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Subject: PH Due Process Determination: South Dakota

June 22, 1992

HUD DUE PROCESS DETERMINATION

for the

STATE OF SOUTH DAKOTA

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ANALYSIS

I. Jurisdiction: South Dakota

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 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 South Dakota to determine if eviction procedures 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 South Dakota law governing an eviction by an action for detainer in circuit or magistrate court includes 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 South Dakota Constitution, code, case law and court rules.

III. Overview of South Dakota Eviction Procedures

Article 16 of Title 21 of the South Dakota Codified Laws Annotated as well as the South Dakota Rules of Civil Procedure in Circuit Court and the due process clause of the South Dakota Constitution, S.D. Const. Article VI, 2, afford the tenant the opportunity for a pre-eviction hearing in court containing the required elements of due process.

The eviction procedures for detainer in South Dakota are set forth in S.D. Codified Laws Ann. 21-16-1 to -12. Under the laws of South Dakota, an action for detainer may be commenced either in a circuit court or in a magistrate court presided over by a law trained magistrate. S.D. Codified Laws Ann. 21-16-3.1

The jurisdiction of magistrate courts is limited to civil actions where the debt, damage, claim, or value of the property involved does not exceed \$2,000. S.D. Codified Laws Ann. 16-12A-24.

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Except as provided in the detainer statute, a detainer case brought in circuit or magistrate court is governed by the provisions of South Dakota law concerning civil actions and the

South Dakota Rules of Procedure in Circuit Courts. S.D. Codified Laws Ann. 15-6-1 to -86.

State Constitution: Due Process Clause

Eviction by action for detainer is also governed by the South Dakota Constitution. Article VI, 2 of the South Dakota Constitution provides that: "No person shall be deprived of life, liberty or property without due process of law."

IV. Analysis of South Dakota State Eviction Procedures for Each of the Regulatory Due Process Elements

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 South Dakota circuit and magistrate courts.

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

The landlord commences an eviction action for detainer by serving a summons on the tenant. S.D. Codified Laws Ann. 15-6-3, 15-2-30 and -31 (1984). A written complaint verified by the landlord or landlord's attorney must be served with the summons. S.D. Codified Laws Ann. 21-16-6 (1987).

The complaint must set forth:

- (1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief to which he deems himself entitled.

S.D. Codified Laws Ann. 15-6-8(a).

The right to adequate notice of the grounds for eviction is also guaranteed by the due process clause of the South Dakota Constitution. S.D. Const. Art. VI, 2. *Apoian v. State*, 89 S.D. 539, 235 N.W.2d 641 (1975); *Phillips v. Branch Mint Mining & Milling Co.*, 27 S.D. 350, 131 N.W. 308 (1911).

South Dakota law requires that adequate notice be given to the tenant of the grounds for terminating the tenancy and for eviction.

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

While not stated explicitly in the State statutes or court rules, the right of the tenant to be represented by counsel may be inferred from references throughout the South Dakota Rules of Procedure in Circuit Courts. For example, S.D. Codified Laws

Ann. 15-6-5(b) requires that whenever service is made upon a party represented by counsel, the service must be made upon the attorney unless the court orders otherwise.

The right of a tenant to be represented by counsel may also be inferred from laws governing detainer proceedings. S.D. Codified Laws Ann. 21-16. For example, whenever an attorney (who is licensed to practice by the South Dakota Supreme Court) shall have appeared on behalf of the prevailing party, the court must tax five dollars in attorney's fees to the prevailing party as part of the court costs in the case. S.D. Codified Laws Ann. 21-16-11.

In addition, the right to be represented by counsel is guaranteed by the due process clause of the South Dakota Constitution. S.D. Const. Art. VI, 2.

- 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 circuit or magistrate court:

. . . all relevant evidence is admissible, except as otherwise provided by Constitution or statute or by S.D. Codified Laws Ann. Title 19, ch. 19-9 to 19-18 or by other rules promulgated by the Supreme Court of the state.

S.D. Codified Laws Ann. 19-12-2.

Except to the limited extent that depositions and interrogatories may be used at trial, the testimony of witnesses must be taken orally and in open court. S.D. Codified Laws Ann. 15-6-43(a), -32(a) and -33(b).

Evidentiary rules permit the defendant to refute evidence by cross-examination of witnesses, S.D. Codified Laws Ann. 19-14-19, and to examine hostile or adverse party witnesses by the use of leading questions. S.D. Codified Laws Ann. 19-14-20.

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In addition, the right to refute PHA evidence, including the right to confront and cross-examine witnesses, is guaranteed by the due process clause of the South Dakota Constitution. S.D. Const. Art. VI, 2.

Thus, the tenant has full opportunity under the South Dakota statutes and South Dakota Constitution to refute the evidence presented by the PHA.

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

The South Dakota Rules of Civil Procedure provide for one form of action to be known as a "civil action." The rules abolish the distinction between actions at law and suits at equity. S.D. Codified Laws Ann. 15-6-2.

S.D. Codified Laws Ann. 15-6-8(b) and 15-6-8(c) require the defendant to state his defenses to each claim asserted. In addition, when responding to the complaint, the defendant must set forth all of his affirmative defenses. S.D. Codified Laws Ann. 15-6-8(c). The code also lists a number of affirmative defenses, many of which are equitable in nature. Id.

The South Dakota law does not restrict the right of the defendant to raise any available legal or equitable defense.

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

Pursuant to the South Dakota Rules of Procedure in Circuit Courts, judgment is entered upon the verdict of the jury or decision of the court. S.D. Codified Laws Ann. 15-6-58. In a jury trial, the jurors are sworn to "try the matters in issue" and render a true verdict "according to the evidence and instructions of the court." S.D. Codified Laws Ann. 15-14-11. The court must instruct the jury as to the law of the case after presentation of all evidence. S.D. Codified Laws Ann.

15-6-51(a). In a bench trial, the judge must find the facts specifically and state separately its conclusions of law. S.D. Codified Laws Ann. 15-6-52(a).

The above rules imply that a verdict by the jury or decision by the court is arrived at only after consideration of the evidence, and that a decision must be based on the merits, based on the law and the facts as presented in the case.

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The due process clause of the South Dakota Constitution also requires a decision on the merits. S.D. Const. Art. VI, 2.

V. Conclusion

South Dakota law governing eviction by a detainer action in the circuit or magistrate 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 under section 6(k) of the U.S. Housing Act of 1937, a PHA in South Dakota may evict a public housing tenant pursuant to a district or justice 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 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.