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HUD DUE PROCESS DETERMINATION

for the

STATE OF ALABAMA

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ANALYSIS

I. Jurisdiction: Alabama

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 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 Alabama to determine if eviction procedures under those laws require a hearing with all of the regulatory "elements of due process", as defined in 966.53(c).

HUD finds that the requirements of Alabama law governing evictions pursuant to an unlawful detainer action or pursuant to a possessory action under the Sanderson Act include all of the elements of basic due process, as defined in 24 CFR 966.53(c). This conclusion is based upon requirements in the Alabama Constitution, code, case law and court rules.

III. Overview of Alabama Eviction Procedures

In order to evict a tenant in Alabama, the landlord must institute either an unlawful detainer action (Ala. Code 6-6-310(2) to 6-6-353 (1975)), or a possessory action under the Sanderson Act (Ala. Code 35-9-80 to 35-9-88 (1975)).

Unlawful Detainer Action

Section 6-6-310(2) of the Alabama Code states that unlawful detainer shall mean the following:

where one who has lawfully entered into possession of lands as tenant fails or refuses, on 10 days demand in writing after the termination of his possessory interest, to deliver possession thereof to anyone lawfully entitled thereto, his agent or attorney; and it is sufficient to leave a copy of such demand in writing at the usual place of abode of the party holding over.

The district courts have jurisdiction over unlawful detainer actions (12-12-30). Proceedings in the district courts are governed by the Alabama Rules of Civil Procedure. Alabama Code Section 12-12-11 states that:

The Alabama Rules of Civil Procedure shall be applicable to all civil actions brought in the district court, except as they are inconsistent with this chapter and except as the supreme court may otherwise provide by rule.

(In this due process determination "Rule" is used to designate citations to the Alabama Rules of Civil Procedure.)

Possessory Action under the Sanderson Act

Ala. Code 35-9-80 to 35-9-88 is popularly known as the "Sanderson Act". This statute authorizes eviction proceedings in the nature of an action in unlawful detainer. Section 35-9-80 states that:

in all cases where a tenant shall hold possession of lands or tenements over and beyond the term for which the same were rented or leased to him, or after his right of possession has terminated or been forfeited, and the owner of the lands or tenements shall desire possession of the same, such owner may by himself, his agent or attorney-in-fact . . . demand the possession of the property

The district courts have jurisdiction over possessory actions under the Sanderson Act (35-9-80). As stated above, proceedings in the district courts are governed by the Alabama Rules of Civil Procedure.

A possessory action under the Sanderson Act is intended to afford a more speedy remedy to a landlord to recover possession of land after expiration of the term of the lease or right of possession by the tenant. The Sanderson Act procedure is in the nature of an action in unlawful detainer, and must be read in pari materia with the unlawful detainer statute. Glenn v. Nixon, 248 Ala. 569, 28 So. 2d 718 (1946). The general principles which relate to actions of unlawful detainer have application to possessory actions under the Sanderson Act. Riley v. Riley, 257 Ala. 636, 60 So. 2d 432 (1952).

Alabama Constitution -- Due Process Clause

Possessory actions are subject to the due process clause of the Alabama Constitution. Article I, Section 6 of the Alabama Constitution provides that no citizen shall "be deprived of life, liberty, or property, except by due process of law".

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IV. Analysis of Alabama 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))

- 1. Notice Prior to Commencement of Action

Notice to Quit

Before commencing an action to evict a tenant for breach of the lease or default of the terms of the lease, the landlord must provide the tenant with 10 days' notice of termination or notice to quit (hereafter both types of notice are referred to as "notice to quit") (35-9-6). The notice to quit requirement applies both to an eviction by action for unlawful detainer, and to an eviction by action under the Sanderson act.

The notice to quit must state the specific reason for the termination of the lease, including the "character of the default" (35-9-6). Thus, in an eviction for breach or default under the lease, the notice would provide adequate notice of the grounds for eviction.

A notice of termination or notice to quit may be served by delivering a copy to the tenant, or by leaving the same with some person above the age of 18 years, residing on or in possession of the premises. If no one is in the actual possession of the premises, the notice may be served by posting on the premises (35-9-7).

Demand for Possession

After completing the notice of termination or notice to quit, the landlord must serve a demand for possession of the property (unlawful detainer action: 6-6-310 (requires 10 days' demand); Sanderson Act proceeding: 35-9-80). The demand for possession may not be served until termination of the tenant's right of possession (i.e., after completion of any required notice to quit).

For an unlawful detainer action, the demand for possession may be served by leaving the notice at the tenant's usual place of abode (6-6-310).

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After completion of the required pre-action notice to quit and demand for possession, the landlord may commence the eviction action (unlawful detainer or Sanderson Act proceeding).

2. Notice at Commencement of Action

Action for Unlawful Detainer

An action for unlawful detainer is commenced by filing a complaint with the court (Rule 3). Upon the filing of the complaint, the clerk issues the required summons or other process for service upon the defendant (Rule 4(a)). Service of the summons may be made by delivering a copy to the defendant in person, by certified mail, or upon motion, by publication (Rules 4(c), 4.1(c) and 4.3).

A copy of the complaint shall be attached to each summons (Rule 4(a)). The complaint must contain a short and plain

statement of the claim showing that the pleader is entitled to relief, and a demand for judgment for the relief requested (Rule 8(a)). The statement of claim in the complaint constitutes an adequate statement of the "grounds" for eviction as required by HUD's due process definition at 24 CFR 966.53(c).

Upon receiving the complaint, the district court judge must issue a notice to the party against whom the complaint is made directing the defendant to appear and answer to, and make defense against the complaint (6-6-332(a)). It appears that this notice to appear and defend constitutes the summons in the unlawful detainer action. Pursuant to the Alabama Civil Rules, a copy of the complaint must be attached to the summons (Rule 4(a)).

The notice must be served on the defendant at least six days before the return day of the process. It is sufficient to leave a copy of the notice at the defendant's usual place of abode (6-6-332(b)).

Possessory Action Under the Sanderson Act

In a possessory action under the Sanderson Act, if the tenant fails to deliver possession of the property upon the owner's demand, the owner may "make oath of the facts" before the district court (35-9-80). We construe this to signify that the oath (affidavit of the facts) must constitute a statement of the facts which are the basis for the action, and thus of the owner's

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alleged grounds for eviction of the tenant. We presume moreover that the affidavit must be held on file at the court, available for inspection by the defendant.

Upon filing of the landlord's affidavit, the district court must issue a writ or process directing the sheriff to deliver possession of the property to the owner (35-9-81). The sheriff must then serve the writ on the tenant. The writ states where the land lies, and requires the tenant to deliver quiet possession.

The writ or process must be served on the tenant by leaving the same with a person over the age of 18 years; by posting a copy of the writ or process on the door of the premises; or by first class mail (35-9-82).

Adequate Notice: Conclusion

In actions for breach of the lease adequate notice of the grounds is provided in the notice to quit prior to commencement of the action. For an unlawful detainer action, adequate notice is also provided by service of the complaint on the tenant under the Civil Rules. For a Sanderson Act eviction, landlord's "oath of facts" (affidavit) filed with the court contains adequate

notice of the grounds for eviction.

Based on the foregoing, adequate notice of the grounds for eviction is required by Alabama law in both an unlawful detainer action and a possessory action under the Sanderson Act. Adequate notice of the grounds for eviction is also required by the due process clause of the Alabama State Constitution. Article I, Section 6.

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

The right of a defendant to be represented by counsel is implied throughout the Alabama Rules of Civil Procedure. For example, Rule 5(b) states that service shall be made upon the attorney unless service upon the party is ordered by the court. In addition, many decisions in eviction cases take notice that the tenant in the case was represented by counsel. *Arfor-Brynfield, Inc. v. Huntsville Mall Associates*, 479 So. 2d 1146 (1985); *Mitchell v. Rogers*, 370 So. 2d 263 (1979).

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The tenant has the right to be represented by counsel under the due process clause of the Alabama Constitution. Article I, Section 6.

- 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 both an unlawful detainer action and a possessory action under the Sanderson Act, "all testimony, except as otherwise directed, must be given in open court on the oath or affirmation of the witness" (12-21-135). Furthermore, in either type of eviction proceeding, "the right of cross-examination, thorough and sifting, belongs to every party as to the witnesses called against him" (12-21-137).

The defendant tenant may present witnesses to refute the PHA's evidence. The Alabama Code states that any party to the pending case shall have the power to subpoena witnesses (12-21-180).

The requirements for an unlawful detainer action or a Sanderson Act possessory action provide opportunity for the tenant to refute evidence presented by the PHA, including the right to confront and cross-examine witnesses. The due process clause of the Alabama Constitution also gives the right to confront and cross-examine witnesses. Article I, Section 6.

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

In an unlawful detainer action, ". . . all legal and equitable defenses may be had against a recovery . . . for the unlawful detention of the land" (6-6-336).

In a possessory action under the Sanderson Act, the tenant also has the opportunity to present any affirmative legal or equitable defense. A writ or process is served by the sheriff requiring plaintiff to deliver possession of the property. The tenant will be evicted from the land after the writ or process unless the tenant states on oath in a counter affidavit that he still has a lawful right to the possession of the premises (35-9-84). Only after the counter affidavit is delivered does the dispute proceed to trial (35-9-85). The tenant may put forth any available defenses at the trial (35-9-84, 35-9-85).

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Rule 8(b) of the Alabama Rules of Civil Procedure states that a party 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.

Rule 8(c) further states that in pleading to a preceding pleading, a party shall:

set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress . . . and any other matter constituting an avoidance or affirmative defense.

A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or on equitable grounds, or on both (Rule 8(e)).

Under the court rules and statutes, the tenant has the right to present any available affirmative defense which might defeat the landlord's claim to possession.

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

Section 12-12-3 provides that "all cases in the district court shall be tried by the judge, who shall determine all issues of law and fact without a jury."

Section 6-6-319 provides that in an unlawful detainer action "the judge must record the decision and enter judgment"

Section 35-9-86 requires "judgment after resolution of the issues before the court" in a possessory action under the Sanderson Act.

These provisions require a decision on the merits -- based upon the facts and the law. The opportunity for a decision on the merits is also required by the due process clause of the Alabama State Constitution. Article I, Section 6.

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V. Conclusion

Alabama law governing eviction procedures in the Alabama district court 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 by HUD under section 6(k) of the U.S. Housing Act of 1937, a PHA in Alabama may evict a public housing tenant pursuant to a district court decision in an unlawful detainer action (Ala. Code 6-6-310 et seq.) or in a possessory action under the Sanderson Act (Ala. Code 35-9-1 et seq.) 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. The PHA is not required to first afford the tenant the opportunity for an administrative hearing on the eviction.

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