



February 14, 2011

630 Eye Street, N.W.
Washington, D.C. 20001
(202) 289-3400
Fax (202) 289-3401
E-mail: hdli@hdli.org
Web page: www.hdli.org

President
Mattye Gouldsby Jones, Esq.
Dallas, TX

Vice President
Vivian Bryant, Esq.
Orlando, FL

Secretary-Treasurer
George Keith Martin, Esq.
Richmond, VA

Board of Directors

Susan C. Cohen, Esq.
Boston, MA

David C. Condon, Esq.
Owensboro, KY

Kurt Creager
Phoenix, AZ

Ricardo L. Gilmore, Esq.
Tampa, FL

Barbara Holston
Ft. Worth, TX

Carol A. Kubic, Esq.
Minneapolis, MN

Stephen Holmquist, Esq.
Washington, DC

Thomas E. Lewis, Esq.
Merced, CA

Margaret McFarland, Esq.
College Park, MD

Rudolph Montiel, PE
Los Angeles, CA

Ricardo Elias Morales, Esq.
New York, NY

Saul N. Ramirez, Jr.
Washington, D.C.

Michael H. Reardon, Esq.
Washington, D.C.

Steven J. Riekens, Esq.
Omaha, NE

Fradique Rocha, Esq.
Tampa, FL

Mitzie Smith-Mack, Esq.
Washington, DC

Rod Solomon, Esq.
Washington, D.C.

**Executive Director
& General Counsel**
Lisa L. Walker, Esq.

Director of Administration
Timothy P. Coyle

Shaun Donovan
Secretary
U.S. Department of Housing and Urban Development
451 7th Street SW Suite 10000
Washington, DC 20410

Michael P. Stephens
Acting Inspector General
Office of Inspector General
U.S. Department of Housing and Urban Development
451 7th Street, SW Suite 8256
Washington, DC 20410

Re: Preserving Legal Privileges for Public Housing Agencies

Dear Secretary Donovan and Acting Inspector General Stephens:

Since 1984, the Housing Development Law Institute ("HDLI") has served as a legal resource in the affordable housing industry. Our members consist of more than 200 public housing agencies and redevelopment agencies (collectively, "PHAs"), attorneys who represent those agencies, and other stakeholders in the public and affordable housing industry across the United States. HDLI enjoys a long-standing and productive relationship with the United States Department of Housing and Urban Development ("HUD"). On behalf of HDLI's members, HDLI writes to request your assistance in preserving legal privileges for HUD grantees. Notwithstanding their public status, PHAs and other governmental or quasi-governmental entities enjoy the same legal protections as do private parties, most especially the important protections of the attorney-client privilege.

HDLI is aware that, through HUD Notice PIH 2006-9, HUD continues to urge PHAs to attach an addendum to legal contracts with outside counsel that, *inter alia*, waives the attorney-client privilege with respect to HUD.¹ HDLI is concerned that waiver of PHA privileges as to HUD could be devastating to PHAs, particularly in states that do not provide for partial or selective waivers. Waiver of the attorney-client and other privileges could adversely impact the integrity of a PHA's litigation position, its procurement process, and the PHA's operations overall, thereby putting precious Federal dollars at significant risk.

Anything divulged to HUD potentially could find its way via a FOIA request into the hands of opposing counsel, competing bidders and other entities, to the detriment of the PHA. Once more, a waiver of the privilege for HUD could be construed as a waiver as to all other parties in litigation matters. Giving an undue advantage to other parties, this could result in the PHA losing, or having to settle, a case that it otherwise might have won without the release of the privileged and sensitive information.

For in-house or outside counsel and their clients, the attorney-client privilege is an integral part of the attorney-client relationship. It protects PHAs from the disclosure of confidential communications made to their attorneys for the purpose of obtaining legal advice. The privilege encourages frank discourse, with the objective of effectively addressing the needs of HUD grantees. Access to counsel, whether in-house or outside, is critical to ensuring accurate interpretations of HUD's regulations and the appropriate expenditure of Federal funds. Further, PHAs that are able to obtain legal advice are better able to competently and efficiently address their wide range of legal issues, protecting HUD grantees and Federal dollars from frivolous claims.

PHAs, working with effective legal advice, are able to achieve significant success. Across the country, in-house and outside counsel have been instrumental in leveraging hundreds of millions of dollars in non-Federal funds to build new public housing, revitalize communities, and improve the lives of public housing residents. The ability to access legal advice has protected PHAs from paying untold dollars in frivolous lawsuits, ensuring that Federal funds are instead spent on HUD programs. When PHAs decide to use the services of outside counsel, that counsel is selected under open, competitive bid processes, often at rates that reflect the public nature of the work and, where necessary, are approved by HUD.

A recent situation illustrates HDLI's concerns. It has come to HDLI's attention that HUD has requested that at least one PHA, Philadelphia Housing Authority², waive the attorney-client privilege as to HUD with regard to on-going legal services and with respect to the procurement of future legal services. Our understanding is that HUD has sought to deny counsel to this PHA by refusing to approve contracts for legal services because the PHA has sought to protect attorney-client communications that are apparent in their legal billing statements. This omnibus request arguably would include many communications protected by the attorney-client privilege, since the details in billing statements often contain information about topics discussed between attorneys and their clients, and legal strategy. HDLI understands that HUD has rejected the PHA's suggestion to provide redacted billing statements devoid of attorney-client privileged information. These restrictions on the PHA's retention of counsel and payment of legal fees significantly undermine the attorney-client relationship. PHAs must have the discretion to select counsel, whether in-house or outside, which is best equipped to address its wide-ranging needs. They must have the autonomy to have open, frank discussions with their counsel and devise litigation strategy, without fear of exposure of their sensitive information and strategies. That is what the tenets of the attorney-client privilege guarantee. In the case of the Philadelphia Housing Authority, a large housing authority involved in complex litigation, the privilege is critical to its success and viability.

¹ See addendum to Notice PIH 2003-24 "Procurement of Legal Services by Public Housing Agencies," extended as Notice PIH 2006-09. See also Appendix 6 of HUD Handbook 1530.1 REV-5 "Litigation" dated May 2004, which incorporates the former notices, and Section 7.4G of HUD Handbook 7460.8 REV-2 "Procurement Handbook for Public Housing Agencies" dated March 2007.

² Philadelphia Housing Authority is not an HDLI member.

HDLI respectfully suggests that, in the interest of expedience and fiscal responsibility, a compromise quickly could be reached that would protect both HUD and the Authority and obviate the need for more protracted discussions or proceedings. The Authority could produce redacted billing statements to HUD, and for those statements where HUD is not satisfied with the amount of detail, a neutral third party or judge could review them *in camera* and make a determination whether additional detail is necessary to provide an adequate explanation of the need for the particular services, which HDLI understands is the genesis for HUD's need for the information. This type of compromise is common with regard to discovery issues, and would save taxpayers significant expense.

There is a growing consensus among other leading Federal law enforcement agencies on this issue. For instance, the United States Department of Justice and several other key federal agencies have reversed their privilege waiver policies in recent years. The Department of Justice replaced its previous privilege waiver policy in August 2008 with new guidelines which ensure that prosecutors do not pressure companies and other organizations to waive their attorney-client privilege and work product protections during investigations. Moreover, the U.S. Sentencing Commission voted unanimously to remove the waiver language from Section 8C2.5 of the Federal Sentencing Guidelines in April 2006, and the Commodity Futures Trading Commission replaced its previous August 2004 waiver policy with a new Enforcement Advisory in March 2007 directing its staff to respect the privilege and work product protections during investigations. Recently, the Securities and Exchange Commission issued a new Enforcement Manual in January 2010 generally prohibiting its staff from seeking such waivers. HDLI respectfully urges HUD to join its sister agencies and conform its policies accordingly.

Finally, HDLI endorses the positions set forth in the February 8, 2011 letter written to you by President Zack of the American Bar Association with respect to HUD's attorney-client-privilege-related policies and practices.

For the reasons above, HDLI respectfully urges HUD to swiftly take the following actions:

- (1) Establish clear policy that prohibits HUD and HUD OIG employees from requesting waivers of legal privileges or penalizing grantees who choose to protect those privileges;
- (2) Rescind all HUD notices and guidance that recommend that PHAs waive the attorney-client and/or other privileges; and
- (3) Direct all HUD and OIG staff that PHA access to counsel, and HUD's approval of legal services contracts, should never be made contingent on a waiver of legal privileges.

If HDLI can be of any further assistance with this matter, please do not hesitate to contact me at (202) 289-3400 or lwalker@hdli.org.

Respectfully submitted,

Lisa L. Walker
Executive Director & General Counsel