

ASSOCIATION OF BAY AREA GOVERNMENTS

Representing City and County Governments of the San Francisco Bay Area



ABAG

ABAG PLAN CORPORATION

To: Board of Directors via Executive Committee, ABAG PLAN Corporation
Fr: Kenneth K. Moy, Legal Counsel, Association of Bay Area Governments
Dt: December 29, 2009
Re: Inverse Tail Claims – Facilitated Resolution

Summary: Consider adoption of a resolution implementing the process approved by the Board of Directors (BOD) of the ABAG PLAN Corporation at its November 4, 2009 facilitated session. The resolution includes an attachment and exhibits to the attachment.

Recommended Action: Staff and Executive Committee recommend adoption.

Background and Analysis: The BOD met on November 4, 2009 in a facilitated session. At the conclusion of the session, the BOD voted on a process for responding to the tender of certain claims denominated as “inverse tail claims” (ITC). The BOD directed ABAG staff to draft a resolution to adopt and implement the process (ITC Program).

On November 25, the following draft materials were sent by email to the BOD for review and comment:

- A draft resolution implementing the "ITC Program".
- An attachment to the draft resolution that describes the facilitated process undertaken at the November 4 meeting.
- Four exhibits to the attachment that document the facilitated process.

The due date for comments was extended from December 15 to December 18. The cities of Los Altos, Half Moon Bay, Campbell, Milpitas and Pacifica provided comments or posed questions. All comments and questions, and responses are reproduced in attachment A to this memorandum.

In response to the comments, the draft resolution was revised to correct errors and to clarify, and to make one substantive change (final draft). The substantive change is to the process for handling disputes over whether a claim is an ITC. The draft resolution proposed an *ad hoc* committee comprised of two city managers and a city attorney from the members. The final resolution proposes an *ad hoc* appointed by the Chair of the



BOD. This change was made partly in response to a question posed by Milpitas and at the urging of legal counsel to the BOD, Robert Lanzone.

All changes from the draft resolution are shown in the redlined version of the final draft resolution which is attachment B to this memorandum. A clean version of the resolution is attachment C.

**INVERSE TAIL CLAIMS POLICY
ATTACHMENTS**

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ATTACHMENT C – Final Resolution

ATTACHMENT A-1

City of Los Altos Email and Document Comments

Kenneth Moy - FW: PLAN - ITC Resolution

From: Patrick Alvarez <PAvarez@losaltosca.gov>
To: "Kennethm@abag.ca.gov" <Kennethm@abag.ca.gov>
Date: 12/9/2009 2:49 PM
Subject: FW: PLAN - ITC Resolution
CC: J Logan <jlogan@losaltosca.gov>, Jolie Houston <jolie.houston@berliner.com>, Doug Schmitz <DSchmitz@losaltosca.gov>, RussellMorreale <RMorreale@losaltosca.gov>, Susan Kitchens <SKitchens@losaltosca.gov>, Patrick Alvarez <PAvarez@losaltosca.gov>
Attachments: PLAN - ITC Resolution v. 1.doc; PLAN - ITC Resolution - Background Attachment.doc; ITC Resolution - A-1.pdf; PLAN - ITC Resolution - A-2.pdf; PLAN - ITC Resolution - A-3.pdf; PLAN - ITC Resolution B-1 through B-5.pdf; Kenneth Moy.vcf

Ken,

The City of Los Altos has reviewed all the attached documents and finds that they are consistent with our notes and recollection of the meeting. We have no changes to the resolution or to any of the other documents, except for two minor grammatical errors in the reso.

Please let me know if you have any comments or questions.

Patrick Alvarez
Human Resources Manager
City of Los Altos
650.947.2606

-----Original Message-----

From: J Logan
Sent: Wednesday, November 25, 2009 3:46 PM
To: Patrick Alvarez; Jolie Houston
Cc: Doug Schmitz; Russell Morreale; Susan Kitchens
Subject: FW: PLAN - ITC Resolution

HI ALL,

Per the Nov. 4 ABAG BOD meeting that Jolie and Patrick attended, the attached resos need review. Please advise if edits or recommendations are needed based on your understanding of the final conclusions of the discussions.

Please advise who should respond back to Ken for the City per his request to receive comments by Dec. 15. Thanks,jL

-----Original Message-----

From: Kenneth Moy [mailto:Kennethm@abag.ca.gov]

DRAFT

RESOLUTION __

BOARD OF DIRECTORS

ABAG PLAN CORPORATION

Whereas, the self funded municipal liability pool commonly know as the ABAG PLAN Program has been operating since 1986 under the auspices of the Association of Bay Area Governments (ABAG) and the ABAG PLAN Corporation (PLAN), and

Whereas, in 2005 one member of the program sued ABAG and PLAN and obtained a decision (Decision) that allowed the member to recover defense costs for two claims, each of which included a cause of action for inverse condemnation based on the member's exercise of, or failure to exercise, its land use authority (regulatory inverse condemnation claims), and

Whereas, prior to the Decision, the ABAG PLAN Program had denied coverage for regulatory inverse condemnation claims and the members had acceded to all such denials, and some members forbore from tendering such claims, and

Whereas, after the Decision, the PLAN approved changes to the ABAG PLAN Program intended and designed to exclude any regulatory inverse condemnation claims with a date of occurrence later than July 1, 2008, and

Whereas, PLAN anticipates that members will tender regulatory inverse condemnation claims with dates of occurrence prior to July 1, 2008 ("inverse tails claim" or ITC) to PLAN for possible coverage under the ABAG PLAN Program, and

Whereas, PLAN is required to respond to such tenders, and

Whereas, case-by-case responses to tenders of ITCs will prolong and exacerbate the ongoing controversy among the members over how to respond to such tenders with the attendant risks of more litigation between members and PLAN and/or the dissolution of the ABAG PLAN Program, and

Whereas, legally binding all members to a specific method for resolving ITCs requires agreement by the governing bodies of each and every member, which the PLAN has deemed to be impracticable, and

Deleted: to

Whereas, the Board of Directors of PLAN participated in an interest based facilitation on November 4, 2009 to devise a strategy for handling ITCs, as described in Attachment 1, including exhibits, to this resolution, and

Whereas, as a result of the facilitation, the Board of Directors concluded that:

- (a) the common interest of the members in continuing the ABAG PLAN Program
- (b) justified the adoption and implementation of a strategy to handle ITCs
- (c) which offers each member with ITC(s) the certainty of coverage for such claim(s) and
- (d) limits the coverage to an amount that is potentially less than that which a member might be able to obtain by successfully litigating each ITC with results similar to the Decision
- (e) in return for avoiding the uncertainty and costs inherent in litigation, and the possibility that such litigation, or multiple litigation, would lead to a dissolution of the ABAG PLAN Program, and

Whereas, as a result of the facilitation, the Board of Directors also concluded that:

- (A) the common interest of the members in continuing the ABAG PLAN Program
- (B) justified the adoption and implementation of a strategy to handle ITCs
- (C) which is dependent on members without ITCs accepting some of the impacts of providing more coverage for ITCs than PLAN would provide if it were to successfully defend the denial of coverage for each ITC
- (D) in return for avoiding the uncertainty and costs inherent in litigation, and the possibility that such litigation, or multiple litigation, would lead to a dissolution of the ABAG PLAN Program.

Now therefore be it resolved that the Board of Directors of the ABAG PLAN Corporation hereby authorizes the following components of a comprehensive program to manage the ABAG PLAN Program's exposure to ITCs (ITC Program):

(1) Set aside Seven Million Dollars (\$7,000,000) from the ABAG PLAN Program "Self-Insurance Retention Fund" for the purpose of funding the ITC Program with periodic reviews, and possible increases in the set aside, by the Board of Directors to ensure adequate funding of the ITC Program.

(2) The exclusions set forth in sections IV.G and IV.H of the Memorandum of Coverage – Liability dated July 1, 2008 (MOC) will be applied to all claims with dates of occurrence prior to July 1, 2008 that are tendered to PLAN after that date. A claim that is excluded by these sections is deemed an ITC. If a member tenders a claim as an ITC, it will be deemed an ITC upon a majority vote of the Executive Committee with the proviso that if a representative of the member submitting the claim is on the Executive Committee, that representative cannot vote. If there is a dispute as to whether a tendered claim is an ITC, a three member committee (ITC) comprised of two city managers and one city attorney from members other than the member tendering the claim appointed by the Executive Committee of the PLAN Board of Directors will determine whether the claim is an ITC.

(3) In response to the tender of an ITC, PLAN will offer to pay defense costs (as defined in the MOC) that exceed the member's deductible, subject to the limitations and conditions of the ITC Program.

(4) Condition the offer described in (3) above on the member agreeing to accept the amounts payable under the ITC Program as fully discharging the PLAN's and ABAG's obligations to the member for defending or indemnifying said member for all of the member's ITCs, known and unknown, and regardless of whether an ITC was actually tendered to PLAN.

(5) Limit the amount paid under the ITC Program to any one member, including all amounts paid to any entity(ies) claiming coverage through said member, to One Million Dollars (\$1,000,000).

(6) Terminate the ITC Program effective July 1, 2013 so that, except for Warranted Claims described in (7) below, neither PLAN nor ABAG will have any liability or obligation to defend or indemnify a member for an ITC tendered on or after that date. . .

Deleted: indemnity

(7) Prior to July 1, 2013, a member may notify PLAN of an unasserted ITC by describing the property and the occurrence that gives rise to the ITC (Warranted Claim). If a member tenders a Warranted Claim to PLAN after July 1, 2013, PLAN will process the claim in accordance with the terms of the ITC Program. The process described in (2) above used to determine whether a claim is an ITC will be used to determine whether a claim is a Warranted Claim.

(8) For the purposes of a member's experience modification factor that is used to calculate the member's premiums, the date of occurrence for each ITC or Warranted Claim is deemed to be the date on which the claim is tendered to PLAN and the amounts paid to the member under the ITC program for each such claim will remain in the member's experience modification factor for five (5) years.

Adopted by Roll Call Vote at a special meeting of the Board of Directors held on _____ at _____.

Roll: Ayes Nays

[Certification]

Secretary

ATTACHMENT A-2

City of Half Moon Bay Email and Document Comments

Kenneth Moy - RE: PLAN - ITC Resolution

From: "Tony Condotti" <TCondotti@abc-law.com>
To: "Michael P. Dolder" <mdolder@hmbcity.com>
Date: 12/15/2009 11:20 AM
Subject: RE: PLAN - ITC Resolution
CC: <Kennethm@abag.ca.gov>
Attachments: PLAN - ITC Resolution v 1 (2).r.doc; PLAN - ITC Resolution v 1 (2).r.doc; PLAN - ITC Resolution v 1 (2).r.doc

Michael,

By copy of this message I'm forwarding my suggested changes to the Resolution to Ken Moy. I have no further comments or suggested changes. Ken, please feel free to contact me with questions or comments.

Regards,

Tony
ANTHONY P. CONDOTTI
Atchison, Barisone, Condotti & Kovacevich
333 Church Street
Santa Cruz, CA 95060
(831) 423-8383
Fax (831) 423-9401

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From: Michael P. Dolder [mailto:mdolder@hmbcity.com]
Sent: Friday, December 11, 2009 8:05 AM
To: Tony Condotti
Subject: FW: PLAN - ITC Resolution

Tony,
We need to discuss these documents on Monday if possible.
Michael

From: Kenneth Moy [mailto:Kennethm@abag.ca.gov]
Sent: Thu 12/10/2009 4:36 PM

DRAFT

RESOLUTION __

BOARD OF DIRECTORS

ABAG PLAN CORPORATION

Whereas, the self funded municipal liability pool commonly know as the ABAG PLAN Program has been operating since 1986 under the auspices of the Association of Bay Area Governments (ABAG) and the ABAG PLAN Corporation (PLAN), and

Whereas, in 2005 one member of the program sued ABAG and PLAN and obtained a decision (Decision) that allowed the member to recover defense costs for two claims, each of which included a cause of action for inverse condemnation based on the member's exercise of, or failure to exercise, its land use authority (regulatory inverse condemnation claims), and

Whereas, prior to the Decision, the ABAG PLAN Program had denied coverage for regulatory inverse condemnation claims and the members had acceded to all such denials, and some members forbore from tendering such claims, and

Whereas, after the Decision, the PLAN approved changes to the ABAG PLAN Program intended and designed to exclude any regulatory inverse condemnation claims with a date of occurrence later than July 1, 2008, and

Whereas, PLAN anticipates that members will tender regulatory inverse condemnation claims with dates of occurrence prior to July 1, 2008 ("inverse tails claim" or ITC) to PLAN for possible coverage under the ABAG PLAN Program, and

Whereas, PLAN is required to respond to such tenders, and

Whereas, case-by-case responses to tenders of ITCs will prolong and exacerbate the ongoing controversy among the members over how to respond to such tenders with the attendant risks of more litigation between members and PLAN and/or the dissolution of the ABAG PLAN Program, and

Whereas, legally binding all members to a specific method for resolving ITCs requires agreement by the governing bodies of each and every member, which the PLAN has deemed to be impracticable, and

Whereas, the Board of Directors of PLAN participated in an interest based facilitation on November 4, 2009 to devise a strategy for handling ITCs, as described in Attachment 1, including exhibits, to this resolution, and

Whereas, as a result of the facilitation, the Board of Directors concluded that:

- (a) the common interest of the members in continuing the ABAG PLAN Program
- (b) justified the adoption and implementation of a strategy to handle ITCs
- (c) which offers each member with ITC(s) the certainty of coverage for such claim(s) and
- (d) limits the coverage to an amount that is potentially less than that which a member might be able to obtain by successfully litigating each ITC with results similar to the Decision
- (e) in return for avoiding the uncertainty and costs inherent in litigation, and the possibility that such litigation, or multiple litigation, would lead to a dissolution of the ABAG PLAN Program, and

Whereas, as a result of the facilitation, the Board of Directors also concluded that:

- (A) the common interest of the members in continuing the ABAG PLAN Program
- (B) justified the adoption and implementation of a strategy to handle ITCs
- (C) which is dependent on members without ITCs accepting some of the impacts of providing more coverage for ITCs than PLAN would provide if it were to successfully defend the denial of coverage for each ITC
- (D) in return for avoiding the uncertainty and costs inherent in litigation, and the possibility that such litigation, or multiple litigation, would lead to a dissolution of the ABAG PLAN Program.

Now therefore be it resolved that the Board of Directors of the ABAG PLAN Corporation hereby authorizes the following components of a comprehensive program to manage the ABAG PLAN Program's exposure to ITCs (ITC Program):

(1) Set aside Seven Million Dollars (\$7,000,000) from the ABAG PLAN Program "Self-Insurance Retention Fund" for the purpose of funding the ITC Program with periodic reviews, and possible increases in the set aside, by the Board of Directors to ensure adequate funding of the ITC Program.

(2) To determine if a claim is an ITC for purposes of eligibility for participation in the ITC Program, the exclusions set forth in sections IV.G and IV.H of the Memorandum of Coverage – Liability dated July 1, 2008 (MOC) will be applied to all claims with dates of occurrence prior to July 1, 2008 that are tendered to PLAN after that date. A claim that is excluded by these sections will be deemed an ITC. If a member tenders a claim as an ITC, it will be deemed an ITC upon a majority vote of the Executive Committee with the proviso that if a representative of the member submitting the claim is on the Executive Committee, that representative cannot vote. If there is a dispute as to whether a tendered claim is an ITC, a three member committee (ITC) comprised of two city managers and one city attorney from members other than the member tendering the claim appointed by the Executive Committee of the PLAN Board of Directors will determine whether the claim is an ITC.

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(3) In response to the tender of an ITC, PLAN will offer to pay defense costs (as defined in the MOC) that exceed the member's deductible, subject to the limitations and conditions of the ITC Program.

(4) The offer described in (3) above will be conditioned on the member agreeing to accept the amounts payable under the ITC Program as fully discharging the PLAN's and ABAG's obligations to the member for defending or indemnifying said member for all of the member's ITCs, known and unknown, and regardless of whether an ITC was actually tendered to PLAN.

Deleted: Condition t

(5) The amount paid under the ITC Program to any one member, including all amounts paid to any entity(ies) claiming coverage through said member, shall be limited to One Million Dollars (\$1,000,000).

Deleted: Limit t

(6) ~~The~~ the ITC Program will terminate effective July 1, 2013 so that, except for Warranted Claims described in (7) below, neither PLAN nor ABAG will have any liability or obligation to defend or indemnify a member for an ITC tendered on or after that date.

Deleted: Terminate

(7) Prior to July 1, 2013, a member may notify PLAN of an unasserted ITC by describing the property and the occurrence that gives rise to the ITC (Warranted Claim). If a member tenders a Warranted Claim to PLAN after July 1, 2013, PLAN will process the claim in accordance with the terms of the ITC Program. The process described in (2) above used to determine whether a claim is an ITC will be used to determine whether a claim is a Warranted Claim.

(8) For the purposes of a member's experience modification factor that is used to calculate the member's premiums, the date of occurrence for each ITC or Warranted Claim is deemed to be the date on which the claim is tendered to PLAN and the amounts paid to the member under the ITC program for each such claim will remain in the member's experience modification factor for five (5) years.

Adopted by Roll Call Vote at a special meeting of the Board of Directors held on _____ at _____.

Roll: Ayes Nays

[Certification]

Secretary

4 of 4

ATTACHMENT A-3

City of Pacifica Email Comments

From: <quicke@ci.pacifica.ca.us>
To: <Kennethm@abag.ca.gov>
Date: 12/15/2009 1:16 PM
Subject: FW: PLAN - ITC - Resolution

Here you go. Best, Cecilia

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-----Original Message-----

From: Quick, Cecilia
Sent: Tuesday, December 15, 2009 11:36 AM
To: 'Kenneth Moy'; Clark Guinan; Bronda Silva; Jerry Gruber; Heather McLaughlin; Julie Carter; LeeAnn McPhillips; Michael Dolder; J. Logan; Emma Karlen; Jim O'Leary; Peggy Curran; Jesse Takahashi; Alvin James; Stephanie Osaze; Jeff Maltbie; Shawn Mason; Laura Allen; Carol Atwood; Kristi Chappelle; Kathy Leroux; Carl Cahill; Orry Korb; Danny Wan; Gary Galliano; Angela Howard; Michael Taylor; Jim Steele; Herb Lester; Gary Broad; Susan George
Cc: Darrell Dearborn; Henry Gardner; Bob Lanzone; Michael Harrington; Royleen White; Marcus Beverly
Subject: RE: PLAN - ITC - Resolution

Hi Ken-

I am confused by the proposed resolution. I thought the inverse tail concern had to do with claims that would be excluded by the July 1, 2008 exclusion but not excluded by the previous exclusions (as interpreted by the Court in the Pacifica matter). This proposal seems to provide defense coverage for any regulatory inverse case that occurred before July 1, 2008 and tendered after July 1, 2008. Is that what is intended?

Also, is the 1 million dollar cap an aggregate cap? To get a defense for one case, does the member have to waive coverage for all other potential claims? Can a member opt out of this process?

Thank you for your clarification.

Best regards, Cecilia Quick

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-----Original Message-----

From: Kenneth Moy [mailto:Kennethm@abag.ca.gov]
Sent: Thursday, December 10, 2009 4:42 PM
To: Clark Guinan; Bronda Silva; Jerry Gruber; Heather McLaughlin; Julie Carter; LeeAnn McPhillips; Michael Dolder; J. Logan; Emma Karlen; Quick, Cecilia; Jim O'Leary; Peggy Curran; Jesse Takahashi; Alvin James; Stephanie Osaze; Jeff Maltbie; Shawn Mason; Laura Allen; Carol Atwood; Kristi Chappelle; Kathy Leroux; Carl Cahill; Orry Korb; Danny Wan; Gary Galliano; Angela Howard; Michael Taylor; Jim

ATTACHMENT A-4

Ken Moy's Response to City of Pacifica Comments

Kenneth Moy - Re: FW: PLAN - ITC - Resolution

From: Kenneth Moy
To: quickc@ci.pacifica.ca.us
Date: 12/15/2009 4:07 PM
Subject: Re: FW: PLAN - ITC - Resolution
Attachments: Kenneth Moy.vcf

Cecilia,

Effective July 1, 2008, the Board of Directors (BOD) of the ABAG PLAN Corporation amended the Memorandum of Coverage (MOC) for the ABAG PLAN Program to close loopholes in the MOC's exclusion for regulatory inverse condemnation claims. Coverage for inverse condemnation claims with dates of occurrence prior to July 1, 2008 - inverse tail claims (ITC) - are not affected by the amendment. Coverage for these claims are determined under the MOCs in effect on the date of occurrence.

The resolution of the "Pacifica matter" left open the question of how the ABAG PLAN program would respond to a tender of an ITC by a member. The proposed ITC resolution and attachments are intended to document the decision of the ABAG PLAN BOD on how to respond to the tender of an ITC. The decision is to offer members with an ITC coverage for defense costs incurred in connection with the ITC subject to the conditions and limitations set forth in the "resolved" sections of the proposed ITC resolution.

Based on the above, the answer to your first question is a qualified "yes".

To your more specific questions:

- The \$1 Million cap applies to one member. Covered defense costs for all ITCs tendered to the ABAG PLAN Program by a member is counted against the cap.

- A member submitting its first ITC to the ABAG PLAN Program has the option of accepting the ABAG PLAN Corporation BOD's offer set forth in the ITC resolution. A member that accepts the offer for the first ITC it tenders is required to sign a waiver that requires the member to accept the offer for all other ITCs it may have in the future. If the cumulative covered defense costs for all other ITCs exceed the member's \$1 Million cap, the coverage is exhausted. I believe the preceding addresses your question re "waiving coverage".

- A member can "opt out" by rejecting the offer by the ABAG PLAN Corporation BOD when the member tenders its first ITC.

Based on your questions, I urge you to speak with Board members who attended the November 4th facilitated meeting. The preliminary list of attendees is included in the materials sent to you and the pdf document titled "PLAN - ITC Resolution - A-3".

Your questions and my responses will be included in a package of materials that will be sent out with a revised ITC resolution which will (hopefully) be the version presented to the ABAG PLAN BOD for its formal action. The recipients will include the ABAG PLAN BOD and the cc's on my original email.

Regards,

Ken Moy

ATTACHMENT A-5

City of Milpitas Email Comments

From: "Emma Karlen" <EKarlen@ci.milpitas.ca.gov>
To: "Kenneth Moy" <Kennethm@abag.ca.gov>
Date: 12/15/2009 3:07 PM
Subject: RE: PLAN - ITC Resolution

Ken,

I noticed that the resolution proposed using an ITC committee to resolve dispute but during the meeting, we never discussed the Committee should comprise of 2 City Managers and one City Attorney. Would the Committee be ad-hoc and appointed by the Executive Committee each time?

The notes mentioned 5 years window. The resolution terminate ITC Program effective 7/1/2013. Not quite 5 years, more like 3 1/2 years by the time the resolution is adopted.

The Warranted claim was not discussed but wouldn't the timeline of 7/1/2013 be extended by the notification of a warrant claim? If one submits a warrant claim prior to 7/1/2013, how long is it good for?

-----Original Message-----

From: Kenneth Moy [mailto:Kennethm@abag.ca.gov]
Sent: Wednesday, November 25, 2009 3:37 PM
To: Clark Guinan; Bronda Silva; Jerry Gruber; Heather McLaughlin; Julie Carter; LeeAnn McPhillips; J. Logan; Jeff Killian; Emma Karlen; Cecilia Quick; Jim O'Leary; Peggy Curran; Jesse Takahashi; M.L. Gordon; Jeff Maltbie; Shawn Mason; Laura Allen; Carol Atwood; Kristi Chappelle; Kathy Leroux; Michael Dolder; Carl Cahill; Orry Korb; Danny Wan; Gary Galliano; Angela Howard; Michael Taylor; Jim Steele; Herb Lester; Gary Broad; Susan George
Cc: Darrell Dearborn; Henry Gardner; Kenneth Moy; Bob Lanzone; Michael Harrington; Royleen White; Marcus Beverly
Subject: PLAN - ITC Resolution

Members, Board of Directors, ABAG PLAN Corporation:

Attached are the draft documents which staff proposes be used to implement the vote taken at the November 4 Board meeting to resolve the issue of Inverse Tail Claims (ITC). In so doing, we have largely acted as scribes to the process: we did devise a procedure for determining whether a claim is an ITC.

The documents consist of the following:

- PLAN - ITC Resolution v. 1 - the proposed resolution for adoption by the Board implementing the "ITC Program" - the document is in Word format. Please use "Track Changes" when sending edits or comments.
- PLAN - ITC Resolution - Background Attachment - an attachment to the resolution describing the facilitated process undertaken at the November 4 meeting - the document is in Word format. Please use "Track Changes" when sending edits or comments.
- 4 documents denominated "PLAN - ITC Resolution -" and grouped as

ATTACHMENT A-6

Ken Moy's Response to City of Milpitas Comments

Kenneth Moy - RE: PLAN - ITC Resolution

From: Kenneth Moy
To: Emma Karlen
Date: 12/15/2009 4:38 PM
Subject: RE: PLAN - ITC Resolution

Emma,

During the discussion of this matter, I suggested to the BOD that a committee be designated to determine what is an ITC claim if there is disagreement on that point. The composition of the committee was not discussed. The composition is my suggestion and is based on the notion that 2 city managers and one city attorney have sufficient experience to recognize an regulatory inverse claim "when they see one." The committee would be ad hoc. The process for selecting the committee is left up to the BOD or the Executive committee. I have received one other comment on the ITC committee.

I understood the 5 year window to be measured from the date of the July 1, 2008 revisions to the MOC. The reasoning is as follows: the statute of limitations for these types of claims is typically 4 years. Any ITC claim, by definition, has a date of occurrence prior to July 1, 2008. Any ITC that is presented on or after July 1, 2013 will likely be barred by the statute of limitations.

You are correct about warranted claims. The notion of warranted claims was discussed briefly. The idea is that some unusual circumstances might allow a claimant to avoid the statute of limitations. In almost all the circumstances that can be imagined, such claims are likely to be "notorious", i.e. known to the member. If a member is aware of such a claim, it can warrant that claim to the ABAG PLAN BOD and extend the coverage offered by the ITC Resolution until the warranted claim is presented.

I hope this answers your questions.

I will be including your questions and my response in a package of materials that I will be sending out to the ABGA PLAN Corporation BOD for formal adoption.

Regards & happy holidays,

Ken Moy

>>> On 12/15/2009 at 3:06 PM, in message
 <591C81ADEF586D45A9A39694DA2BBD2F040205BF@paravion.nt.ci.milpitas.ca.gov>, "Emma Karlen"
 <EKarlen@ci.milpitas.ca.gov> wrote:

Ken,

I noticed that the resolution proposed using an ITC committee to resolve dispute but during the meeting, we never discussed the Committee should comprise of 2 City Managers and one City Attorney. Would the Committee be ad-hoc and appointed by the Executive Committee each time?

The notes mentioned 5 years window. The resolution terminate ITC Program effective 7/1/2013. Not quite 5 years, more like 3 1/2 years by the time the resolution is adopted.

The Warranted claim was not discussed but wouldn't the timeline of 7/1/2013 be extended by the notification of a warrant claim? If one

ATTACHMENT A-7

City of Campbell Email Comments

From: "Jesse Takahashi" <JESSET@cityofcampbell.com>
To: "Kenneth Moy" <Kennethm@abag.ca.gov>
Date: 12/15/2009 3:35 PM
Subject: RE: PLAN - ITC Resolution

Ken,

I think your draft resolution looks good and captures the essence of the lengthy discussion we had last month. I have no changes.

Jesse Takahashi
Finance Director
City of Campbell

-----Original Message-----

From: Kenneth Moy [mailto:Kennethm@abag.ca.gov]
Sent: Wednesday, November 25, 2009 3:37 PM
To: Clark Guinan; Bronda Silva; Jerry Gruber; Heather McLaughlin; Julie Carter; LeeAnn McPhillips; J. Logan; Jeff Killian; Emma Karlen; Cecilia Quick; Jim O'Leary; Peggy Curran; Jesse Takahashi; M.L. Gordon; Jeff Maltbie; Shawn Mason; Laura Allen; Carol Atwood; Kristi Chappelle; Kathy Leroux; Michael Dolder; Carl Cahill; Orry Korb; Danny Wan; Gary Galliano; Angela Howard; Michael Taylor; Jim Steele; Herb Lester; Gary Broad; Susan George
Cc: Darrell Dearborn; Henry Gardner; Kenneth Moy; Bob Lanzone; Michael Harrington; Royleen White; Marcus Beverly
Subject: PLAN - ITC Resolution

Members, Board of Directors, ABAG PLAN Corporation:

Attached are the draft documents which staff proposes be used to implement the vote taken at the November 4 Board meeting to resolve the issue of Inverse Tail Claims (ITC). In so doing, we have largely acted as scribes to the process: we did devise a procedure for determining whether a claim is an ITC.

The documents consist of the following:

- PLAN - ITC Resolution v. 1 - the proposed resolution for adoption by the Board implementing the "ITC Program" - the document is in Word format. Please use "Track Changes" when sending edits or comments.
- PLAN - ITC Resolution - Background Attachment - an attachment to the resolution describing the facilitated process undertaken at the November 4 meeting - the document is in Word format. Please use "Track Changes" when sending edits or comments.
- 4 documents denominated "PLAN - ITC Resolution -" and grouped as follows: A-1, A-2, A-3 and B-1 through B-5. These documents are all in PDF format. The only changes that may be made is to the attendance list in A-3. Any suggested changes should only be made by the affected jurisdiction.

ATTACHMENT B

Final Draft Resolution Redlined Version

ATTACHMENT B

DRAFT

RESOLUTION __

BOARD OF DIRECTORS

ABAG PLAN CORPORATION

Whereas, the self funded municipal liability pool commonly know as the ABAG PLAN Program has been operating since 1986 under the auspices of the Association of Bay Area Governments (ABAG) and the ABAG PLAN Corporation (PLAN), and

Whereas, in 2005 one member of the program sued ABAG and PLAN and obtained a decision (Decision) that allowed the member to recover defense costs for two claims, each of which included a cause of action for inverse condemnation based on the member's exercise of, or failure to exercise, its land use authority (regulatory inverse condemnation claims), and

Whereas, prior to the Decision, the ABAG PLAN Program had denied coverage for regulatory inverse condemnation claims and the members had acceded to all such denials, and some members forbore from tendering such claims, and

Whereas, after the Decision, the PLAN approved changes to the ABAG PLAN Program intended and designed to exclude any regulatory inverse condemnation claims with a date of occurrence later than July 1, 2008, and

Whereas, PLAN anticipates that members will tender regulatory inverse condemnation claims with dates of occurrence prior to July 1, 2008 ("inverse tails claim" or ITC) to PLAN for possible coverage under the ABAG PLAN Program, and

Whereas, PLAN is required to respond to such tenders, and

Whereas, case-by-case responses to tenders of ITCs will prolong and exacerbate the ongoing controversy among the members over how to respond to such tenders with the attendant risks of more litigation between members and PLAN and/or the dissolution of the ABAG PLAN Program, and

Whereas, legally binding all members to a specific method for resolving ITCs requires agreement by the governing bodies of each and every member, which the PLAN has deemed to be impracticable, and

Deleted: to

Whereas, the Board of Directors of PLAN participated in an interest based facilitation on November 4, 2009 to devise a strategy for handling ITCs, as described in Attachment 1, including exhibits, to this resolution, and

Whereas, as a result of the facilitation, the Board of Directors concluded that:

- (a) the common interest of the members in continuing the ABAG PLAN Program
- (b) justified the adoption and implementation of a strategy to handle ITCs
- (c) which offers each member with ITC(s) the certainty of coverage for such claim(s) and
- (d) limits the coverage to an amount that is potentially less than that which a member might be able to obtain by successfully litigating each ITC with results similar to the Decision
- (e) in return for avoiding the uncertainty and costs inherent in litigation, and the possibility that such litigation, or multiple litigation, would lead to a dissolution of the ABAG PLAN Program, and

Whereas, as a result of the facilitation, the Board of Directors also concluded that:

- (A) the common interest of the members in continuing the ABAG PLAN Program
- (B) justified the adoption and implementation of a strategy to handle ITCs
- (C) which is dependent on members without ITCs accepting some of the impacts of providing more coverage for ITCs than PLAN would provide if it were to successfully defend the denial of coverage for each ITC
- (D) in return for avoiding the uncertainty and costs inherent in litigation, and the possibility that such litigation, or multiple litigation, would lead to a dissolution of the ABAG PLAN Program.

Now therefore be it resolved that the Board of Directors of the ABAG PLAN Corporation hereby authorizes the following components of a comprehensive program to manage the ABAG PLAN Program's exposure to ITCs (ITC Program):

(1) Set aside Seven Million Dollars (\$7,000,000) from the ABAG PLAN Program "Self-Insurance Retention Fund" for the purpose of funding the ITC Program with periodic reviews, and possible increases in the set aside, by the Board of Directors to ensure adequate funding of the ITC Program.

(2) To determine whether a claim is an ITC for the purpose of participating in the ITC Program, the exclusions set forth in sections IV.G and IV.H of the Memorandum of Coverage – Liability dated July 1, 2008 (MOC) will be applied to all claims with dates of occurrence prior to July 1, 2008 that are tendered to PLAN after that date. A claim that is excluded by these sections will be deemed an ITC. If a member tenders a claim as an ITC, it will be deemed an ITC upon a majority vote of the Executive Committee with the proviso that if a representative of the member submitting the claim is on the Executive Committee, that representative cannot vote. If there is a dispute as to whether a tendered claim is an ITC, the Chair of the Board of Directors of the ABAG PLAN Corporation will appoint an *ad hoc* committee comprised of representatives from no less than three (3) members to determine whether the claim is an ITC for the purposes described in this paragraph.

Deleted: The

Deleted: is

Deleted: a three member committee (ITC) comprised of two city managers and one city attorney from members other than the member tendering the claim appointed by the Executive Committee of the PLAN Board of Directors will determine whether the claim is an ITC

(3) In response to the tender of an ITC, PLAN will offer to pay defense costs (as defined in the MOC) that exceed the member's deductible, subject to the limitations and conditions of the ITC Program.

(4) ~~The offer described in (3) above will be conditioned on the member agreeing to accept the amounts payable under the ITC Program as fully discharging the PLAN's and ABAG's obligations to the member for defending or indemnifying said member for all of the member's ITCs, known and unknown, and regardless of whether an ITC was actually tendered to PLAN.~~

Deleted: Condition the

(5) ~~The amount paid under the ITC Program to any one member, including all amounts paid to any entity(ies) claiming coverage through said member, shall be limited to One Million Dollars (\$1,000,000).~~

Deleted: Limit the

(6) Terminate the ITC Program effective July 1, 2013 so that, except for Warranted Claims described in (7) below, neither PLAN nor ABAG will have any liability or obligation to defend or ~~indemnify a member for an ITC tendered on or after that date.~~

Deleted: indemnity

(7) Prior to July 1, 2013, a member may notify PLAN of an unasserted ITC by describing the property and the occurrence that gives rise to the ITC (Warranted Claim). If a member tenders a Warranted Claim to PLAN after July 1, 2013, PLAN will process the claim in accordance with the terms of the ITC Program. The process described in (2) above used to determine whether a claim is an ITC will be used to determine whether a claim is a Warranted Claim.

(8) For the purposes of a member's experience modification factor that is used to calculate the member's premiums, the date of occurrence for each ITC or Warranted Claim is deemed to be the date on which the claim is tendered to PLAN and the amounts paid to the member under the ITC program for each such claim will remain in the member's experience modification factor for five (5) years.

Adopted by Roll Call Vote at a special meeting of the Board of Directors held on _____ at _____.

Roll: Ayes Nays

[Certification]

Secretary

ATTACHMENT C

Final Resolution

RESOLUTION 01-2010

BOARD OF DIRECTORS

ABAG PLAN CORPORATION

Whereas, the self funded municipal liability pool commonly know as the ABAG PLAN Program has been operating since 1986 under the auspices of the Association of Bay Area Governments (ABAG) and the ABAG PLAN Corporation (PLAN), and

Whereas, in 2005 one member of the program sued ABAG and PLAN and obtained a decision (Decision) that allowed the member to recover defense costs for two claims, each of which included a cause of action for inverse condemnation based on the member's exercise of, or failure to exercise, its land use authority (regulatory inverse condemnation claims), and

Whereas, prior to the Decision, the ABAG PLAN Program had denied coverage for regulatory inverse condemnation claims and the members had acceded to all such denials, and some members forbore from tendering such claims, and

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Whereas, PLAN anticipates that members will tender regulatory inverse condemnation claims with dates of occurrence prior to July 1, 2008 ("inverse tails claim" or ITC) to PLAN for possible coverage under the ABAG PLAN Program, and

Whereas, PLAN is required to respond to such tenders, and

Whereas, case-by-case responses to tenders of ITCs will prolong and exacerbate the ongoing controversy among the members over how to respond to such tenders with the attendant risks of more litigation between members and PLAN and/or the dissolution of the ABAG PLAN Program, and

Whereas, legally binding all members to a specific method for resolving ITCs requires agreement by the governing bodies of each and every member, which the PLAN has deemed to be impracticable, and

Whereas, the Board of Directors of PLAN participated in an interest based facilitation on November 4, 2009 to devise a strategy for handling ITCs, as described in Attachment 1, including exhibits, to this resolution, and

Whereas, as a result of the facilitation, the Board of Directors concluded that:

- (a) the common interest of the members in continuing the ABAG PLAN Program
- (b) justified the adoption and implementation of a strategy to handle ITCs
- (c) which offers each member with ITC(s) the certainty of coverage for such claim(s) and
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- (2) To determine whether a claim is an ITC for the purpose of participating in the ITC Program, the exclusions set forth in sections IV.G and IV.H of the Memorandum of Coverage – Liability dated July 1, 2008 (MOC) will be applied to all claims with dates of occurrence prior to July 1, 2008 that are tendered to PLAN after that date. A claim that is excluded by these sections will be deemed an ITC. If a member tenders a claim as an ITC, it will be deemed an ITC upon a majority vote of the Executive Committee with the proviso that if a representative of the member submitting the claim is on the Executive Committee, that representative cannot vote. If there is a dispute as to whether a tendered claim is an ITC, the Chair of the Board of Directors of the ABAG PLAN Corporation will appoint an *as hoc* committee comprised of representatives from no less than three (3) members to determine whether the claim is an ITC for the purposes described in this paragraph.

RESOLUTION ATTACHMENTS
(referred to as Attachment 1 in Resolution)

- Attachment A-1: November 4, 2009 Board of Directors Meeting Agenda
- Attachment A-2: ITC Summary of Issue and Purpose of Meeting
- Attachment A-3: List of Meeting Attendees
- Attachment B-1: Interest Based Facilitation Process Description
(email from Royleen White)
- Attachment B-2: Photographs of Criteria Matrix
- Attachment B-3: Photographs of Criteria Matrix
- Attachment B-4: Photographs of Criteria Matrix
- Attachment B-5: Photograph of Proposed Solution Characteristics

**ATTACHMENT 1
TO
RESOLUTION 01-2010**

**BOARD OF DIRECTORS
ABAG PLAN CORPORATION**

**NOVEMBER 4, 2009
FACILITATED MEETING**

Members of the Board of Directors (BOD) of the ABAG PLAN Corporation met on November 4, 2009 in an all day session facilitated by Royleen White, Royleen White & Associates using an interest based approach. The agenda (1 page) and background materials (2 pages) sent to the members of the BOD in advance of the meeting are attached as A-1 and A-2, respectively. The list of attendees is attached as A-3. The meeting began at approximately 9:40 AM and ended at approximately 4:30 PM.

The interest based facilitation process is described by Royleen White in an email attached as B-1. Each of steps 1 through 4 was initiated in subgroups and concluded by the group as a whole. At the conclusion of Step 3, a set of criteria emerged, were written on large format PostIts™ and each PostIt™ was placed in a matrix that sorted similar or aligned criteria in columns – the more PostIts™ in a column, the more times it was mentioned by the subgroups. Proposed solutions emerging from Step 4 were evaluated against the criteria matrix. A series of photographs of the criteria matrix are attached as B-2 through B-4 with the leftmost portion of the matrix captured by B-2 and the rightmost by B-4.

The facilitation culminated in a solution with the characteristics listed in attachment B-5. The approximately 26 to 27 members present at that point in the meeting approved the proposed solution with 4 to 5 of those members either abstaining from the process or opposing the proposed solution.

A – 1

ABAG PLAN Board of Directors

Meeting Agenda

November 4, 2009



Association of Bay Area Governments
ABAG PLAN CORPORATION
101 - 8th Street
Oakland, CA 94607-4756

AGENDA

Board of Directors Meeting
November 4, 2009
9:00 a.m. to 4:30 p.m.
Westin Hotel
675 El Camino Real
Palo Alto, CA 94301

1. Call To Order & Introductions

Opening Remarks: Laura Allen, Board Chair, Colma

2. Public Comments

3. Approval of Minutes*

Board of Directors Meeting August 17, 2009

Action

4. Facilitated Discussion of Inverse Tail Claim Strategy**

Royleen White, Royleen White & Associates, will lead an interest-based facilitation designed to assist members in developing a strategy to manage the PLAN's exposure to "Inverse Tail Claims", claims that pre-date changes made to the PLAN Memorandum of Coverage effective July 1, 2008.

Action

Break - Lunch

5. Continued Discussion, Wrap Up and Next Steps**

Royleen White will continue to lead the facilitation, assist members in summarizing agreements reached, and help determine the steps needed to implement the Board's recommendations.

Action

6. Other Business

7. Adjournment

Note: The Board may act on any agenda item

* Enclosure

** To be provided at meeting

**Inverse Tail Claims
Summary of Issue and Purpose of Meeting**

The ABAG PLAN Board members are being asked to participate in an interest-based facilitation on November 4-5, 2009, led by consultant Royleen White, to determine if a consensus can be reached on how to manage the PLAN's exposure to "Inverse Tail Claims" (ITC).

From the beginning of the PLAN in 1986, claims for regulatory or physical inverse have been excluded. In 1997, the PLAN Memorandum of Coverage (MOC) was amended to exclude inverse claims that also contained allegations of trespass, nuisance, violations of due process or various civil rights. In 2007, a trial court rendered a decision that undermined that strategy by requiring the PLAN to pay defense costs associated with a regulatory inverse claim. The members amended the MOC effective July 1, 2008, to prevent a similar result going forward.¹

However, the changes enacted in 2008 do not impact claims arising from the actions of a covered person(s) that took place prior to July 1, 2008. Since the process of approving land use agreements can be subject to dispute over a lengthy period of time, there is the potential for claims to be presented to the PLAN that arise from actions taken prior to the 2008 changes. It is this exposure to what are termed Inverse Tail Claims the members are attempting to manage.

At the PLAN Board meeting on October 22, 2008, members discussed the exposure and considered a number of options for managing it, ranging from doing nothing, to establishing a deadline for claims to be presented, to limiting the dollar amount available for the claims. After much discussion, the members approved, on a 12 to 9 vote, implementing a lifetime cap of \$1 million per member for inverse tail claims, defined as those that would be excluded under the 2008 language. Members voting against the proposal were divided among those who felt the cap was too high and those that wanted no change.

The PLAN Executive Committee subsequently met and discussed how to proceed with taking the proposal to the member city managers and/or councils for approval. Recognizing the lack of consensus among the Board and the Committee itself, and the fact that ten members were not present to vote, the Committee agreed to recommend that members participate in an interest-based facilitation to determine if a consensus can be reached regarding management of the ITC exposure.

The options generally fall within three categories:

1. Do nothing and use the current process of ad-hoc Board review, with member able to appeal to binding arbitration.
2. Agree to a new procedure for determining coverage for Inverse Tail Claims that would avoid the ad-hoc approach, e.g. a time limit for claims to be filed.
3. Agree to a limit on the financial exposure to such claims, with a per claim, member, or aggregate cap.

Staff is available to provide more detail on the options and their pros and cons, as well as provide more information on the ITC exposure as needed.

¹ See attached Risk Matters Newsletter article for a description of the changes and coverage provided.

Coverage Corner

Marcus Beverly, ABAG PLAN Risk Manager

Coverage Corner responds to member questions about ABAG PLAN. This article explains the changes to the Liability Memorandum of Coverage.

At the recent ABAG PLAN Board meeting, a revision to the inverse condemnation exclusion in the Liability Memorandum of Coverage (MOC) was adopted, effective July 1, 2008. The change in the language is meant to support the PLAN's existing practice of covering sewer backup claims while denying defense and indemnity for inverse claims that include other allegations such as trespass or nuisance.

The intent is to reverse the effects of a recent trial court's decision obligating the ABAG PLAN to pay claims arising from inverse condemnation, which were previously denied (or excluded from coverage). Outlined below is an overview of the types of inverse claims ABAG PLAN has experienced over the years and how we have responded. The changes to the MOC are meant to support these practices.

Types of Inverse Claims

Regulatory Inverse – action or inaction affecting the use of, or rights or entitlements in, any real property or improvements to real property.

Examples

- ❖ Denial of permit for construction of housing development
- ❖ Ordinance restricting use of property
- ❖ Delay or discrimination in processing permit.

Physical Inverse – the non-negligent operation of a public improvement that causes damage.

Examples

- ❖ Storm water drainage system diverts storm water to places as designed
- ❖ Catchment overflows when storm water inflow exceeds design capacity.



ABAG PLAN Corporation
A Pooled Liability Assurance Network

Providing self-insured coverage to cities in the San Francisco Bay Area

Emma Karlan, Chair
Laura Allen, Vice Chair
Henry Gardner, President
Marcus Beverly, Risk Manager
Ken Moy, Legal Counsel

Newsletter Staff
Leah Zippert, Writer & Editor
Kathleen Cha, Editor
Vicki Rutherford, Design & Production

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Eileen Barr, Claims Examiner
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Chantelle Coleman-Doan, Claims Examiner
Marken Hew, Claims Examiner
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Jim Nagal, Claims Examiner
Gertruda Luermann, Risk Management Analyst

P.O. Box 2050, Oakland, CA 94604-2050 • Telephone: 510-464-7900
 Fax: 510-464-7979 • Email: info@abag.ca.gov

ABAG PLAN's MOC exclusions apply even when claims are combined with other causes of action such as trespass, nuisance, violations of civil or procedural rights, or dangerous condition of public property.

The exclusion for physical inverse *does not apply* if the claim is based on one or more of the following:

❖ Negligent Maintenance

The primary basis for the claim is failure to maintain a public improvement, rather than the proper operation of the improvement itself. Plaintiffs often plead inverse, trespass, and/or nuisance as they are easier to prove and allow for recovery of more than just property damage, including attorney fees, diminution of value, and emotional distress.

Examples

- Sewer backflows into homes and businesses
- Localized flooding due to failure to clean storm water inlets
- Landslide due to poorly maintained drainage ditches.

❖ Negligent Design

The primary basis for the claim is inadequate or improper design of the public improvement(s), with negligent maintenance an associated factor.

Examples

- Flooding along creek due to obstruction from bridge, combined with failure to maintain creek bed
- Landslide due to inadequate storm water system, combined with failure to maintain leaky sewer main.

ABAG PLAN coverage for mixed inverse claims is evaluated on a case-by-case basis, often resulting in a legal defense and payment for **physical damage to property**.

The right to deny coverage for other types of damages, such as plaintiff attorney fees, diminution in value, emotional distress, or the cost of the "fix" that may be the central focus of the claim is reserved. The portion of the property damage that may be attributable to the maintenance is often difficult to evaluate and members work closely with counsel and staff to resolve.

By passing the changes to the MOC, members have reaffirmed this practice. The new MOC, along with additional analysis and examples of how the MOC is applied to actual claims, is available on the ABAG PLAN website.

We encourage members to review or reference the website as needed when questions arise over inverse claims. When in doubt or there are questions about coverage, contact ABAG PLAN staff to discuss.

A - 3

ABAG PLAN Members	
AMERICAN CANYON	Bronda Silva and Richard Ramirez
ATHERTON	Eileen Wilkerson
BENICIA	Heather MCLaughlin
BURLINGAME	Gus Guinan
CAMPBELL	Jesse Takahashi
COLMA	Brian Dossey
CUPERTINO	David Woo
DUBLIN	Julie Carter
EAST PALO ALTO	Alvin James and Stephanie Osaze
FOSTER CITY	Kristi Chappelle
GILROY	Tom Haglund
HALF MOON BAY	Michael Dolder
HILLSBOROUGH	Kathy Leroux
LOS ALTOS	Patrick Alvarez and Jolie Houston
LOS ALTOS HILLS	Nick Pegueros
LOS GATOS	Orry Korb & Jenny Haruyama
MILLBRAE	LaRae Brown
MILPITAS	Emma Karlen
MORGAN HILL	Danny Wan
NEWARK	Sandy Abe
PACIFICA	none
PORTOLA VALLEY	Angela Howard
ROSS, TOWN OF	none
SAN BRUNO	Jim O'Leary
SAN CARLOS	Yulia Rasulova
SAN MATEO	Shawn Mason
SARATOGA	Barbara Powell
S. SAN FRANCISCO	Jim Steele
SUISUN CITY	none
TIBURON	Heidi Bigall
WOODSIDE	Kevin Bryant & Susan George

B-1

From: "Royleen White" <royleenwhite@earthlink.net>
To: "Darrell Dearborn" <DarrellD@abag.ca.gov>
Date: 11/8/2009 3:44 PM
Subject: Re: List of Criteria

Hi, Darrell,

I hope this is in sufficient detail for your purposes. Let me know!

Step 1: Define the problem – This was continued from October 2008; after several conversations with ABAG staff, Marcus, and the Executive Committee, and Board interviews, the question I settled on was: "How might we develop a workable agreement to manage the PLAN's exposure to "Inverse Tail Claims," claims that pre-date the changes made to the PLAN's Memorandum of Coverage effective July 1, 2008?"

- a. Develop a question that contains the issue and begins with, "How might we?"
- b. Do not address "Yes/No" questions
- c. Do not present solutions yet
- d. Do not use accusations

Step 2: Determine interests

- a. Identify Board Member's interests—their needs and concerns
- b. Identify common interests

Step 3: Develop options

- a. Utilize brainstorming
- b. Refer to best practices
- c. Continually ask, "How else might we ...?"

Step 4: Select a solution

- a. Screen your options
- b. Shorten your list
- c. Test solutions against criteria
- d. Decide on a solution

Be well, Royleen

Royleen White Associates
510.658.9518
www.royleenwhite.com

> [Original Message]

> From: Darrell Dearborn <DarrellD@abag.ca.gov>

> To: <royleenwhite@earthlink.net>

> Date: 11/6/2009 11:41:10 AM

> Subject: Re: List of Criteria

>

> Royleen,

> I'm doing the minutes for the meeting. Can you tell me again the several stages of the process you took the group through to arrive at the policy for treating inverse tail claims?

>

> Darrll

>

> Darrell Dearborn

> Interim Risk Manager

B-1

> (510) 464-7969 phone
> (510) 433-5569 fax
>
>
> >>> "Royleen White" <royleenwhite@earthlink.net> 11/5/2009 8:21 AM >>>
> Darrell,
>
> Nice to meet you yesterday. I am sending along the criteria in the event
you might need them later in the process.
>
> Be well, Royleen
>
> Royleen White Associates
> 510.658.9518
> www.royleenwhite.com

Legally
defensible

Politically
"sellable"

Balance
Interest of
PLAN w/
City's interests

**Financial
Responsibility**

Fiscally
achievable &
prudent

Remains Financially
Strong

Quantify Risk
Exposure to
PLAN

Keep PLAN
fiscally viable
for most mmbbs

Fairness
(practices &
standards)

Fairness to
all members
(similar
treatment)

Fair &
EQUITABLE

Fair, both
Legal and
Objective

BALANCE
RISK SHARE
BETWEEN
PLAN/MEMB

Clarity &
predictability

SIMPLE &
EASY TO
MANAGE

Non-Arbitrary
Process

Consensus
Solution to
all members

Keep Pool
together

Flexibility in
developing
solution (not
"in" to a particular
process or
approach)

DEMOCRACY
(ACCEPT
SOLUTION)

Keeps Plan
Together

CREATIVITY

KEEP OPEN
MIND

Everyone's
heard

Retain cost
effective care
liability insurance
plan

MOVE
FORWARD

Commonalities:

- CREATE A RESERVE OR
Pool within the Pool
- earmarked \$ 7 MILLION
(REGULARLY MONITORED)
- Limited timeframe
 - * 5 years + warranted claims
- Experience mod. affected
 - * going forward (~~5~~ 5yrs)
- ^{Member} ~~State~~ Cap - \$1 million - requires
 - * official documentation agreeing - no litigation
- Limit Coverage to defense
 - * COSTS Board
 - Use of COMMITTEE to decide
 - * If claim is on ITC