

Legal Opinion: GCH-0025

Index: 2.245

Subject: PH Due Process Determination: California

December 3, 1991

Honorable Pete Wilson
Governor of California
Sacramento, California 95814

Dear Governor Wilson:

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

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 law governing an action for unlawful detainer in the superior, municipal and justice courts of the State of California 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 California 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 public housing tenant pursuant to an unlawful detainer action 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

DUE PROCESS DETERMINATION

FOR THE

STATE OF CALIFORNIA

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ANALYSIS

- I. Jurisdiction: State of California
- 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 public housing agency (PHA) including the right to confront and cross-examine witnesses and

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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 California to determine if an eviction action for unlawful detainer 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 California law governing an action for unlawful detainer in the superior, municipal and justice 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 California Civil Procedure Code (CCP), the California Civil Code (CC), case law and court rules. III. Overview of California Eviction Procedures.

CCP 1161 defines unlawful detainer to include evictions because of (1) termination of tenancy at will; (2) possession after default in rent; (3) failure to perform conditions of lease; (4) subletting, waste, nuisance and unlawful use; and (5) failure to quit after notice. This determination will focus on the use of an unlawful detainer action for those evictions which may be excluded from a PHA's grievance procedure pursuant to a HUD due process determination (i.e., evictions for drug-related criminal activity or criminal activity that threatens a tenant's or a PHA employee's health or safety). Thus, the analysis will consider unlawful detainer evictions because of failure to perform conditions of the lease or because of unlawful use.

The California Constitution, Art. 6, Section 10, provides, inter alia: "Superior Courts have original jurisdiction in all causes except those given by statute to other trial courts." California statute gives such original jurisdiction to municipal and justice courts in most residential eviction cases. CCP 86 provides:

- (a) Each municipal and justice court has original jurisdiction of civil cases and proceedings as follows . . .
i n all proceedings in forcible entry or forcible or unlawful detainer where the whole amount of damages claimed

is twenty-five thousand dollars (\$25,000) or less

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Owners, including PHA's, may bring unlawful detainer actions in municipal or justice court, or if recovery of over \$25,000 is being sought, superior court. Actions in these courts are subject to the requirements of the CCP.

IV. Analysis of California 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)).

As the first step in an eviction for breach of a lease covenant or condition other than rent, or for violation of a covenant or condition prohibiting use of the premises for an unlawful purpose (CCP Section 161(2)(3)(4)), the landlord must give three days' notice of the termination of tenancy to the tenant. After this notice, a verified complaint is filed pursuant to CCP Section 1166. The complaint:

must set forth the facts on which (the plaintiff) seeks to recover, and describe the premises with reasonable certainty, and may set forth therein any circumstances of fraud, force, or violence which may have accompanied the alleged forcible entry or forcible or unlawful detainer Upon filing the complaint, a summons must be issued thereon.

Pursuant to CCP Section 1167, the summons and complaint in an action for unlawful detainer are issued and served and returned in the same manner as a summons in a civil action "except that when the defendant is served, the defendant's response shall be filed within five days after the complaint is served upon him or her, instead of the usual 30 days" The shorter response period is required because unlawful detainer actions are summary proceedings and has been held not to deny due process in *Deal v. Municipal Court (Tilbury)*, 204 Cal. Rptr. 79 (157 Cal. App. 3rd 991)(1984).

Procedures for service are prescribed by CCP 1162. The complaints and summons required by CCP 1162 may be served by (a) delivering a copy to the tenant personally; (b) leaving a copy with a person of suitable age and discretion at either the place of residence or usual place of business; (c) or by posting.

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In addition to the above notice requirements, California Health and Safety Code, Section 34331, in the Housing Authorities

Law, provides that:

In the operation or management of housing projects, an authority shall not do any of the following: (a) Evict any tenant without reasonable cause unless the tenant has been given a written statement of such cause

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

Statutes and court rules governing actions in superior, municipal and justice courts include references to counsel, and assume the right to be represented by counsel, e.g., California Court Rule 376 (motion to be relieved as counsel), CCP 284 (change of attorney), CCP 283 (authority: attorneys and counselors at law). CCP 1014 provides that "a defendant appears in an action when he answers, demurs . . . or when an attorney gives notice of appearance for him."

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)).

Under CCP 2002 the testimony of witnesses is taken in three modes: (1) affidavit, (2) deposition and (3) oral examination. Oral examination is defined under CCP 2005 as an "examination in the presence of the jury or tribunal which is to decide the fact or act upon it, the testimony being heard by the jury or tribunal from the lips of the witness." Section 773 of the California Evidence Code provides that a witness examined by one party may be cross-examined upon any matter within the scope of the direct examination by each other party to the action in such order as the court directs.

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

CCP 1170 provides that "on or before the day fixed for his appearance the defendant may appear and answer or demur." CCP 431.30(b) provides that "the answer to a complaint shall contain: (1) the general or specific denial of the material allegation of the complaint . . . (2) a statement of any new matter constituting a defense."

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In summary the rule:

. . . is that a defense normally permitted because it arises out of the subject matter of the original suit is generally excluded in an unlawful detainer action if such defense is extrinsic to the narrow issue of possession, which the unlawful detainer procedure seeks speedily to resolve. Fn. omitted. ' No . . .

California decision, however, prohibits a tenant from interposing a defense which does directly relate to the issue of possession and which, if established, would result in the tenant's retention of the premises. (emphasis added) Fn. omitted (Green v. Superior Court (1974) 10 Cal. 3d 616, 632-633, 111 Cal. Rptr. 704, 517 P. 2d 1168).

Deal v. Municipal Court (Tilbury), 204 Cal. Rptr. 79 (157 Cal. App. 3d 991)(1984) noted that under the California Rules of Court, the mandatory form of answer "contains the affirmative defenses now recognized in California." Deal was cited with approval in Lynch & Freytag v. Cooper, 267 Cal. Rptr. 189, 192 (1990): ". . . the constitutionality of these summary procedures is based on their limitation to the single issue of right to possession and incidental damages."

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

Section 632 of the CCP provides for courts in non-jury trials to "issue a statement of decision explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial upon the request of any party appearing at the trial" In jury trials the jury's verdict must be made on the basis of the facts and the law. CCP 592 states that " i n actions for the recovery of . . . real property . . . with or without damages . . . an issue of fact must be tried by a jury unless a jury trial is waived." Where issues of law and fact both exist, the former must be disposed of first by the court.

V. Conclusion.

California law governing an unlawful detainer action in the superior, municipal and justice 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.

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By virtue of this determination under section 6(k) of the U.S. Housing Act of 1937, a PHA in California may evict a tenant pursuant to a superior, municipal or justice court decision. For such evictions, the PHA is not required to first afford the tenant the opportunity for an administrative hearing on an unlawful detainer action 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.