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Subject: PH Due Process Determination: Montana

January 28, 1992

HUD DUE PROCESS DETERMINATION

for the

STATE OF MONTANA

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ANALYSIS

I. Jurisdiction: Montana

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 Montana 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 Montana law governing eviction by an action for possession in the Montana district or justice court under the Montana Residential Landlord and Tenant Act of 1977 (Mont. Code Ann. Title 70, Chapter 24) (M.R.L.T.A.) 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 Montana State Constitution, statutes, case law and court rules.

III. Overview of Montana Eviction Procedures

Eviction procedures for residential rental property are stated in the Montana Residential Landlord and Tenant Act of 1977, Mont. Code Ann. Title 70, Chapter 24 (70-24-101 to 70-24-442). Except in limited instances, such as abandonment or surrender, a landlord may not recover or take possession of a dwelling unit by self-help. Mont. Code Ann. 70-24-428. After the expiration or termination of the rental agreement, the landlord may bring an action for possession. Mont. Code Ann. 70-24-427 and 70-24-429.

Both the district courts and justice courts have jurisdiction over eviction cases under the Montana Residential Landlord and Tenant Act of 1977. Mont. Code Ann. 3-5-302(1); Mont. Code Ann. 3-10-30. Procedures for eviction actions in the district court are governed by the Montana Rules of Civil Procedure (M.R.Civ.P.). M.R.Civ.P. Rule 1, 81. Procedures for eviction actions in the justice court are governed by the Montana Justice Courts Rules of Civil Procedure (M.J.C.R.C.P.). M.J.C.R.C.P. Rule 1. Proceedings in district and justice courts are governed by the Montana Rules of Evidence (M.R.E.). M.R.E. Rule 101.

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Actions for eviction are subject to the due process clause

of the Montana State Constitution. Article II, 17 of the Montana Constitution provides that "no person shall be shall be deprived of life, liberty or property without due process of law."

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 eviction in Montana district or justice court.

IV. Analysis of Montana State 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))

Lease Termination Notice

An action for possession may only be brought after expiration or termination of the lease. Montana Residential Landlord and Tenant Act of 1977 (M.R.L.T.A.) 70-24-427 and 70-24-429. To evict a tenant holding possession under a lease, the landlord must first terminate the tenant's lease. M.R.L.T.A. 70-24-427. To terminate the lease for noncompliance with the lease, or for noncompliance with tenant obligations affecting health or safety (established by M.R.L.T.A. 70-24-321), the landlord must deliver written notice to the tenant "specifying the acts and omissions constituting the breach" M.R.L.T.A. 70-24-422(1). Notice must be given in accordance with M.R.L.T.A. 70-24-108. In general, the notice must be delivered or mailed to the tenant. M.R.L.T.A. 70-24-108(1).

Where required, a notice of non-compliance is adequate notice of the grounds for eviction.

Notice by Process in Action

In district court or justice court, the landlord commences an eviction action by filing a complaint with the court. Montana Rules of Civil Procedure (M.R.Civ.P.) 3; Montana Justice Courts Rules of Civil Procedure (M.J.C.R.C.P.) 3. Upon filing of the complaint, a summons is issued by the court, notifying the defendant of the opportunity to appear and defend the action. M.R.Civ.P. 4C; M.J.C.R.C.P. 4C. The summons and complaint must be served on the defendant. M.R.Civ.P. 4D; M.J.C.R.C.P. 4D.

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In district court, the complaint must contain "a short and plain statement of the claim showing that the plaintiff is entitled to relief." M.R.Civ.P. 8(a). In justice court, the complaint is a "concise statement in writing of the facts constituting the plaintiff's cause of action" (or a copy of the account, note, bill, bond, or instrument upon which the action is

based). M.J.C.R.C.P. 7A.

For an action in district or justice court, service of the summons and complaint gives adequate notice of the eviction action and of the grounds for eviction.

State Due Process Clause

Adequate notice of the grounds for eviction is required by the due process clause of the Montana Constitution. Article II, 17. The due process clause of the Montana Constitution requires notice reasonably calculated to apprise a party of proceedings affecting a legally protected interest. Great Northern Railway Co. v. Roosevelt County, 134 Mont. 355, 332 P.2d 501 (1958).

Notice: Conclusion

Montana law requires adequate notice of the grounds for termination and eviction. Such notice is provided by notice of lease termination prior to commencement of action, and by service of process in the action.

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

The right to be represented by counsel may be inferred from references to the role of counsel throughout the Montana Residential Landlord and Tenant Act of 1977, the Montana Rules of Civil Procedure, and the Montana Justice Court Rules of Civil Procedure.

For example, 70-24-442 of the Montana Residential Landlord and Tenant Act of 1977 provides that "in an action on a rental agreement or arising under this chapter, reasonable attorney fees . . . may be awarded to the prevailing party" Court rules require that whenever service is made upon a party represented by counsel, the service must be made upon the attorney unless the court orders otherwise. M.R.Civ.P. 5(b); M.J.C.R.C.P. 5B.

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The due process clause of the Montana Constitution also guarantees the right to be represented by counsel. Article II, 17; In re Simmons, 698 P.2d 850 (Mont. 1985).

- 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))

The Montana Rules of Evidence govern eviction proceedings in all courts in the State of Montana. M.R.E. 101. In both district and justice courts:

All relevant evidence is admissible, except as otherwise provided by constitution, statute, the M.R.E. , or other rules applicable in the courts of this state.
M.R.E. 402.

A witness must have personal knowledge of a matter. M.R.E. 602. A party may cross-examine witnesses. M.R.E. 611(b), (c) and (d). To provide opportunity for a party to confront witnesses, "a witness can be heard only in the presence and subject to the examination of all parties" (with limited exceptions specified in State law and court rules). M.R.E. 611(e). A party may call a hostile or adverse witness, and interrogate the witness by leading questions. M.R.E. 611(c). A witness may be cross-examined on the subject of the direct examination. M.R.E. 611(b)(1).

The court's control over the mode and order of interrogating witnesses is intended to "make the interrogation and presentation effective for the ascertainment of the truth." M.R.E. 611(a). Thus the defendant in an eviction action, as in other civil actions, has the right to confront and cross-examine witnesses, subject to the normal judicial control over conduct of the trial.

A party may challenge the credibility of a witness through cross-examination. M.R.E. 611(b)(1). The credibility of a witness may be attacked by any party. M.R.E. 607(a). No party is bound by the testimony of any witness. M.R.E. 607(b). Relevant evidence may include evidence bearing upon the credibility of a witness. M.R.E. 401. Credibility of the witness may be attacked by evidence concerning the witness' character or conduct. M.R.E. 608. Credibility of a witness may be impeached by evidence of a prior inconsistent statement. M.R.E. 614.

The tenant may present evidence or witnesses to refute the case presented by the plaintiff, subject to reasonable judicial

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control over the "mode and order" of presenting witnesses and evidence. M.R.E. 611. The tenant may subpoena the attendance of witnesses or the production of other evidence. Mont. Code Ann. Title 26, Chapter 2, Part 1 (26-2-101 to 26-2-107; 26-2-301 and 26-2-302); M.R.Civ.P. Rule 45 (district court). A subpoenaed witness must attend the trial and answer questions. Mont. Code Ann. 26-2-301 and 26-2-302.

Based on the above, HUD concludes that for an eviction in district or justice court, the tenant has the opportunity to refute the evidence presented by the PHA, including the right to confront and cross-examine witnesses. In addition, the opportunity to refute evidence and cross-examine witnesses is required by the due process clause of the Montana Constitution. Article II, 17.

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

The Montana Rules of Civil Procedure and Montana Justice Court Rules of Civil Procedure provide for one form of action to be known as a "civil action." M.R.Civ.P. Rule 2; M.J.C.R.C.P. Rule 2.

In district court, the defendant must state any defenses to each claim asserted. M.R.Civ.P. Rule 8(b). Montana law enumerates certain "affirmative defenses" which must be affirmatively pleaded by a defendant. M.R.Civ.P. Rule 8(c). A party must state any defenses, whether based on legal or on equitable grounds or both. M.R.Civ.P. Rule 8(e)(2). For an eviction action in justice court, the answer may deny facts stated in the complaint, and may also state any facts containing a defense against plaintiff's claim. M.J.C.R.C.P. 7B. For an eviction action in district or justice court, there are no restrictions which bar the defendant-tenant from asserting any available defense, whether legal or equitable in character, against the owner's claim for possession.

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

A trial determines issues of fact and issues of law. Mont. Code Ann. 25-31-801. Facts may be found by the court or by the jury. M.R.Civ.P. Rules 47 to 52; M.J.C.R.C.P. Rules 16 and 17; Mont. Code Ann. 25-31-803(2).

Unless jury trial is waived, an issue of fact must be tried by a jury. M.J.C.R.C.P. Rules 14 and 15; Mont. Code Ann.

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25-31-803(2). In a jury trial, the court instructs the jury on the law of the case, and judgment is entered on the verdict of the jury. M.R.Civ.P. Rule 51; M.J.C.R.C.P. Rules 16E and 17A(3).

Any question of law must be decided by the court. Mont. Code Ann. 26-1-201; M.J.C.R.C.P. Rule 16E; Mont. Code Ann. 25-31-803(1). In a bench trial in district court, the court must make findings of fact and conclusions of law. M.R.Civ.P. Rule 52. The court may adopt findings of fact and conclusions of law "so long as they are supported by the evidence and the law of the case." M.R.Civ.P. Rule 52.

A judgment is the final determination of the rights of the parties. M.R.Civ.P. Rule 54(a). Following a bench or jury trial judgment is entered by the court. Mont. Code Ann. 25-31-904; M.J.C.R.C.P. Rule 17A(3) and (4).

Mont. Code Ann. 25-9-101 specifically provides that "in every case, judgment must be rendered on the merits" (emphasis supplied). For an action in the district or justice

court, the statutes and respective court rules imply that whether facts are found by the court or by a jury, the decision must be made on the merits -- based upon the facts and the law. Decision on the merits is required by the due process clause of the Montana Constitution. Article II, 17.

V. Conclusion

Montana law governing an action for possession in the Montana district or justice court under the Montana Residential Landlord and Tenant Act of 1977 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 Montana may evict a tenant pursuant to a district or justice court decision in an eviction 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.