

THE COUNSELLOR



NEXT EVENT: HDLI FALL CLE CONFERENCE: MONDAY, NOVEMBER 1, 2010 in Reno, NV. *Register Today!*

Gun Control in Public Housing After McDonald v. Chicago

By Lisa L. Walker

The U.S. Supreme Court recently has reshaped Second Amendment doctrine in a manner that directly affects the rights of public housing tenants to possess handguns in their homes for self-defense purposes.

Background

Two years ago in the case of *District of Columbia v. Heller*, 554 U.S. ___ (2008) the U.S. Supreme Court, in a plurality 5-4 decision, settled longstanding debate over whether the 2nd Amendment right to keep and bear arms is a right of individuals, in addition to a collective right of state-regulated militias. In *Heller*, the High Court held that there is an individual right to keep and bear arms in the District of Columbia. The Court in *Heller* observed that to “keep and bear arms” means to “possess and carry weapons in case of confrontation.” *Heller, supra*, 554U.S. ___ (Slip Op. @19). The *Heller* holding was limited to federal laws and federal enclaves such as the

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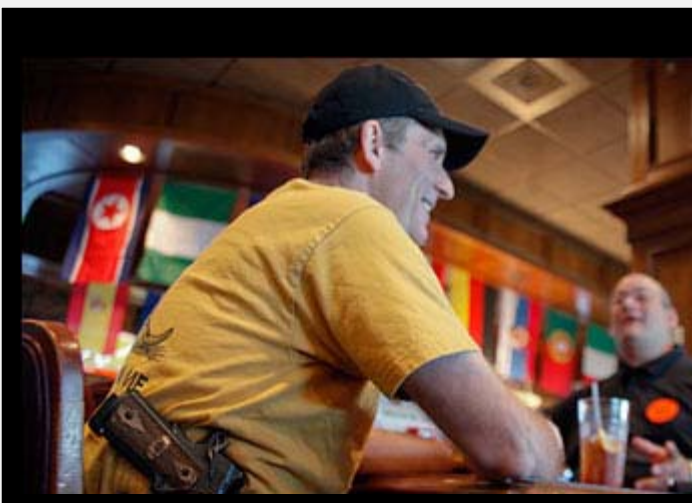
District, did not affect other state and local laws, and brewed uncertainty as to the constitutionality of gun regulation in the 50 states. Housing agency weapons policies were in a state of flux.

Then came the widely anticipated decision in the *McDonald* case a few weeks ago. Using Chicago and its neighboring suburb as a backdrop, gun advocate groups promptly bankrolled a suit to attempt to extend the *Heller* holding to Illinois and all states across America. *McDonald v. Chicago*, 561 U.S. ____ (Jun. 28, 2010) (combined with *NRA v. Chicago*) *accessible at*

<http://www.supremecourt.gov/opinions/09pdf/08-1521.pdf>. Chicago was chosen because its gun ban, unlike more limited bans elsewhere across the country, banned handgun registration and possession by almost every citizen, and set up mandatory re-registration and other conditions upon gun ownership.

The suit challenged these laws on the ground that they left citizens vulnerable to criminals. Specifically, the plaintiffs sought a declaration that the ban and related ordinances violated the 2nd and 14th Amendments because the right to bear arms is among the “privileges or immunities” of citizens of the U.S. protected by the 14th Amendment, and/or

Please see *Gun Control* on page 4



Picture courtesy of WashingtonPost.com

Greetings Friends and Colleagues:

I would like to once again encourage you all to spread the word about HDLI to your colleagues and business partners. We have been working to grow the organization to include developers, syndicators, management companies, lenders, consultants and other stakeholders in the public and affordable housing business. We believe that having them take part in our renowned training programs and conferences will not only better educate them on the idiosyncrasies of our industry, but will add another important voice to our discussions and debates. We will soon be adding programming that will include their work. In your next encounter with an industry partner, please recommend that they get to know HDLI. Our website's Membership page has useful information to share.

Once again, we have a superb line-up of topics for our next legal CLE conference, taking place November 1st in Reno, NV. Lisa Walker's Director's Dialogue on page 3 mentions all of our proposed topics. As we develop future seminars we always strive to hear from fresh

President's Page

Greetings from HDLI's President



Mattye Gouldsby Jones, Esq.

voices with fresh perspectives. I'm sending all of my friends a personal invitation to lend your expertise and experience at HDLI's upcoming events - the *General Counsel Forum* and *Spring Legal CLE Conference*. If you are interested in being a speaker at either or both of these events, please let me, staff or any HDLI board member know of your interest. And, as always, we want to hear from you on topics of interest. We are here to serve you.

I'm looking forward to chatting with all of you November 1st at HDLI's Fall CLE Conference.

Mattye 

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Lisa L. Walker, Esq.

Dear HDLI Members,

I hope that you are staying cool this summer. Most of this issue of the *Counsellor* is devoted to a discussion of the Supreme Court's recent landmark decision regarding restrictions on handguns - *McDonald v. Chicago* and its implications for housing agencies and local governments. The *McDonald* decision literally reshapes the contours of Second Amendment law. The decision is sure to spark a wave of new litigation to further define the limits of gun regulation in public housing and in the greater community. We will keep you posted.

~HDLI's Fall CLE Conference~

**November 1, 2010 at the Grand Sierra
Hotel and Casino in Reno, Nevada
Up to 6 CLE credits!**

Please plan to attend HDLI's upcoming Fall Legal CLE Conference titled **"LEGAL HOT TOPICS FOR HOUSING DIRECTORS, COUNSEL, & STAFF!"** The conference takes place November 1, 2010 as part of NAHRO's National Conference.

Proposed seminars include:

Director's Dialogue

News from the Executive Director & General Counsel

1. *The Evolution of Procurement: "Buy American" & Other New Procurement Rules*
2. *Wild, Wild West: Gun Control in Public Housing After Heller & McDonald*
3. *Lessons From Westchester: Understanding the Duty to Affirmatively Further Fair Housing*
4. *Don't Let the Sunshine Laws Burn You: The Art & Rules of the "Public Meeting"*
5. *Recent HUD Audits: What We've Learned*
6. *Section 8 Legal Developments: HUD's Transforming Rental Assistance Program*
7. *Semi-Annual Review of Case Law Affecting Assisted Housing*

You don't have to register for the entire NAHRO conference to attend HDLI's legal CLE conference. Register separately at a super low rate now! A registration form is attached.

HDLI'S Website & WebStore!

Please remember to travel the internet to HDLI's Website from time to time: www.hdli.org. We update it with "Legally Important" information, sample forms and policies, and other useful information. And you can always renew your membership and purchase HDLI conference materials and other products at HDLI's WebStore with a few clicks of your mouse: www.hdlistore.org.

I look forward to seeing you in Reno! 

WELCOME NEW HDLI MEMBERS!

HOUSING AUTHORITY OF THE CITY OF SHREVEPORT, LA

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because the 14th Amendment's Due Process Clause incorporates the 2nd Amendment right. 38 states filed *amicus curiae* briefs in support of eliminating the gun bans. More members of Congress signed on to *amicus* briefs in this case than at any other time in history.

The McDonald Holdings

The lower district court and the 7th Circuit held in favor of the gun bans, finding that precedent interpreting the 14th Amendment's Privileges or Immunities Clause did not extend 2nd Amendment guarantees to the states.

On June 28, 2010, the Supreme Court handed down a 214–page decision and dissent. In another 5–4 plurality decision, the Supreme Court reversed the 7th Circuit using a judicial process known as “selective incorporation.” Selective incorporation involves determining that a certain right guaranteed in the Bill of Rights or elsewhere (e.g., the right to bear arms) is “fundamental” by being “implicit in the concept of ordered liberty” or “deeply rooted in our nation’s history and traditions.” If fundamental, then courts will find that the right is “selectively incorporated” by the 14th Amendment and applied to the states. This means that state action cannot abridge that right.

Writing for the majority, Justice Samuel Alito delivered a number of holdings important to housing agencies and local governments (some of which were restatements of the *Heller* holdings):

1) The Second Amendment protects “a

Don't Miss Upcoming HDLI Events . . .

HDLI's Fall Legal CLE Conference

November 1, 2010

Reno, NV

Registration form attached



Housing and Development Law Institute

- personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home.”
- 2) Self-defense is a fundamental, basic right and is “the *central component*” of the Second Amendment right (Sl. Op. @ 25);
 - 3) The 2nd Amendment right to keep and bear arms for self-defense is “fully applicable to the states” through the 14th Amendment’s Due Process Clause (Sl. Op. @5);
 - 4) The right to self-defense applies to handguns because they are “the most preferred firearm in the nation to ‘keep’ and use for protection of one’s home and family (Sl. Op. @4);”
 - 5) If a Bill of Rights guarantee is fundamental from an American perspective, then, unless *stare decisis* counsels otherwise, that guarantee is fully binding on the states and thus *limits* (but by no means eliminates) their ability to devise solutions to social problems that suit local needs and values” (Sl. Op.

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“It is important to underscore that the *Heller* and *McDonald* decisions are specifically limited to bans on handguns for self-protection in the home.”

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@38);and

- 6) The right to keep and bear arms is not “a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose,” this holding does not cast doubt on such longstanding regulatory measures as “prohibitions on the possession of firearms by convicted felons and the mentally ill,” “laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms” (Sl. Op. @39);

Justices Scalia (concurring on all grounds) and Thomas (concurring on Privileges or Immunities grounds) filed concurring opinions, and Justices Stevens and Breyer filed dissents. Justices Ginsburg and Sotomayor joined in Justice Breyer’s dissent.

Highlights of the Dissents

Justices Stephens and Breyer filed lengthy dissents. Justice Breyer’s dissent argued against extending the 2nd Amendment to state and local governments, and would overturn *Heller*. Justice Stephens’ dissent actually renamed the Due Process Clause as the “Liberty Clause” and argued that the right to bear arms is not a fundamental right, such as rights relating to marriage, procreation, contraception, family relationships, child rearing, education, and rights against unconscionable government action.

Limitations of the McDonald Decision

It is important to underscore that the *Heller* and *McDonald* decisions are specifically limited

to bans on handguns used for self-defense in the home. The decisions do not affect controls on the use of handguns for other purposes or, for now, the use of other types of weapons.

Moreover, *McDonald* does not strike down any gun-control law or elaborate upon what kind of laws would offend the Constitution. It merely remands the case back to the district court to review the gun bans under the scrutiny of the Second Amendment.

Additional, despite the plaintiffs’ requests that it do so, *McDonald* does not disturb the Supreme Court’s 1873 *Slaughter-House* ruling that the 14th Amendment’s Privileges or Immunities Clause did not apply the Bill of Rights to the actions of the states, since the Court decided the issue in *McDonald* under the 14th Amendment Due Process Clause. Justice Charles Thomas was the lone Justice in favor of this approach (*See* his concurrence). If *Slaughter-House* had been overturned, scholars worried that other constitutional rights that are not universally guaranteed by the states– such as the right to a jury in civil cases or the right to a grand jury in felony cases – would have been applied against the states automatically.

What Kind of Regulation is Constitutional?

Unfortunately, the *Heller* and *McDonald* fail to give us clear guidance as to what type of regulation or restriction on handgun possession is legal, leaving fertile ground for future litigation. However, given the pronouncements of the courts, we do have an idea of the outer bounds of what would constitute reasonable regulation of handguns. According to *Heller* and reinforced by

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McDonald, we can prohibit the possession of firearms by convicted felons and “mentally ill” persons. Of course, the rub is in knowing who is a felon or is mentally ill, and what types of conditions qualify as “mental illness.” Thus, it may be reasonable to require public housing residents who wish to possess handguns in public housing buildings to obtain permission, and as a condition of that permission, certify (with appropriate verifying documentation, if appropriate) that they are neither felons nor “mentally ill.” Until we get more guidance on the definition of “mentally ill” for these purposes, I would suggest borrowing from the definition of “disability” in fair housing cases: “a mental condition that substantially interferes with one or more major life activities” if you decide to ban possession by the “mentally ill.”

We also know that we can forbid the carrying of firearms in “sensitive places such as schools and government buildings,” which would seem to at least include housing agency business offices. This may also extend to other housing agency-owned and/or operated buildings and areas apart from residences, such as community and recreational rooms, day care centers, laundry facilities, parking lots, other common areas, etc.

We also can forbid “weapons that are most useful in military service,” such as M-16 rifles and the like. And while the courts also have stated that imposing conditions and qualifications on the commercial sale of arms is constitutional, housing agencies are not likely to find themselves in such a predicament within legal confines.

There also is the issue of the varying types of handguns. While I am not very knowledgeable about handguns, I would think that there may be some that are more prone to misfire or pose other safety concerns. Those types of handguns

might permissibly be banned on safety grounds. It might also be permissible to establish a roster of approved handgun types, and ban anything not listed. Such is the focus of a suit pending in California now, *Pena v. Cid*. Alternatively, a “safer” ban might be to ban specific types of especially dangerous handguns and allow all others not listed.

What about weapons other than handguns? Right now, we can still forbid them. Neither *Heller* nor *McDonald* addresses the possession of weapons other than handguns.

Developments

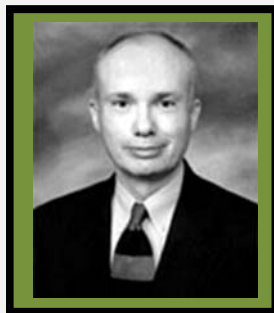
According to UCLA law professor Adam Winkler, since *Heller*, there have been about two hundred federal court decisions on the constitutionality of gun control under the Second Amendment. Nearly every challenged gun law that did not involve a complete ban on handguns survived for health and safety reasons. In those cases where the 2nd Amendment was not being applied to state action, the cases will most likely be reconsidered in light of *McDonald*.

There also have been a number of more recent developments worth noting. Weeks after the *Heller* decision, the District of Columbia city council passed gun restrictions that required handgun and semiautomatic pistol owners to pass a written exam, register their weapons, submit them to ballistics testing, and keep them inside of their homes. Assault weapons and high-capacity magazines were banned outright. Mr. Heller, the 76-year-old African-American grandfather who was the lead plaintiff in the *Heller* case, challenged the new restrictions, but a district judge ruled that the gun restrictions met the standards of *Heller*, leaving intact much of the District’s gun ban –



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Michael Hawes Reardon



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Affiliated With: Nixon Peabody LLP, Partner, Washington, DC Office

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Immediate Past Career: HUD, Assistant General Counsel for Assisted Housing

Interests(s): World-wide travel, biking, skiing, movies and books.

Little Known Secret: Dances like crazy when nobody's watching.

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for now. Likewise, Chicago recently has proposed new gun laws which are going through the deliberative process.

The State of Virginia also has passed a concealed weapons law, allowing people with permits to carry concealed weapons as long as they comply with the law. These laws would potentially apply to public housing residents, as well.

Conclusion

Housing agencies still have a duty to maintain their developments in a safe manner for all residents, employees, and invitees. Legal handgun policies are a tool that housing agencies still may use to carry out that duty. However, those policies must be narrowly tailored to meet the strictures of the 2nd Amendment. For now, “safe” policies might be limited to outright bans only against convicted felons. Although apparently sanctioned by the Supreme Court, I believe that it is less “safe” to outright ban possession by persons who are “mentally ill” for a number of reasons: the lack of a definition for “mentally ill,” the difficulty in identifying who is “mentally ill,” the fact that some mental illnesses may impact gun safety while others may not, and the likelihood of challenges by disability advocacy groups.

“Safe” policies, for now, might restrict possession within the confines of the public housing unit, and ban the possession or carrying of handguns and other weapons outside of the public housing unit with respect to public housing property. Forbidding weapons that are most useful in military service, such as M-16rifles, and requiring that handguns be registered and follow all local laws would also pass muster.

As the courts work out the full “do’s and “don’ts” surrounding the issue of gun control, we will keep you abreast of those developments. ⚖️

A quick synopsis of recent cases of interest . . .

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Case	Held
<i>Goodwin v. Omaha Hous. Auth.</i> , 2010 U.S. Dist. LEXIS 66574 (D. Neb. July 2, 2010)	Failure to provide a Sec. 8 hearing record is not a due process violation.

Case	Held
<i>Morton v. D.C. Hous. Auth.</i> , 2010 U.S. Dist. LEXIS 65341 (D.D.C. July 1, 2010)	2.5 month delay to review request for emergency health transfer could support IIED claim.

Case	Held
<i>Welke v. Dakota County Cmty. Dev. Agency</i> , 2010 Minn. App. Unpub. LEXIS 678 (Minn. Ct. App. July 13, 2010)	Consideration of mitigating circumstances is permissive under 24 C.F.R. § 982.552(c)(2).

*Be sure to consult HDLI's Semi-Annual Case Law Review and *Authority* publication for more detailed summaries of recent cases in the industry.

Recent HUD Notices

Public & Indian Housing Notices (PIH):

<u>Notice Number</u>	<u>Date</u>	<u>Subject</u>	<u>Expiration Date</u>
PIH 2010-21 (HA)	5/24/10	Processing Information for the Submission of Replacement Housing Factor (RHF) Plans	5/31/11
PIH 2010-19 (HA)	5/17/10	Administrative Guidance for Effective and Mandated Use of the Enterprise Income Verification (EIV) System	5/31/11
PIH 2010-18 (HA)	5/10/10	Revision to HUD Notice PIH 2009-51 PHA Determinations of Rent Reasonableness in the Housing Choice Voucher (HCV) Program – Comparable Unassisted Units in the Premises	5/31/11
PIH 2010-15 (HA)	5/6/10	U.S. Department of Housing and Urban Development (HUD) Privacy Protection Guidance for Third Parties	5/31/11

*Note: This is only a partial list of recent HUD notices. All HUD notices are available online at HUDCLIPS: http://portal.hud.gov/portal/page/portal/HUD/program_offices/administration/hudclips/notices

SUBMIT YOUR ARTICLES AND ANNOUNCEMENTS!

Do you want to showcase your agency or company? Why not submit an article on a topic of interest to be featured in an upcoming *Counsellor*. Perhaps you can extract an article from one of your recent briefs, research projects, or other writings. Perhaps you have a colleague who has written something of interest to HDLI members.

Announcements! Has your housing agency done something noteworthy recently? Let us all know about it. Send us an announcement to be featured in the *Counsellor* (no job announcements, please).

Particulars: Articles and announcements should be in Lucida Sans Unicode size 10 font and contain no more than 530 words. We welcome illustrations and photos. Please send in Microsoft Word format. Contact Tim Coyle for more information at (202) 289-3400 or tcoyle@hdli.org.

Happy Writing!

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