

Legal Opinion: GCH-0017

Index: 2.245

Subject: PH Due Process Determination: Colorado

December 3, 1991

Honorable Roy R. Romer  
Governor of Colorado  
Denver, Colorado 80203

Dear Governor Romer:

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

Under Federal law, if the Secretary of the Department of Housing and Urban Development (HUD) determines that 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 recently 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 Colorado law governing an action for unlawful detainer in the Colorado district and county courts 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 Colorado 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 Colorado unlawful

detainer action action in the Colorado district or county court 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,

Jack Kemp

Enclosure

HUD DUE PROCESS DETERMINATION

for the

STATE OF COLORADO

TABLE OF CONTENTS

- I. Jurisdiction
- II. Elements of Due Process
- III. Overview of Colorado Eviction Procedures
- IV. Analysis of Colorado Eviction Procedures for Each of the Regulatory Due Process Elements
- V. Conclusion

ANALYSIS

I. Jurisdiction: State of Colorado

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;
- (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

#### Colorado Due Process Determination

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 Colorado to determine if unlawful detainer procedures under those laws require 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 Colorado law governing an action for unlawful detainer in the district and county courts under Colo. Rev. Stat. 15-40-104 to -123 (1987) 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 Colorado Constitution, statutes, case law and court rules.

#### III. Overview of Colorado Eviction Procedures

The eviction procedures for unlawful detainer in Colorado are set forth in Colo. Rev. Stat. 13-40-104 to -123 (1987, Supp. 1989). Except as provided in the unlawful detainer statute, such cases are governed by the rules of practice and provisions of law concerning civil actions in the court in which the case is brought. Colo. Rev. Stat. 13-40-119 (1987).

An action for unlawful detainer may be brought in the Colorado district court or county court. Colo. Rev. Stat. 13-40-109 (1987). For district court cases, the Colorado Rules of Civil Procedure control (C.R.C.P. Rules 1-266), while for county court cases the Colorado Rules of County Court Civil Procedure apply (C.R.C.P. Rules 301-411). The procedural rules in the district court and the county court are substantially the same, but the county court's jurisdiction is limited to cases where the monthly rental value of the property at issue does not exceed ten thousand dollars.

The Colorado Constitution also governs unlawful detainer cases. In determining whether a "jurisdiction . . . requires" basic elements of due process for purposes of section 6(k), these elements may be found in State constitutional provisions, as well

as in other valid sources of State law, such as State statute,

2

#### Colorado Due Process Determination

regulation or common law. Article II, section 25 of the Colorado Constitution provides: "No person shall be deprived of life, liberty or property, without due process of law." The Colorado Supreme Court has held that this provision requires, at a minimum, the same guarantees as those protected by the due process clause of the Federal Constitution. *Air Pollution Variance Bd. v. Western Alfalfa Corp.*, 191 Colo. 455, 553 P.2d 811 (1976).

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

The following discussion will consider separately each element of the regulatory due process definition and demonstrate that each element is satisfied in the action for unlawful detainer in Colorado district court and county court under Colorado law.

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

The landlord commences an eviction action for unlawful detainer by filing a complaint with the court. *Colo. Rev. Stat.* 13-40-110 (1987). The complaint must describe the property with reasonable certainty, the grounds for the recovery, the name of the person in possession or occupancy, and a prayer for recovery of possession. *Id.* The complaint must be served upon the defendant by personal service or, if that is not possible despite diligent effort, by posting it in some conspicuous place upon the premises. *Colo. Rev. Stat.* 13-40-112 (1987).

Clearly, the Colorado unlawful detainer statute requires that adequate notice be given to the tenant. This is also required by the due process clause of the Colorado Constitution. *Public Utils. Comm'n v. Colorado Motorway, Inc.*, 165 Colo. 1, 437 P.2d 44 (1968).

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

As noted above, the Colorado Supreme Court has held that the Colorado Constitution's guarantee of due process of law requires, at a minimum, the same guarantees as those granted by the due process clause of the Federal Constitution. *Air Pollution Variance Bd.*, 191 Colo. 455, 553 P.2d 811. In *Aspen Properties Co. v. Preble*, 780 P.2d 57, 58 (Colo. Ct. App. 1989), the court found that such guarantees include the right to retain counsel.

3

Colorado Due Process Determination

To come to this result, the court found that a civil litigant's right to due process of law includes the right to cross-examine witnesses and to have an opportunity for rebuttal and that, in order to exercise these rights fully, due process requires that civil litigants be allowed to secure assistance of counsel. *Id.*

- 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))

In district court:

. . . all evidence shall be admitted which is admissible under the statutes of this state or of the United States (excepting the Federal Rules of Evidence which became effective July 1, 1975) or under the rules of evidence heretofore applied in the trial of actions in the courts of this state. In any case, the statute or rule which favors the reception of the evidence governs . . . .  
(C.R.C.P. 43(a))

Except to the limited extent that depositions and interrogatories may be used at trial pursuant to C.R.C.P. 32 and 33, the testimony of witnesses must be taken orally and in open court. C.R.C.P. 43(a).

The district court rules permit a party to call an adverse party or an officer, director, employee or management agent of an adverse party and interrogate him by leading questions and contradict and impeach him. A party may interrogate any unwilling or hostile witness by leading questions. A party may cross-examine an adverse party only upon the subject matter of his examination in chief. C.R.C.P. 43(b).

The county court rules on admissibility of evidence and confrontation of witnesses are practically identical to the district court rules. C.R.C.P. 343(a) and (b).

Thus, in district court and county court the tenant has the opportunity pursuant to the Colorado Rules of Civil Procedure and the Colorado Rules of County Court Civil Procedure to refute the evidence presented by the PHA including the right to confront and cross-examine witnesses. Such opportunity is also required by the due process clause of the Colorado Constitution. *Air Pollution Variance Board*, 553 P.2d 811; *Aspen Properties*, 780 P.2d 57.

Colorado Due Process Determination

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

The Colorado unlawful detainer statute requires the defendant to file an answer with the court setting forth the grounds on which the defendant bases a claim for possession and presenting every defense to the complaint which then exists and upon which the defendant intends to rely. Colo. Rev. Stat. 13-40-113(1) (1987). The Colorado Supreme Court has held that this statute permits the defendant to raise both legal and equitable defenses in such cases. *Adcock v. Lieber*, 51 Colo. 373, 117 P. 993 (1911) There are no limitations on the opportunity of the tenant to present any available legal or equitable defense to the landlord's claim for possession.

Thus, under Colorado law, the tenant has the opportunity to present any legal or equitable defense which the tenant may have.

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

In an unlawful detainer action, Colorado law requires that the trier of fact determine whether the defendant has committed an unlawful detainer. Colo. Rev. Stat. 13-40-115 (1987). It is an error to issue a writ of restitution where the legal relation between the parties is unresolved or the entitlement to the property is still in question. *Lindsay v. District Crt.*, 694 P.2d 843 (Colo. 1985).

In a district court jury trial, the jurors are sworn to "try the matter at issue" and to render a true verdict "according to the evidence." C.R.C.P. 47(i) (1973). Additionally, the court is required to instruct the jury as to the prevailing law applicable to the evidence. C.R.C.P. 51.1 (1973). In a bench trial the court must make findings of fact and conclusions of law. C.R.C.P. 52 (Supp. 1988).

The procedures for both bench and jury trials in county court are substantially the same as those in district court. C.R.C.P. 351.1, 352(a) (1984).

These rules imply that in district or county court, whether the decision is by the judge or the jury, the decision must be made on the merits. In addition, the Colorado Supreme Court has held that due process requires a decision upon the evidence. *Colorado Motorway*, 437 P.2d 44.

V. Conclusion

5

#### Colorado Due Process Determination

Colorado law governing the unlawful detainer procedure in the district and county courts 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 due process determination under section 6(k) of the U.S. Housing Act of 1937, a PHA in Colorado may evict

a public housing tenant pursuant to a district or county court decision in an unlawful detainer proceeding for any grievance involving 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, and is not required to first afford the tenant the opportunity for an administrative hearing on the eviction.