COMMONWEALTH OF MASSACHUSETTS
TRIAL COURT

SUFFOLK, ss.

HOUSING COURT DEPARTMENT
CITY OF BOSTON DIVISION
SUMMARY PROCESS ACTION
DOCKET NO. 91-SP-0730

Cruz Management Co., Inc. ,
Plaintiff,

v.

Nancy Rodriguez,
Defendant

DEFENDANT'S MOTION TO DISMISS AND MEMORANDUM IN SUPPORT THEREOF

The Defendant, Nancy Rodriguez, hereby moves that the Court dismiss this action for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) and 12(h)(3) of the Mass. Rules of Civil Procedure, inasmuch as: (1) her tenancy was not properly terminated in accordance with applicable HUD regulations and handbook provisions as well as the provisions of the parties' lease; (2) Ms. Rodriguez never received the summons and complaint in this action, and therefore did not have notice of these proceedings; and (3) on belief and information, if the tenancy between the parties was ever properly terminated, a new tenancy was subsequently established. In support of this motion, the following memorandum is submitted.

BACKGROUND

A. Status of the Premises; Lease; Notice Provided; BREB Proceedings; Service of Summary Process Summons and Complaint.

Counsel for the parties agree that this action involves premises located in the Wayne Apartments, a Federally subsidized multi-family housing development. The Wayne Apartments were constructed or rehabilitated pursuant to Section 236 of the National Housing Act, 12 U.S.C. § 1715z-1. They also receive subsidy assistance for all units through the Section 8 Additional Assistance (Loan-Management Set-Aside) Program. See 42 U.S.C. § 1437f; 24 Code of Federal Regulations (hereinafter, C.F.R.) Part 886, Subpart A.

Ms. Rodriguez's tenancy is also pursuant to a written lease, as required by HUD regulations. A copy of the last lease executed between the parties prior to the service of the notice to quit in this action, whose term began on May 1, 1990, is attached hereto and made a part hereof as Exhibit "A".

The plaintiffs rely in this action on a notice to quit dated November 30, 1990, which is in the Court's file. The constable's return on this notice to quit is dated December 3, 1990, and states that it was left at 358 Walnut Avenue #4, Roxbury, MA on that date, together with BREB Forms E-0 and E-1. The return does not state in what manner the notice was left--i.e., whether it was given to Ms. Rodriguez in hand, left with an adult member of her household, or merely left at the abode. The return does not indicate service of a second copy of the notice to quit by first class mail, postage prepaid.

The notice to quit states as "the grounds on which eviction is being sought" the following:

> "Violation of Section 13 of your lease by failing to use the premises only as a private dwelling for yourself and the individuals listed on the Certification and Recertification of Tenant Eligibility . . . . .by allowing other individuals to reside in the unit without obtaining prior written approval of the landlord. Management has received information that an adult peron [sic] is residing in your unit who is not an authorized occupant. Also for violation of section 13(d) by having pets or animals of any kind, namely a dog, in the unit, without the prior written permission of the Landlord. Management has received information that you are keeping a dog in your unit. Also for failing to provide your landlord with proper documentation to certify your income, employment, and family composition in order to determine your proper rent. Also for non-payment of rent."

The notice also included the following language:

> "You are advised that you have ten (10) days from the earlier of the day this Notice is hand delivered to your unit or the day after the date this Notice is mailed to you with which to discuss the termination of your tenancy with the undersigned."

At the same time that the plaintiff served Ms. Rodriguez with this notice to quit, it served her with a copy of an application for a certificate of eviction from the Boston Rent Equity Board (hereinafter, the Board), BREB Form E-1. This application stated as grounds for the eviction the following: Ground #1 (Non-Payment of Rent), Ground #2 (Violation of Covenant of Lease), Ground #3 (Nuisance), and Ground #5 (Refusal to Renew Written Rental Agreement).[1] On

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[1] The plaintiff may have also intended to evict Ms. Hernandez on Ground #11, as it filled in information under this section and also attached a memo summarizing its

December 7, 1990, the plaintiff filed this application with the Board. Following a hearing, on January 3, 1991, the Board issued a decision denying the plaintiff's application on Grounds #1, #3, and #5. On Ground #2, the Board found the plaintiff's statement that a dog was in the premises more credible than Ms. Rodriguez's denial of the presence of a dog, but ruled that it would conditionally deny a certificate of eviction on this ground if Ms. Rodriguez got rid of the dog and reported this to the plaintiff and the Board by January 23, 1991; otherwise, it would grant a certificate of eviction.[2] Neither party appealed this decision by the Board.[3]

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grounds for eviction under Ground #3 and Ground #11. The memo stated: "Management has received complaints of excessive traffic in and out of the unit at 358 Walnut Park #4. Management has also received complaint of a dog in the unit making excessive noise. There have been reports of an unauthorized occupant residing in the unit who has caused disturbances also." However, since this section was not checked, the Board did not consider whether there were grounds for eviction under Ground #11, and the plaintiff did not appeal this decision.

2 The Board's decision indicates that Ms. Rodriguez had the dog for security reasons, and that she felt its presence was justified due to the high crime rate in her area; its barking would warn her if someone were trying to break and enter. If the Court denies this motion to dismiss but grants the defendant's motion to vacate the default judgment, it is defendant's position that, under her lease and HUD regulations, she should be permitted to show that the dog's presence was justified given these risks. See Pierce v. Hargrove, Boston Housing Court SP #33520 (Martin, J., March 15, 1985) (where there was security risk in HUD-owned development, presence of pet not "good cause" to terminate tenancy under lease). While the defendant is barred from challenging the Board's decision of "just cause" under local rent control law by failing to appeal its decision (see Gentile v. Rent Control Board of Somerville, 365 Mass. 343 (1974), she is not barred, if a new trial is granted, from raising the separate issue of whether there is "good cause" under her lease and Federal law to end her tenancy. See Tenants Development Corporation v. Otero, et al., Boston Housing Court CA # 27445 (Daher, C.J., January 22, 1990); Dolben & Sons, Inc. v. Boston Rent Equity Board, et al., Boston Housing Court CA # 27958 (Daher, C.J., June 6, 1990). See also Associated Blind Housing Development Fund Corp. v. Katz, 129 Misc.2d 1032 (N.Y. 1985 (trial court incorrectly gave binding effect to administrative hearing decision; judgment reversed because tenant should have been given opportunity to present defense in court under Federal law).

3 A copy of the Board's January 3, 1991 decision, with notica sent to the parties on January 10, 1991, is attached hereto and made a part hereof as Exhibit "B".

On January 31, 1991, the Board issued a decision granting a certificate of eviction on Ground #2 to the plaintiff.[4] The Board's decision stated that since Ms. Rodriguez failed to notify the Board that she had gotten rid of the dog, and since the plaintiff indicated that a dog was still in the premises, Ms. Rodriguez failed to satisfy the conditions for a conditional denial of the certificate of eviction, and the certificate should be granted.[5] Neither party appealed this decision of the Board.

The summons and complaint in this action states as grounds for eviction the following:

> "violation of Section 13(d), by having pets or animals of any kind, namely a dog, in the unit. You have violated an obligation or covenant of tenancy other than the obligation to surrender possession upon proper notice and have failed to cure such violation after having received written notice thereof from the landlord."

According to the return of service on the summons and complaint filed with the Court, a constable left a copy of the summons and complaint on February 25, 1991

> "at the last and usual place of abode of the tenant occupant to Wit: 358 Walnut Avenue, Dorchester, District of the City of

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[4] A copy of the Board's January 31, 1991 decision is attached hereto and made a part hereof as Exhibit "C".

[5] Should the motion to dismiss not be dispositive, the defendant would note, in support of her motion to vacate default, that she did in fact get rid of the dog, but failed to notify the Board of the same. Even if the Court were to find that a dog is present in violation of a lease, the Court could well, under the doctrine of prevention of forfeiture, grant a remedy short of eviction by entering an order requiring the defendant to get rid of the dog. See Boston Housing Authority v. Duffy, Boston Housing Court SP No. 53025 (Daher, C.J., December 14, 1989).

> Boston. Afterward on the same day, I mailed a second copy hereof to the tenant occupant at said address, first class postage prepaid."

Ms. Rodriguez denies ever receiving any copy of the summary process summons and complaint. She did not appear at trial on March 14, 1991.

On March 15, 1991, a default judgment entered against Ms. Rodriguez due to her failure to appear at trial. An execution issued from the Court on June 12, 1991. On July 10, 1991, Ms. Rodriguez filed a motion to remove the default judgment and a proposed answer under Rule 60(b) of the Mass. Rules of Civil Procedure. Among the defenses raised in the answer was that the notice to quit was defective according to her lease and the regulations applying to her subsidized tenancy and that she did not receive notice of the court proceedings.[6]

B. Recertification and Execution of a New Lease

Ms. Rodriguez originally moved into the Wayne Apartments in 1976, and the anniversary date for her annual recertification is in October of every year. In May, 1990, Ms. Rodriguez was transferred to a new unit by the plaintiff, and she signed an interim recertification form and a lease running from May 1, 1990 to April 30, 1991.

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6 On July 10, 1991, Ms. Rodriguez also sought a temporary restraining order to restrain the plaintiff from using the execution pending the hearing on her motion to remove default. See Boston Housing Court Civil Action No. 91-CV-0789. The Court denied this application on the same date, and wrote an order on July 18, 1991. However, the Court took no action on Ms. Rodriguez's motion to remove the default judgment. The Clerk's office subsequently marked up the motion to remove the default judgment on July 25, 1991. By agreement of counsel for the parties, this motion was continued to August 1, 1991, and plaintiff's counsel agreed to hold and not use the execution until hearing and decision on the motion.

Ms. Rodriguez was due to recertify again in the fall of 1990; her failure to submit recertification information in a timely manner was one of the reasons the plaintiff sought a certificate of eviction from the Boston Rent Equity Board in December, 1990. Ms. Rodriguez submitted her recertification information to the plaintiff by December 7, 1990, and the Board found that, with this provision of information, there was no basis to grant a certificate of eviction under Ground 5. See the Board's decision of January 10, 1991.

On belief and information, some time after December 7, 1990, the plaintiff used the information provided by Ms. Rodriguez on December 7, 1990 to recertify her, and/or at the same time entered into a new lease, lease addendum, or lease extension with Ms. Rodriguez.[7]

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[7] Defendant's counsel advances this claim on belief and information, since it is the logical outcome of the prior action of the parties. He has not yet been able to reach his client to confirm the execution of recertification and/or lease papers after the notice to quit was served, but wishes to get this memorandum to opposing counsel in enough time prior to the August 1, 1991 hearing on this case so to avoid surprise. Defendant's counsel would also like an opportunity to review the documents that are in plaintiff's possession regarding recertification and execution of leases or lease addendum. Should these asumptions not bear out, defendant's counsel will withdraw this ground for his motion to dismiss; however, the other grounds would remain.

C. HUD Notice Requirements

The Courts have long held that the United States Department of Housing and Urban Development may require governmentally-involved owners to provide certain types of notices in conjunction with eviction cases. See Thorpe v. Durham Housing Authority, 386 U.S. 670 (1967) and 393 U.S. 268 (1970) (HUD-prescribed notice provisions for public housing evictions; eviction dismissed for failing to comply with HUD requirements).

In 1976, HUD issued regulations specifying that tenants in HUD-subsidized multi-family housing such as that involved here could not be evicted except for certain types of "good cause" and except where certain types of notice had been provided in conjunction with the termination of tenancy. See 41 Federal Register 43330-43333 (September 30, 1976), promulgating 24 C.F.R. Part 450. These regulations were intended, in part, to put an end to continued litigation about the precise nature of tenants' substantive and procedural rights in HUD subsidized housing. See, for example, McQueen v. Druker, 317 F. Supp. 1122 (D. Mass. 1970), aff'd. on other grounds, 438 F.2d 781 (1st Cir. 1971); Banks v. Multi-Family Management, Inc., 554 F.2d 127 (4th Cir. 1977). As HUD noted in promulgating these regulations,

> The basic purpose of the . . . regulation is to reflect the increasing body of judicial opinions that occupancy in a subsidized housing project is in the nature of a welfare entitlement and that tenants in these units are entitled to basic substantive and procedural protections.

41 Federal Register, at 43331.

In 1980, a lawsuit was filed challenging HUD's failure to promulgate uniform leases for all of its subsidized housing developments, as required by statute, 12 U.S.C. § 1715z-1b. See Love v. United States Department of Housing and Urban Development, 704 F.2d 100 (3d Cir. 1983). As a result of this lawsuit, in part, in 1981 HUD issued Handbook 4350.3, Occupancy Requirements of Subsidized Multi-Family Housing Programs.[8] This handbook mandated that HUD-subsidized landlords utilize a HUD model lease. See Love, 704 F.2d at 102-103, n. 10. In addition, to meet concerns that evictions only occur through court action and that tenants be informed of this requirement, HUD amended the notice provisions of 24 C.F.R. Part 450. See 48 Federal Register 22913 (May 23, 1983) and 48 Federal Register 322006 (July 13, 1983). In 1984, HUD redesignated 24 C.F.R. Part 450 as 24 C.F.R. Part 247, and this is how the regulation is currently codified. See 49 Federal Register 6712 (February 23, 1984).[9]

As noted above, the premises here also receive subsidy under the Section 8 Additional Assistance (Loan-Management Set-Aside) Program. Prior to 1988, HUD required that owners of such housing both comply with the notice requirements of 24 C.F.R. Part 247 and with an additional notice requirement found at 24 C.F.R. § 886.128.[10]

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8 A copy of relevant portions of HUD Handbook 4350.3 are attached hereto as Exhibit "D".

9 A copy of 24 C.F.R. Part 247 is attached hereto and made a part hereof as Exhibit "E".

10 A copy of the pre-February 1988 version of 24 C.F.R. § 886.128 is attached hereto and made a part hereof as Exhibit "F".

This additional notice requirement mandated that the owner's notice advise the tenant of the right to meet with the owner to discuss the eviction within a certain number of days after receipt of the notice, so that the eviction could possibly be informally resolved.

In February, 1988, HUD decided to eliminate the separate notice provision of 24 C.F.R. § 886.128, noting that a provision for response to the owner's notice within ten days after receipt was already required to be incorporated in all eviction notices by HUD Handbook 4350.3:

> "Two commenters urged HUD to incorporate certain requirements contained in 24 C.F.R. § 886.128 into Part 247. This section requires the project owner to give the family a written notice of the eviction, stating the grounds and advising the family that they have 10 days (or greater number, if any, that may be required by local law) within which to respond to the owner. . . . HUD has provided the family with an informal opportunity to respond to a proposed termination through provisions in the model lease. As noted in the proposed rule, HUD Handbook 4350.3--Occupancy Requirements of Subsidized Multifamily Programs, Appendix 19a requires the project owner to advise the family that it has 10 days to discuss a proposed termination of tenancy with the project owner. HUD believes that this lease provision is sufficient to encourage the informal resolution of disputes that would otherwise be brought to court.
>
> "Commenters asserted that the Handbook is not legally binding or enforceable and argued that the failure to include this provision in the regulation may result in unnecessary litigation concerning the scope of HUD's termination of tenancy requirements. Sections 886.127(b) and 886.327(b) of the final rule provide that the lease between the owner and the family must comply with HUD regulations and requirements, and must be on the form required by HUD. HUD believes that these sections are sufficient to ensure that leases will contain the described provision and that the lease will create a legally

> binding and enforceable obligation on the part of the project owner to provide families with a 10-day opportunity to respond to a termination notice."

See 53 Federal Register 3366-3369, at 3367 (February 5, 1988).

Ms. Rodriguez's lease incorporates the notice requirements found in the HUD handbook. Paragraph 23 of her lease states that the notice must specify the date the lease is terminated, state the grounds for termination with enough detail so that the tenant can prepare a defense, advise the tenant that she has 10 days within which to discuss the proposed termination with the owner, and advise the tenant of the right to defend the action in court. It also describes "material non-compliance" with the lease in the same manner as the HUD Handbook.

As things currently stand, then, 24 C.F.R. § 247.4(a) and (b), HUD Handbook 4350.3, §§ 4-20 and 4-21, the HUD model lease (HUD Handbook 4350.3, Appendix 19a), and Ms. Rodriguez's lease, taken together, mandate that the following elements must be part of the termination of tenancy notice:

(a) The notice must specify the date the tenancy agreement will be terminated. See 24 C.F.R. § 247.4(a)(1); HUD Handbook 4350.3, § 4-20.a.(1); Paragraph 23.c. of the HUD Model Lease and Ms. Rodriguez's lease.

(b) The notice must state the grounds for termination with enough detail for the tenant to prepare a defense. See 24 C.F.R. §§ 247.4(a)(2), (e); HUD Handbook 4350.3, § 4-20.a.(2); Paragraph 23.c. of the HUD Model Lease and Ms. Rodriguez's lease.

(c) The notice must advise the tenant that she has 10 days within which to discuss the proposed termination of tenancy with

the landlord. See HUD Handbook 4350.3, § 4-20.a.(4); Paragraph 23.c. of the HUD Model Lease and Ms. Rodriguez's lease.

(d) The notice must advise the tenant that if she remains in the unit on the date specified for termination of the rental agreement, the landlord may seek to enforce the termination only by bringing a judicial action, at which time the tenant may present a defense. See 24 C.F.R. § 247.4(a)(3); HUD Handbook 4350.3, § 4-20.a.(3); Paragraph 23.c. of the HUD Model Lease and Ms. Rodriguez's lease.

(e) The notice must be delivered both by personal or abode service and by first class mail, postage prepaid. See 24 C.F.R. §§ 247.4(a)(4), (b); HUD Handbook 4350.3, § 4-21.

(f) The termination of tenancy must be based on "good cause", which is defined as "material noncompliance with the rental agreement," "material failure to carry out obligations under any state landlord and tenant act", or "other good cause." 24 C.F.R. § 247.3; HUD Handbook 4350.3, § 4-20; Section 23 of the HUD Model Lease and Ms. Rodriguez's lease.

In addition, the HUD regulations provide that where a termination of tenancy notice does not comply with the requirements of 24 C.F.R. § 247.4, the termination of tenancy is not valid:

> "No termination shall be valid unless it is in accordance with the provisions of § 247.4."

24 C.F.R. § 247.3(a).

D. Comparison of the Notice to Quit Served In This Action with the HUD Notice Requirements.

The notice to quit in this action does not comply with HUD notice requirements or the parties' lease in three respects:

(a) It does not meet the specificity requirements of 24 C.F.R. § 247.4(a)(2), as the same have been construed in case law.

(b) It was not served on the tenant both by first class mail, postage prepaid, and by personal or abode service, as required by 24 C.F.R. § 247.4(a) and (b) and HUD Handbook 4350.3, § 4-21.

(c) The grounds for eviction, as stated, are not sufficient to constitute "material noncompliance with the rental agreement", as defined at 24 C.F.R. § 247.3(c).

ARGUMENT

I. Where a Tenancy Has Not Been Properly Terminated as a Matter of the Lease or Applicable Regulations, the Court Lacks Subject Matter Jurisdiction to Entertain a Summary Process Action, and It Must Be Dismissed Under M. R. Civ. P. 12(b)(1) and 12(h)(3).

Under Rule 12(h)(3) of the Mass. Rules of Civil Procedure, a defense of lack of subject matter jurisdiction can be raised at any time, including after judgment or during appeal. Subject matter jurisdiction cannot be conferred by consent, conduct, or waiver, and a claim of such a jurisdictional defect must be decided regardless of the point at which it is first raised. Litton Business Systems, Inc. v. Commissioner of Revenue, 383 Mass. 619, 622 (1981). Where a statute or regulation establishes a precondition for asserting a

right in court and that precondition has not been met, the Courts do not have the power to entertain the action. See Flynn v. Contributory Retirement Appeal Board, 17 Mass. App. Ct. 668 (1984) (no jurisdiction over late-filed appeal under G.L. c. 30A); Karbowski v. Bradgate Associates, Inc., 25 Mass. App. Ct. 526 (1988) (District Court lacked jurisdiction over motion to vacate arbitration award); Irving Levitt Co. v. Sudbury Management, 19 Mass. App. Ct. 12 (1984) (subject matter jurisdiction destroyed as a matter of Federal law by filing of bankruptcy petition); Shea v. Neponset River Marine & Sportfishing, Inc., 14 Mass. App. Ct. 121 (1982) (due to removal statute, Superior Court lacked jurisdiction over de novo summary process appeal in commercial action, and vacating of judgment under Rule 60(b)(4) required). See, generally, Jones v. Jones, 297 Mass. 198 (1937).

In order to commence a summary process action under Chapter 239 of the General Laws, a landlord must meet the statutory condition precedent of terminating the tenancy.

> ". . . [I]f the lessee of lands or tenements or a person holding under him holds possession without right after the determination of a lease by its own limitation or by notice to quit or otherwise, . . . the person entitled to the land or tenements may recover possession thereof under this chapter."

G.L. c. 239, § 1. If the tenancy has not been validly terminated in accordance with the terms of the lease, the court lacks jurisdiction to hear the summary process action. See Shannon v. Jacobson, 262 Mass. 463, 469 (1928); Nautican Realty Co. v. Nantucket Shipyard, 28 Mass. App. Ct. 902 (1989). See also Spence v. Gormley, 387 Mass.

258, 259, n. 2 (1982) (outcome of summary process depends upon whether the tenancy has validly been terminated); Torrey v. Adams, 254 Mass. 22 (1925); Oakes v. Munroe, 62 Mass. (8 Cush.) 282 (1851). As the Appeals Court has noted, "More than most actions, [a summary process action] may founder on procedural technicalities." Rahman v. Federal Management Co., Inc., 23 Mass. App. Ct. 701, 706-707 (1987), *further appellate review denied*, 400 Mass. 1102 (1987).

In addition to terminating the tenancy in accordance with the terms of the parties' lease, an owner of HUD subsidized housing must comply with the requirements imposed by regulation in order to be able to proceed with eviction. Subsidized tenancies are, in fact, a new creature of law--"tenancies by regulation", as the Appeals Court has termed them--and therefore the owner must show that the regulations have been followed. See Spence v. O'Brien, 15 Mass. App. Ct. 489 (1983), further appellate review denied, 389 Mass. 1102 (1983) (finding that procedural requirements of HUD regulations followed in public housing eviction). Here HUD's regulation, 24 C.F.R. § 247.3(a), specifically states that "no termination shall be valid" if it has not been carried out in accordance with the mandatory notice requirements of 24 C.F.R. § 247.4. If there is no valid termination, an action may not properly be brought under G.L. c. 239, § 1, as the statutory precondition for maintaining the eviction action has not been met.

II. While There Are No Reported Decisions of the Massachusetts Appellate Courts Dismissing an Eviction Action for Failure to Comply with HUD Notice Requirements in Subsidized Multi-Family Housing, There Is a Substantial Body of Reported Precedent From Federal and State Courts, as Well as Unreported Precedent from Other Massachusetts Trial Courts.

The Masschusetts appellate courts have never issued an opinion dealing directly with the issue of dismissal of an eviction action for failure to comply with HUD's eviction notice requirements. However, there is a substantial body of reported precedent from other Federal and State courts on this issue, as well as unreported precedent from the Housing Court.

In Leake v. Ellicott Redevelopment Phase II, 470 F. Supp. 600 (W.D.N.Y. 1979), the Federal District Court enjoined pending State court eviction proceedings due to failure to adhere to HUD's notice requirements. It found that because the notice to quit did not advise the tenant of the right to defend against the eviction in court, did not meet the specificity requirements of HUD's notice regulations for non-payment of rent cases, and was not served both by first class mail and by personal or abode service, the termination of tenancy was invalid.

In Love v. U. S. Department of Housing and Urban Development, supra, judgments had already entered against the tenants in State court, and execution had issued. Nonetheless, the Federal District Court enjoined levying on the executions and the State eviction proceedings because the owner had failed to follow HUD's notice requirements. While the Third Circuit overruled the District Court's action requiring tenant participation in comment on changes in HUD

regulations, it left intact the District Court's rulings invalidating the eviction.

State courts that have considered the issue have found HUD's notice provisions to be mandatory. In Sandefur Co. v. Jones, 9 Ohio App.3d 85, 458 N.E.2d 390 (Ohio 1982), the Court noted:

> "Inasmuch as plaintiff has accepted substantial rent subsidies from the Federal government, it waives ordinary rights of a landlord and, instead, is bound by the regulations of the Federal government."

Sandefur Co., 458 N.E.2d at 392. In Newhouse v. Settegast Heights Village Apartments, 717 S.W.2d 131 (Tex. 1986), the Court found that when the owner entered into Section 8 subsidy contracts with HUD, it "agreed to be bound by those regulations and by the handbooks promulgated by HUD to aid in their implementation." Newhouse, 717 S.W.2d at 132. As the Court stated in Green Park Associates v. Inman, 121 Misc.2d 204, 205 (N.Y. 1983):

> "It is established that the handbook-prescribed . . . termination procedures were intended to be mandatory and not, as petitioner suggests, merely advisory [citing Thorpe and Staten v. Housing Authority of Pittsburgh, 469 F. Supp. 1013 (W.D. Pa. 1979)]."

See also Goodwin v. Rodriguez, 520 Pa. 296, 554 A.2d 6 (Pa. 1989) (case remanded where the lower court did not consider the impact of the HUD handbook on whether the tenancy was properly terminated).

A number of state courts have ruled that eviction cases must be dismissed for failure to comply with HUD's notice requirements, and/or that a landlord who evicts a tenant without following the notice provisions may be sued for wrongful eviction. In Goler v.

Metropolitan Apartments, Inc. v. Williams, 43 N. C. App. 648, 260 S.E.2d 146 (N.C. 1979), *request for discretionary review denied*, 299 N.C. 328, 265 S.E.2d 395 (N.C. 1980), the North Carolina Court of Appeals ruled that a tenant who had been evicted with a notice that did not comply with HUD's notice requirements had the right to bring suit for wrongful eviction.

In Central Brooklyn Urban Development Corporation v. Copeland, 122 Misc.2d 726, 729 (N.Y. 1984), the Court set aside an execution, removed the tenant's default, and entered an order restoring the tenant to possession when proper notice was not given under the HUD regulations and handbook. The Court noted that the failure to serve a proper HUD notice "is a fatal jurisdictional defect and mandates that the default judgment awarding possession be set aside."

Other cases where evictions have been dismissed for failure to adhere to the handbook and regulatory provisions include: Green Park Associates, supra (dismissing eviction for failure to adhere to HUD handbook provisions in terminating subsidy); Fairview Co. v. Idowu, 148 Misc.2d 17 (N.Y. 1990) (dismissing eviction for failure to meet specificity requirement of 24 C.F.R. §§ 247.4(a)(2), 247.4(e)); Criss v. Salvation Army Residences, 319 S.E.2d 403, 405, n. 2 (W.Va. 1984) (noting that a prior eviction case between the parties had been dismissed for failure to serve a proper notice under 24 C.F.R. § 450.4); Newhouse, supra (failure to meet "good cause" requirements of regulations and handbook); Associated Estates Corp. v. Bartell, 24 Ohio App.3d 6, 492 N.E.2d 841 (Ohio 1985) (failure to comply with "specificity" requirements of HUD handbook); American National Bank & Trust Co. v. Dominick, 154 Ill.App.3d 275, 507 N.E.2d 512 (Ill.

1987) (HUD circular interpreting "just cause" provisions of handbook binding); Gerstein Companies v. Deloney, 212 Cal.App.3d 1119, 261 Cal.Rptr. 431 (Cal.1989) (no showing of "good cause" in compliance with specific standards found at 24 C.F.R. § 247.3); and North Shore Plaza Associates v. Guida, 117 Misc.2d 778 (N.Y. 1983) (insufficient showing of substantial breach of lease as required by 24 C.F.R. § 247.3). See also Versailles Arms v. Pete, 545 So.2d 1193 (La. 1989), where the handbook and regulations were not discussed, but the Court dismissed the eviction because the notice did not advise the tenant of the right to meet with the manager within ten days, as prescribed by the lease.

There are also a number of unpublished opinions from the Housing Court in which eviction cases had been dismissed for failing to follow 24 C.F.R. Part 247 and the HUD handbook. See Bowdoin School Associates v. Spivey, Boston Housing Court SP No. 26766 (King, J., May 31, 1983); Greater Boston Community Development, Inc. v. Hughes, Boston Housing Court SP No. 28555 (King, J., April 17, 1984); State Management, Inc. v. McHugh, Boston Housing Court SP No. 39118 (Daher, C.J., April 16, 1986); Castle Square Associates v. Wallace, Boston Housing Court SP No. 55473 (Smith, J., November 1, 1990); Port Antonio Associates v. Pizarro, Boston Housing Court SP No. 56838 (Kyriakakis, J., November 27, 1990); and Federal Management Co., Inc. v. Marshall, Boston Housing Court No. 91-SP-01053 (Kerman, J., May 16, 1991).

III. Dismissal Is Required in This Case Because of the Plaintiff's Failure to Comply with HUD Notice Requirements and the Parties' Lease.

As noted above, the notice to quit on which the plaintiff relies in this action is defective in three respects under the HUD notice requirements and/or the parties' lease:

> (a) It was not served by the two means of service required by 24 C.F.R. § 247.4(a)(4) and (b), first class mail and personal or abode service;
>
> (b) It did not state the grounds for eviction with enough specificity and detail to enable the tenant to prepare a defense.
>
> (c) It does not state "good cause" for eviction, inasmuch as it fails to articulate grounds that would constitute "material non-compliance with the rental agreement" under 24 C.F.R. § 247.3(c).

Each of these deficiencies is sufficient to lead to dismissal of this case. Each of the problems with the notice will be addressed in turn.

A. Failure to Serve the Termination Notice Both by First Class Mail and by Personal or Abode Service.

As noted above, the notice to quit on which the plaintiff relies in this action, according to its return of service, was served on Ms. Rodriguez either by personal or abode service. It was not, however, served by first class mail, as required by 24 C.F.R. § 247.4(b)(1). The HUD regulations are very clear that both means of service are mandatory, and termination is not deemed to be effective unless both means of service are accomplished:

> "Service shall not be deemed effective until both notices provided for herein have been accomplished. The date on which the notice shall be deemed to be received by the tenant shall be the date on which the first class letter provided for in this paragraph is mailed, or the date on which the notice provided for in this paragraph is properly given." (Emphasis added.)

Under this language, if the tenant is only given notice by one of the two means required by the regulation, the time period for the termination of tenancy does not run, and the tenancy does not terminate. The failure to give notice by the two means required in the HUD regulation was one of several grounds under which the Federal court in Leake v. Ellicott Redevelopment Phase II, invalidated State eviction procedures.

In Boston Housing Authority v. Benders (hereinafter, "Benders"), Boston Housing Court SP # 51049 (Daher, C.J., June 6, 1990) , the Court dismissed public housing evictions for failure to provide consecutive, rather than concurrent, state and HUD-mandated notices. The Court did this inasmuch as HUD and the Federal courts had previously interpreted the Federal regulations to require consecutive notices. While Benders did not specifically involve 24 C.F.R. Part 247, the reasoning followed in that case must lead to dismissal here. Here HUD's regulations and the Leake decision make clear that the notice to quit must be served in two separate and distinct ways, and the plaintiff has failed to show such service. The Court must follow the regulations and the Leake decision to give the Federal law full effect, even if, as a matter of

public policy, the procedural protections involved seem unnecessary.[11]

B. The Notice To Quit Does Not Meet the Specificity Requirements of HUD's Regulations.

Under 24 C.F.R. § 247.4(a)(2), the landlord's termination of tenancy notice must "state the reasons for the landlord's action with enough specificity so as to enable the tenant to present a defense." Here, the notice provided by the owner did not meet the "specificity" requirements of the regulations, and the eviction case must as a result be dismissed. Similar requirements are incorporated in HUD Handbook 4350.3, § 4-20 and in Paragraph 23 of the HUD Model Lease and Ms. Rodriguez's lease.

The Housing Court has recently had an opportunity to review the level of detail required in notices to quit in subsidized housing. In Piano Craft Guild v. Glasgow (hereinafter, "Piano Craft Guild"), Boston Housing Court No. 91-SP-01043 (Kerman, J., June 4, 1991), the parties' subsidized housing lease required that the pretermination notice include "the specific reasons for termination, the facts upon which they are based, and the sources of those facts." The notice did not refer to particular events or dates, or sources of information. The court found, based on the precedent in Housing Authority v. Saylors, 19 Wash. App. 871, 578 P.2d 76 (Wash. 1978), DeKalb County Housing Authority v. Pyrtle, 167 Ga.App. 181, 306

[11] As the Court pointed out in Benders, the landlord's remedy, there as here, is not to ignore the HUD regulations, but to convince HUD to change its regulations. This has occurred in the past. See 53 Federal Register 3366-3369 (February 5, 1988) (eliminating requirement for HUD involvement in authorizing evictions in Section 8 property disposition developments).

S.E.2d 9 (Ga. 1983), and Escalera v. New York City Housing Authority, 425 F.2d 853, 858, n. 2 (2d Cir. 1970), *cert. denied*, 400 U.S. 853 (1970), that the notice was not sufficient, as the notices "did not set forth a factual statement of the incident or incidents complained of, and do not accomplish the purpose of adequately informing the tenant of the particular conduct and particular evidence involved." Piano Craft Guild, p. 2. The Court, accordingly, dismissed the eviction for failure to meet the "specificity" requirements of the lease.

Similar "specificity" standards to those followed in the Piano Craft Guild case have been applied in cases under 24 C.F.R. Part 247 and HUD Handbook 4350.3, § 4-20.In Associated Estates Corp. v. Bartell (hereinafter, "Bartell"), 24 Ohio App.3d 6, 492 N.E.2d 841 (Ohio 1985), the Ohio appellate courts dismissed an eviction for the owner's failure to provide a specific enough notice. The court noted:

> The purpose of requiring that the notice state reasons for the termination is to insure that the tenant is adequately informed of the nature of the evidence against him so he can effectively rebut that evidence. Escalera [op. cit.], 425 F.2d at 862. Hence, termination notices have been found to be insufficient when they contain only one sentence, are written in "vague and conclusory language", and fail to set forth a factual statement of the reasons for termination.

Bartell, 492 N.E.2d at 846. The Bartell court found that since the notice to quit in that case did not refer to specific instances of conduct, it was inadequate and therefore denied the tenant due process. See also Fairview Co. v. Idowu (hereinafter, "Idowu"), 148 Misc.2d 17, 22-23 (N.Y. 1990) (grounds for eviction not suficiently

specific to enable tenant to prepare a defense except as to one incident, and that incident did not rise to the level of a "substantial" violation of the lease); Bowdoin School Associates v. Spivey, Boston Housing Court SP No. 26766 (King, J., May 31, 1983) (general conclusory statements about tenant's behavior fail "to put the tenant on notice as to the specific factual basis upon which the notice of termination of tenancy is based"; eviction dismissed for notice's failure to meet specificity standards).

The notice to quit here states that Ms. Rodriguez had a dog in her unit in violation of her lease. However, it did not state the specific facts on which the landlord relied to base this allegation, so that Ms. Rodriguez could rebut the allegations of breach of her lease. The notice thus failed to meet the requirements of 24 C.F.R. § 247.4(a)(2) and HUD Handbook 4350.3, § 4-20, and did not validly terminate Ms. Rodriguez's tenancy.

C. The Notice to Quit Does Not State Cause for Termination of the Tenancy, Inasmuch as It Does Not Allege Facts Sufficient to Show Material Noncompliance with the Rental Agreement.

Owners of Federally subsidized multi-family housing developments

> "may not terminate any tenancy in a subsidized project except upon the following grounds:
> (1) Material noncompliance with the rental agreement,
> (2) Material failure to carry out obligations under any state landlord and tenant act, or
> (3) Other good cause."

24 C.F.R. § 247.3(a).

This case is not one involving "material failure to carry out obligations under any state landlord and tenant act," as defined in 24 C.F.R. § 247.3(a)(2), since there is no Massachusetts law that prohibits tenants from having pets. Moreover, this is not a case of "other good cause," since the conduct of a tenant cannot be deemed "other good cause" under 24 C.F.R. § 247.3(a)(3) unless the landlord has given the tenant prior notice, served in accordance with 24 C.F.R. § 247.4(b), that said conduct shall henceforth constitute a basis for termination of tenancy. See 24 C.F.R. § 247.3(b). Therefore, the grounds for eviction in this case must be analyzed solely under the "material noncompliance with the rental agreement" standard found at 24 C.F.R. § 247.3(c).

"Material non-compliance with the rental agreement" is defined by HUD to include"one or more substantial violations of the rental agreement" or "repeated minor violations of the rental agreement that (i) disrupt the livability of the project, (ii) adversely affect the health or safety of any person or the right of any tenant to the quiet enjoyment of the leased premises and related project facilities, (iii) interfere with the management of the project, or (iv) have an adverse financial effect on the project." 24 C.F.R. § 247.3(c).

As the Court noted in American National Bank & Trust Co. v. Dominick, supra, the term "material noncompliance" is created and defined in HUD's regulations and guidelines that are incorporated into the lease by reference: "Not all repeated, minor lease violations constitute material noncompliance." Dominick, 507 N.E.2d at 515, n. 3. In Dominick, the Illinois appellate court held that late payment of

rent without showing of economic impact on development does not constitute "material noncompliance").

In Gerstein Companies v. Deloney, supra, the California Court of Appeal construed HUD's use of "material noncompliance" and "substantial violation" as follows:

> "Under this regulation a tenancy governed by the regulations may not be terminated by a landlord except for some important reason. This conclusion is compelled not only by the regulation's use of the phrases 'material noncompliance' and 'substantial violation,' but by the fact the regulation allows termination for repeated minor violations only when an owner is able to demonstrate adverse consequences to the subsidized project."

Gerstein Companies, 261 Cal.Rptr. at 435. There, too, the Court held that late payment of rent, absent a showing of adverse financial consequences to the development, did not constitute "material non-compliance" with the lease.

While the presence of a dog on the property without the owner's consent is a violation of the lease, defendant contends it is not a "substantial" breach of the lease within the meaning of 24 C.F.R. § 247.3(c). This is amply supported by case law.

In North Shore Plaza Associates v. Guida (hereinafter, "Guida"), 117 Misc.2d 778 (N.Y. 1983), the court had to construe the meaning of the phrase "substantial violation of the lease" in HUD's regulations. The court noted that while there has been very little case law construing the term "substantial violation" under HUD's regulations,

the phrase has a rich decisional history under rent control law in New York[12]:

> New York courts have dealt with the concept of 'substantial violation' in the context of rent control and rent stabilization law. . . . Case law has held that 'substantial' is a word of general reference which takes on color and precision from its total context. . . . 'Substantial violation' has been found to require a violation which causes loss to the landlord . . . or one which affects a real interest of the landlord. . . . Breaches of tenancy which have been found to be substantial include failure to pay rent, . . . use of the premises for a purpose other than that set forth in the lease, . . . permitting an unauthorized person to reside in the premises, . . . and unauthorized or illegal alterations in the demised premises."

Guida, 117 Misc. 2d at 780-781. The Court in Guida found that the conduct by the tenant's son, while objectionable, did not rise to the level of a "substantial" violation of the lease, and therefore there was not good cause to terminate the tenancy. See also Idowu, supra, 148 Misc. 2d at 22-23 (water overflow incident not "substantial" violation--not good cause for eviction).

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12 The standard under Federal law for "material noncompliance" is different than that under Boston's rent control laws for violation of a lease covenant, since there is no requirement, under Boston's rent control law, that there be a "substantial" violation of the lease. Contrast Section 10-2.9(a)(2) of Chapter 10 of the City of Boston Code with 24 C.F.R. § 247.3(c) and the statutes discussed in Guida. Thus, the Appeals Court's recent ruling in Clifford V. Miller, Inc. v. Rent Control Board of Cambridge, __ Mass. App. Ct. ___, No. 90-P-37 (July 22, 1991), holding that eviction for the ownership of a dog under Cambridge's rent control law is permissible, is clearly distinguishable. The Cambridge law applied there allows termination of tenancy for "violation of an obligation or covenant of his tenancy not inconsistency with Chapter 93A of the General Laws or this act, or the regulations issued pursuant thereto, other than the obligation to surrender possession upon proper notice . . ." See St. 1976, c. 36, § 9(a)(2). This standard is clearly a lesser standard than that of a "substantial violation" of the lease. See, generally, 52A C.J.S. Landlord & Tenant, § 792.28.

The analysis used in Guida is very instructive in the present case, because it turns out that courts have repeatedly determined that the keeping of a pet in violation of a no-pets provision in a lease is not a "substantial violation" of the lease. See 52A C.J.S. Landlord & Tenant, § 792.28, at 272, and the cases cited there: Jerome Realty Co. v. Yankovich, 35 Misc.2d 183 (N.Y. 1962); Harday Realty Corp. v. Donahue, 8 Misc.2d 951 (N.Y. 1957); and B.G. Smith Real Estate v. Byrne, 3 Misc.2d 559 (N.Y. 1952).[13] The courts have generally found that the presence of pets in violation of the no-pets clause only constitutes a "substantial violation" where there is an actual interference with the quiet enjoyment of other tenants. See case law summarized in Fanchild Investors v. Cohen, 43 Misc.2d 39, 41 (N.Y. 1964).[14]

HUD was presumably aware of this rich decisional law when it intentionally decided to use the phrase "substantial violation" in defining what would constitute "material noncompliance" with the lease. The "substantial violation" standard is not merely a product of New York law, but was also found in the federal Housing and Rent Act of 1947. See U.S. v. Ravitz, 93 F.Supp. 913 (E.D.Pa. 1950) (subletting a "substantial violation" of lease, but was waived by

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13 For other cases, see Parkside Development Co. v. McGee, 21 Misc.2d 277 (N.Y. 1959); Kingsway-14th Broadway Co. v. Flickstein, 234 N.Y.S.2d 812 (N.Y. 1962); Hilltop Village Co-op v. Goldstein, 41 Misc.2d 402 (N.Y. 1962); and Mutual Redevelopment Houses, Inc. v. Hanft, 42 Misc.2d 1044 (N.Y. 1964).

14 The New York courts have differed on whether injunctive remedies are available to the landlord to remove pets where there is no "substantial violation". Compare 930 Fifth Corp. v. King, 71 Misc.2d 359, 362 (N.Y. 1972) (could seek injunction) with Jerome Realty v. Yankovich, 37 Misc.2d 433, 434 (N.Y. 1962) (injunction denied in absence of showing of specific harm from dog).

landlord's subsequent conduct); Finn v. 415 Fifth Ave. Co., 153 F.2d 501 (2d Cir. 1946), *cert. denied sub. nom.* Meighan v. Finn, 328 U.S. 839 (1946) (bankruptcy doesn't waive local rent control laws, and filing of bankruptcy was not a "substantial violation" of tenancy under New York's rent control laws). It is generally the rule to adhere to the construction of prior legislation which is subsequently incorporated in a statute or regulation. See Altschuler v. Boston Rent Board, 12 Mass. App. Ct. 452, 425 N.E.2d 781, 788, n. 15 (1981), *aff'd.*, 386 Mass. 1009 (1982), and cases cited therein.

Since the presence of a dog in violation of a "no pets" provision is not sufficient to constitute a "substantial violation" of the lease under prior precedent, plaintiff is not entitled to use this as a basis for the defendant's eviction.[15] Defendant agrees that if a dog were to repeatedly disturb other tenants' quiet enjoyment, this would constitute "material noncompliance" such as to trigger the HUD regulations. However, this is not the case here. Since the plaintiff has not alleged, in the notice to quit or in the summons and complaint, grounds such as would show a "substantial" violation of the lease, it is not entitled to recover possession in this action.

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[15] In Jefferson Garden Assocs. v. Greene, 202 Conn. 128, 520 A.2d 173 (Conn. 1987), the Court found that a tenant could be evicted for having a doberman pinscher in subsidized housing in violation of her lease. However, the tenant there did not assert that the presence of the dog was not a "substantial violation" of her lease within the meaning of 24 C.F.R. § 247.3(c), and therefore the Court had no occasion to rule on this issue.

IV. Where, As Here, Ms. Rodriguez Never Received Notice of the Court Action, The Case Must Be Dismissed.

As noted above, Ms. Rodriguez claims to have never received notice of this proceeding prior to her default, since she did not receive a copy of the summons and complaint. This defect must not only lead to vacating of the default under Rule 60(b)(4), but it must lead to dismissal of the action.

In Peralta v. Heights Medical Center, Inc., 485 U.S. 80, 108 S.Ct. 896 (1988), the Supreme Court had to consider the effects of a default judgment where the defendant never received notice of the proceeding. The Texas courts held that, in order to be entitled to relief from the default, the defendant not only needed to show that he had not gotten notice, but also had to show that he had a defense on the merits of the action. The Supreme Court rejected this standard on constitutional grounds and reversed the State court:

> "[U]nder our cases, a judgment entered without notice or service is constitutionally infirm. 'An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under the circumstances, to apprise interested parties of the pendency of the action and afford them the opportunity to present their objections.' Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). Failure to give notice violates 'the most rudimentary demands of due process of law.' Armstrong v. Manzo, 380 U.S. 545, 550 (1965)."

Peralta, 108 S.Ct. at 899.

In the present case, Ms. Rodriguez denies receipt of the summons and complaint, and the constable's return does not indicate that it was served to her apartment, but only to the building address.

Under Peralta, this lack of service of process makes the judgment not only voidable, but void, and therefore the plaintiff is not entitled to proceed against Ms. Rodriguez in this action.

V. By Recertifying Ms. Rodriguez and Executing a New Lease, the Plaintiff Established a New Tenancy, and Thereby Gave Up the Right to Maintain This Action.

As noted above, defendant's counsel believes, based on the facts in this case, that there may well have been a recertification of the tenant and/or the execution of a new lease or lease addendum or extension subsequent to the service of the notice to quit. In Tenants Development Corp. v. Elad, Boston Housing Court CA #24891 (Daher, C.J., May 27, 1988), the Housing Court found that a Federally subsidized landlord had established a new tenancy by recertifying the tenant and entering into a new lease after entry of a summary process judgment against the tenant. Here, on belief and information, Ms. Rodriguez recertified and/or executed a new lease or lease addendum or extension after receipt of the notice to quit. By recertifying the tenant and executing a new lease or addendum, the plaintiff waived its notice terminating the tenancy, and this action must be dismissed.

CONCLUSION

For all the foregoing reasons, then, the defendant asks that the Court vacate the default judgment and grant her motion to dismiss under Rule 12(b)(1) and 12(h)(3) of the Mass. Rules of Civil Procedure.

NANCY RODRIGUEZ,
By her attorney,

James M. McCreight, Esq.
Greater Boston Legal Services
68 Essex Street
Boston, MA 02111
(617) 357-5757, ext. 3301
BBO #542407

Date: July 24, 1991

Certificate of Service

Hdelivered

I, James M. McCreight, counsel for the defendant, do hereby certify that on this the 24th day of July, 1991, I caused a copy of the foregoing to be ~~mailed, first class mail, postage prepaid~~, to counsel for the plaintiff in this action, Robert D. Russo, Esq., 295 Devonshire Street, Boston, MA 02110.

Date: July 24, 1991

J. M. McC
James M. McCreight