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Subject: PH Due Process Determination: Delaware

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DUE PROCESS DETERMINATION

for the

STATE OF DELAWARE

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ANALYSIS

- I. Jurisdiction: Delaware
- 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;

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- (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 State 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 Delaware 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 Delaware law governing a summary proceeding for possession in the Delaware Justice of the Peace court under Chapter 57 of the Delaware Code Annotated (Del.C.) 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 Delaware Constitution, Code, case law and court rules.

III. Overview of Delaware Eviction Procedure

In Delaware, there is one eviction procedure. In 1972, Delaware enacted a new eviction procedure, known as a summary proceeding for possession. 25 Del.C., Chapter 57. This procedure was intended by the legislature as an expedited form of the original forcible detainer action. Authority for the original forcible detainer action was expressly repealed by the new law. Hopkins v. Justice of Peace Court No. 1, 342 A.2d 243, 244 (Del. Super. 1975).

After terminating the lease on 60 days notice, a landlord begins the court action by filing a complaint for possession with the justice of the peace in the county where the property is located. Del.C. 5701 and 5704. Notice of the complaint and hearing is served on the tenant ( 5705-5706) and the tenant may submit an answer ( 5709). Trial was originally only to the court ( 5710), but the statute was amended in 1975 by adding new 5713 and 5714, which provide for a jury trial in the Justice of the Peace Court on request by either party. Cf. Hopkins v.

Justice of the Peace court No. 1, 342 A.2d 243 (Del. Super. 1975); Bomba's Restaurant & Cocktail Lounge, Inc. v. Lord De La Warr Hotel, 389 A.2d 766 (Del. Supr. 1978). The judgment of the magistrate, whether based on its own finding or that of a jury, is final and nonappealable . Bomba's Restaurant, at 766.

Actions in the Justice of the Peace Court are subject to the Justice of the Peace Civil Rules (J.P.Civ.R.). The Delaware Uniform Rules of Evidence (U.R.E.), which generally follow the Federal Rules of Evidence, govern proceedings in the courts of the State. U.R.E. Rule 101.

#### Delaware Constitution: Due Course of Law Clause

The Delaware Constitution of 1897 declares at Article I, Section 9 that the courts shall be open to all, and that "every man . . . shall have remedy by due course of law . . . according to the law of the land . . . ." Delaware courts have interpreted this clause to have substantially the same meaning as "due process of law" in the Fourteenth Amendment to the U. S. Constitution. In re Carolyn S. S., 498 A.2d 1095 (Del. Supr. 1968). The "due process of law" clause in the Federal Constitution, and the "law of the land" clause in the Delaware Constitution, mean the same. Aprile v. State, 51 Del. 215, 143 A.2d 739 (Superior Court).

The Delaware Supreme Court has further stated that Article I, Sections 7-9 of the Delaware Constitution, like the due process clauses of the Fifth and Fourteenth Amendments, require that, " b efore a party can be deprived of life, liberty, or property, it has the right to notice and a hearing in a meaningful time and meaningful manner." Formosa Plastics Corp. v. Wilson, 504 A.2d 1083, 1089-90 (Del. Supr. 1986). The Delaware Supreme Court has also held that due process does not require the trier of fact to admit all evidence that a party offers, but only that the case proceed after notice and a hearing with proceedings adequate to safeguard the interests for which constitutional protection is invoked. Perrine v. Pennroad Corporation, 47 A.2d 479, 486 (Del. Supr. 1946).

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#### IV. Analysis of Delaware 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))

#### Termination of Tenancy

The Delaware Landlord-Tenant Code requires the landlord to give the tenant 60 days notice to terminate the lease. The landlord must comply with 25 Del.C. 5107(c) before commencing a summary proceeding for possession. The leasehold must be

terminated under Chapter 51 before the landlord proceeds with an eviction under Chapter 57.

25 Del.C. 5105(a) requires that the landlord serve the tenant with a personal notice of lease termination. The notice can be served by leaving a copy of the notice at the dwelling place with an adult resident, or by registered or certified mail to the tenant. 5105(b). It does not appear that this notice must specify the grounds for the termination.

#### Commencement of Action

A landlord begins an eviction proceeding by filing a complaint with the Justice of the Peace Court. 25 Del.C.

5704(a). The court must then serve the complaint on the defendant-tenant with a notice of the time and place of hearing. Del.C. 5704(b). The complaint and a notice of the hearing must be served on the tenant at least 5 days prior to the hearing, and not more than 12 days before the hearing. Del.C. 5705(a).

Service of the notice of hearing and complaint must be made in the same manner as personal service of a summons in an action. 25 Del.C. 5706(a). Service of the hearing notice may be made by personal service upon the tenant, by leaving the papers at the residence in the presence of a resident "of suitable age and discretion," by certified mail, or by delivering copies of the papers "to an agent authorized by appointment or by law to receive service of process." Justice of the Peace Civil Rules (J.P.Civ.R.) Rule 5(g). The summary proceeding statute also authorizes service by leaving the notice and complaint personally with "a person of suitable age and discretion who resides or is employed in the rental unit," if service cannot be accomplished in the manner stated above. 25 Del.C. 5706(b). Finally, the statute authorizes service by posting and certified or registered mail, when no such person can be found. Del.C. 5706(c).

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Under the Delaware Code, a complaint in the Justice of the Peace Court to recover the possession of the premises must:

- (1) State the interest of the plaintiff in the rental unit from which removal is sought;
- (2) State the defendant's interest in the rental unit and his relationship to the petitioner with regard thereto;
- (3) Describe the rental unit from which removal is sought;
- (4) State the facts upon which the proceeding is based; and
- (5) State the relief sought.

25 Del.C. 5701, 5707.

In addition, where the complaint for possession of the premises is based on a claim that the tenant has violated or failed to observe a lawful obligation in relation to use of the premises, the complaint must also:

- (1) Set forth the rule, condition, or the like, allegedly breached, together with the date and manner in which the rule, or the like, was made known to the defendant;
- (2) Allege with specificity the facts constituting a breach of the rule and that notice or warning as required by law was given to the defendant;
- (3) Set forth the facts constituting a continued or recurrent violation of the rule;
- (4) Set forth the purpose serviced by the rule breached, and that the rule promotes the convenience, safety or welfare of other tenants of the property or preserves the property and appurtenances thereto from abusive use by tenants or others or seeks to distribute services and facilities held out for common use in an equitable manner;
- (5) Allege that the rule, if not a part of the rental agreement or any understanding of the landlord and tenant at the time of the formation of the rental agreement, does not work a substantial modification of the defendant's bargain, or, if it does, that the defendant consented knowingly in writing to the rule; and

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- (6) If the rule breached is for the benefit of other tenants only, allege that all the tenants for whose benefits the rule purports to be, or, if more than 3, any 3 of them, are in favor of the rule.

25 Del.C. 5708.

The requirements governing the content of the possessory complaint under Delaware statutes satisfy the requirement that the notice must give a tenant adequate notice of the grounds for terminating the tenancy and for eviction. It appears, moreover, that adequate notice must also be provided under the due course of law clause of the Delaware State Constitution (Article I, Section 9) (since that clause is deemed to provide protections equivalent to the due process clauses of the Federal Constitution).

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

The summary proceeding statute is silent as to

representation by counsel. However, it appears that in Delaware, parties may be represented by counsel in any proceeding. The due course of law clause of the Delaware State Constitution implies that litigants are afforded the right to be represented by counsel. Article I, Section 9.

Appearances in Justice of the Peace court may be made by counsel. J.P.Civ.R. Rule 6(a) states that "no appearance by an attorney shall be withdrawn except upon motion and order of the court . . . ." In addition, the Delaware Code provides that attorney's fees are recoverable to a successful plaintiff bringing an action to enforce a written instrument. 10 Del.C. 3912.

- C. Opportunity for the tenant to refute the evidence presented by the PHA, including the right to confront and examine witnesses (24 CFR 966.53(c)(3))

The Delaware Uniform Rules of Evidence (U.R.E.) generally follow the Federal Rules of Evidence. The U.R.E. govern proceedings in the courts of the State. U.R.E. Rule 101. The U.R.E. are intended to promote the development of the law of evidence in order to attain the truth in a judicial proceeding. U.R.E. 102.

Generally, all relevant evidence is admissible unless limited by constitutional requirements, by statute or by Delaware

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court rules. U.R.E. 402. Relevant evidence may only be excluded if probative value of the evidence is substantially outweighed on grounds of prejudice, confusion, or waste of time. U.R.E. 403. The Justice of the Peace Rules of Civil Procedure provide that all evidence must be admitted "which is admissible." J.P.Civ.R. 17(a).

The court shall determine the qualifications of a person to be a witness, and the admissibility of evidence, based on its determination of relevance. U.R.E. 104(a). This rule does not limit the right of a party to present relevant evidence before the jury. U.R.E. 104(e).

Generally, every person is deemed competent to be a witness unless specifically disqualified due to prescribed incapacities of the witness outlined in U.R.E. 601(a),(b). A witness may not testify unless the witness has personal knowledge of the matter (other than opinion testimony by expert witnesses). U.R.E. 602. The J.P.Civ.R. provides that the testimony of witnesses must be taken orally in open court (unless otherwise provided by J.P.Civ.R., the U.R.E., or by statute). J.P.Civ.R. 17(a).

A defendant-tenant may refute the credibility of the plaintiff's witnesses. The credibility of a witness may be impeached by any party. U.R.E. 607. The credibility of a

witness may be attacked by evidence of reputation (except as provided in 11 Del.C. 3508 and 3509). A party may introduce evidence of a witness' untruthfulness. The truthful character of the witness may be attacked by reputation evidence. U.R.E. 608(a). A witness' credibility may be attacked by evidence of a prior conviction of a crime which involved dishonesty or was punishable by death or imprisonment in excess of two years. U.R.E. 609. A witness' prior statement is subject to cross-examination. U.R.E. 613. The J.P.Civ.R. also gives the tenant-defendant the right to impeach or contradict the plaintiff's case through cross-examination, including leading questions to an unwilling or hostile witness. J.P.Civ.R. at 17(b).

A party has a right to inspect writings or recorded statements used by the adverse party in court. U.R.E. 106.

A defendant tenant has the right to present evidence and witnesses to refute the case presented by the PHA, subject to reasonable judicial control as to the method of interrogating witnesses and of presenting evidence on direct and cross-examination. U.R.E. 611(a). The witness may be cross-examined on any matter relevant to issues in the case, including

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credibility. U.R.E. 611(b). Ordinarily, leading questions are permitted on cross-examination of an adverse witness. U.R.E. 611(c).

The Delaware rules of evidence give a defendant-tenant a full opportunity to defend against and refute the PHA's evidence, including the right to confront and cross-examine witnesses. In addition, the due course of law clause of the Delaware constitution grants a party the opportunity to refute evidence and to cross-examine witnesses. Delaware Constitution Art. I, 9.

- D. Opportunity to present any affirmative legal or equitable defense which the tenant may have ( 966.53(c)(4))

The purpose of the Justice of the Peace Court under the summary proceeding statute is to decide the possession issue and the court's jurisdiction is limited to that purpose. *Bomba's Restaurant & Cocktail Lounge, Inc. v. Lord De La Warr Hotel*, 389 A.2d 766, 770 (Del. Supreme Court 1978).1

The summary proceeding statute allows the defendant to answer the complaint orally or in writing. "The answer may contain any legal or equitable defense . . . ." 25 Del.C. 5709.

Therefore, the applicable court rules and the Delaware summary proceeding statute provide the tenant with the

opportunity to present in the Justice of the Peace Court any legal or equitable defense which pertains to the eviction issue.

E. A decision on the merits ( 966.53(c)(5))

The Landlord-Tenant Code provides that all "triable issues of fact" are tried by the court ( 5710), but that, where a jury trial is demanded, the jury shall "make a true and just report . . . according to the evidence . . . under their hands and return the same to the justice who shall give judgment according to the report" ( 5713(b)). In "all other cases" (i.e., where no demand

1 Claims and defenses which relate to the lease agreement, but which are not related to the landlord's claim for possession, are not within the jurisdiction of the Justice of the Peace Court. Any other matter in controversy between the parties in the possession suit must be settled separately in the Superior Court. Bomba's Restaurant, at 770, n.3.

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has been made for a jury) "the justice shall hear the case and give judgment according to the right of the matter and the law of the land" ( 5713(d)). The court must enter a final judgment determining the rights of the parties. 5711(a).

The phrase "law of the land" used in the Code is a reference to the Delaware constitutional requirement found in Sections 7 and 9 of Article I of the 1987 Constitution. This phrase has been construed to have the same meaning as procedural due process under the Fourteenth Amendment to the U. S. Constitution. The phrase "implies action in conformity with the general law, based upon evidence, and after a full hearing upon notice to the party or parties affected and an opportunity to be heard." *Aprile v. State*, 143 A.2d 739, 744 (Del.Super. 1958), *aff'd*, 146 A.2d 180 (Del.Supr. 1958). The due course of law clause of the Delaware State Constitution also affords the right to a decision on the merits, based upon the facts and the law. Article I, Section 9.

Therefore, Delaware statutes and constitutional provisions, as interpreted by Delaware courts, require a hearing and decision on the merits of the case in a tenant eviction action.

V. Conclusion.

Delaware law governing a Chapter 57 summary proceeding for possession in the Justice of the Peace 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 under section 6(k) of the U.S. Housing Act of 1937, a PHA in Delaware may evict a public tenant pursuant to Justice of the Peace court decision in an eviction proceeding for 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 the premises, and is not required to first afford the tenant the opportunity for an administrative hearing on the eviction.