

**Summary Minutes  
DRAFT  
Board of Directors  
Special Meeting  
Monday, August 17, 2009  
1:00 p.m. – 5:00 p.m.**

**Town of Colma  
Colma Community Center  
1520 Hillside Blvd.  
Colma, CA**

**Presiding:**

Laura Allen, Chair

**Jurisdiction:**

Colma

**Board Members Present:**

Shawn Mason

Jim O’Leary

Jesse Takahashi

Jim Steele

Jeff Maltbie

Gary Galliano

Michael Dolder

Emma Karlen

Kristi Chappelle

Herb Lester

Heather McLaughlin

Susan George

Kathy LeRoux

LaRae Brown

Bronda Silva

Tina Reza

J. Logan

Heidi Bigall

San Mateo

San Bruno

Campbell

South Can Francisco

San Carlos

Newark

Half Moon Bay

Milpitas

Foster City

Suisun City

Benicia

Woodside

Hillsborough

Millbrae

American Canyon

Morgan Hill

Los Altos

Tiburon

**ABAG Staff Present:**

Henry Gardner, ABAG Executive Director

Kenneth Moy, ABAG Legal Counsel

Carol Taylor, ABAG Secretary

**Consultants Present:**

Robert Lanzone, General Counsel, PLAN Corporation

Louis Leone, Special Counsel

Marcus Beverly, Consultant

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**1. Call to Order and Introductions:**

Meeting called to order by Laura Allen.

**2. Public Comment: None**

**3. Approval of Board of Directors Minutes of June 11, 2009**

Minutes amended per Steele. /M/Oleary/S/Maltbie/ C/unanimously approved the minutes

Approval of Executive Committee Minutes of June 8, 2009

Minutes amended per Karlen

Approval of Executive Committee Minutes of July 14, 2009

Minutes amended per Lester

/M/Lester/S/Karlen/C/unanimously approved the minutes.

**4. Recommendation from Executive Committee re Legal Services**

Moy reviewed memorandum. Moy serves as legal counsel to ABAG and ABAG PLAN Corp. Under current circumstances, some Board members might perceive that his loyalties are divided. State Bar rules of profession conduct require that Moy advise both client of the possible conflict so that they can waive the conflict or adjust the representation to avoid the conflict.

Moy recommended to Executive Committee that he be relieved of responsibility to act as legal counsel to PLAN in the following areas:

- Interpretation of legal documents to which ABAG and PLAN are parties
- Issues raised by the ad hoc committee on cost allocation
- Issues raised by the ad hoc committee on governance
- Advice on the call or conduct of meetings of policy bodies for PLAN.

The recommendation is for PLAN to retain its own counsel in these areas and to permit Moy to continue as ABAG counsel in these areas. Executive Committee recommends the proposal.

Galliano questioned whether the Board has authority to retain and pay for its own counsel. Moy stated in his opinion the current circumstances fall outside the provisions of the Bylaws and the Agency Agreement and that the Board has the power to retain and pay for its own counsel. Moy has also given the same opinion to ABAG.

Steele asked whether Moy will continue claims coverage opinions to claims staff. Moy responded that he would and that he would also continue to provide legal services for programmatic functions. If a conflict arises in a programmatic area, Moy will advise the Board.

O'Leary asked whether Moy had raised the conflict issue or whether the committee had. Moy pointed out that the first conflict issue arose during discussions at the May 14

Executive Committee meeting and that the committee identified the conflict at that time and adopted a motion for PLAN to retain its own counsel. Moy raised the balance of the issues to the Executive Committee and requested the actions before the Board.

/M/Dolder/S/Steele/C/unanimously approved the recommended actions.

**5. Recommendation from Executive Committee re Retention of Interim General Counsel and Legal Counsel for personnel matter**

Mason presented Robert Lanzone of Aaronson, Dickerson, Cohn & Lanzone to serve as interim general counsel. Lanzone has experience as legal counsel to cities in San Mateo County and general counsel to at least one JPA. Mason also presented Louis Leone of Stubbs and Leone to serve as counsel to PLAN on personnel matters that – as indicated on the agenda – will be coming before the Board.

Lester requested cost information. Mason responded that work would be on a time and materials basis at the rate of \$250/hr for Lanzone and \$225/hr for Leone.

Steele asked whether Leone had Brown Act experience. Leone stated he did.

Chappelle noted that Lanzone's firm has represented or does represent some member cities, Woodside, Foster City and San Carlos and asked whether any conflict issues might arise. Lanzone stated that was not likely since he would not be working on coverage or program matters.

Karlen asked whether the administrative budget should be amended. Moy responded that the PLAN administrative reserve has sufficient funds to cover additional legal costs.

Galliano asked who would work with general counsel on a day-to-day basis. Moy stated that was up to Board. Maltbie expected that interim general counsel would be working with the Executive Committee and coordinating with ABAG staff. Moy stated he would be the point of contact between interim general counsel and ABAG. Allen and Galliano agreed that the reporting relationship would be a separate action.

/M/Maltbie/S/Mason/C/unanimously approved to accept the re

Transfer of general counsel duties to Lanzone occurred at this point.

Lanzone suggested that the reporting relationship be with the Executive Committee. The Board accepted the suggestion.

**6. Report from Governance Subcommittee.**

Mason reported on behalf of the subcommittee comprised of Maltbie, Steele, Broad and himself. The subcommittee has met twice by phone, developed a range of alternatives to consider and retained Lanzone to provide legal advice. Lanzone has gone over the

organic documents, reviewed the current relationship between ABAG and PLAN and has prepared a report that has not been reviewed by the subcommittee. They will be scheduling a meeting to do so and report back by the Board meeting to be scheduled for the 5<sup>th</sup> of November.

George asked what the timeframe was. Mason responded that the first milestone was 60 days for a first report which this accomplishes. Maltbie stated that the subcommittee expected to have a recommendation within the next couple of months. George urged that the matter be concluded as soon as possible.

## **7. Report from Cost Allocation Subcommittee**

Steele presented on behalf of the subcommittee comprised of Takahashi, Nava and himself. The Executive Committee had asked that the subcommittee review the overhead cost allocation from ABAG to PLAN to confirm that those charges are supportable. Steele defined the following terms: 'direct program costs' (program staff costs and contract services), 'direct administrative support' (administrative staff that directly support PLAN), and 'indirect costs' (overhead costs). The committee was charged to examine the indirect costs.

Direct costs for staff last year was \$1.45 Million. Direct non-staff costs was \$359,000. Direct administrative costs was \$216,000.

Indirect costs are those that cannot be assigned to a specific program or costs that cannot be cost-effectively allocated. These are put into an overhead pool. Examples are finance, IT, and personnel costs, utilities, etc.

The subcommittee met several times by phone. ABAG staff and the subcommittee reviewed the budget. The subcommittee did not review the scope of the indirect cost, such as how many people worked in HR. Instead, it reviewed the reasonableness of the allocation. The allocation is based on the ratio of direct staff costs for PLAN to ABAG's total staff costs. Steele gave examples. In 2010, PLAN's percentage of ABAG's staff costs is 21.8%. This is applied to the total overhead costs resulting in an overhead charge of \$716,000.

The question is whether these overhead costs seem reasonable. The subcommittee did not conduct a detailed audit of the costs but subjected these costs to a reasonableness test. The subcommittee saw no evidence that any costs were double charged or that ABAG was consciously trying to pass along costs inappropriately. All costs had a rationale to them. As a matter of context, the overhead charge is equivalent to 7-8 FTEs.

The subcommittee did not examine whether any costs could be scaled back. Building costs – financing for purchasing the office condominium and condominium charges - are appropriately charged. When bonds are paid off, these will drop off. ABAG is not charging rent. PLAN may wish to memorialize this arrangement in writing.

Previously, Beverly has raised the issue of the Oracle database which ABAG needs for its operations. This database is more robust than PLAN needs. It is allocated to PLAN at 21.8%. Subcommittee recommends that the allocation percentage for this item be reconsidered. ABAG's Finance Director has agreed to reexamine this issue.

Mason asked whether the subcommittee considered its work to be completed. Steele said yes.

Maltbie stated that San Carlos has just completed an outside study and revision of its own cost allocation plan and asked whether the subcommittee saw anything that would indicate that PLAN should look at ABAG's cost allocation plan in more detail. Steele stated that in his opinion, there were no glaring problems.

Allen asked if there was a deadline for the Oracle database issue. Steele stated that he expected a response soon.

Takahashi stated that the subcommittee performed a reasonableness test of the cost allocation plan. It did not go through the time consuming and complex process of examining individual costs. That would be a different set of objectives.

Lester asked whether there is a process for working more closely with ABAG on the budget. Steele stated this is a topic being discussed in the governance subcommittee. It might make sense for the Finance Committee to review cost allocations going forward.

Silva asked whether there is a 'standard' overhead rate for an office environment. Steele noted that the overhead rate is adjusted annually. He does not have the expertise to give an opinion on a 'standard' overhead rate. Looking at the overhead rate and the FTE equivalent, he felt it was reasonable and not onerous. There is probably room for some savings.

Allen asked whether there was a plan for going forward. Mason responded that the governance subcommittee was looking at PLAN retaining its own executive to monitor these costs with the intent of bringing them down.

Mason asked whether the subcommittee had examined whether positions directly charged to the PLAN were providing value to the PLAN. Steele stated that they looked at the program and administrative positions directly charging to PLAN and they seemed reasonable. The biggest direct administrative charges are: the Finance Director at \$15,000 per year or 10% of his time, accounting specialist at \$61,000 or about 50% time, \$69,000 for legal counsel. In the indirect administrative charges are:  $\frac{3}{4}$  or  $\frac{2}{3}$ <sup>rd</sup> of a computer programmer,  $\frac{2}{3}$ <sup>rd</sup> of a webmaster, one executive secretary, an accounting clerk, etc. These are all put into the pool and PLAN's share of these is 21.8%.

Galliano asked if a position that directly charges both ABAG and PLAN was misallocated, would that bias be magnified because it increases PLAN's share of indirect costs. Steele stated that this is an accurate observation. He reminded all that the

subcommittee performed a reasonableness test on the costs. Galliano reflected on his experiences in allocating costs in the private sector.

Moy stated that there is a difference between the budgeted direct staff charges and what is charged to PLAN. Actual direct staff charges are based on semimonthly timesheets reflecting actual time spent doing work for PLAN. Steele explained that ABAG adjusts the overhead percentage each year based on actual charges in the previous year.

Chappelle asked, unless we find something that is really amiss, would it not make sense to put this discussion on hold until we determine the governance model. That might determine whether we need to go through more time and expense. Maltbie agreed with Chappelle.

Maltbie stated that he fundamentally disagrees with ABAG treating PLAN as a department of ABAG. PLAN is its own separate entity. The rate should not be set without the Board weighing in. He would prefer a multiyear contract for financial services where the rate and the factors used to set it were approved by the Board. In Maltbie's experience as a finance director, the overhead rates change to meet general fund needs. He is concerned that ABAG uses PLAN as a balancing mechanism to serve ABAG's general fund and that this is occurring beyond the jurisdiction of the Board.

Allen asked whether this issue should be referred to the governance subcommittee. Maltbie stated that the governance subcommittee is already considering options that would affect the way the administrative relationship. Chappelle stated that depending on the recommendation from the governance, she expected that there would be further direction given.

Galliano requested a copy of the power point presentation from Steele. Steele agreed to provide it.

Mason stated that there was a specific allegation made by Beverly that there were people charging to the PLAN who provide no value to the PLAN. He asked whether the subcommittee interviewed Marcus to determine why he reached that conclusion. Steele stated that subcommittee did not. Mason asked whether the subcommittee had shared their findings with Beverly and whether he agreed. Steele stated they had not thought of that.

Takahasi stated that the subcommittee objective was to examine the methodology. It did not perform a position by position examination of the value a person provides to the PLAN which is what Marcus is suggesting. This would take us down a different path.

Lester asked whether the committee saw anything to justify an audit which would be very time consuming. What can we do to move forward and improve relations? Steele agreed that the governance issue needs to be resolved before more is done on this issue. There was some concern expressed that the specific allegations made by Beverly were not

addressed. Steele replied that one of the specific allegations was double dipping. The subcommittee found no evidence of that. This is indicative and straight forward.

/M/Mason/S/Maltbie that a more detailed investigation be conducted of Beverly's allegation of overcharges and that the Executive Committee be authorized to hire an outside consultant to perform the investigation.

Dolder asked whether the goal is to look over past charges and get money back or to look forward. Mason stated that the goal is to look back. Steele asked why this should be done now. Mason believed this issue is independent of the governance issue.

Maltbie stated that this is a time consuming project involving an outside audit firm as well as ABAG financial staff time. Silva stated that the investigation could be focused on a small area.

In response to a question by Allen, Mason stated that one concern is the value of some of the direct staff charges but that there might be others.

Chappelle stated that the subcommittee did what the Board asked at the June meeting. As far as the specific allegations that Beverly has made to some members of the Board, they were an undercurrent at the June meeting. Chappelle stated she did not recall that the subcommittee was charged to investigate them.

Steele asked that the issue be tabled until after the closed session item on the agenda. The maker and seconder of the motion agreed.

## **8. Report from Interim Risk Manager Recruitment Subcommittee**

Allen reported that a subcommittee comprised of Lester, Silva and herself is working with Gardner. The subcommittee has met twice. The recruitment is now for an interim position using Ralph Anderson & Associates. Interviews are scheduled for September.

Lester stated his concern about the relationship of the interim Risk Manager to the Beverly who is proposed to be a consultant to PLAN in the next agenda item. He believes that it will be awkward.

Silva stated that it is not uncommon. The interim will just hold the fort until final decisions are made. Beverly's nine years of experience is difficult to replace. It makes sense to retain that expertise.

Lester stated that there is expertise currently within the PLAN staff. Lester expressed his concern about paying for two positions. Current staff for PLAN can fill in without an interim Risk Manager.

Gardner referred to minutes of the July 14 Executive Committee meeting for item 5 at pages 4-5 which clarifies the relationship between the two positions.

## **9. Retention of Risk Management Consultant – Marcus Beverly**

Maltbie reported that the Executive Committee decided the interim Risk Manager would handle the day to day operations. The risk management consultant would handle the higher level functions and manage the actuarial consultants, among others. He stated it would be unrealistic to expect the interim Risk Manager to come in and understand everything that has been done over the past nine years.

Maltbie opposes the retention of an interim Risk Manager. Maltbie pointed out that at the last Board meeting ABAG refused to consider Beverly as the interim Risk Manager. Maltbie stated that he, for one, wanted Beverly and the alternate arrangement that the Board can make is to contract directly with Beverly.

Maltbie doesn't believe that an interim Risk Manager can come in and do the job. Having Beverly available would be an asset. There is a lot of work to be done, including the software conversion and some of the other issues that have occupying the Board over the past few years. Beverly can provide support to the Board for these issues.

Maltbie stated that the situation is awkward but that he wanted to keep Beverly in the mix and not take another position until the governance issue is resolved. At worst, PLAN would be paying Beverly six months worth of severance, which after 10 years of effectively being the executive director of PLAN; he should have gotten to begin with.

Lester stated he agreed with Maltbie. He believes it is insincere to go through the exercise of retaining an interim Risk Manager knowing that the Board wishes to retain Beverly.

Allen recounted the events of the past few months that led to the recruitment of an interim Risk Manager and the retention of a risk management consultant at the same time.

Chappelle stated that PLAN is putting the PLAN staff in a terrible position by doing both. The governance issue needs to be speeded up and the issue resolved soon.

Steele commented on the scope of services. He referred to the minutes of the July Executive Committee meeting at page 5 which describes what the risk management consultant is to do. The proposed scope of services is broader. For example, work on current claims should be excluded. Other functions in the proposed scope of services are more day to day than Steele would prefer.

Maltbie explained that Beverly would be available to consult about claims at the request of ABAG. Maltbie pointed out that some wanted to expand the scope to include the interim position.

George asked for an explanation of the compensation. Maltbie responded that Beverly had been asked to come up with a six month contract with a three month termination

clause based on how long it would take for issues like governance to be resolved. The retainer amount is based on the salary and benefits Beverly received as the Risk Manager, maybe a little less.

Concern was expressed about how the governance issue inhibits PLAN's ability to address these other items. There should not be action on either of these items before governance issues are further along.

Beverly stated that the retainer is 80% of the Risk Manager position in ABAG. He stated that he was asked to present a proposal. He stated his concern about the software conversion. He designed the new system and the conversion has gone sideways. Beverly encouraged Board members to speak to PLAN staff confidentially. Beverly stated his focus would be the software conversion and the upcoming October Board meeting where inverse tail claims will be considered. Beverly stated he has no interest in the governance issues. He asked that a decision be made today.

/M/Dolder/S/Steele/C/ approved with one nay vote to table the matter until conclusion of the closed session.

The Board entered closed session:

Public Employee Performance Evaluation  
Title: President ABAG PLAN Corporation

The Board returned to open session.

### **Tabled Agenda Item 7 – Report of Cost Allocation Subcommittee**

Allen noted that two items were tabled from the meeting before the closed session. First, the question left from agenda item 7 is whether to do a more detailed examination of the financial allegations made by Beverly about ABAG.

Steele stated that he had been confronted by Beverly and presented with ABAG's payroll allocation report. Beverly asked whether it was appropriate that the former finance director Joe Chan both charge 25 hours directly to the PLAN and also have a pool of Chan's hours in the cost allocation plan. Steele stated that in his opinion this is not double dipping as long as Chan is not charging more than 1700 hours combined. Steele could not be sure that this is the only thing that Beverly meant by 'double dipping'. Steele stands by his earlier statement that ABAG is not consciously doing anything in the cost allocation plan that is harmful to the PLAN.

Mason asked whether Gardner had an opinion on whether there should be additional investigation of ABAG's cost allocation plan. Gardner replied that was up to the Board but if it decided to do so, he would welcome it. However, the only issue Gardner recalled being raised was double dipping. Gardner did not think the value of an employee's work for the PLAN was at issue. In any event, he saw no way to resolve that issue.

Maltbie stated that solving the governance issue is key. He agrees with Steele that what was described is not double dipping. However, in his city this type of thing is done for the benefit of the general fund and in this case ABAG is the general fund. While there may not be anything inappropriate, PLAN may not be getting the best deal.

Allen agreed that the cost allocation committee has settled the issue of whether anything inappropriate has happened. The governance committee has to determine whether PLAN is getting the best deal under the current governance structure.

Maltbie agreed stating that a member of the city's RDA had come to him with the exact same issue stating that the city was double charging the RDA.

Mason stated that his point is that in this case someone believes there was overcharging and that person was not asked why he believed that was the case.

Galliano asked whether there is a way to have the auditors cost effectively address this issue. Maltbie and Mason described ways this might be done, including a desk audit. Maltbie stated another way to do this would be to survey the market for what other pools are charged.

Dolder suggested that rather than looking back we should move forward. He does not believe PLAN will find misconduct. Instead, the other entity that may hedge things to their side just like if PLAN was in charge it would hedge things on its side. This is not black and white. It's in the legal gray area.

/M/Karlen/S/Dolder/C/ approved with one nay vote to accept the cost allocation committee report and defer further investigation until the governance issue is settled.

### **Tabled Agenda Item 8 - Retention of Risk Management Consultant – Marcus Beverly**

Steele suggested that day to day items and the software conversion should be removed from the scope of work. Maltbie opposed removing the conversion task. Gardner stated his concern is not about using Beverly as a resource but in his managing or leading the staff or the project. In response to a question, Gardner stated that the conversion is ongoing.

Chappelle asked who would direct Beverly's work. Maltbie indicated in some cases, direction would come from ABAG staff and in others from PLAN. Chappelle asked who from PLAN would provide that direction. Maltbie suggested the Executive Committee.

George stated that the scope of work was too broad. It does not appear to be the scope for a special project. In addition, the three month notice of termination is too long and the almost \$20,000 per month retainer is outrageous.

Maltbie stated that it would take six months to resolve the governance issues. The length of notice is from Beverly. Maltbie suggested that the three months might be necessary to help make a transition to a new Risk Manager if that is outcome. In the meantime, nothing has been done to resolve the inverse tail claim issue.

Beverly stated that the retainer fee is 80% of what PLAN is paying for the ABAG Risk Manager. The reason for the three month notice to allow him to find other work. The question is one of trust and whether the Board trusts Beverly to get the software conversion finished properly and to resolve the inverse tail claim issue.

George does not believe it's a matter of trust. As a plain business matter, \$21,000 a month for special projects is a lot of money.

Karlen disagreed stating that it breaks down to \$130 per hour which is not over the top.

In response to a question from Galliano, Moy asked whether the \$21,000 per month is paid regardless of hours worked. Galliano stated he would oppose the contract if it was not to be paid on an hourly basis.

Moy then stated that previous discussion seems to imply that ABAG staff would have some control over the amount of hours that Beverly could charge. Under the current circumstances, this places ABAG in an untenable position.

In response to a question, Beverly affirmed that the requested retainer is 80% of what PLAN pays to ABAG for the Risk Manager position: salary, benefits and overhead.

Maltbie clarified that the matter before the Board is discussion of the principles for the contract. The Executive Committee will have oversight in preparing the contract and managing it.

Chappelle stated it is not clear what the interim Risk Manager will do and what the risk management consultant would do. Maltbie replied that there would only be a few months of overlap between the interim and the consultant.

Concern was expressed that there is too much overlap. The price for the consultant seems to be above the market. Perhaps a reduction in price might be order.

Logan stated that the claims department no longer has a litigation manager and that without a Risk Manager, the claims staff appears to be overstressed. The hourly rate seems appropriate perhaps the issue is the number of hours.

At Allen's request Maltbie went over the exclusions from Beverly's scope of work: no day to day supervision of ABAG staff or claims, and no involvement in the governance committee activity or the finance activity, with the caveat that those committees may wish to call on Beverly as a former ABAG employee. Allen clarified that Beverly may be

called upon by ABAG's Executive Director or the interim Risk Manager for advice on claims.

/M/Logan/S/Karlen to refer the matter to the Executive Committee to negotiate and approve a contract with Beverly consistent with the comments from the Board regarding the amount of hours and the scope of work.

In response to a question, Gardner stated that ABAG could not continue to run the program without a manager and intended to pursue and complete the recruitment for an interim Risk Manager.

Dolder suggested that the Executive Committee work with the PLAN legal counsel to get it done.

Chappelle expressed her concern that the retention of Beverly will be a continuing distraction. For this to work, animosity must be put behind us.

Allen expressed her concern about keeping the group together and retention of Beverly will perpetuate the tension that has existed since May.

Silva believes retaining Beverly will help heal the group.

Roll call vote:

Ayes: Mason, Logan, Bigall, LeRoux, Silva, Lester, Karlen, Dolder, Maltbie, Takahashi, McLaughlin

Noes: Allen, George, Reza, Brown, Chappelle, Steele, O'Leary.

Motion carried on an 11-7 vote.

Report from Closed Session:

The Board approved sending a letter to the ABAG Board about a personnel matter.

Other Business:

/M/Allen/S/Chappelle/C/ approved unanimously to move the special Board meeting to November 4 and 5.

**ABAG PLAN Corporation  
Board of Directors  
Special Meeting  
Wednesday, November 4, 2009  
9 a.m. to 4:30 p.m.**

**Westin Hotel  
675 El Camino Real  
Palo Alto, CA 94d301**

**Presiding**

Shawn Mason

**Jurisdiction**

San Mateo

**Board Members Present**

Bronda Silva

Eileen Wilkerson

Heather McLaughlin

Gus Guinan

Jesse Takahashi

David Woo

Julie Carter

Alvin James

Kristi Chappelle

Tom Haglund

Michael Dolder

Kathy Leroux

Patrick Alvarez

Nick Pegueros

Orry Korb

Jenny Haruyama

LaRae Brown

Emma Karlen

Danny Wan

John Becker

Angela Howard

Pamela Thompson

Shawn Mason

Barbara Powell

Jim Steele

Heidi Bigall

Kevin Bryant

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American Canyon

Atherton

Benicia

Burlingame

Campbell

Cupertino

Dublin

East Palo Alto

Foster City

Gilroy

Half Moon Bay

Hillsborough

Los Altos

Los Altos Hills

Los Gatos

Los Gatos

Millbrae

Milpitas

Morgan Hill

Newark

Portola Valley

San Bruno

San Mateo

Saratoga

South San Francisco

Tiburon

Woodside

## **PLAN Corporation**

Robert Lanzone, General Counsel  
Marcus Beverly, Consultant

## **ABAG**

Henry Gardner, Executive Director  
Ken Moy, Legal Counsel  
Darrell Dearborn, Interim Risk Manager

### **1. Call to Order**

Shawn Mason called the meeting to order at 9:40. He noted that Laura Allen, Board Chair, was absent due to a family matter. Quorum was present.

### **2. Public Comments:**

None

### **3. Facilitated Discussion of Inverse Tail Claim Strategy**

Royleen White, consultant, facilitated a discussion among the Board members of the development of a PLAN policy to govern the treatment of claims based on a cause of action for regulatory inverse condemnation with dates of occurrence prior to July 1, 2008 (“Inverse Tail Claims” or “ITC”).

Ms. White divided the members into groups of 5 or 6 to work through the several stages of policy development. Groups were asked to identify interests that should be addressed in an ITC policy, options for addressing these claims and the elements of a preferred solution. Each group identified their input at each of these steps and recorded them on wall charts for consideration by the group as a whole.

The following draft policy was approved by the group at the end of the process.

#### **Draft Policy to Handle Inverse Tail Claims (ITC) Arising Before July 1, 2008**

- Create a \$7M reserve for ITCs. Monitor reserve regularly. This reserve shall not limit PLAN liability for ITCs.
- Permit members to warrant to PLAN any potential ITCs of which the member is aware but which have not been presented or asserted by the putative claimant (“warranted ITCs”). [such claims outstanding upon the approval of this policy by the Board].
- Limit PLAN liability for ITCs to five years, July 1, 2008 to June 30, 2013.

- The cost of these ITCs will be reflected in member experience modification factors used to set liability pool premiums for five years.
- A cap will be placed on PLAN liability for each member in the amount of \$1M for all ITCs submitted by a member within the five year period and any warranted ITC.
- Members that submit ITCs to PLAN shall be required to sign a waiver as a condition of PLAN acceptance of any liability for such claims.
- PLAN liability for ITCs shall be limited to defense costs only.
- A committee of the PLAN Board shall be established to determine if a claim is subject to this policy.

The ABAG Legal Counsel, Mr. Moy, will prepare a resolution incorporating these points into a formal policy to be adopted by the Board at its next meeting within 30 days.

**4. Other Business**

None

**5. Adjournment**

The meeting adjourned at 4:40 p.m.

**ABAG PLAN Corporation  
Board of Directors Meeting  
Special Meeting  
Wednesday, November 5 2009  
9 a.m. to Noon**

**Westin Hotel  
675 El Camino Real  
Palo Alto, CA 94d301**

**Presiding**

Shawn Mason

**Jurisdiction**

San Mateo

**Committee Members Present**

**PLAN Corporation**

Robert Lanzone, General Counsel

Marcus Beverly, Consultant

**ABAG PLAN**

Henry Gardner, President

Ken Moy, Legal Counsel

Darrell Dearborn, Interim Risk Manager

**1. Call to Order**

Shawn Mason, Board Vice Chair, called the meeting to order at 9:15 a.m.

**2. Public Comments**

None

**3. PLAN Governance Structure**

Shawn Mason reported that the Governance Sub-committee considered 4 options:

- (1) Do nothing.
- (2) Use the Board of Directors or committees to create greater oversight over ABAG and costs
- (3) Create a position that reports directly to the Board of Directors to create greater oversight over ABAG and costs
- (4) Severe the relationship with ABAG and establish an independent JPA

Mason reported that the Governance Sub-committee decided on the 3<sup>rd</sup> option and distributed a proposed organization chart for PLAN entitled, "Recommended ABAG Plan Governing/Operating Organizational Chart" (attached), which was recommended by the Governance Sub-committee. Mr. Mason discussed the main

advantages of this new organization and relationship to ABAG as providing the Board greater independence in matters relating to the employment and compensation of PLAN staff, and in obtaining the lowest cost for services required to administer PLAN services.

Extended discussion took place regarding the need for these changes and their consequences for PLAN. During those discussions, Mr. Gardner said that any arrangement under which ABAG staff would be supervised by a PLAN employee would not be workable for ABAG. Mr. Mason explained that variations on this model could be considered which would still preserve the independence of PLAN sought by the new organizational relationship, but which might result in less cost to PLAN and less change to the current relationship with ABAG.

A motion was made and seconded to authorize the Board to create a new position for PLAN entitled, “Executive Director/Risk Manager”.

The incumbent of this position would be employed by PLAN and report to the Board. This position would have primary responsibility for managing the Agency contract between PLAN and ABAG and the services received from ABAG.

Before that motion was voted, a substitute motion was made and seconded that PLAN enter into discussions with ABAG about the issues that have given rise to governance concerns, to include in those discussions both options 2 and 3, and with the goal of identifying a solution that is acceptable to a majority of PLAN members and ABAG. The substitute motion was approved by a vote of 13 to 11.

**Members voting Aye**

Atherton – Eileen Wilkerson  
 Campbell – Jesse Takahashi  
 Colma -  
 East Palo Alto - Stephanie Osaze  
 Foster City – Kristi Chappelle  
 Hillsborough – Kathy Leroux  
 Los Gatos – Jenny Haruyama  
 Millbrae – LaRae Brown  
 Morgan Hill – Danny Wan  
 Ross -  
 San Bruno – Pamela Thompson  
 South San Francisco – Jim Steele  
 Woodside – Susan George

**Members voting No**

American Canyon – Bronda Silva  
 Benicia – Heather McLaughlin  
 Burlingame – Gus Guinan  
 Dublin – Julie Carter  
 Gilroy – Tom Haglund  
 Half Moon Bay – Mike Dolder  
 Los Altos – Patrick Alvarez  
 Milpitas – Emma Karlen  
 Portola Valley – Angela Howard  
 San Carlos -  
 San Mateo – Shawn Mason

After discussion, the Board reached consensus on directing the Chair of the Board to appoint a subcommittee to negotiate with ABAG.

**(5) Adjournment**

The meeting was adjourned at 11:30 a.m.