COURT OF CHANCERY
OF THE
STATE OF DELAWARE

JOHN W. NOBLE
VICE CHANCELLOR

417 SOUTH STATE STREET
DOVER, DELAWARE 19901
TELEPHONE: (302) 739-4397
FACSIMILE: (302) 739-6179

April 18, 2008

John W. Paradee, Esquire
Kevin M. Baird, Esquire
Prickett, Jones & Elliott, P.A.
11 North State Street
Dover, DE 19901

Joseph Scott Shannon, Esquire
Marshall, Dennehey, Warner,
Coleman & Goggin, P.C.
1220 N. Market Street, 4th Fl.
P.O. Box 8888
Wilmington, DE 19899-8888

Re: In re Kent County Adequate Public Facilities Ordinances Litigation
Consolidated C.A. No. 2921-VCN
Date Submitted: April 7, 2008

Dear Counsel:

Petitioners, landowners and developers, are challenging Respondent Kent County's adoption of certain land use ordinances known as the Adequate Public Facilities Ordinances (the "APFOs"). Discovery is ongoing. Before the Court is Petitioners' motion to compel responses to certain discovery requests.[1] The Court begins with a brief recitation of the facts pertinent to its resolution of this motion.

[1] In their response to Petitioners' motion to compel, Respondents moved for the return of certain privileged documents, which they contend were inadvertently disclosed in their January 30, 2008, production of documents to the Petitioners. *See generally* Kent County's Resp. in Opp'n

I. BACKGROUND

The parties' latest skirmish arises from Petitioners' Third Request for Production of Documents, served on or about December 17, 2007. In that request, Petitioners sought production of the following categories of documents:

(1) Documents related to "transportation improvement costs" as defined by the APFO for Roads;

(2) Documents related to the mitigation formulas for the APFO for schools;

(3) Correspondence sent by or on the behalf of any of the Commissioners to any State agencies regarding the APFOs;

---

to Pet'rs' Mot. to Compel Disc. and Mot. for the Return of Docs. Petitioners respond that the disclosure constitutes a waiver of the attorney-client privilege, and, in any event, that the subject matter of the documents disclosed—namely, the drafting, interpretation, and application of the APFOs—have been placed "at issue" by Respondent and, therefore, that Respondents may not selectively assert attorney-client privilege to preclude discovery of otherwise privileged communications touching upon that subject matter.

It is not clear from Petitioners' motion that they have moved to compel the documents thus far withheld under the attorney-client privilege; at least, they did not explicitly request them. The issue arguably is joined through Respondents' motion for the return of documents; certainly, Respondents focused on the issue in their written opposition to Petitioners' motion and both parties spent considerable time arguing the attorney-client privilege issue at oral argument. *See generally* Tr. of 4/7/2008 Oral Argument on Pet'rs' Mot. to Compel Discovery ("Tr.") at 47-92. On the other hand, however, the issue is not properly briefed because there is no written submission from Petitioners.

Notwithstanding the halting presentation of the attorney-client privilege issues, the Court will endeavor to provide some general guidance, at least as the Court understands those issues from the current, limited record. See *infra* Part II(B). The issues presented are hardly novel, although the parties have adopted aggressive positions.

> (4) Correspondence received by or on the behalf of any of the Commissioners [from] any State agencies regarding the APFOs;
>
> (5) Documents, correspondence, presentations, or memos prepared by, or on behalf of, any of the Commissioners instructing, advising, or otherwise stating how to interpret, apply or ensure compliance with any of the [APFOs]; and
>
> (6) Emails or electronic correspondence sent or received by Respondents regarding the APFOs.[2]

Respondents produced documents in response to Petitioners' requests on or about January 30, 2008. With respect to requests 5 and 6, Respondents objected to the extent that those requests sought production of attorney-client privileged materials, but, otherwise, they purported to produce documents responsive to those requests as well. Much to Petitioners' dismay, however, the documents produced by Respondents contained not "a single Levy Court or Planning Commissioner email, and a scant four pages of documents drafted by Commissioners . . . ."[3] Petitioners inquired of Respondents regarding the apparent dearth (in their view) of responsive documents on February 21, 2008. They also noted that Respondents' January 30 production had included several pages of correspondence between Respondents and their legal counsel regarding the APFOs; Petitioners argued that

[2] Pet'rs' Mot. to Compel Disc. at 1.
[3] *Id.* at 2.

this disclosure constituted a waiver of the attorney-client privilege, and, according to Respondents, they demanded all communications between Respondents and their counsel regarding the APFOs.[4]

Respondents replied to Petitioners that same day. First, with respect to Petitioners' concerns regarding the lack of correspondence and emails, Respondents stated that they were reviewing "several thousand" more pages of emails and that they would endeavor to produce additional documents or a privilege log by February 29, 2008. Second, with respect to the disclosed attorney-client privileged documents, Respondents maintained that the disclosure had been inadvertent and requested the return of those documents.

Neither a privilege log nor additional documents were produced by February 29. The parties communicated several more times regarding Petitioners' demands for production and Respondents' demands for the return of their privileged documents. On or about March 10, the parties reached impasse when Respondents stated that they would not engage in further discovery until the Court issued its decision on Respondents' then-pending motion for a protective order to

[4] There is some debate between the parties as to the scope of privileged communications demanded by Petitioners.

preclude depositions of individual Respondents, which raised issues of legislative privilege that, in their view, also would inform the remainder of the discovery process more generally. Petitioners then moved to compel production.

The Court issued its decision on Respondents' motion for a protective order on March 19, 2008.[5] In that letter opinion, the Court acknowledged Respondents' assertion of legislative privilege and concluded that it *might* curtail Petitioners' ability to discover certain evidence directly from the Levy Court and Regional Planning commissioners.[6] In addition, in an attempt to focus the parties' efforts going forward, the Court provided some general guidance regarding the scope of permissible discovery that Petitioners might seek from those individuals.[7] Even

[5] *In re Kent County Adequate Pub. Facilities Ordinances*, 2008 WL 859342 (Del. Ch. Mar. 19, 2008).

[6] Respondents' motion for a protective order more or less presented the question of whether Delaware law recognizes legislative privilege as a legitimate testimonial and evidentiary privilege that could be asserted by the individual Respondents to avoid (or limit) inquiry into their efforts to craft the APFOs. The Court concluded that such a privilege should be recognized but also that it was limited and could not be asserted to foreclose Petitioners' efforts to discover facts about the process by which the APFOs came into being. The Court did not have an opportunity in its March 19 letter opinion to explore any particular application of legislative privilege in this case, however, because Respondents' motion sought preemptively to preclude Petitioners from seeking depositions from the Levy Court and Regional Planning commissioners.

[7] *Id.* at *5 ("Although Petitioners are entitled to seek discovery from the [individual Respondents], such discovery will necessarily be limited by the legislative privilege. Petitioners, for example, may not inquire into the Kent County Officials' motivations for enacting the APFOs, the substance of their public, or lawful private, discussions and deliberations relating to the drafting and enactment of the APFOs, or their understanding of the APFOs (*e.g.*, the "why" or "what did you intend" questions). On the other hand, for example, inquiry about discussions

with the Court's March 19 letter opinion, however, the parties apparently have not been able to agree upon a continued course of discovery, and, thus, the present motion requires resolution.

As in their recent battle over the existence of legislative privilege, the parties stake out diametrically opposed "all or nothing" positions with respect to the additional discovery sought by the pending motion. For example, Petitioners continue to seek "[a]ll documents, correspondence, presentations, or memos prepared by, or on behalf of, any of the Respondents or any of their employees or department directors, instructing, advising, or otherwise stating how to interpret, apply or ensure compliance with any of the [APFOs]."[8] Respondents, for their

---

among Levy Court members or Planning Commission members, in the presence of a quorum of the respective body and not at a meeting in compliance with [the Freedom of Information Act], would be proper. A more precise delineation of the proper boundaries of inquiry, however, cannot be achieved on the present record."). Although the Court's March 19 decision specifically considered the application of legislative privilege in the context of Petitioners' attempt to depose various members of the Levy Court and Regional Planning Commission, the legislative privilege, as an evidentiary and testimonial privilege, may apply to other types of discovery requests as well.

At oral argument on the pending application, Petitioners requested clarification from the Court regarding the extent to which other County employees might be able to assert legislative privilege to resist discovery. *See* Tr. at 84. That particular issue was not presented for the Court's consideration in connection with its March 19 letter opinion regarding the application of legislative privilege in this case. Moreover, it has not been brought before the Court now in any specific factual context. The Court declines the Petitioners' invitation to expound in a factual vacuum about how the legislative privilege may benefit County employees.

[8] Pet'rs' Mot. to Compel Disc. at 1.

part, have flatly refused to produce additional responsive documents or a privilege log. Moreover, they now appear to resist further discovery altogether based upon an argument that, in its most succinct form, can best be summarized as "enough is enough,"[9] but, more specifically, appears to rest upon some loose amalgamation of privilege (attorney-client or legislative) and a belief that Petitioners' discovery requests are irrelevant or are otherwise unduly burdensome. Thus, the Court must once again enter the discovery fray.[10]

---

[9] Tr. at 77.

[10] The Court's admonition to the parties in *Amirsaleh v. Bd. of Trade of City of New York, Inc.*, 2008 WL 241616 (Del. Ch. Jan. 17, 2008), regarding the conduct of discovery has considerable force in this case as well, particularly in light of the gratuitous barbed comments and pointed tone in the parties' recent series of filings (and other communications between counsel submitted into evidence in connection with those filings):

> The Rules of this Court are primarily based on the Federal Rules of Civil Procedure, which were originally crafted in their modern form in 1938. The framers of the federal rules intended the discovery process to be managed with little judicial oversight by the parties, and intended that the process be cooperative and self-regulating. Today, with far more complex cases and discovery processes that are extraordinarily voluminous and complicated, cooperation and communication among the parties and their counsel are even more important.
>
> Such communication and cooperation were clearly absent in this case. Defendants protest at length in their answering brief about [plaintiff's counsel's] failure to discuss this discovery dispute. Such behavior is inappropriate. *The Court does not relish the opportunity to resolve discovery spats that likely could have been resolved by the parties on their own.* If defendants did not understand [the Court's prior discovery decision], they should have asked for clarification. If plaintiff took issue with defendants' response to discovery request, he should have reached out to defense counsel to express his concerns. Plaintiff's counsel should certainly not refuse to articulate such concerns when explicitly asked to do so by

II. ANALYSIS

The present dispute, although something of a morass, may be reduced to the resolution of three issues to move this matter forward: (1) whether Petitioners are entitled to an order compelling further responses to their Third Request for Production of Documents; (2) whether Respondents are entitled to assert various privileges to resist and circumscribe the scope of documents sought by Petitioners' Third Request for Production of Documents; and (3) the extent to which Respondents' disclosure of attorney-client privileged communications may have waived the privilege. The first two issues are interrelated and can be addressed in a cursory fashion. The third issue is slightly more nuanced.

> the other side. *Both sides are reminded to treat one another with respect and civility throughout the discovery process.*

Id. at *3 (emphasis added) (citations omitted).

The Court, of course, does not intend to discourage the parties (or litigants generally) from bringing to the Court's attention legitimate discovery disputes, which, undoubtedly, will arise from time to time. Moreover, the Court acknowledges that counsel for both parties did, in fact, attempt to communicate regarding the present discovery issues, at least in the latter part of February and in early March. The lack of communication to resolve this dispute following the Court's March 19 letter opinion, however, is inexplicable. The more acute problem in this case would seem to be the parties' tendency to adopt intractable positions instead of seeking out pragmatic solutions to move the discovery process along.

A. *Respondents Must Produce Additional Documents or a Privilege Log*

Petitioners have reason to believe Respondents possess additional documents that may be responsive to their Third Request for Production of Documents.[11] For reasons that, frankly, are unclear, Respondents appear unilaterally to have decided that Petitioners have taken sufficient discovery and, therefore, that they are not going to produce any additional documents or a privilege log. In support of this arbitrary "line in the sand," Respondents bemoan the extent of discovery sought in this case; such is the nature of complex litigation, however. The Court recognizes that the County has already produced several thousand pages of documents, but that fact alone does not (and cannot) justify Respondents' actions, particularly where Petitioners continue to seek information that may be relevant to their procedural claims—to be clear, non-privileged emails and other communications bearing on the process by which the APFOs came into being are relevant to Petitioners' procedural claims.

To the extent that request 5 seeks documents which reflect the individual and subjective "understanding" of Levy Court and Planning Commission

[11] To be sure, Respondents indicated on February 21, 2008 that they had "thousands" of additional pages of emails.

members, Petitioners have failed to demonstrate how that request is likely to lead to the discovery of admissible evidence.[12] More to the point, on numerous occasions, the Court has indicated to Petitioners that the Levy Court commissioners' understanding and interpretation of the APFOs would be of dubious evidentiary value; nevertheless, Petitioners continue to seek it. The APFOs cannot survive or fail judicial review based upon a legislator's subjective understanding or interpretation; instead, the Court will review the ordinances and determine whether, on their face, they fail for vagueness or otherwise are subject to arbitrary or capricious application. Accordingly, the scope of request 5 is modified in this manner.[13]

In sum, the Court will enter an order compelling Respondents to respond to Petitioners' discovery requests, except request 5 as limited above, to the extent they have additional responsive, non-privileged documents; to the extent

[12] A party generally is entitled to seek broad discovery, provided, however, that the discovery sought is relevant to the subject matter involved in the pending action and is reasonably calculated to lead to the discovery of admissible evidence. Ct. Ch. R. 26(b).

[13] Petitioners' request 5 may be read to include not only the subjective views of individual Respondents, but also any formal guidance documents adopted by Respondents. This latter category, if there are documents within it, is appropriate for discovery.

Respondents seek to withhold documents on the basis of privilege, they shall provide a privilege log.[14]

B. *Attorney-Client Privilege Issues*

The parties also disagree about the extent to which Respondents may have waived attorney-client privilege in this matter. In particular, this issue arises from two separate incidents in which Respondents have disclosed attorney-client privileged communications—one was voluntary and intentional, the other was inadvertent.[15]

"Broadly speaking, the attorney-client privilege protects communications between a client and an attorney where the communications are intended to be and remain confidential."[16] The privilege can be waived, however. For example, "[a] waiver may result from the voluntary disclosure of privileged information to third parties, including partial disclosure, or from placing a privileged communication

[14] Without a privilege log, a rational approach to resolving the next round of discovery disputes will not be achievable.

[15] According to the parties, the disclosure consists of six strings of communications (approximately twenty-one pages in total) among various Kent County officials and employees and the County's attorneys.

[16] DONALD J. WOLFE, JR. & MICHAEL A. PITTENGER, *Corporate and Commercial Practice in the Delaware Court of Chancery* § 7-2, at 7-12 (2007) [hereinafter WOLFE & PITTENGER] (citations omitted).

'at issue.'"[17] In addition, although waiver typically is viewed as the voluntary relinquishment of a known right, "waiver of the attorney-client privilege may be implicit, even if contrary to the party's actual intent."[18] Thus, "[a] party may waive the attorney-client privilege with intent or when the party's actions have the practical result of granting access to the opposing party."[19] Under the circumstances presented by the two instances of disclosure in this case, different results with respect to waiver of the privilege obtain.

1. The First Instance of Disclosure and the "At Issue" Exception to Attorney-Client Privilege

The first disclosure occurred in connection with Respondents' motion for a protective order to preclude Petitioners' efforts to depose the individual Respondents. In support of that motion, Respondents attached a string of email communications between the Director of Planning Services for Kent County and the County's attorney regarding the drafting and preparation of certain

[17] *Id.* § 7-2[c][1], at 7-25 (citations omitted).
[18] *Tackett v. State Farm Fire and Cas. Ins. Co.*, 653 A.2d 254, 259 (Del. 1995).
[19] *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 2008 WL 498294, at *3 (Del. Super. Jan. 14, 2008).

amendments to the APFOs (the "APFO Amendments").[20] There is no dispute that this particular waiver of attorney-client privilege was voluntary and intentional.

Respondents contend, however, that their decision to disclose that particular communication was a tactical one, intended to allay Petitioners' concerns that the APFO Amendments introduced at the public meeting to adopt the APFOs on March 27, 2007, were prepared by a quorum of Levy Court members in violation of FOIA's public meeting requirement; thus, in their view, attorney-client privilege has been waived only as to the contents of that particular privileged communication. Furthermore, Respondents argue that they disclosed the entire communication; accordingly, there can be no valid concerns under the partial disclosure exception to attorney-client privilege. Petitioners counter that, by relying upon an argument that the APFO Amendments were drafted and prepared by the County's attorneys and, more specifically, by disclosing selected privileged communications to prove that point, Respondents have waived their right to assert attorney-client privilege to protect similar communications regarding the drafting and preparation of the APFOs generally because they have now placed those documents and the County's attorneys' involvement "at issue."

[20] *See* App. A-2 to Resp'ts' Mot. for Protective Order (Aff. of Michael J. Petit de Mange), Ex. 2. The parties have referred to this document by its Bates number, APFO1677.

The "at issue" exception to attorney-client privilege applies when "the party holding the privilege waives the privilege in one of two basic ways: (1) the party injects the communications into the litigation, or (2) the party injects an issue into the litigation, the truthful resolution of which requires an examination of the confidential communications."[21] In this case, Respondents have waived the protection of attorney-client privilege with respect to their communications regarding the drafting and preparation of the APFO Amendments on both grounds. First, Respondents specifically placed their communications with counsel at issue by relying upon certain communications between the County and its attorneys in support of their motion for a protective order to preclude depositions of the individual Respondents. Second, Respondents' chief defense to Petitioners' theory that the APFO Amendments were drafted in violation of FOIA is that the County's attorneys prepared several detailed versions of the amendments in anticipation of possible concerns that might have been raised by the Levy Court commissioners at the meeting to consider and adopt the APFOs. That defense to Petitioners' allegations places the County's attorneys' actions and communications with the

[21] *Baxter Int'l, Inc. v. Rhone-Poulenc Rorer, Inc.*, 2004 WL 2158051, at *3 (Del. Ch. Sept. 17, 2004).

County at issue, at least with respect to the drafting and preparation of the APFO Amendments.

It is axiomatic that a party may not make bare factual assertions, "the veracity of which are central to the resolution of the parties' dispute, and then assert the attorney-client privilege as a barrier to prevent a full understanding of the facts disclosed."[22] Accordingly, Respondents cannot assert attorney-client privilege to protect communications regarding the drafting and preparation of the APFO Amendments. In that limited respect, the privilege has been waived and Petitioners are entitled to discover that information.[23] On the other hand, the scope of the waiver is not without limits. The County "injected" attorney-client communications into this matter on a relatively narrow basis: to respond to Petitioners' specific allegations about the (to them) surprising appearance of the draft APFO Amendments adopted by the Levy Court on March 27, 2007.[24] To

[22] *Tackett*, 653 A.2d at 259.

[23] It may be that the County has produced all documents for which the privilege has been waived. Without a privilege log detailing the communications both before and after the disclosed emails regarding the APFO Amendments, that is a question that cannot be answered.

[24] Although Respondents' subjective intent does not define the scope of waiver under the "at issue" exception, any such waiver of privilege typically is limited to the particular subject matter of the disclosure, s*ee, e.g.*, *Citadel Holding Corp. v. Roven*, 603 A.2d 818, 825 (Del. 1992); WOLFE & PITTENGER, *supra* note 16, § 7-2[c][2], at 7-29. In this instance, Respondents waived the privilege only to address a narrow question regarding the process by which the detailed

amendments to the APFOs came into being. The County Administrator's affidavit (and the content of the disclosed emails) demonstrates the limited scope of disclosed materials:

> 11. Through a series of e-mails, the release and disclosure of which is not intended as a waiver of any applicable privilege other than as to the specific matters as stated within the released e-mails themselves, I corresponded with the County Attorney beginning on March 22, 2007 . . . by which I forwarded to him Ordinance LC06-27 (Roads) as introduced on June 13, 2006 and three (3) amendments: Amendment 1 prepared by Attorney . . . and dated December 15, 2006; Amendment 2 prepared by myself dated December 15, 2006 and incorporating comments received from DelDOT; and, Amendment 3 prepared by myself in consultation with [the County Attorney] pertaining to the time limits on the filing of the vested rights claim. . . . I [also] forwarded to [the County Attorney] Ordinance LC06-28 (Schools) as introduced on June 13, 2006 along with three (3) amendments: Amendment 1 prepared by Attorney . . . dated December 15, 2006; Amendment 2 prepared by myself dated December 15, 2006 incorporating comments from the Delaware Department of Education; and, Amendment 3 prepared by myself in consultation with [the County Attorney] pertaining to the time limits on the filing of vested rights claims. . . . [The County Attorney] requested the materials so that he could review and make the revisions to the amendments as requested by certain Levy Court Commissioners during the March 20, 2007, Planning Services Committee Meeting. Those e-mails and the attached documents are [an exhibit] hereto and Bates Numbered "APFO0640" through "APFO01701," and represent previously-prepared amendments and any revisions made through March 22, 2007.
>
> 12. By e-mail dated March 27, 2007 . . . [the County Attorney] returned to me three (3) amendments for LC06[-]27 (Roads) identified therein as Amendment 4, Amendment 5, and Amendment 6 as requested by certain of the Levy Court Commissioners, which e-mail and attachments in the form received by me are attached [as an exhibit] hereto and Bates Numbered "APFO1677" through "APFO1701", and provide three different level of service options for APFO LC06-27 for the originally-designated Proposed Amendment 2.
>
> [. . . .]
>
> 14. [The Levy Court adopted certain amendments identified in paragraphs 11 and 12 at the public hearing on March 27, 2007.].

See Aff. of Michael J. Petit de Mange, *supra* note 20.

construe a limited and focused waiver regarding the preparation of certain amendments into a broad waiver as to all (or almost all) communications between the County and its attorneys is unjustified.[25]

2. The Second Instance of Disclosure and the Inadvertently Disclosed Documents

The second disclosure occurred during Respondents' production of documents on January 30, 2008. Respondents claim that several privileged communications between various County officials or employees and the County's attorneys were inadvertently disclosed.[26] Petitioners counter that the communications are not privileged because they pertain to their claims regarding the drafting, interpretation, and application of the APFOs.[27]

[25] "The Delaware Supreme Court has explained that the waiver doctrine rests upon a fairness rationale." WOLFE & PITTENGER, *supra* note 16, § 7-2[c][1], at 7-25 (citing *Tackett*, 653 A.2d at 259). Under the circumstances, fairness mandates that Petitioners be afforded complete discovery regarding the drafting and preparation of the amendments to the APFOs. Conversely, however, it would be unfair to Respondents if the Court deemed this particular instance of limited disclosure to constitute a broad waiver of the ordinarily sacrosanct attorney-client privilege.

[26] These documents have been identified to the Court by their Bates numbers as APFO 2005-2013; 2120; 2165; 2166; and 2170-73. At oral argument, Petitioners represented to the Court that documents APFO 2005-2013 have been destroyed. Tr. at 54.

[27] The Court has not reviewed the documents; general guidance will have to suffice.

An inadvertent disclosure of privileged communications will not necessarily operate to waive the attorney-client privilege.[28] In order to determine whether the inadvertently disclosed documents have lost their privileged status, the Court must consider the following factors: (1) the reasonableness of the precautions taken to prevent inadvertent disclosure; (2) the time taken to rectify the error; (3) the scope of discovery and extent of disclosure; and (4) the overall fairness, judged against the care or negligence with which the privilege is guarded.[29]

The Court is satisfied that Respondents have not waived the attorney-client privilege with respect to the "inadvertently disclosed" documents.[30] First, it appears that Respondents instituted reasonable precautions to prevent the disclosure of privileged materials—*e.g.*, their outside litigation counsel reviewed the documents prior to producing them to Petitioners. Given the volume of discovery in this case, however, it is not inconceivable that Respondents' counsel, even with a diligent review of the documents, could inadvertently have produced privileged materials to Petitioners. Second, Respondents' counsel acted promptly

---

[28] WOLFE & PITTENGER, *supra* note 16, § 7-2[c][1], at 7-26.
[29] *Id.* at 7-27; *Monsanto Co. v. Aetna Cas. & Sur. Co.*, 1994 WL 315238, at *6 (Del. Super. May 31, 1994) (quoting *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 104 F.R.D. 103, 105 (S.D.N.Y. 1985)).
[30] Except, of course, to the extent any of the "inadvertently disclosed" documents fall within the "at issue" exception discussed above.

to demand a return of the privileged communications upon discovering that they had been disclosed—indeed, he took that action within hours of learning that Petitioners were in possession of potentially privileged materials. Third, Respondents represent that the handful of privileged documents disclosed in the January 30 production amounts to less than 0.1% of the thousands of pages of documents produced in this litigation so far. Although the Court has not had (nor has it sought) an opportunity to review the documents, the Court agrees, based upon Respondents' representations, that the January 30 disclosure is a relatively minor incident in the context of the broad discovery engaged in by the parties. Finally, fairness in this instance dictates that Respondents not be deemed to have waived attorney-client privilege with respect to the inadvertently disclosed communications.

In sum, the Court is satisfied that Respondents implemented adequate safeguards to avoid disclosure of privileged materials; although Respondents' counsel clearly missed privileged communications in his review of the documents produced to Petitioners, there is no evidence that he was culpably negligent in his efforts to preserve the attorney-client privilege. Mistakes and inadvertent disclosures inevitably will happen from time to time, particularly in complex

litigation requiring the review of thousands of documents. Respondents should not be deemed to have waived the attorney-client privilege due to the inadvertence of their counsel under these circumstances. Moreover, to the extent the inadvertently disclosed documents pertain to the individual Respondents' subjective views on the interpretation and application of the APFOs, Petitioners will not be prejudiced by returning the documents because those issues, as the Court has already noted, are not relevant to this litigation. Accordingly, Petitioners must return to Respondents the inadvertently disclosed privileged documents, except to the extent any of those documents fall within the "at issue" exception discussed above.

III. CONCLUSION

In accordance with this letter opinion, the parties' discovery dispute is resolved as follows:

(1) Respondents must produce additional documents responsive to Petitioners' Third Request for Production of Documents or a detailed privilege log within a reasonable period of time to be agreed upon by the parties. Any assertion of privilege by Respondents must be consistent with this letter opinion and the Court's March 19, 2008 letter opinion concerning the application of legislative privilege in this case;

(2) Respondents have waived the attorney-client privilege with respect to communications between or among County officials and the County's attorneys pertaining to the drafting and preparation of the APFO Amendments; and

(3) Any inadvertently disclosed privileged communications not falling within the "at issue" exception (or other applicable exceptions, if any) to the attorney-client privilege shall be returned by Petitioners to Respondents promptly.

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: William W. Pepper, Sr., Esquire
Register in Chancery-K