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Subject: PH Due Process Determination: District of Columbia

September 4, 1992

DUE PROCESS DETERMINATION

for the

DISTRICT OF COLUMBIA

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ANALYSIS

- I. Jurisdiction: District of Columbia.
- 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 ¹ 966.53(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 jurisdiction's eviction procedures satisfy this regulatory definition is called a "due process determination."

The present due process determination is based on HUD's analysis of the laws of the District of Columbia to determine if eviction procedures under D.C. laws require a hearing with all of the regulatory "elements of due process," as defined in ¹ 966.53(c).

HUD finds that the requirements of District of Columbia law governing each of the following eviction procedures include all of the elements of basic due process as defined in 24 CFR ¹ 966.53(c):

- (1) a civil ejectment action under section 16-1101 of the D.C. Code Annotated (D.C. Code) in the Civil Division of Superior Court,
- (2) a summary civil action for unlawful detainer under section 16-1501 of the D.C. Code in the Landlord and Tenant Branch of Superior Court, and
- (3) an action to recover possession of a rental unit used as a drug haven under section 45-2559.2 of the D.C. Code in the Landlord and Tenant Branch of the Superior Court.

This conclusion is based upon requirements contained in the D.C. Code, case law and court rules.

III. Overview of Eviction Procedures in the District of Columbia

A. Eviction Procedures

In the District of Columbia, a landlord may pursue any of the following three forms of eviction action:

- (1) A civil ejectment action under section 16-1101 of the D.C. Code in the Civil Division of Superior Court.
- (2) A summary civil action for unlawful detainer under section 16-1501 of the D.C. Code in the Landlord and Tenant Branch of Superior Court.
- (3) An action to recover possession of a rental unit used as a drug haven under section 45-2559.2 of the D.C. Code in the Landlord and Tenant Branch of Superior Court.

Each of these eviction procedures includes all of the elements of basic due process, as defined in 24 CFR ¹ 966.53(c).

B. Ejectment Action in Superior Court

A person claiming the right to possession of real property may bring a civil action in ejectment. D.C. Code ¹ 16-1101. The action is brought in the regular Civil Division of the Superior Court. D.C. Code ¹ 45-1410. A Superior Court action for ejectment is an alternative to Summary Proceedings in the Landlord and Tenant Branch. *Nicholas v. Howard*, App. D.C., 459 A.2d 1039 (1983).

An action for ejectment is subject to the Superior Court Rules of Civil Procedure (SCR-Civil), rather than the Superior Court Rules of Civil Procedure for the Landlord and Tenant Branch (SCR-LT) which govern Summary Proceedings. SCR-Civil Rule 1; SCR-LT Rule 1.

C. Forcible Entry and Unlawful Detainer Action in the Landlord and Tenant Branch of Superior Court

A person claiming the right to possession of real property may bring an action in Superior Court for restitution of possession. D.C. Code ¹ 16-1501. The action may be brought by a summary proceeding in the Landlord and Tenant Branch of the Superior Court.

The Summary Proceeding in the Superior Court is subject to the Superior Court Rules of Civil Procedure for the Landlord and Tenant Branch. SCR-LT Rule 1. In addition, many of the Superior Court Rules of Civil Procedure are applicable to a proceeding in the Landlord and Tenant Branch, except where the rules are inconsistent. SCR-LT Rule 2.

D. Action for Possession of a Rental Unit Used as a Drug Haven

The District of Columbia law provides for the eviction of a tenant who uses the rental unit as a drug haven. D.C. Code ¹ 45-2559.1. The action is brought in the Landlord and Tenant Branch of Superior Court.

A drug haven is defined as a rental unit and surrounding area where drugs are used, stored, manufactured, or distributed. D.C. Code ¹ 45-2559.1. The eviction of the tenant must be ordered if the Superior Court of the District of Columbia has determined by a preponderance of the evidence that the rental unit is a drug haven. D.C. Code ¹ 45-2559.4(a).

It appears that an action for possession of a rental unit used as a drug haven is subject to the Superior Court Rules of Civil Procedure for the Landlord and Tenant Branch (SCR-LT) which govern proceedings in that branch, rather than the Superior Court Rules of Civil Procedure. SCR-Civil Rule 1; SCR-LT Rule 1.

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

A. Ejectment Action

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

Commencement of Action

The ejectment proceeding is begun by filing a complaint with the Clerk of the Superior Court. The Clerk will sign the summons, affix the court seal, and state the time and place where the defendant must appear and defend the complaint or else have a judgment for default entered for the relief demanded in the complaint. SCR-Civil Rule 4(a), (b). The complaint must contain:

a short and plain statement of the claim showing that the pleader plaintiff is entitled to relief.

SCR-Civil Rule 8(a)(2).

The District of Columbia Superior Court Rules of Civil Procedure require that a summons and complaint must be properly served on the defendant. SCR-Civil Rule 4. The plaintiff is responsible for arranging for service of the summons and a copy of the complaint. SCR-Civil Rule 4(a). The summons gives the defendant notice of the action, and an opportunity to appear and defend the complaint. SCR-Civil Rule 4(b), see CA Form 1, Summons, in D.C. Court Rules (1988 Ed.), pp. 419-420. The plaintiff must file proof of service within 60 days of filing the complaint. SCR-Civil Rule 4(j).

The summons and complaint must be served together. They may be served by any of the following procedures: 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." SCR-Civil Rule 4(d). Service may also be made by publication and certified or registered mail with return receipt

requested. SCR-Civil Rules 4-I, 4(g)(2). The court determines the periodicals or newspapers that are suitable for publishing notices. SCR-Civil Rule 4-I. Finally, the court authorizes service upon a defendant through defendant's attorney, when a defendant is represented by an attorney. SCR-Civil Rule 5(b).

The above Superior Court Rules satisfy the requirement of the HUD due process definition that the landlord must give notice which informs the tenant of the grounds for terminating the tenancy and for eviction.

2. Right to be represented by counsel
(24 CFR ¹ 966.53(c)(2))

The right of a litigant to be represented by counsel is implied by various provisions of the Superior Court Rules concerning the role of counsel. The Court Rules regulate practice by attorneys before the court (SCR-Civil Part XII), including provisions governing entry of appearance by an attorney on behalf of a party. SCR-Civil Rule 101(b).

3. Opportunity for the tenant to refute the evidence presented by the PHA, including the right to confront and cross-examine witnesses
(24 CFR ¹ 966.53(c)(3))

The Superior Court Rules of Civil Procedure on the taking of testimony provides that the testimony of witnesses is taken orally in open court (unless otherwise provided by the SCR-Civil Rules). SCR-Civil Rule 43(a). Furthermore, all admissible evidence shall be admitted. SCR-Civil Rule 43(a).

The Civil Rules also provide the tenant-defendant the right to impeach or contradict the plaintiff's case through cross-examination. SCR-Civil Rule 43(b). A party may interrogate hostile or adverse party witnesses by leading questions, and may contradict or impeach testimony of an adverse party witness. SCR-Civil Rule 43(b).

The tenant-defendant may present evidence to refute the PHA's case. The defendant may arrange the issuance of subpoenas to produce witnesses or documentary evidence. SCR-Civil Rule 45(b).

At a trial or hearing, a pretrial deposition may only be used against a party who had the opportunity to be present at the taking of the deposition. SCR-Civil Rule 32(a). At the taking of a deposition, the witness may be cross-examined in the same manner as permitted at trial. SCR-Civil Rule 30(c). A deposition may only be used at trial in specific and restrictive circumstances stated in the rules. SCR-Civil Rule 32(a). Provisions which allow the use of a deposition at trial under "exceptional circumstances" note the importance of presenting the testimony of witnesses orally in open court." SCR-Civil Rule 32(a)(3).

The District of Columbia Superior Court Rules of Civil

Procedure 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.

4. Opportunity to present any affirmative legal or equitable defense which the tenant may have (¹ 966.53(c)(4))

A defendant in an ejectment action is entitled to answer the complaint. SCR-Civil Rule 12(a). The answer may deny any statement which is in dispute, and may state "any affirmative defense" without limitation, in accordance with District of Columbia Superior Court Rules of Civil Procedure. SCR-Civil Rule 12(b); SCR-Civil Rule 8(c). The answer may deny any statement made by the plaintiff. SCR-Civil Rule 8(b). At the defendant's option, some affirmative defenses may be made by motion. SCR-Civil Rule 12(b). These include lack of jurisdiction over the subject matter, or over the person; insufficiency of process or of service of process; failure to state a claim upon which relief can be granted; or failure to join a party who is subject to service under Rule 19. SCR-Civil Rule 12(b).

The District of Columbia Superior Court Rules of Civil Procedure applicable to an ejectment proceeding provide the tenant with the opportunity to present any legal or equitable defense which pertains to the eviction issue.

5. A decision on the merits (¹ 966.53(c)(5))

Judgment is entered upon the verdict of the jury or the decision of the court. SCR-Civil Rule 58. In a jury case, the judgment is based upon the verdict of the jury pursuant to instruction of the court. SCR-Civil Rule 51. In a non-jury case, the court must state the findings of fact and conclusions of law upon which the judgment is based. SCR-Civil Rule 52(a). The official Commentary states that the rule is "designed to insure that all litigants who desire it receive a fair and adequate statement of the grounds of decision applied in their case" D.C. Court Rules (1988 Ed.), p. 321.

The Rules are "construed to secure the just, speedy and inexpensive determination of every action." SCR-Civil Rule 1. The structure of the Superior Court Rules implies that the decision and judgment of the court must be based on the evidence presented in the trial bearing on the legal and factual issues framed by the complaint and answer.

B. Forcible Entry and Unlawful Detainer Action

In the District of Columbia, an owner claiming the right to possession of real property may bring a action for restitution of possession in Superior Court under chapter 15 of the D.C. Code, section 16-1501. The Landlord and Tenant Branch of the Superior Court is subject to the Superior Court Rules of Civil Procedure for the Landlord and Tenant Branch. SCR-LT Rule 1..

1. Adequate notice to the tenant of the grounds for

terminating the tenancy and for eviction
(24 CFR ¹ 966.53(c)(1))

A landlord and tenant action is commenced by delivery of the complaint and prepared summons to the court. SCR-LT Rule 3. The summons is then issued by the court. D.C. Code ¹ 16-1501. The summons and complaint must be properly served on the defendant. SCR-LT Rule 4; D.C. Code ¹ 16-1502.

The summons and complaint must give the defendant notice of the action, and of the opportunity to appear and defend the complaint. SCR-LT Rule 3; Landlord and Tenant Form 1. The complaint must contain:

a short and plain statement of the claim showing that the pleader plaintiff is entitled to relief.

SCR-Civil Rule 8(a)(2). The summary action complaint directs an owner to "explain fully" the grounds on which possession is sought. (LT Form 1).

In a summary unlawful detainer action, the summons and complaint must be served seven days before the commencement of trial. D.C. Code ¹ 16-1502. The defendant-tenant must be served personally or by leaving a copy with someone over the age of sixteen who resides in the premises. If no one is at the premises, service can be made by posting a copy of the summons on the premise where it can be conveniently read. If the summons is posted, a copy of the summons must be mailed to the premises, in the name of the person known to be in possession of the premises, or if unknown, in the name of the occupant of the premises. D.C. Code ¹ 16-1502; see also, SCR-LT Rule 4. Posting is only permitted after a "diligent effort" to achieve personal or substituted service has failed, which is usually interpreted to mean at least two attempts. *Parker v. Frank Emmet Real*, 451 A.2d 62 (D.C. 1982).

In addition, the tenant must also be given adequate notice of the termination grounds in the notice to vacate, which must be served before commencement of the action. A notice to vacate is required for all evictions except evictions for nonpayment of rent or drug haven evictions pursuant to D.C. Code ¹ 45-2559.2. D.C. Code ¹ 45-2551. Where required, such a notice is a condition precedent to commencement of the landlord's suit for possession. *Moody v. Winchester Mgt. Corp.*, 321 A.2d 562, 563 (D.C. App. 1974), D.C. Code ¹ 45-1406.

Thus the District of Columbia requirements governing process in the summary proceeding require adequate notice to the tenant of the grounds for termination and eviction at issue in the action.

2. Right to counsel (¹ 966.53(c)(3))

The summary process rules explicitly provide that "any party is entitled to appear through counsel of his choice." SCR-LT Rule 11.

3. Opportunity to refute the evidence presented by the PHA including the right to confront and cross-examine witnesses (¹ 966.53(c)(4))

The parties to an eviction action are entitled to a trial before the court. SCR-LT Rule 12(b). A trial in Landlord and Tenant Court is subject to Rule 43 of the regular civil procedure rules governing presentation of evidence. SCR-LT Rule 2.

The Superior Court Rule of Civil Procedure on the taking of testimony provides that the testimony of witnesses must be taken orally in open court (unless otherwise provided by the SCR-Civil Rules). SCR-Civil Rule 43(a). Furthermore, all admissible evidence must be admitted. SCR-Civil Rule 43(a).

The Superior Court Rules of Civil Procedure provide the tenant-defendant the right to impeach or contradict the plaintiff's case through cross-examination. SCR-Civil Rule 43(b). A party may interrogate hostile or adverse party witnesses by leading questions, and may contradict or impeach testimony of an adverse party witness. SCR-Civil Rule 43(b).

The tenant may present evidence to refute the PHA's case. For this purpose, the defendant may arrange the issuance of subpoenas for production of witnesses or documentary evidence. SCR-Civil Rule 45(b).

The District of Columbia Superior Court Rules of Civil Procedure 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.

4. Opportunity to present any affirmative legal or equitable defense (¹ 966.53(c)(4))

In a summary proceeding, a defendant is not required to file any answer or defense in writing. SCR-LT Rule 5(a). However, the judge is required to conduct the trial "in such manner as to fully elicit all matters of defense and all facts in the case." SCR-LT Rule 12(b). The summary process rules do not contain any restriction on the defendant's ability to present any affirmative equitable or legal defense.

The District of Columbia Superior Court Rules of Civil Procedure applicable to an unlawful detainer, and the Superior Court Rules for the Landlord and Tenant Branch, provide the tenant with the opportunity to present any legal or equitable defense which pertains to the eviction issue.

5. Decision on the merits (¹ 966.53(c)(5))

In a summary proceeding, if the parties are unable to settle the controversy, the judge is required to "proceed with a trial on the merits of the case." SCR-LT Rule 12(b).

A summary proceeding must also adhere to many of the

Superior Court Rules of Civil Rules as enumerated in Superior Court Rules of Civil Procedure for the Landlord and Tenant Branch. SCR-LT Rule 2. Judgment is entered upon the verdict of the jury or the decision of the court. SCR-Civil Rule 58. In a jury case, the judgment is based upon the verdict of the jury pursuant to instruction of the court. SCR-Civil Rule 51. In a non-jury case, the court must state the findings of fact and conclusions of law upon which the judgment is based. SCR-Civil Rule 52(a). The official Commentary states that the rule is "designed to insure that all litigants who desire it receive a fair and adequate statement of the grounds of decision applied in their case" D.C. Court Rules (1988 Ed.), p. 321.

The Rules are "construed to secure the just, speedy and inexpensive determination of every action." SCR-Civil Rule 1. The structure of the Superior Court Rules implies that the decision and judgment of the court must be determined on the merits -- based on the evidence presented in the trial bearing on the legal and factual issues framed by the complaint and answer.

C. Action for Possession of Rental Unit Used as a Drug Haven

The District of Columbia has enacted a proceeding for eviction of a tenant who uses a rental unit as a drug haven. D.C. Code \perp 45-2559.2. A drug haven is defined as a rental unit and surrounding area where drugs are used, stored, manufactured, or distributed. D.C. Code \perp 45-2559.1. The eviction of the tenant must be ordered if the Superior Court of the District of Columbia has determined by a preponderance of the evidence that the rental unit is a drug haven. D.C. Code \perp 45-2559.4(a).

It appears that an action for possession of a drug haven is subject to the Superior Court Rules of Civil Procedure for the Landlord and Tenant Branch (SCR-LT), rather than the Superior Court Rules of Civil Procedure.

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

A housing provider commences a drug haven action by delivering a summons and complaint to the Clerk of the Superior Court. D.C. Code \perp 45-2559.2, SCR-LT Rule 3. "Housing provider" means:

- (A) a landlord, owner, lessor, sublessor, or assignee; or
- (B) the agent of a landlord, owner, lessor, sublessor, or assignee; or
- (C) any person entitled to compensation for the use or occupancy of a rental unit within a housing accommodation.

The complaint must contain:

a short and plain statement of the claim showing that the pleader plaintiff is entitled to relief.

SCR-Civil Rule 8(a)(2).

For actions in the Landlord Tenant Branch, a summons and complaint must be served seven days before the commencement of trial. D.C. Code ¹ 16-1502. The defendant-tenant must be served personally or by leaving a copy with someone over the age of sixteen who resides in the premises. If no one is at the premises, service can be made by posting a copy of the summons on the premise where it can be conveniently read. If the summons is posted, a copy of the summons must be mailed to the premises, in the name of the person known to be in possession of the premises, or if unknown, in the name of the occupant of the premises. D.C. Code ¹ 16-1502. Posting is only permitted after a "diligent effort" to achieve personal or substituted service has failed, which is usually interpreted to mean at least two attempts. *Parker v. Frank Emmet Real*, 451 A.2d 62 (D.C. 1982).

Thus, the District of Columbia requirements governing process in the actions to regain possession of a rental unit used as a drug haven provides adequate notice to the tenant of the action, and of the grounds for termination and eviction at issue in the action.

2. Right to be represented by counsel
(24 CFR ¹ 966.53(c)(2))

The Superior Court Rules of Civil Procedure for the Landlord and Tenant Branch explicitly provide that "any party is entitled to appear through counsel of his choice." SCR-LT Rule 11.

3. Opportunity for the tenant to refute the evidence presented by the PHA, including the right to confront and cross-examine witnesses
(24 CFR ¹ 966.53(c)(3))

In an action for possession of a rental unit used as a drug haven, the court must hold a full hearing on the merits of the eviction. D.C. Code ¹ 45-2559.4. An action in Landlord and Tenant Court is subject to Rule 43 of the regular civil procedure rules governing presentation of evidence. SCR-LT Rule 2.

The Superior Court Rule of Civil Procedure on the taking of testimony provides that the testimony of witnesses is to be taken orally in open court (unless otherwise provided by the SCR-Civil Rules). SCR-Civil Rule 43(a). All admissible evidence shall be admitted. SCR-Civil Rule 43(a).

The Superior Court Rules of Civil Procedure provide the tenant-defendant the right to impeach or contradict the plaintiff's case through cross-examination. SCR-Civil Rule 43(b). A party may interrogate hostile or adverse party witnesses by leading questions, and may contradict or impeach testimony of an adverse party witness. SCR-Civil Rule 43(b).

The tenant may present evidence to refute the PHA's case. For this purpose the defendant may arrange the issuance of subpoenas for production of witnesses or documentary evidence.

SCR-Civil Rule 45(b).

The above District of Columbia Superior Court Rules of Civil Procedure 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.

4. Opportunity to present any affirmative legal or equitable defense which the tenant may have (24 CFR ¹ 966.53(c)(3))

In an action in the Landlord and Tenant Branch, a defendant is not required to file any answer or defense in writing. SCR-LT Rule 5(a). However, the judge is required to conduct the trial "in such manner as to fully elicit all matters of defense and all facts in the case." SCR-LT Rule 12(b). The summary process rules do not contain any restriction on the defendant's ability to present any affirmative equitable or legal defense.

The District of Columbia Superior Court Rules for the Landlord and Tenant Branch provide the tenant with the opportunity to present any legal or equitable defense which pertains to the eviction issue.

5. A decision on the merits (24 CFR ¹ 966.53(c)(4))

The Superior Court is required to "hold a full hearing on the merits of the eviction action." D.C. Code ¹ 45-2559.4(a). To determine whether a rental unit is a drug haven, the court must consider:

- (1) Whether a tenant or occupant of the rental unit has been charged with a violation of Chapter 5 of Title 33, or the Controlled Substances Act of 1970
- (2) Whether the rental unit has been the subject of more than 1 drug-related search or seizure that has resulted in the arrest of a tenant or occupant during the 180-day period that precedes the time that an eviction action is commenced
- (3) Whether a firearm has been discharged within the rental unit at any time during the 180-day period that precedes the time that an eviction action is commenced
- (4) The testimony of any witness concerning the possession, manufacture, storage, distribution, use or the attempted possession, manufacture, storage, distribution, or use of an illegal drug by a tenant or occupant in the housing accommodation that contains the rental unit; or
- (5) Any other relevant and admissible evidence that demonstrates that the rental unit is or is not a drug haven.

D.C. Code ¹ 45-2559.2(a). If the Superior Court determines by a preponderance of the evidence that the rental unit is a drug haven, then the Court shall order one or both of the following:

- (1) Eviction of the tenant or occupant; or
- (2) Closure of the rental unit for a period of time to be decided by the court.

D.C. Code ¹ 45-2559.4(a).

Therefore, in an action for possession of a rental unit used as a drug haven, the court must render judgment upon the merits of the case.

V. Conclusion

District of Columbia law governing the following forms of eviction proceeding 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 ¹ 966.53(c) of the HUD regulations:

- (1) A civil ejectment action under section 16-1101 of the D.C. Code.
- (2) A summary civil action for unlawful detainer under section 16-1501 of the D.C. Code.
- (3) An action to recover possession of premises used as a drug haven pursuant to section 45-2559.2 of the D.C. Code.

By virtue of this due process determination under section 6(k) of the U.S. Housing Act of 1937, a PHA in the District of Columbia may evict a public housing tenant pursuant to a court decision in any of these eviction proceedings, 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. The PHA is not required to first afford the tenant the opportunity for an administrative hearing on the eviction.