



Association of Bay Area Governments

ABAG PLAN CORPORATION
Board of Directors Special Meeting
Auditorium
101 8th Street
Oakland, CA 94607-4756
February 2, 2010
9:00 a.m. – 12:00 p.m.

Teleconference Locations
City of Gilroy - Human Resources Department Offices
7351 Rosanna Street
Gilroy, CA 95020

Town of Hillsborough – Town Hall
1600 Floribunda Avenue
Hillsborough, CA 94010

City of Milpitas – City Hall
455 E. Calaveras Boulevard
Milpitas, CA 95035

1. Call To Order & Introductions

Opening Remarks: Laura Allen, Board Chair, Colma

2. Public Comments

3. Approval of Minutes for Board Meetings of November 4, 2009 and November 5, 2009 *

4. Inverse Tail Claim Policy *

The Board will consider the Inverse Tail Claims Policy for claims based on regulatory inverse condemnation causes of action arising prior to July 1, 2008 which was drafted at the Board meeting of November 4, 2009. The Executive Committee recommends adoption.

5. PLAN Governance Structure *

- (a) The DRAFT minutes of the January 14, 2010 Executive Committee Meeting.
- (b) The Board will consider a proposal for addressing “governance issues” from the Executive Committee.
- (c) The Board will consider a proposal for addressing “governance issues” from ABAG.
- (d) Budget report.

6. Letter From Rose Jacobs Gibson, ABAG President re: Complaint Investigation *

Board Chair Laura Allen will present this letter which was previously distributed to the Executive Committee.

7. Other Business

Note: The Board may act on any agenda item

* Enclosure(s)

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www.abag.ca.gov/services/plan

**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

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 5th 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 $\frac{2}{3}$ rd of a computer programmer, $\frac{2}{3}$ rd 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

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 3rd 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.

ASSOCIATION OF BAY AREA GOVERNMENTS

Representing City and County Governments of the San Francisco Bay Area



ABAG

A B A G P L A N
C O R P O R A T I O N

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

Mailing Address: P.O. Box 2050 Oakland, California 94604-2050 (510) 464-7900 Fax: (510) 464-7989 plan@abag.ca.gov

Location: Joseph P. Bort MetroCenter 101 Eighth Street Oakland, California 94607-4756



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**

TABLE OF CONTENTS

ATTACHMENT A – City Comments and Responses to PLAN-ITC Resolution

Attachment A-1: City of Los Altos Email and Document Comments

Attachment A-2: City of Half Moon Bay Email and Document Comments

Attachment A-3: City of Pacifica Email Comments

Attachment A-4: Ken Moy’s Response to City of Pacifica Comments

Attachment A-5: City of Milpitas Email Comments

Attachment A-6: Ken Moy’s Response to City of Milpitas Comments

Attachment A-7: City of Campbell Email Comments

ATTACHMENT B – Final Draft Resolution Redlined Version

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

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

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- (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.

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- (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 *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

Contributors
Marcus Beverly, Risk Manager
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Eileen Barr, Claims Examiner
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Chantelle Coleman-Doan, Claims Examiner
Marken Hew, Claims Examiner
Terry Hickman, Litigation Supervisor
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 SHARING
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
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



ABAG PLAN CORPORATION
Executive Committee - Special Meeting
Summary Minutes

Thursday, January 14, 2010
101 Eighth Street
Oakland, CA 94607
Conference Room B

Presiding:

Laura Allen

Jurisdiction:

Colma

Committee Members Present:

Emma Karlen

Bronda Silva

Julie Carter

Jeff Maltbie

Shawn Mason

Gary Broad

Heather McLaughlin

Milpitas

American Canyon

Dublin

San Carlos

San Mateo

Ross

Benicia

Committee Members Present By Teleconference:

Kathy Mount

Jim Steele

South San Francisco

South San Francisco

Consultant/Attorney:

Marcus Beverly, PLAN Consultant

Jean Savaree, Legal Attorney

ABAG PLAN Corporation - Staff Present:

Henry Gardner, ABAG Executive Director

Ken Moy, ABAG Legal Counsel

Darrell Dearborn, PLAN Interim Risk Manager

Carol Johnson-Taylor, PLAN Secretary

Members of the Public/Non Committee Board members

Pamela Thompson

San Bruno

1. Meeting Called to Order:

Laura Allen called the meeting to order at 1:35 p.m. A quorum was present.

2. Public Comments:

None

3. ABAG PLAN Governance:

Report and recommendation from the Governance Subcommittee to affect additional committee oversight of certain ABAG activities and to retain an employee or consultant to interface with ABAG.

Laura Allen reviewed the meeting with Henry Gardner in December, 2009 and discussed the subcommittee's proposal, pointing out that:

- Claims management and Loss Prevention functions would remain in the ABAG organization.
- The new consultant position may or may not be a full-time position.
- There will be added cost to the PLAN for these changes.
- The proposal would be in addition to ABAG's proposed changes: strengthening the Finance Committee's role in the budget process, and strengthening the role of the Executive Committee in the recruitment, selection and retention of the new consultant/employee and in discipline of that person, if required.

Much discussion of the proposal occurred, especially regarding the relationship between the new PLAN consultant/employee and ABAG. Several Committee members believed that the functions and employees remaining in ABAG under the proposal could be effectively managed and supervised by the PLAN consultant/employee. Mr. Gardner stated that it was not acceptable, that no city in ABAG allows its employees to be supervised by a person who was not also under that city's authority and control. Further discussions dealt with the responsibility for the PLAN budget, the designation of PLAN officers and the possible impact of PLAN organizational changes on ABAG positions and their responsibilities.

A motion was made to recommend that the Board adopt the subcommittee's proposal in concept, including the amendment offered by Julie Carter that after one year information about its budget impact will be provided to the Board and it will be reevaluated for the possibility of change or reversal.

/M/Karlen/S/Broad/C/unanimously approved

An amendment was offered by Jeff Maltbie to recommend to the Board that it issue an RFP for third party administrative (TPA) services for service responsibilities not assumed by the new consultant/employee within 18 months of approval of the proposal by the Board.

/M/Jeff Maltbie/S/McLaughlin/C/unanimously approved

Roll Call Vote:

Members Voting Yes:

Laura Allen
Shawn Mason
Emma Karlen
Jeff Maltbie
Bronda Silva
Gary Broad
Heather McLaughlin
Julie Carter

Members Voting No:

Jim Steele

4. Proposed Inverse Tail Claim Policy:

Proposed program for responding to tenders of regulatory inverse condemnation claims with dates of loss prior to July 1, 2008

Ken Moy reviewed the Policy and the process followed at the Board meeting November 4, 2009 which led to its development. He also described the process he followed to distribute the Policy materials prior to the Executive Committee meeting, and the changes reflecting comments received that are included in the final draft resolution which would be presented to the Board for final adoption.

In answer to a question from Emma Karlen, Ken Moy said "that this policy does not have to be approved by city councils to become effective."

Shawn Mason and Jeff Maltbie opposed the Policy because it required PLAN to defend all claims rather than being able to do so on a case by case basis.

Motion was made to forward action to the full Board for resolution and to approve the Policy.
/M/McLaughlin/S/ Karlen/C/unanimously approved

Roll Call Vote:

Members Voting Aye

Laura Allen
Gary Broad
Bronda Silva
Heather McLaughlin
Julie Carter
Emma Karlen
Jim Steele

Members Voting No

Shawn Mason
Jeff Maltbie

5. ABAG PLAN Emergency Response Protocol:

Proposed written emergency response protocol for contacting ABAG PLAN claims staff.

Pamela Thompson, City Attorney of San Bruno, joined the meeting by teleconference call for item #5.

Darrell Dearborn reviewed the staff report and responses including the suggestions made by Pamela Thompson relating to ABAG PLAN's protocols. The report was accepted by the Committee with the following comments:

- In addition to the written protocol, ABAG PLAN should distribute a check list of information that city first responders can use to assist in advising the public and affected property owners at the scene of an emergency, particularly a sewer or water failure. Darrell Dearborn said he would do that.
- Ken Moy said that a city can maintain confidentiality of investigative materials through the claims investigation process if it is not otherwise protected through the city's defense counsel.

6. Compliance with Medicare Secondary Payer Act of 2007 (MSP):

Darrell Dearborn reviewed the new legal requirements that apply to ABAG PLAN respecting payment of claims for bodily injury that may include medical conditions also covered by Medicare for beneficiaries. He explained that under this legislation, Medicare is the secondary payer and ABAG PLAN may be liable to pay Medicare any amounts that it pays to Medicare beneficiaries rather than to Medicare. Ken Moy explained that this new

obligation may make claim settlement negotiations more difficult and lengthen the time to reach final settlement. The report was unanimously accepted by the Committee.

7. Other Business:

None came before the Committee.

8. Adjournment:

The meeting was adjourned at 3:40 p.m.

Respectfully Submitted,

Darrell Dearborn
PLAN Interim Risk Manager and Secretary



January 26, 2010

To: ABAG PLAN Board of Directors

From: Laura Allen Board Chair, Colma

Re: Recommendation from Executive Committee Regarding Governance Proposal

As a follow up to the November 2009 Board meeting, I established the Governance 2.0 Subcommittee consisting of San Mateo City Attorney Shawn Mason (ABAG PLAN Vice-Chair), Town of Ross Town Manager Gary Broad, and myself to negotiate with ABAG as directed by the Board.

The Governance 2.0 Subcommittee met on December 9, 2009 with ABAG Executive Director Henry Gardner, ABAG Attorney Ken Moy and ABAG Finance Director Herb Pike. The meeting resulted in the attached ABAG PLAB Governance 2.0 Proposal (outline and organizational chart). The proposal was presented, with ABAG's support, to the ABAG PLAN Executive Committee on January 14, 2010. After much discussion, it was approved conceptually and recommended for approval by the Board with two additions: evaluate the revised structure in one year and issue a Request for Proposal in 18 months (see Executive Committee minutes for more details).

Several questions were raised at the Executive Committee meeting regarding the impact of the proposal on the ABAG PLAN budget which I intended to address at the February 2, 2010 Board meeting. Unfortunately, on January 25, 2010 the Executive Committee received a letter from Henry Gardner indicating ABAG opposes the recommendation.

Clearly we have lots to discuss regarding governance options and next steps. I look forward to seeing you at the meeting.

ABAG PLAN – GOVERNANCE 2.0 PROPOSAL

1. Establish Executive Director/Risk Manager Position for PLAN

Transfer responsibility for strategic planning, insurance bids, ABAG performance monitoring, implementation of Board policy, member complaints, and all outside contractors, including the claims auditor.

- Moves day to day operations and programs cleanly
- Leaves claims and loss prevention under ABAG Risk Manager (RM)
- May not be full-time position
- Start as consultant
- Provides more independence as well as checks and balances at an additional cost

2. Enhance Committee Structure Proposal (Recommended by ABAG Executive Director, see attachment)

a. Budget

Finance Committee continues to review document, holding its annual meeting in April rather than March. ABAG will provide budget to Finance Committee at least one month before April meeting. Changes to the budget will be made during the Committee review process. The budget will be jointly presented to the Board of Directors (BOD) by the Finance Committee Chair and ABAG's Finance Director. A copy of the budget will be provided to the full BOD at least two weeks before the BOD meeting.

b. Personnel

The BOD will appoint an existing or new Committee to participate in the process as outlined below:

- Recruitment: Committee and ABAG Executive Director (ED) will jointly manage the recruitment of the ABAG Risk Manager (RM), including screening and interviewing applicants. The Committee and ABAG ED will select the successful candidate by consensus. This is the process that was recently followed to recruit the Interim Risk Manager.
- Performance: Committee and/or BOD will annually set programmatic goals for the ABAG RM. During the manager's tenure the Committee will participate in the annual evaluation by assessing the manager's performance in relation to the goals during the year, recognize achievements, and identify areas in need of improvement. Committee will be responsible for creating a process for PLAN members to participate in the annual evaluation.

ABAG ED will convey Committee's goals and performance assessment to ABAG RM and report to the Committee on the outcome of the evaluation, to the extent commensurate with the manager's privacy rights and the confidentiality of the personnel process.

- Disciplinary Action: If the ABAG ED decides to impose discipline on ABAG RM, the ABAG ED will immediately notify the Chair of the Committee of the action or proposed action. To the extent commensurate with the manager's privacy rights and the confidentiality of the personnel process, the ABAG ED will expeditiously confer with the Committee regarding the action or proposed action.

The Governance 2.0 Subcommittee recommends the Executive Committee perform this role.

Next steps

Executive Committee review and recommendation (January 14, 2010)

BOD Review and Approval (February 2, 2010)

- The BOD will need to bring agency agreement current if approved.

To: Laura Allen

Fr: Ken Moy

Dt: December 17, 2009

Re: Contractors Providing Services to ABAG PLAN Program

Below is a compilation of selected independent contractors that provide services in support of the ABAG PLAN Program that could, in theory, be managed by a person retained or employed by the ABAG PLAN Corporation. Information includes the amounts paid to the contractor from July 1, 2008 to December 11, 2009.

1. Bickmore Risk Services: Actuarial services for annual premium setting and for special projects: \$23,470.¹
2. ARM Techniques Inc.: Consultant services with expertise in municipal liability pools. Retained on a project basis: \$8,000
3. Farley Consulting: Performs claims audit (last one was done in 2007). Retained on a periodic basis.²
4. Alliant: Insurance broker. Retained by ABAG PLAN Corporation in 2001 for pool excess insurance, property insurance and other insurance products. Paid on commission basis.
5. Royleen White & Associates: Facilitator retained for ITC facilitation: \$9,707.50.
6. Aaronson, Dickerson, Cohn & Lanzone: Legal Counsel to ABAG PLAN Corporation: \$9,250.
7. Stubbs & Leone: Special Counsel to ABAG PLAN: \$3,163.75
8. Reasoned Risk Management: Risk Management Consultant to ABAG PLAN Corporation: \$41,081.45.

I have not included the following:

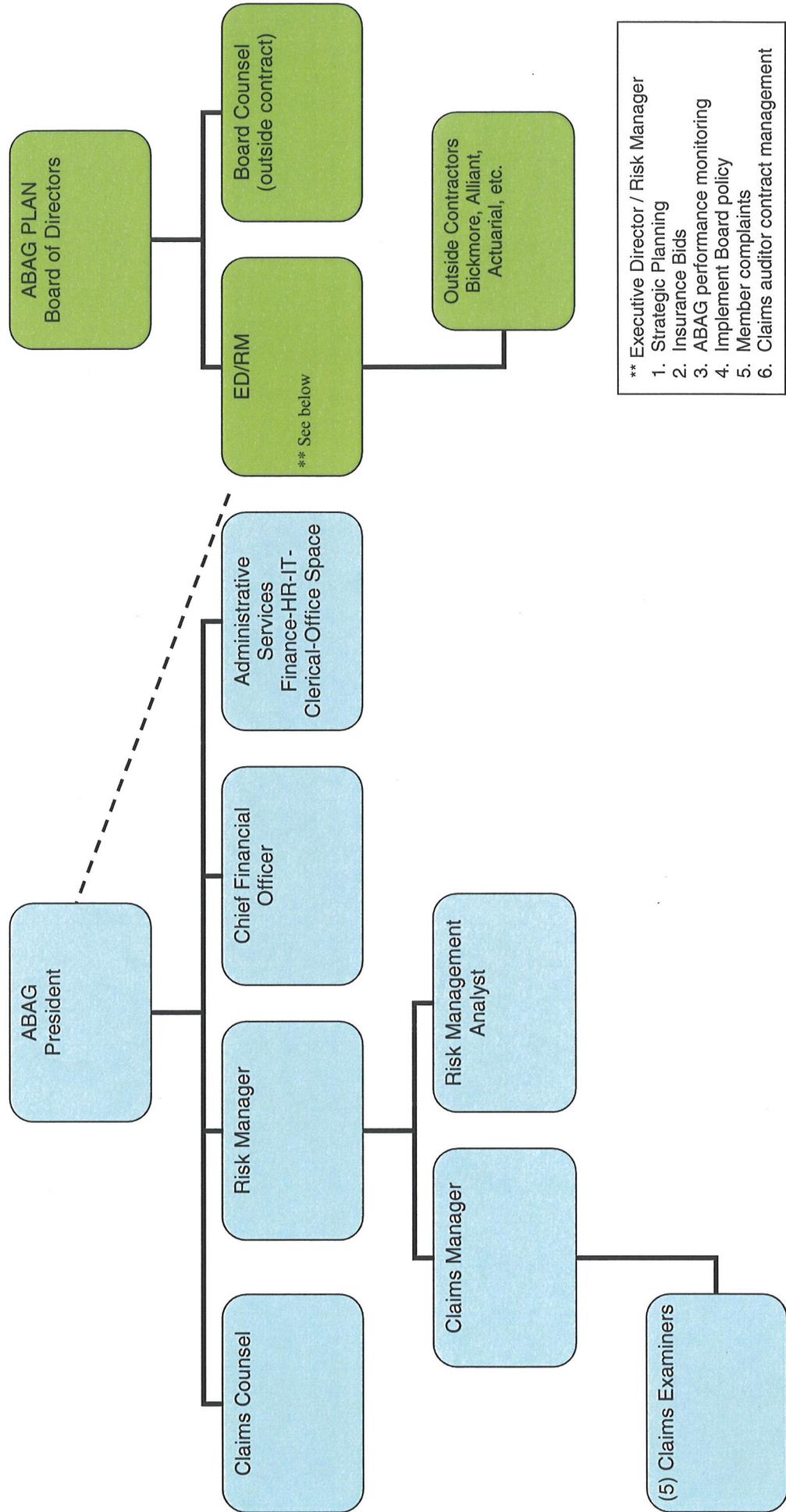
- ◇ Contracts with service providers for the Loss Prevention Program. All of these are under the manager of the Loss Prevention Program, Gertruda Luermann.
- ◇ Temporary or contract employees, including contract claims examiners.
- ◇ Contracts for administrative, support or technical services that are included in ABAG's cost allocation to the ABAG PLAN Program budget.

Cc: Herbert Pike
Henry Gardner
Darrell Dearborn

¹ Bickmore also provides services to Loss Prevention Program. The contract can be amended to separate the two types of services. Billing information is for actuarial services only.

² Researching cost of last audit.

Proposed ABAG PLAN Governing and Operations Organizational Chart



** Executive Director / Risk Manager

1. Strategic Planning
2. Insurance Bids
3. ABAG performance monitoring
4. Implement Board policy
5. Member complaints
6. Claims auditor contract management

ASSOCIATION OF BAY AREA GOVERNMENTS

Representing City and County Governments of the San Francisco Bay Area



Date: December 4, 2009

To: Laura Allen
City Manager, Town of Colma

Shawn Mason
City Attorney, City of San Mateo

Gary Broad
Town Manager, Town of Ross

From: Henry L. Gardner
Executive Director

Subject: **ABAG PLAN – Governance Issues**

Summary: The Association of Bay Area Governments (ABAG) believes the ABAG PLAN Corporation's (PLAN) concerns regarding governance are addressed in our Committee Structure Proposal without additional program costs.

Recommended Action: The PLAN Board of Directors (BOD) should adopt and implement the Committee Structure Proposal at its next meeting.

Background and Discussion: On November 5, the PLAN BOD authorized the Chair, Laura Allen, to appoint a committee to discuss with ABAG two options for resolving the governance issues that have arisen over the past six months:

- Use the PLAN committee structure to implement changes that respond to the governance issues.
- Use an employee or independent contractor to the PLAN to implement changes that respond to the governance issues.

With respect to the first, ABAG has a proposal that is outlined below. With respect to the second, ABAG has a specific response to the organization chart passed out at the meeting and some general comments about alternative arrangements that use an employee or independent contractor to the PLAN to implement the desired changes.

Mailing Address: P.O. Box 2050 Oakland, California 94604-2050 (510) 464-7900 Fax: (510) 464-7985 info@abag.ca.gov

Location: Joseph P. Bort MetroCenter 101 Eighth Street Oakland, California 94607-4756



A. Committee Structure Proposal

We understand that PLAN wishes to exert more control and have more input in two areas: (1) the budget for the ABAG PLAN Program and (2) personnel providing program services. With respect to the latter point, we understand that the primary focus is on the manager of the ABAG PLAN Program¹. Thus, the proposal is limited to that position.

1. Budget

The Finance Committee is scheduled to meet on March 24, 2010. ABAG suggests an April meeting to allow more time for the development of a more precise budget. ABAG will present a detailed budget and cost allocation plan to the Finance Committee for its review and recommendation to the BOD. Changes to the budget, if any, will be made during the committee review process. The budget will be jointly presented to the Board by the Chair of the Finance Committee and ABAG's Finance Director.

2. Personnel

The BOD will appoint an existing or new committee to participate in the process as outlined below (Committee).

For the recruitment and hire of the manager of the ABAG PLAN Program, the Committee and the Executive Director of ABAG will jointly manage the recruitment process, including screening applicants and interviewing candidates. The Committee and the Executive Director of ABAG will select the successful candidate by consensus.

ABAG anticipates that the Executive Committee and/or the BOD will annually set programmatic goals for the manager of the ABAG PLAN Program. During the tenure of the manager of the ABAG PLAN Program, the Committee will participate in the annual evaluation of the manager, as follows

- Assess the manager's performance with respect to the annual programmatic goals over the course of the year, and
- Identify areas of achievement and areas for improvement.

The Committee will be responsible for creating a process for PLAN members to participate in the annual evaluation.

¹ This position has traditionally been titled "Risk Manager". However, the title is also used in the PLAN Bylaws and policies adopted by the BOD to describe the person responsible for specified functions as described in those documents. This discussion focuses on the delivery of services necessary to the ABAG PLAN Program. Therefore, to avoid confusion, this memorandum refers to the manager of the ABAG PLAN Program.

The Executive Director of ABAG will convey the Committee's goals and performance assessment to the manager. To the extent commensurate with the manager's privacy rights and the confidentiality of the personnel process, the Executive Director of ABAG will report to the Committee on the outcome of the evaluation.

If, during the tenure of the manager of the ABAG PLAN Program, the Executive Director of ABAG decides to impose disciplinary action on the manager, the Executive Director will immediately notify the Chair of the Committee of the action, or proposed action. To the extent commensurate with the manager's privacy rights and the confidentiality of the personnel process, the Executive Director of ABAG will expeditiously confer with the Committee regarding the action, or proposed action.

B. PLAN Employee/Subcontractor Proposal

The Governance Subcommittee proposed the retention of an "Executive Director/Risk Manager" (ED/RM) to perform a number of functions as illustrated in the "Recommended ABAG PLAN Governing/Operating Organizational Chart" (Chart) attached to this memorandum. The Chart does not indicate whether the ED/RM is a PLAN employee or independent contractor.

In either case, ABAG will not agree to an arrangement that has a person outside of ABAG managing or supervising ABAG employees. The Chart appears to contemplate such an arrangement and on that basis ABAG will not agree to it.

ABAG will discuss an arrangement where a person hired or contracted by PLAN acts as an interface between ABAG and PLAN. We anticipate that the interface will be between the ED/RM and ABAG's Executive Director. We also note that under any such arrangement, ABAG will still need to retain a manager for the ABAG PLAN Program. Therefore, the retention of an ED/RM will be an additional program cost.

We look forward to discussing our proposal with the committee members on December 9.

Attachment:

Recommended ABAG Plan Governing/Organizational Chart

Copy: Kenneth Moy, Legal Counsel
Herbert Pike, Finance Director

To: Board of Directors
ABAG PLAN Corporation

Fr: Henry Gardner 
Executive Director, ABAG

Dt: January 25, 2010

Re: "Governance" Proposal

Summary: ABAG recommends the Board adopt the proposal to have Board committee oversight for the administrative budget for the ABAG PLAN Program, and for the recruitment, selection and retention of the Risk Manager and programmatic goals. ABAG opposes the adoption of the consultant/employee portion of the "governance" proposal that is before it.

Discussion: ABAG opposes the "governance" proposal before the Board on the following grounds:

- A) There are competing or incompatible goals within the proposal.
- B) Unresolved, open issues in the proposal will likely lead to continuing conflict.

In May 2009, the former Risk Manager for the ABAG PLAN Program voiced concerns that ABAG is 'double dipping' in what it charges for its services to the program and that the members do not exercise sufficient control over the program. Prior to May 2009, neither the Board nor any committee had expressed any concerns about how ABAG handled the budgeting process, about the program itself or who "controlled" it.

The Board formed an *ad hoc* committee of Finance Directors to investigate the allegations regarding double dipping. The committee could not confirm any of them.

To address the budget and "control" issues for the long term, ABAG proposed that committees comprised of Board members be included in the budget process and in the process of recruiting, selecting and retaining a successor Risk Manager. The Board would have the opportunity to set program goals and evaluate the performance of the Risk Manager against those goals. We remain confident that the committee proposal is the most direct, cost effective, and simplest means for the members to collectively exercise their "control" over the program.

The governance proposal before the Board requires the PLAN Corporation to hire a consultant/employee. To date, there has been no scope of work, job description or duties and no budget for this position. Despite this, ABAG originally indicated its support to this arrangement in an effort to move forward. Unfortunately, we must now oppose this part of the proposal.

Based on the discussions to which ABAG has been a party, we understand some members want the consultant/employee to take over some of the program functions previously performed by the Risk Manager and to “manage” how ABAG performs its services for the program. Further, this arrangement is viewed as a means of effecting structural changes in ABAG’s role in the program – making it a third party administrator held at “arms length” from the members of the program.

This is not a role consistent with ABAG’s mission of collaboration and partnership with its members and is also not compatible with ABAG’s goal of repairing the existing relationship between ABAG and members of the program – a goal we believe is shared by the collective membership. It bears repeating that the damage to that relationship was inflicted by unfounded accusations from the former Risk Manager.

The fact that the consultant/employee proposal has been a blank slate – with respect to both duties and compensation – is grounds for the Board to reject it. If the Board does not do so, the ‘negotiations’ over what functions will be undertaken by the consultant/employee are likely to be a source of continuing tension – especially if the ultimate goal is to reduce ABAG’s role to that of a third party administrator.

ABAG was not created by its 109 members to be a municipal insurance pool. When called upon by some of them to form such a pool, we did so as a service to those members and we did so in collaboration. ABAG has no interest in being a third party administrator to any insurer, even one created by 31 members. If we collectively agree to repair the existing relationship, the Board should adopt ABAG’s committee proposal. If we collectively agree that the relationship cannot or ought not to be repaired, we should plan a transition for the members of the program to assume direct and full control over the program outside of ABAG.

ASSOCIATION OF BAY AREA GOVERNMENTS

Representing City and County Governments of the San Francisco Bay Area



Date: December 4, 2009

To: Laura Allen
City Manager, Town of Colma

Shawn Mason
City Attorney, City of San Mateo

Gary Broad
Town Manager, Town of Ross

From: Henry L. Gardner
Executive Director

Subject: **ABAG PLAN – Governance Issues**

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The Executive Director of ABAG will convey the Committee's goals and performance assessment to the manager. To the extent commensurate with the manager's privacy rights and the confidentiality of the personnel process, the Executive Director of ABAG will report to the Committee on the outcome of the evaluation.

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We look forward to discussing our proposal with the committee members on December 9.

Attachment:

Recommended ABAG Plan Governing/Organizational Chart

Copy: Kenneth Moy, Legal Counsel
Herbert Pike, Finance Director



A B A G P L A N
C O R P O R A T I O N

To: PLAN Board of Directors
From: Darrell Dearborn, Interim Risk Manager
Date: January 26, 2010
Subject: **Current PLAN Administrative Costs**

RECOMMENDATION

None. This report is for information only.

BACKGROUND

At its meeting of January 14, 2010, the Executive Committee requested information respecting current administrative costs and staffing dedicated to PLAN services that might be affected if its recommendation regarding reorganization is approved by the Board.

ANALYSIS

Three attachments to this memo provide this information.

- Attachment A** **ABAG PLAN Corporation 2009-10 Budget**
This attachment presents the annual costs budgeted in each of the three Funds maintained by ABAG for PLAN. The Administration Fund reflects virtually all of the administrative costs budgeted and expended for the program, including all staff positions. The General Liability Fund displays revenues and costs for the liability insurance program, including loss prevention grants, training and related non-personnel expenses. The Property Fund displays revenues and costs for property insurance coverage.
- Attachment B** **PLAN Staffing**
This attachment shows the total number and cost of ABAG positions now dedicated to PLAN.
- Attachment C** **ABAG PLAN Organization 2008-09**
This attachment reflects the organization and reporting relationships within ABAG and between ABAG and PLAN for the previous fiscal year. This organization would continue if Mr.



Gardner's recommendation of January 25, 2010 is approved by the Board. However, there will direct committee oversight of the Administrative Budget and the personnel processes for the Risk Manager.

ANALYSIS

The organizational changes recommended by the Executive Committee would have a minimal impact on the annual costs reflected in Attachments A and B. A reduction in the salary for the position of ABAG Risk Manager may be called for, depending on the revised scope of responsibilities for that job and internal and external salary considerations. ABAG would retain claims management responsibilities which would continue to require the ten positions that are now entirely dedicated to PLAN services. And none of the duties recommended to be transferred to the new consultant/employee position outside of ABAG would permit a reduction in the 1.2 FTE positions that now support PLAN in other ABAG departments.

CONCLUSION

It is recommended that the Board consider this information as it makes its decisions regarding the future organization of functions and responsibilities for PLAN governance.

ATTACHMENT A

ABAG PLAN CORPORATION FY 09-10 BUDGET

	<i>Administration Fund</i>	<i>General Liability Fund</i>	<i>Property Fund</i>	<i>Total</i>
REVENUES				
EARNED PREMIUM	2,500,000	5,825,957	1,085,715	9,411,672
INVESTMENT INCOME (INCL. LAIF)		1,300,000	27,000	1,327,000
TOTAL REVENUES	<u>2,500,000</u>	<u>7,125,957</u>	<u>1,112,715</u>	<u>10,738,672</u>
EXPENSES				
ADJ. TO CLAIMS RESERVE		2,000,000	150,000	2,150,000
PERSONNEL COSTS	<u>2,368,405</u>	<u>15,644</u>		<u>2,384,049</u>
TOTAL PERSONNEL COSTS	<u>2,368,405</u>	<u>15,644</u>	<u>0</u>	<u>2,384,049</u>
TECHNICAL CONSULTANT FEES	60,000			60,000
LEGAL CONSULTANTS	50,000			50,000
CLAIMS CONSULTANTS	70,000			70,000
RISK MANAGEMENT CONSULTANTS	10,000			10,000
ACTUARIAL CONSULTANTS	20,000			20,000
AUDIT FEES CLAIMS ADMIN.	10,000			10,000
AUDIT FEES FINANCIAL	18,000			18,000
BEST PRACTICES SERVICES		415,050		415,050
DEFENSIVE DRIVER TRAINING		40,000		40,000
FRAMEWORK GRANTS		170,592		170,592
POLICE RISK MANAGEMENT FUND		360,000		360,000
RISK MANAGEMENT PROGRAMS		1,420,253		1,420,253
RISK MANAGEMENT TRAINING		143,000		143,000
SEWER LOSS PREVENTION		60,000		60,000
TOTAL	<u>238,000</u>	<u>2,608,895</u>	<u>0</u>	<u>2,846,895</u>
OTHER DIRECT CHARGES				
TRAVEL	7,000			7,000
PRINTING IN-HOUSE	3,000			3,000
PRINTING OUTSIDE	6,000			6,000
CONFERENCES & SEMINARS	25,000			25,000
OFFICE SUPPLIES	8,000			8,000
SUBSCRIPTION & MEMBERSHIPS	7,000			7,000
DEPRECIATION FURNITURE & AUTO	15,000			15,000
INSURANCE & BONDING	20,000	801,436		821,436
PROPERTY INSURANCE			885,716	885,716
STAFF TRAINING & DEVELOPMENT	5,000			5,000
MISCELLANEOUS	25,000			25,000
TOTAL OTHER DIRECT CHARGES	<u>121,000</u>	<u>801,436</u>	<u>885,716</u>	<u>1,808,152</u>
TOTAL EXPENSES	<u>2,727,405</u>	<u>5,425,975</u>	<u>1,035,716</u>	<u>9,189,096</u>
SURPLUS/(DEFICIT)	<u>(227,405)</u>	<u>1,699,982</u>	<u>76,999</u>	<u>1,549,576</u>

ATTACHMENT B

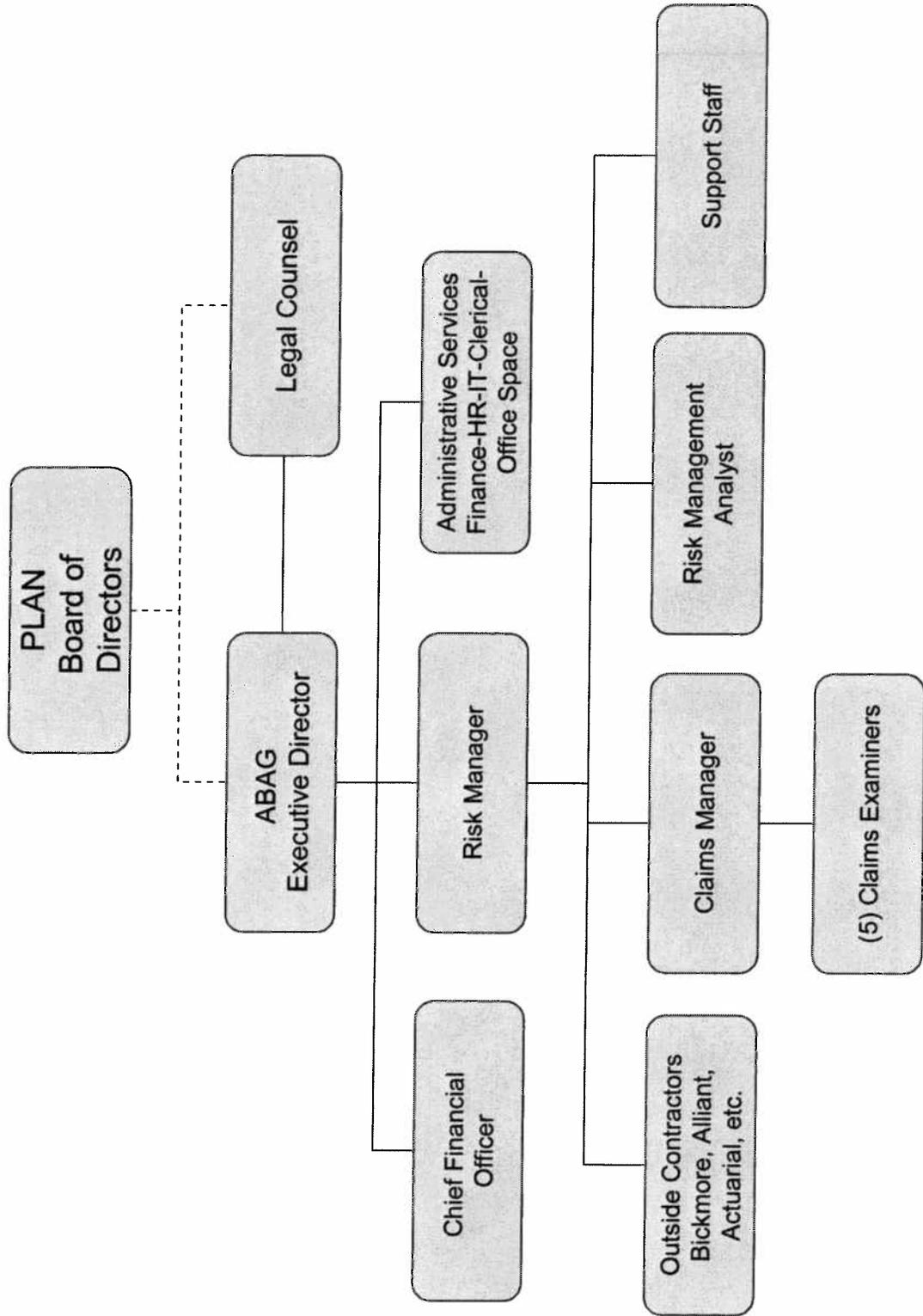
PLAN Staffing

<u>FTE</u>	<u>Title</u>	<u>Cost *</u>
1.0	Risk Manager	\$211,000
2.0	Secretary	173,000
1.0	Risk Analyst	140,000
1.0	Claims Manager	176,000
<u>5.0</u>	Claims Examiner	<u>708,000</u>
10.0	Total PLAN	\$1,408,000
<u>1.2</u>	Non-PLAN	<u>205,000</u> **
11.2	Total FTE	\$1,613,000

* Costs (rounded) include salary and fringe benefits

** Includes salary and fringe benefits for 1.2 FTE positions of ten ABAG employees in Finance, IT, Legal Counsel and Executive Director Offices that are budgeted to provide direct support to PLAN services.

ABAG Plan Governing and Operations Organizational Chart (2008 – 2009)





August 21, 2009

Rose Jacobs Gibson
President
Association of Bay Area Governments
101 8th Street
Oakland, CA 94607

Re: Potential Complaint regarding Discriminatory Conduct in the Work Place

Dear Ms. Gibson:

The Board of Directors of the ABAG PLAN has come to learn of a potential complaint of discriminatory conduct with respect to an employee of ABAG which may also implicate ABAG Executive Director Mr. Henry Gardner.

Although not legally obligated to bring this situation to ABAG's attention, our Board feels that it would be prudent to do so. The information that has been communicated to the PLAN with respect to these issues is as follows:

On December 5, 2008, it was reported to Mr. Marcus Beverly that inappropriate racial comments were made to an ABAG staff employee by an ABAG managerial employee. These comments were then passed along by Mr. Beverly to Mr. Gardner for handling and investigation. It was then reported back by the staff employee to Mr. Beverly that Mr. Gardner spoke to the employee and attempted to convince this employee that the comments made were not racial and that employee should drop any concerns or complaints regarding this incident.

The ABAG PLAN Board of Directors is passing this information on to ABAG to allow ABAG to perform a thorough independent investigation of these allegations of discriminatory conduct in the work place and to ensure Mr. Gardner responded appropriately to this situation.

Sincerely,

Laura Allen
Chair, Board of Directors, ABAG PLAN Corporation

Cc: ABAG PLAN Board of Directors
Henry Gardner, ABAG Executive Director

ASSOCIATION OF BAY AREA GOVERNMENTS

Representing City and County Governments of the San Francisco Bay Area



December 8, 2009

Laura Allen
City Manager
Town of Colma
Town Hall
1198 El Camino Real
Colma, CA 94014-3212

Dear Ms. Allen,

In a recent letter to you, I expressed my appreciation for bringing a “potential complaint of discriminating conduct” to the ABAG Executive Board’s attention. Also, I informed you that we would perform an independent investigation as ABAG takes seriously all allegations that may compromise our goal to provide a workplace that is free of discrimination. Accordingly, ABAG retained Carmen Plaza de Jennings of the law firm Curiale Hirschfeld Kraemer LLP to conduct the investigation.

Ms. de Jennings has extensive experience in public sector employment law and is a seasoned investigator. She has completed the investigation and presented a confidential report on her findings. The report remains confidential both as a personnel matter and a communication between attorney and client. Based on the findings of the report, Henry Gardner did not attempt to convince an employee that the comments considered racial were not and did not attempt to persuade the employees to drop the concerns or complaints the employee had raised. On this basis, ABAG is closing the investigation.

Again, thank you for bringing these matters to ABAG’s attention.

Regards,

Rose Jacobs Gibson
ABAG President

