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Subject: PH Due Process Determination: Nebraska

June 1, 1992

DUE PROCESS DETERMINATION

for the

STATE OF NEBRASKA

TABLE OF CONTENTS

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

ANALYSIS

I. Jurisdiction: State of Nebraska.

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:

NEBRASKA: DUE PROCESS DETERMINATION

- (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 Nebraska 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 Nebraska law governing a civil action for the restitution of real property in the county or district courts of Nebraska under the Nebraska Uniform Residential Landlord and Tenant Act (N.R.L.T.A.) (76-1401 et seq. of the Revised Statutes of Nebraska (N.R.S.)) include all of the elements of basic due process, as defined in 24 CFR 966.53(c). This conclusion is based upon the Nebraska Constitution, the N.R.L.T.A., the Nebraska Rules of Civil Procedure, the Nebraska Rules of Evidence and case law.

III. Overview of Nebraska Eviction Procedures

Under the N.R.L.T.A., a civil action for the restitution of real property may be commenced in either the county courts or the district courts of the State of Nebraska. N.R.S. 76-1409.

The N.R.L.T.A states the substantive requirements for a restitution action brought in the State of Nebraska. N.R.S. 76-1401 et seq. The procedural requirements are found in N.R.L.T.A., the Nebraska Rules of Evidence and the Nebraska Rules of Civil Procedure. The Nebraska Rules of Evidence and Rules of Civil Procedure are set forth by Nebraska statute. See N.R.S. 27-101 to 27-1103 and 25-101 et seq. According to the promulgating order of the Supreme Court of Nebraska, the rules of civil procedure apply in the "district court and in all other

NEBRASKA: DUE PROCESS DETERMINATION

courts of Nebraska to the extent they are not inconsistent with other statutes."

The N.R.S. states the procedures for commencement of a

possessory action. N.R.S. 76-1440 to 76-1447.

Due Process Clause of the Nebraska Constitution

Article I, Section 3 of the Nebraska Constitution provides that:

No person shall be deprived of life, liberty, or property, without due process of law.

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

The following analysis considers whether each element of HUD's regulatory due process definition is satisfied in a restitution action commenced in the county or district courts of the State of Nebraska.

This determination will focus on the use of an action for restitution for those evictions which may be excluded from a PHA's grievance procedure pursuant to a HUD due process determination: evictions for drug-related criminal activity or criminal activity that threatens health or safety of a tenant or PHA employee.

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

N.R.S. 71-1536(i)(4) provides that a tenant of a Nebraska housing authority whose tenancy is terminated:

shall be sent a written notice of termination setting forth the reasons for such termination, and any tenant served with a notice shall be given the opportunity to contest the termination in an appropriate hearing if required by state or federal law Such notice may provide that if the tenant fails to pay his or her rent or comply with any covenant or condition of his or her lease, of the rules and regulations of such authority, or cure a violation of default thereof, as the case may be, as specified in such notice or follow the procedure for a hearing as set forth in the notice, all within the time or times set forth in such notice,

NEBRASKA: DUE PROCESS DETERMINATION

the tenancy shall be automatically terminated and no other notice or notices need be given of such termination or the intent to terminate the tenancy, and upon such termination, and without any notice other than as provided for in this subsection, an authority may file suit against any tenant for recovery of possession, of the premises and may recover the same as provided by law.

N.R.S. 71-1436(i)(4) further provides that:

i f a tenant has created or maintained a threat constituting a serious and clear danger to the health or safety of other tenants or authority employees, an authority may, after three days written notice and without a hearing, file suit against any such tenant for recovery of possession of the premises. A serious and clear danger to the health or safety of other tenants or authority employees shall include, but is not limited to, any of the following activities of the tenant or of any other person on the premises with the consent of the tenant: (a) Physical assault or the threat of physical assault; (b) illegal use of a firearm or other weapon or the threat to use an illegal firearm or other weapon; or (c) possession of a controlled substance by the tenant or any other person on the premises with the consent of the tenant if the tenant knew of or should have known of the possession by such other person of a controlled substance

In the State of Nebraska, a civil action for the restitution of real property is commenced when the person seeking possession files a petition for restitution with the clerk of the district or county court. N.R.S. 76-1441. The petition must: (1) state with particularity the facts upon which the plaintiff seeks recovery; (b) describe with reasonable accuracy the premises; and

4

NEBRASKA: DUE PROCESS DETERMINATION

(c) comply with the notice provisions of 25-21,2191 and 76-1401 to 76-1449 of N.R.L.T.A.. N.R.S. 76-1441.

A summons with a copy of the petition attached must be served upon the defendant within 3 days from the date the court clerk issued the summons. N.R.S. 76-1442; N.R.S. 25-2204. The summons must state:

the cause of the complaint, the time and place of trial of the action for possession . . . and notice that if the defendant fails to appear judgment shall be entered against him. (N.R.S. 76-1442)

Under Nebraska law, service of the summons and attached petition may be made by any person. N.R.S. 76-1442. The person making the service must file an affidavit with the court stating with particularity the manner in which service was made. N.R.S. 76-1442.

Thus, under the procedural requirements of the N.R.L.T.A., a tenant receives adequate notice of the grounds for an action brought for the restitution of real property. N.R.S. 76-1441. See also, Housing Authority of the City of Lincoln v. Wolfe, 324 N.W.2d 891, 893 (Neb. Sup. Ct. 1982).

Adequate notice of the grounds for terminating the tenancy and for eviction is also required by the due process clause of the Nebraska Constitution (Article I, Section 3). The Nebraska due process clause states that "no person shall be deprived of life, liberty, or property without due process of law."

Section 25-21,219 (Forcible entry and detainer; jurisdiction; exception) does not have any notice requirements. It would seem that the section referenced should be 25-21,21 (Forcible entry and detainer; notice to leave premises; when and how served.) This section provides that:

It shall be the duty of the party, desiring to commence an action under 25-21,219 to 21, 235, the forcible entry and detainer procedures to notify the adverse party to leave the premises for the possession of which the action is about to be brought. This notice shall be served at least three days before commencing the action by leaving a written copy with such adverse party, or at his usual place of abode, if he cannot be found.

5

NEBRASKA: DUE PROCESS DETERMINATION

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

Many provisions of the code of civil procedure refer to the role of counsel, e.g., Neb. R. Evid., Rule 27 (depositions); N.R.S. 25-2702 (appearances, representation, attorney, qualification). These provisions assume and imply that litigants have the right to be represented by counsel.

The right to be represented by counsel is also afforded by the due process clause of the Nebraska Constitution (Article I, Section 3).

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 accordance with the Nebraska Rules of Evidence and Rules of Civil Procedure, the defendant has the right to interrogate witnesses and present evidence. N.R.S. 27-611; N.R.S.

25-1107. Appearance of witnesses may be compelled by subpoena. "The clerks of the several courts and judges of the county courts shall on application of any person having a cause or any matter pending in the court, issue a subpoena for witnesses"

N.R.S. 25-1223. Further, depositions of witnesses not available at trial are admissible if taken in accordance with the Rules of Evidence. See, Neb. R. Evid., Rule 27; see also, State v. Priest, 223 N.W. 635 (Neb. Sup. Ct. 1929) (deposition admissible where the defendant had been provided notice and was represented by counsel who had the opportunity to cross-examine).

Thus, a tenant in an action for restitution of real property has adequate opportunity to refute evidence presented by the plaintiff.

The right to refute evidence presented by the plaintiff is also guaranteed by the due process clause of the Nebraska Constitution (Article I, Section 3).

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

The defendant may appear "on or before the day fixed for his appearance . . . and answer and assert any legal or equitable defense" N.R.S. 76-1445.

6

NEBRASKA: DUE PROCESS DETERMINATION

N.R.S. 25-811 provides that:

the answer shall contain (1) a general or specific denial of each material allegation of the petition controverted by the defendant; and (2) a statement of any new matter constituting a defense, counterclaim or setoff, in ordinary and precise language

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

HUD finds that Nebraska law requires a determination on the merits - a decision based upon the facts and the law.

The Nebraska Rules of Civil Procedure, N.R.S. 25-1101, provides that "issues arise on the pleadings where a fact or conclusion of law is maintained by one party and controverted by the other. These are of two kinds: (1) of law; (2) of fact." N.R.S. 25-1103 provides that "a trial is a judicial examination of the issues, whether of law or of fact in an action." (See also *Krepcik v. Interstate Transit Lines*, 38 N.W.2d 533, 536 (Neb. Sup. Ct., 1949)).

N.R.S. 25-1301 provides that "a judgement is the final determination of the rights of the parties in action." Where a court decides a case upon its merits after introduction of evidence, it is a trial. *Shipley v. McNeel*, 32 N.W.2d 639, 641 (Neb. Sup. Ct. 1948).

A decision on the merits is also required by the due process clause of the Nebraska Constitution (Article I, Section 3).

Based on the above, HUD concludes that Nebraska law requires a decision on the merits.

V. Conclusion

Nebraska law governing a restitution action for possession

of real property in the Nebraska county or district 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 by HUD under section 6(k) of the U.S. Housing Act of 1937, a PHA in Nebraska may evict a public housing tenant pursuant to an action for restitution of possession of real property in the county or district courts, for any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises of

7

NEBRASKA: DUE PROCESS DETERMINATION

other tenants or employees of the PHA, or any drug-related criminal activity on or near the premises. The PHA is not required to first afford the tenant the opportunity for an administrative hearing on the eviction.

8