side may examine or cross-examine a witness.

(e) [i]f counsel for either party offers himself as a witness on behalf of his client and gives evidence on the merits of the case, he shall not argue the case to the jury unless by permission of the court.

-- Alaska Stat. 09.30.050 (1983) states that a confession of judgment "may be made only by the confessor in person or by the person's attorney in fact under a power of attorney"

The right to representation by counsel is also required by the due process clause of the Alaska Constitution. Article I, Section 7.

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

Civil Rule 46 sets requirements for the conduct of a trial. The rule states that each party first presents a statement of the case, including the defendant's defense. Each party introduces his or her evidence; presents rebutting evidence; examines or cross-examines witnesses; and finally presents his or her closing argument.

Civil Rule 32(a) governs the use of a deposition at trial, and allows use of a deposition to contradict or impeach the testimony of the deponent as

a witness. Civil Rule 33(b) states that interrogatories may be used at trial to the extent permitted by the rules of evidence.

Based on the foregoing, a tenant in a proceeding under the FED Statute must be given full opportunity to confront and cross-examine witnesses, and to refute the evidence presented by the PHA. The right to refute PHA evidence is also guaranteed by the due process clause of the Alaska State Constitution. Article I, Section 7.

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

Civil Rule 85 states that in answering the complaint the defendant shall state "in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies." Civil Rule 8(f) states that "all pleadings will be so construed as to do substantial justice."

Civil Rule 8(c) lists all the defenses which a party shall set forth affirmatively in response to a preceding pleading. The Landlord/Tenant Act spells out a variety of issues a tenant may use in defending against the action of a landlord. The Court determined in *McCall v. Fickes*, supra at 540, that the defenses under the Uniform (Landlord/Tenant Act) may be asserted in FED proceedings. The Alaska law does not contain any limits on the tenant's right to present any available defenses in the FED action.

Based on the Alaska court rules and case law, a tenant must be given the opportunity to present any available affirmative defenses which are germane to the issue of possession under the FED Statute. This right is also afforded by the due process clause of the Alaska State Constitution. Article I, Section 7.

- D. A decision on the merits
(24 CFR Section 966.53(c)(4))

In a jury or non-jury trial under Alaska law, the court must render a decision on the merits -- based upon the facts and the law.

Civil Rule 38 states that the right of a trial by jury as declared in Section 16 of article 1 of the Alaska Constitution or as given by a state statute, shall be preserved to the parties. Under Civil Rule 39, if demanded and not waived under Civil Rule 38, a trial shall be by jury unless the parties agree otherwise, or unless no such right to a jury trial is found under Section 16 of the state constitution or by state statute. Further, upon hearing their charge, the jury must retire for deliberation of the issues presented, and shall remain under the charge of an officer until the jury agrees upon its verdict or is discharged by the court. See Civil Rule 48(f). In a trial by jury, Alaska law requires a decision on the merits, based on the facts as found by the jury pursuant to the charge of the court.

In non-jury trials, Civil Rule 52(a) requires that the court "find the facts specially and state separately its conclusions of law thereon and judgment shall be entered" Further, the rule states that findings of facts "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witness" In a trial to the court, Alaska law requires a decision on

the merits, based on the facts and the law as found by the court.

In addition, the right to a decision on the merits is guaranteed by the due process clause of the Alaska State Constitution. Article I, Section 7. Based upon the foregoing, a decision on the merits is required by Alaska law.

V. Conclusion.

Alaska law governing a FED action requires a pre-eviction hearing which meets all elements of HUD's regulatory due process definition.

By this HUD determination under section 6(k) of the U.S. Housing Act of 1937, a PHA in Alaska may evict a public housing or Indian housing tenant pursuant to a decision of the Alaska District or Superior Court in a forcible entry and detainer proceeding. In a forcible entry and detainer eviction 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 involves any drug-related criminal activity on or near the premises, the PHA is not required to first afford the tenant the opportunity for an administrative grievance hearing.