



U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
THE SECRETARY
WASHINGTON, D.C. 20410-0001

April 28, 1992

Honorable Arne H. Carlson
Governor of Minnesota
St. Paul, Minnesota 55155

Dear Governor Carlson:

I am happy to advise you of a new public housing "due process determination" for the State of Minnesota.

Under Federal law, if the Secretary of the Department of Housing and Urban Development (HUD) determines that the law of the jurisdiction requires a pre-eviction court hearing with the basic "elements of due process" (42 U.S.C. 1437d(k), as amended in 1990), a public housing agency (PHA) is not required to provide an administrative grievance hearing before evicting a public housing tenant for:

1. 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
2. Any drug-related criminal activity on or near such premises.

In accordance with the law, HUD has issued a regulation which revises HUD's definition of due process elements at 24 CFR 966.53(c) (56 Federal Register 51560, October 11, 1991).

Pursuant to the revised regulation, HUD has determined that the law governing a FED Action in the Minnesota District Courts (or in the Housing Courts of Hennepin and Ramsey Counties) under Sections 566.01-.33 of the Minnesota Statutes requires that the tenant have the opportunity for a pre-eviction hearing in court containing the elements of due process as defined in 24 CFR 966.53(c) of the HUD regulations. The basis of this determination is explained in the legal analysis enclosed with this letter.

In accordance with HUD's determination, a PHA operating public housing in the State of Minnesota may exclude from its administrative grievance procedure any grievance concerning an eviction or termination of tenancy which 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.

When a PHA evicts a tenant pursuant to a FED Action in the Minnesota District Courts (or in the Housing Courts of Hennepin and Ramsey Counties) under Sections 566.01-.33 of the Minnesota Statutes for the reasons set forth above, the PHA is not required to afford the tenant the opportunity for an administrative hearing on the eviction under 24 CFR Part 966, and may evict a public housing tenant pursuant to a decision in such judicial action.

Very sincerely yours,

A handwritten signature in black ink, appearing to read "Jack Kemp", written in a cursive style. The signature is positioned above the printed name "Jack Kemp".

Jack Kemp

Enclosure

DUE PROCESS DETERMINATION

for the

STATE OF MINNESOTA

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ANALYSIS

- I. Jurisdiction: State of Minnesota.
- 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 C.F.R. § 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;

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- (2) Right of the tenant to be represented by counsel;
- (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 on HUD's analysis of the laws of the State of Minnesota to determine if an action for forcible entry and unlawful detainer (FED Action) under those laws require a hearing with all of the regulatory "elements of due process," as defined in § 966.53(c).¹

HUD finds that the requirements of Minnesota law governing a FED Action in the Minnesota District Courts (or in the Housing Courts of Hennepin and Ramsey Counties)² under Sections 566.01-.33 of the Minnesota Statutes (FED Statute) include all of the elements of basic due process, as defined in 24 C.F.R. § 966.53(c). This conclusion is based upon requirements contained in the State Constitution, Minnesota Statutes, case law and Minnesota Rules of Court.

¹ Under certain circumstances, when contraband or a controlled substance has been seized on residential rental property, incident to a lawful search or arrest, involving the same tenant in more than one occurrence, the property is subject to forfeiture in an action brought by the county attorney. M.S.A. § 609.5317. Such forfeiture actions are not covered by this due process determination.

² In Hennepin and Ramsey Counties, a FED Action also may be commenced in Housing Court, where a referee presides. Rules 601-612 of the General Rules of Practice for District Courts apply to all proceedings in Housing Court.

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III. Overview of Minnesota Eviction Procedures

A FED Action is a civil action which may be commenced in the District Court (or the Housing Court for Hennepin or Ramsey Counties), in the district in which the premises are located. MSA § 484.01. The substantive requirements for a FED Action are governed by the FED Statute.

Procedural and practice requirements in FED Actions are governed by the Minnesota Rules of Civil Procedure (RCP) and the General Rules of Practice for the District Courts (Minn.Gen.R.Prac.), except as otherwise specifically provided in the FED Statute. MSA § 566.07; RCP Rule 1; Minn.Gen.R.Prac. Rule 1.01. The Minnesota Rules of Evidence (MRE) also apply to a FED Action. MRE Rule 101.

A FED Action may be maintained, among other instances, "when any person holds over lands or tenements after termination of the time for which they are demised or let to that person . . . or contrary to the conditions or covenants of the lease or agreement under which that person holds . . . or when any tenant at will holds over after the determination of any such estate by notice to quit." MSA § 566.03.

To commence a FED Action, the person seeking possession must file a complaint for recovery with the court. The complaint must describe the premises, state the facts which authorize the recovery, and pray for restitution of the premises. The court thereupon will issue a summons, commanding the defendant to appear not less than seven nor more than 14 days from the date of issuance of the summons. A copy of the complaint must be attached to the summons. MSA § 566.05.

Any action or proceeding under the FED Statute must comply with Article I, Section 7 of the Minnesota State Constitution. Article I, Section 7 in part states that no person may "be deprived of life, liberty or property without due process of law." The Minnesota Supreme Court has construed this due process clause as providing no less protection than the due process clause of the Fourteenth Amendment of the United States Constitution. Anderson v. City of Saint Paul, 226 Minn. 186, 32 N.W.2d 538 (1948).

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IV. Analysis of Minnesota 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 C.F.R. § 966.53(c)(1))

The complaint, setting forth the facts which authorize the recovery, must be attached to the summons. The summons must state that the complaint is attached thereto, and that the original complaint has been filed with the court. MSA § 566.05. Service must be made at least seven days before the return day, in the manner provided for service of summons in a civil action in the district court. MSA § 566.06³.

Adequate notice to the tenant of the grounds for terminating the tenancy and for eviction is provided under Minnesota law by service of the complaint. Adequate notice also is required by the due process clause of the Minnesota State Constitution. Article I, Section 7.

B. Right to be represented by counsel
(24 C.F.R. § 966.53(c)(2))

Although the right to representation by counsel in civil proceedings is not explicitly stated by Minnesota statutes and court rules (except in the Housing Court Rules of Hennepin and Ramsey Counties⁴), many provisions imply that there is a right of representation by counsel. The following are some examples:

- (1) Every pleading, motion and other paper of a party represented by an attorney must be signed by at least one attorney of record in the attorney's individual name. A party who is not represented by an attorney must sign the pleading, motion or other paper (RCP Rule 11).

³ The Rules of the Housing Court in Hennepin and Ramsey Counties contain the same requirements. Minn.Gen.R.Prac. Rules 604-605.

⁴ The Housing Court Rules provide that no person "other than a principal or a duly licenced lawyer shall be allowed to appear in Housing Court unless the Power of Authority [for an agent suing on behalf of a principal] is attached to the complaint at the time of filing" Minn.Gen.R.Prac. Rule 603.

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- (2) A person who is not a licensed attorney-at-law is not authorized to conduct a jury trial, or appear pursuant to an appeal in the district court or court of appeals, in any FED Action (MSA § 481.02 Subd. 3(13)).
- (3) Lawyers permitted to practice in the trial courts of other jurisdictions may appear in any Minnesota court provided the pleadings also are signed by a lawyer admitted to practice in Minnesota and that lawyer also is present before the court (Minn.Gen.R.Prac. Rule 5).
- (4) A party filing a civil case must notify the court administrator of the name, address and telephone number of all counsel and unrepresented parties (Minn.Gen.R.Prac. Rule 104).
- (5) After a lawyer has appeared for a party in any action, withdrawal will be effective only if written notice of withdrawal is served on all parties who have appeared, or their lawyers if represented by counsel, and is filed with the court administrator (Minn.Gen.R.Prac. Rule 105).

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

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

Under the FED Statute, the defendant may produce evidence and offer rebutting evidence after the plaintiff has stated the issue and produced the plaintiff's evidence. MSA § 546.11. All evidence admissible under the Minnesota statutes or Rules of Evidence will be admitted, with any statute or rule favoring the reception of evidence governing. RCP Rule 43.01.

Preliminary questions concerning the qualification of a witness or the admissibility of evidence are determined by the court (which is bound by the rules of evidence with respect to privileges only). MRE § 104(a). All relevant evidence is admissible, except as otherwise provided by the United States Constitution, statute or the rules applicable to the Minnesota courts. MRE § 402. "Relevant evidence" is defined as "evidence having a tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE § 401.

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The court, by subpoena, may command a person to appear for the purpose of testifying in open court and producing specified documentation or other tangible items. RCP Rule 45.01-.02. Failure to comply with a subpoena without adequate excuse is contempt of court. RCP Rule 45.07.

A witness who is an adverse party, or is identified with an adverse party, may be cross-examined, contradicted, and impeached by any other party adversely affected by the testimony of the witness. RCP Rule 43.02. Cross-examination, however, is limited to the subject matter of the direct examination and matters affecting the credibility of the witness, unless the court in its discretion permits inquiry into additional matters as if on direct examination. MRE § 611(b).

Based on the foregoing, and the basic right under the due process clause of the Minnesota Constitution (Article I, Section 7) to confront and cross-examine witnesses and refute the evidence presented against a party, a tenant in a FED Action has the opportunity to refute the evidence presented by the PHA, including the right to confront and cross-examine witnesses.

D. Opportunity to present any affirmative legal or equitable defense which the tenant may have (24 C.F.R. § 966.53(c)(3)).

The FED Statute provides that at the time and place appointed in the summons "the defendant, on appearing, may answer the complaint, and all matters in excuse, justification, or avoidance of the allegations thereof shall be set up in the answer . . ." MSA § 566.07. Among the defenses available are specific defenses set forth in the FED Statute, affirmative defenses specified in the Rules of Civil Procedure, and those confirmed by case law, including the following:

- (1) that a notice to quit was intended as a penalty for the defendant's good faith attempt to secure or enforce its rights under the lease, any other agreement or under the law (MSA § 566.03 Subd.2(1));
- (2) that a notice to quit was intended as a penalty for the defendant's good faith reporting of a health, safety or housing code violation (MSA § 566.03 Subd.2(2));
- (3) duress, fraud, illegality, statute of frauds, release, waiver and any other matter constituting an avoidance or affirmative defense (RCP Rule 8.03);

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- (4) the plaintiff breached the covenant of habitability which was incorporated by statute into every residential lease (Fritz v. Warthen, 298, Minn. 54, 213 N.W.2d 339 (1973)); and
- (5) the plaintiff waived its right to terminate the tenancy (Arcade Inv. Co. v. Gieriet, 99 Minn. 277, 109 N.W. 250 (1906); Priordale Mall Investors v. Farrington, 411 N.W.2d 582 (Minn. App. 1987)).

The FED Statute permits the tenant to raise all defenses, whether legal or equitable to the landlord's claim for possession. The purpose of a FED Action is to provide a summary proceeding to determine quickly the right to present possession of property. White Earth Housing Authority v. Schwabe, 375 N.W.2d 568 (Minn.App. 1985). Defenses that relate to the tenant's possession of the premises will be permitted. University Community Properties, Inc. v. Norton, 311 Minn. 18, 246 N.W.2d 858 (1976).

Based upon the statutes, case law and the due process clause of the Minnesota Constitution, a tenant must have the opportunity to present affirmative defenses which are germane to the issue of possession under the FED Statute.

E. A decision on the merits (24 C.F.R. § 966.53(c)(4))

Any verdict of the jury, or finding of the court, in favor of the plaintiff under the FED Statute must state that the facts alleged in the complaint are true and that the plaintiff is entitled to restitution of the premises. (If the verdict or finding is for the defendant, it is sufficient to find that the alleged facts are not true. MSA § 566.15.)

Either party may demand a trial by jury. MSA § 566.07. The jury's verdict may be either a general verdict, in which the jury finds generally upon all the issues, or a special verdict, in which the jury only finds the facts. A special verdict must present the conclusions of fact as established by the evidence so that nothing remains to the court but to draw conclusions of law from the facts. MSA § 546.19. Rule 49 of the Rules of Civil Procedure specifies further procedures necessary to ensure that the jury's decision is based upon the merits of the case. A motion also may be made for a judgment notwithstanding the verdict, which will be granted if the moving party would have been entitled to a directed verdict at the close of the evidence. RCP Rule 50.02.

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In an action tried without a jury (or with an advisory jury), the court must find the facts specially, state separately its conclusions of law thereon and direct entry of the appropriate judgment. The findings of a referee, to the extent adopted by the court, will be considered as findings of the court.⁵ RCP Rule 52.01.

A decision on the merits also is required by the due process clause of the Minnesota Constitution. Article I, Section 7.

V. Conclusion

Minnesota law governing a FED Action in the Minnesota District Court (or in the Housing Courts of Hennepin and Ramsey Counties) 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 C.F.R. § 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 Minnesota may evict a public housing tenant pursuant to a FED Action in the Minnesota District Court (or in the Housing Courts of Hennepin and Ramsey Counties) for 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 the premises, and is not required to first afford the tenant the opportunity for an administrative hearing on the eviction.

⁵ The recommended findings and orders of the referee become the findings and orders of the court when confirmed by a District Court judge. 1989 Minn. Chapter Law 328 § 17 subd.5. In the alternative, either party may request that a judge hear a case by filing such a request at least one day prior to the scheduled hearing date. Minn.Gen.R.Prac. § 602.