



ABAG PLAN CORPORATION

101 8th Street
Oakland, CA 94607-4656

Minutes
Special Meeting
Executive Committee
July 14, 2009, 1:30 P.M.

San Mateo City Hall
Conference Room B
330 West 20th Avenue
San Mateo, CA 94403

Teleconference Locations

455 E. Calaveras Blvd, Milpitas, CA	Emma Karlen
4381 Broadway, American Canyon, CA	Bronda Silva
31 Sir Francis Drake Blvd, Ross, CA	Gary Broad

Committee Members Present

Laura Allen
Shawn Mason
Jim Steele
Emma Karlen
Jeff Killian (joined at 2:05 p.m.)
Jeff Maltbie
Bronda Silva
Gary Broad

Colma
San Mateo
South San Francisco
Milpitas
Millbrae
San Carlos
American Canyon
Ross

Staff Present

Henry Gardner
Kenneth Moy

ABAG Executive Director
ABAG Legal Counsel

1. Call to Order

Meeting called to order by Allen at approximately 1:38 p.m.

2. Public Comments

None.

3. Request from Kenneth Moy for clarification or action on his ability to provide legal services to ABAG and /or ABAG PLAN Corporation

The Executive Committee discussed the request for client waivers from Kenneth Moy as outlined in his memorandum dated July 7, 2009. The request arose of Moy's dual representation of ABAG and the ABAG PLAN Corporation (PLAN). After extensive discussion, the committee adopted the following recommendations for the Board of directors:

(1) grant, until further notice, Moy's request for a waiver allowing him to withdraw as legal counsel to the PLAN and allowing him to continue representing ABAG regarding three identified adverse matters: interpretation of the contract between ABAG and ABAG PLAN, any issues raised by the ad hoc subcommittee of PLAN dealing with ABAG's cost allocations to PLAN, and any issues raised by the ad hoc subcommittee of PLAN dealing with the structural or institutional arrangements between ABAG and PLAN.

(2) grant Moy's request for a waiver allowing him to withdraw as legal counsel to PLAN on the call or conduct meetings of PLAN's policy bodies, including advice on the Ralph M. Brown Act or parliamentary procedure, provided he may not withdraw until PLAN has retained legal counsel for such matters.

Allen/Maltbie – c – u

4. Update on activities of subcommittees on cost allocation, PLAN governance, and hiring of interim risk manager

Report from Subcommittee on Cost Allocation:

Steele: Met with Takashi & Nava. Request submitted to Pike. Response is coming.

Mason: Any discussion about Marcus' previous questions re cost allocation.

Steele: No. Just we just asked for data re costs and cost allocation plan.

Mason: What's next?

Steele: Will review data when received. No action plan until we see data.

Steele asked if there were other agenda items that might cause need for a meeting in August. It was decided that the decision to call a board meeting in August should be deferred to the end of this meeting.

Allen said her sense was that the purpose of an August meeting was to provide an update from the various sub-committees. Part of what she heard was that the board was surprised about what was going on and that a lot of what was going on was being done in secret and they were not comfortable with that. Her general sense was that extra meetings were needed to pay extra attention to what the Executive Committee is doing in general.

Maltbie said he had the same sense, but also got the sense the board wants the ability to take action on some things. Maybe there are some larger governance issues that need to be resolved. When it comes to the main point of that frustration don't get the sense that there will be more information than at the last meeting. Maybe there are other things the board needs to do.

Mason reported that the sub-committee on governance had one conference call and have another scheduled on June 9th. They are in the information gathering process and are gathering existing governance documents. One of the things they are charged with is getting a lawyer to help sort through and make recommendations to the full board. He had a conversation with a lawyer who will join the sub-committee tomorrow by conference call. The task would be, among other things, to look at existing structure, alternatives the committee has identified, description of what required steps would be for each alternative and present to the board, presumably with recommendations from the Governance Sub-Committee.

Maltbie said one of the conclusions from the Sub-Committee is that there are limited options. Four have been identified, and one would be no change. They would make a recommendation on one of the options, but would present all options to the board because they would identify the strengths and weaknesses of each approach. He believes that after the meeting on June 9th they will have material for the board. If the board wants a change in the governance documents it may take some time and work. There would have to be an interim plan if substantive changes are made.

Allen reported on the teleconference meeting of the Sub-Committee on Recruitment for hiring an Interim Risk Manager. Allen, Silva and Lester participated in the meeting with Henry Gardner. They discussed the constraints of pursuing an interim recruitment. Gardner indicated that Ralph Anderson and Associates had been retained and that the recruitment would be conducted by its President and CEO, Heather Renschler. The committee discussed the requirements for the position, desirable characteristics, time frame. The estimated time frame is 4 to 6 weeks to identify two or three possible candidates for the interim position. Gardner said he would work with Anderson to incorporate the suggestions made by the committee. Anderson had reported to Gardner that there may be a couple of candidates that could be identified within that time period. Gardner said he estimated that the assignment would

probably last at a minimum to the end of October and more likely to the end of the calendar year. There was a brief recap of the discussion by the committee of prohibiting an interim from applying for the regular position. The Sub-committee decided not to include that restriction.

5. Consideration of hiring outside risk management consultant

Maltbie said that was his issue and that he wanted to propose to the Executive Committee to enter into a contract with Marcus Beverly for risk management consultant services on a month to month arrangement. He said he doesn't want to lose Beverly while looking at potential changes to the PLAN structure. He said he didn't get the impression from the board meeting that people wanted to see Beverly go. He would hate to lose that resource while considering alternative structures. He says he believes he has enough, not all details, regarding what happened between Beverly and ABAG. He said there are enough high level issues going on in ABAG PLAN, independent of the day to day operations for a consultant. He said he was not talking about Beverly doing his old job, but to work on a project basis. He doesn't need to be in the office or involved in the issues the committee is working on right now, other than as an informational resource if the board needs it and he gets the sense from Beverly from talking with him that he is willing to provide the services. Beverly has lots of skills and knowledge about things he can continue to work on. He doesn't think the contract would last longer than what is anticipated for an Interim Risk Manager appointment--end of the year at the longest. He said the question is who will be responsible for drafting the contract. Would it be the chairperson, ABAG or the Executive Committee, and running the agreement by separate legal counsel?

Steele asked for clarification: If City C, for example, wanted to put in a skateboard park and wanted consultant advice on the kinds of issues they should be considering, would the city be able to contact Beverly and get some consulting advice on those specific risk management issues, is that what is envisioned? Maltbie said it was. Some things got drowned out at the board meeting when all these unexpected issues came up, but the board has been working on a number of purely risk management issues, not how PLAN is run. He said he would look for a proposal from Beverly for a scope of services.

Allen asked how the Risk Management Consultant would work with the Interim Risk Manager? What would the Risk Management Consultant do that the Interim Risk Manager would not do?

Maltbie replied that the Interim Risk Manager needs to run the day to day operations: manage claims that come in. He said for his money that is enough for the Interim Risk Manager to do. He doesn't need that person to worry about the long term issues that the board has been working on for years, issues regarding members leaving PLAN, inverse tail claims. Beverly would be available to all members on project related issues as covered by the scope of services. If a claim is active, he would not

be the person to call. He said he is not an advocate for Beverly, he is an advocate for PLAN. He said if it were up to him, he would hire Beverly as the Interim Risk Manager as he suggested at the board meeting but was told that was not an option.

Allen said there are a number of mechanical issues around how to go about this. Maltbie said it is really not that complicated. The contract would be around subjects identified by the Executive Committee. It is a short-term solution around an awkward situation.

Karlen asked if the contract would have to be approved by the board? Maltbie said he did not think so. Allen said that sounded like a legal question. Maltbie said he looked at the bylaws and did not see anything that would prevent the Executive Committee from approving, Mason said he thought the Executive Committee approved the recent contract to engage a facilitator for the October board meeting. Allen said she thought it was a recommendation from the Executive Committee to the board. Mason read from the bylaws regarding the authority of the Executive Committee. Based on that reading, the following motion was made:

Killian moved the proposal made by Maltbie.

Karlen seconded

Steele asked for clarification: How would the scope of services be decided?

Maltbie said there could be an e-mail circulation among the Executive Committee members and each could add to it what they think the scope of services should include and try to reach consensus. He said the scope isn't all that important, but that there be enough of a scope to get a coherent response from a contractor.

Steele proposed an amendment to the motion to specifically exclude four (4) things:

- (1) Consultant would not be asked about governance issues**
- (2) Not be asked about cost allocation issues**
- (3) Not be asked about issues that have to do with the Confidentiality Agreement**
- (4) Not be asked about claims issues**

Maltbie said he was O.K. with that as part of the scope of services. Beverly still has a role as a former employee.

Mason asked what is the legal counsel to the Committee? He then commented that his was not legal advice but that he would be concerned about circulating a document by e-mail for approval. That might be construed as a meeting. Maybe there could be a two person sub-committee given authority by the Executive Committee to negotiate a proposal to be presented to the Executive Committee. The following persons volunteered for the sub-committee: Maltbie, Mason, and Silva

On the Motion:

Yes: Broad, Karlen, Maltbie, Mason, Silva, Steele

No: Allen

Abstain: Killian

6. Consideration of potential legal action in response to denial of records request

Mason said that with respect to the next two items on the agenda that when he prepared the agenda he intended that those items would be in closed session, Items 6 and 7. It became clear that could not go in closed session regarding potential litigation because the Brown Act allows that can only go in closed session to confer with legal counsel. He said he anticipates litigation, and since they do not have outside legal counsel, there is no counsel to confer with and the matter has to be discussed in open session. He said the item is his request and he will explain why he thinks this is important.

Gardner said before Mason proceeds, he appreciated the comment about the Brown Act and the need for proper notice and legal counsel, but he would be happy to excuse himself. He said he had seen Mason's e-mails on the subject and Moy's response, and that if the committee wanted to talk about legal strategy he would excuse himself.

Mason said they would not talk about legal strategy; the sole question is whether they sue or not. Gardner said they may want to do that without him being present and that he would be happy to step outside. Mason said from his perspective it doesn't matter, he was comfortable with Gardner staying. Allen said that was fine. Maltbie said Gardner may want to step outside for his own reasons.

Gardner said he didn't know what else to say about the Confidentiality Agreement. It has been asked for and denied. The question is a legal question. Mason said that getting to that question and the reason it ought to be pursued is the PLAN clearly has an interest in what the Confidentiality Agreement says. He said he has talked with Beverly extensively over the last several weeks and there is information that Beverly has revealed to him and that he will reveal to the full board, and that he believes that information puts the board on notice into matters that they have a duty to investigate and to get Beverly to further elaborate on. He said he has asked Beverly questions and he is no longer responding on advice of counsel. Mason said Beverly's counsel is telling him that he is being threatened with a lawsuit if he speaks to Mason anymore and that he will be sued or could be sued because of the existence of this Agreement that was entered into without their knowledge and is being withheld from them. He said they need to get a copy of this Agreement to know what it says, what it prohibits, does not prohibit and potentially attack the Agreement to the extent it prohibits something that cannot legally be prohibited. Without knowing what it says we are somewhat in the dark. We need to know what it says so we can understand what can

and cannot be disclosed to us. Mason said in his mind there is no question this is a public record and that he cannot find a public lawyer, except Moy, who thinks it is not.

Steele asked Mason what was Moy's comment about why this is not a public record?

Mason said Moy has stated that this is a personnel record, the disclosure of which would constitute an unwarranted invasion of personal privacy. He then cited the statute that Moy had referenced in his memo. Allen said that the packet Mason had sent out had an e-mail exchange between Mason and Moy that covered some of what Mason had presented. Maltbie said he had talked with a couple of lawyers and they felt the Agreement itself could not be withheld from the board.

Maltbie said his intent is not in seeing why the Agreement was put into place, that is what happened between the employee and the employer, his intent is in seeing the terms of the Agreement, what is being prohibited. He said he would be fine with redacting things that are of a personnel nature, but the terms of the Agreement should be released to the board. He said he doesn't want to sue ABAG to get it but willing to do it.

Mason said he echoed those comments and that to the extent that disclosure of personal information would constitute an unwarranted invasion of privacy those should be excluded, but other things the law requires that they be disclosed. He said what is most important is what is provided in the confidentiality provision itself. He asked what greater public interest could there be than the provision of an agreement that the former employee and his lawyer are interpreting as prohibiting them from answering our questions?

Gardner said what he finds unseemly about this is that Beverly's attorney wrote the Agreement and that he had not changed one comma in it. Mason said it did not matter who wrote it. Gardner said but to represent that somehow ABAG is the one throwing up all these roadblocks when it is Beverly's attorney who wrote it and put the confidentiality provision in it that restrains ABAG. Gardner said ABAG even offered if Beverly waived it, ABAG would release it.

Mason said he made no representation regarding roadblocks. Moy gave an opinion that was inconsistent with every attorney he talked with on the issue.

Gardner said the public interest at some point is also ABAG PLAN's interest. These agreements are almost never written to protect the employer, that is the reason his attorney wrote it. Mason asked then why not provide it? Gardner said for the reason he had mentioned, to protect the employee, and if Beverly waives it on advice of his attorney, ABAG would waive it, Mason could have it.

Mason said the employee cannot trump the Public Records Act. Gardner said he was not willing to argue that point. The legal argument has to take place somewhere else,

but the committee needs to know how the Agreement was prepared. Mason said he had made no representation about how the Agreement got there. Gardner said but we keep coming back to ABAG, for no good reason, is trying to hide something and I find that irritating. Mason said he made no representation, simply asking for a copy of the Agreement. Gardner said he wished this had come up while Moy was present.

Allen: Any questions regarding Mason's request to consider legal action?

Broad: If ABAG releases and we go ahead with legal action, what kind of costs are we looking at? I assume we would hire outside attorney to litigate this?

Mason: I think the issues are fairly simple, it would be litigated fairly quickly, ballpark about \$20,000 to \$25,000. If we prevail, ABAG has to pay our bills. That is the way the Records Act is written

Steele: We are on Item 6? Is there anything about Item 7 that will inform the discussion on Item 6.

Mason: Don't have a problem putting off Item 6 if that is what you would like to do. To me they are separate questions. We have an interest in making sure ABAG complies with the Records Act and getting this document regardless of what is revealed in Item 7, and insisting that our rights under the Records Act are respected.

Allen: What would we gain by suing? Is it simply a matter of the Public Records Act and gaining access to what is in that settlement agreement ... that's really the issue?

Mason: There are two reasons: one is we have charged ourselves with investigating things, and Beverly is saying I can't tell you what you need to know because I have been threatened I will be sued because of this agreement. Frankly that is not right; there is probably nothing in the agreement that would prevent him from answering our fact-based, narrow questions. Until we see that agreement, we are operating in a vacuum. That is the primary concern. The second thing is the Governance Committee looking into decisions that have been made that affect the PLAN and PLAN was not aware of, and a prime example of the things that are broken that need to be fixed. It is important for the board to see what happened and to say we don't want this to happen again.

Broad: Is there any limitation as to when we would have to go ahead and litigate this? Any statute of limitation?

Mason: There is not a specific statute of limitation but if you wait too long may be barred by a court. We are well within the time frame not to be barred.

Gardner: My irritation is clearly apparent and it is near its end. You made the comment that Beverly represented that he was threatened that he would be sued ... threatened by whom? This is information that he provided to me that it was from his

lawyer saying there are threats made, don't talk to this person, that's all the information I have on this.

Gardner: My response to that is unless and until Beverly or his attorney can tell you that he has been threatened by somebody, and particularly by anybody from ABAG, this is not O.K.

Mason: Maybe a simple solution is for ABAG to say it is willing to provide a copy of the agreement without any conditions or limitations whatsoever.

Gardner: Then ABAG is sued.

Mason: For what?

Maltbie: I don't think you heard what he said in terms of providing or just put in writing ABAG's willingness to release the agreement.

Gardner: Subject to their waiving the confidentiality provision.

Steele: Doesn't the e-mail say that?

Allen: I think the e-mail does say that.

Mason: That's not what Beverly said.

Steele: The e-mail from Moy to Mason says "As part of ABAG's due diligence in responding to your request we formally asked Mr. Beverly whether he would waive the confidentiality clause in light of your request. He has declined."

Maltbie: What I would say then is I would request from ABAG the documentation of that request. I would like to see that.

Steele: Of this specific request where Beverly declined.

Maltbie: ABAG making the request and Beverly declining. Basically that would take a little bit of the animosity out of the room. We have a duty as board members that have been placed on a sub-committee to look into some pretty serious issues. One of the most obvious is for the Allocation Committee to go talk to ABAG Finance. You are not going to get very far without their cooperation and their numbers as you get to look into it. For the Governance Committee one of the things is that we have to talk with Beverly and we have to talk about how the management works, the relationship between the board, between ABAG, ABAG as a member, ABAG as a service provider. This is a former employee with ten years in the position that has a lot of information. I am not at all interested in the personnel. I have talked with Gardner enough to understand his position and respect it. All I want to know is what the rules are when I talk with Beverly. All I know right now is there is some conflicting

information. Gardner has represented some things one way; Beverly has said just enough to represent some things another way. This is just about the rules of the game. So I would like to know what the agreement says they are allowed to talk about so I will know if Beverly is not answering my questions and the agreement doesn't say what he is telling me it says, then he is pulling my chain, I need to start questioning what I am hearing from him.

Steele: I make a motion that we ask ABAG to put in writing a request to Beverly or to produce such a document with Beverly's response.

Maltbie: I will second that motion but that doesn't take care of this issue.

Steele: But it can until we have the answer to that.

Maltbie: If can if the Executive Committee is willing to let it go there. But he legal issue that is before us. If ABAG and Beverly can agree, then that's great--the problem is solved, we get the agreement and we move on. If they don't agree for whatever reason, I still believe we have a legal right to the document. ABAG disagrees; they say they think it is protected from the freedom of information act; I don't believe that is the case. I don't resent ABAG's position in wanting to defend that, but we have a separate interest and we need to pursue it. I like your approach because I will feel like we have exhausted all our remedies before we get fully legal on each other, which I would hate to do, but whether Beverly agrees or not we still need to see it. It is important to what we are looking at, to understand what the constraints are, what people have agreed to regarding answering questions. That's what a confidentiality agreement is about, it is about keeping specific things confidential, not everything in the world confidential. I want to know what the specific things are, what those black areas are so we can stay in the areas we can get information on.

Allen: We have a motion and we have a second.

Mason: I think we need to have discussion on the motion. I have had these conversations and they are not going anywhere. This is the representation made by Marcus. Nobody at ABAG will talk to me about this stuff, so I can only talk to one side and get one side of the story. The side of the story is that there are conditions being placed on the release, rather than we are O.K. with releasing it, no conditions, we are O.K. with releasing it, but we are going to sue you if you release it. Apparently that has not been successful. There have been negotiations between the parties, which frankly is outside the law. They don't get to veto the Public Records Act. I think we need to decide are we going to get this document or not. ABAG has made their position plain.

Karlen: If getting this document, since we are looking into the issue of the structure of ABAG PLAN, do you think this document is vital.

Mason: I think it is important.

Maltbie: If this document was properly written it should not shed any light on the personnel issue that took place between an employee and employer. It should just say how they are supposed to talk about each other. It is going to tell me a lot based on the conversations I have had and will have.

Allen: Any more discussion on the motion? I see none. Are we clear on what the motion is? This is Steel's motion, seconded by Maltbie.

Steele: I am looking at an e-mail, this is a matter of background, from Moy to Mason, with a copy to Gardner, dated June 22nd. In that e-mail Moy describes that he did formally ask Beverly whether he would waive the confidentiality clause. Moy says in the e-mail that Beverly declined. **My motion is to ask ABAG to provide some kind of written documentation of that.**

Mason: Why don't we make a Public Records request for the e-mail exchange between ABAG and Beverly and his lawyer about this issue.

Steele: We want to see Beverly's response. We want to see ABAG's written request.

Mason: Beverly's response is what he told me is that is not true, that that statement is not true.

Steele: Well, I want to see the evidence of that.

Mason: Then Beverly will say he is not going to talk to me because he is going to get sued.

Gardner: We have gone round and round on this.

Maltbie: I know you have and I feel your frustration. I would like to see the documentation as well. I would also like us to be clear of what it is we are asking to be released. I don't think ABAG should be asking Beverly to give up the confidentiality. We are asking for the release of the actual Confidentiality Agreement. The confidentiality can be maintained with the possibility of one exception: what is it that they are supposed to keep confidential. If there is a personnel dispute, that is supposed to be held confidential. O.K. we want ask questions about that. We can certainly get into other areas. Or basically is it his entire employment from the day he started to today is confidential--well, that just can't be the case. I just want to know what the parameters are, not what the issue was.

Steele: To restate my motion: Provide documentation that will substantiate that ABAG, Ken Moy, formally asked Beverly to waive the confidentiality clause and that Beverly declined--ask to produce some kind of evidence of that.

Maltbie: What we should ask for is what Moy asked for, not to waive confidentiality, but to request the agreement itself.

Steele: That is implicit in my motion. I can say specifically that is what my motion intends.

Maltbie: I am happy to second that.

Allen: We have had a lot of discussion, I would like to call for the vote:

Yes: Karlen, Silva, Broad, Killian, Maltbie, Steele, Allen

No: Mason

Mason: I have some additional things I would like to have discussed.

Killian: I have some additional things I want to discuss on this issue. Is this group prohibited from initiating this action, or will this have to be a recommendation the board? The action initiating a lawsuit? It talked about hiring an attorney.

Maltbie: I don't interpret that as hiring an attorney; I interpret that as hiring a PLAN attorney which is basically identified as an officer of the board.

Killian: I honestly think this thing is an error--maybe an honest mistake or belief in a personnel action, but I think it is wrong in the fact that Moy has opined this cannot be released. I think it is prudent given the importance at hand that this committee if not the entire board have access to this agreement. I am trying to think of developing an additional motion, given that we probably will not have any progress in two weeks, I think we are going to be at the same place and we need to at least **recommend to the entire board that we proceed to demand, even through legal means, access to this agreement.**

Allen: Is that a motion:

Killian: Yes.

Maltbie: Is the recommendation to make a recommendation to the full board?

Killian: Yes.

Mason: Second.

Steele: Not in favor. It assumes there is a smoking gun somewhere. That is why I proposed the last motion that passed. If further down the road we see some evidence of a smoking gun then we can certainly consider this, but I don't think we are there yet; I don't think we need to push it.

Killian: I think there is a smoking gun, not that anybody has done anything wrong. We have an array of city attorneys, including my own in Millbrae, who say this is clearly wrong. I don't think it is appropriate for us to fold our arms with this information and fade away on this issue. So, I think that is what this smoking gun is. I believe Gardner 100% that they would like to release it, but because of their own legal opinion and other issues with Beverly they are prohibited. Maybe this will give them the opportunity to get them out of any bind they may have to force them to release it.

Mason: I was going to respond to the comment and to Gardner's irritation, plainly with me, and I am irritated as well. All I am asking for is what I think we are legally entitled to. I am not assuming anybody did anything wrong, and yet I am being made to feel that I am doing something wrong and I resent that tremendously. I told Gardner in Colma I thought it was highly inappropriate that you would enter into this agreement without the board's knowledge. All I am asking for is this agreement, which I think without question we are entitled to. I just want to find out what happened. People have told me things, we will get to that subject, but I am not assuming those things are correct. Unless people have the opportunity to give their side of the story, all I can operate on is one side.

Gardner: I just want to respond. I have been fairly quiet during your discussions. And I wanted and offer to excuse myself while you discussed this matter. My irritation is not at you Shawn and is not personally directed at all. What set it off was your comment was the reason we have not been able to move this, to get a copy this agreement is that Beverly has represented that he has been threatened to be sued. At that point I really have had it because we offered and continue to offer that if Beverly were to waive the confidentiality, we absolutely will give it to you. The part about Beverly saying he had been threatened to be sued, I had enough of that.

Mason: All I can tell you is what I have been told; don't know if it is accurate but I am not getting anything from the other side.

Gardner: Let me ask you a question. What has the other side provided you with that we can't provide you with. Maybe depending upon what the other side has provided to you, I can provide it too, and I mean that seriously.

Mason: What the other side has provided is their side of the story. Beverly has told me his side of the story and what I have gotten from ABAG is we are not talking about it; you can't have the agreement; we are not interested in talking about it; there is nothing to discuss

Allen: We have had a lot of discussion on this item. I will echo Steele's comment. I am not prepared to go to the point of actually getting in to litigation situation. I sense tremendous tension in this room and I have felt it in several exchanges between this committee and the full board and ABAG for months now. I like to be clear about this. I have an interest in protecting the viability of the insurance pool and I have an

interest of my organization, which is the tiny Town of Colma. I am not prepared for those reasons to get into litigation and I am sorry for the level of frustration that several of folks in this room have had to experience as I know they have struggled to do what they think is right. I am not in a position to say yes to this motion.

Killian: Even though the motion is simply to recommend to the board?

Allen: Yes. So, unless there is more discussion I will call for the vote.

Maltbie: My only comment is that the board was extremely upset (and I say this as a member of the board and not the Executive Committee) that the Executive Committee was not bringing items to the full board for their information and their opportunity to take action. This has the potential to be another one of those items. This may be a situation of history repeating itself.

Allen: On the motion:

Yes: Killian, Maltbie, Mason, Karlen

No: Broad, Silva, Steele, Allen

Allen: The motion fails.

Killian: I move that this item be agendized for the full board and the split vote of this committee be reported.

Maltbie: Second.

Yes: Karlen, Broad, Maltbie, Mason, Killian, Allen

No: Silva, Steele

Allen: In response to your comment about what the full board said about things done in secret, for me that May 14th meeting came as a huge surprise and we have all been grappling about how to work through these issues. It wasn't anybody's intention to do anything in secret. Past practice had not been to send a lot of stuff to the full board. The board only met once or twice a year. There was no intentional secrecy going on, it was more all of us struggling trying to figure out what the issues are.

Maltbie: Never assumed there was secrecy, thought it was mishandled. That would be my criticism of the former Executive Committee, I said that at the meeting and I will stand by that. I do know that plenty people on the board felt differently, that it was secrecy.

Allen: Fair enough. Moving on to Item 7: "Consideration of information provided by former Risk Manager and responses to this information"

7. Consideration of information provided by former risk manager and response to this information

Mason: Item 7 was at my request and as alluded to earlier had intended to have this in closed session. Under the Brown Act, closed session can be had to evaluate the performance of an officer of ABAG PLAN, this case the President which was my intention. The legal issue is there is a document published by the League of California Cities which indicates that in order to have a closed session, the body having the closed session has to have the power to appoint, dismiss, evaluate the position they are meeting in closed session about. It is not clear to me, I think arguments can be made that the Executive Committee does have that authority; arguments can be made that it does not. For that reason I did not put it on to be in closed session. My intention to reveal in that closed session was everything that has been told to me by Marcus Beverly. Marcus Beverly has told me many things that has caused me concerns, raised issues that I think we have a duty to respond to and investigate. I had mentioned in a motion before that we do an investigation because it was my intention to set up a situation where the only two people who have information about what happened could tell us what happened. I made that motion and it was denied. My strategy was to protect Beverly. Beverly felt threatened; whether that was a legitimate feeling, was a cause to feel threatened or not, he communicated to me that he felt threatened. So, I was trying to get us to a point where we could have that conversation between the only two people who know what happened, but that didn't go anywhere. I had made efforts to get Beverly to disclose to the board. Beverly indicated to me that he had the desire to talk to the board about what happened from his perspective. He has been counseled not to do that because of this agreement that we don't know what it says. So, we are at impasse. At that point I felt my duty to my agency, to the PLAN superseded my personal desire to protect Beverly, and I revealed to Beverly's lawyer I was going to tell the board everything Beverly told me. Again, that was my intention today. I am choosing now not to do that because it reveals information that I think is private; involves individuals beyond Beverly. I will propose we put a closed session on the next full board meeting that will allow us to talk about these issues and for me to reveal information that has been provided to me to the full board.

Killian: You are requesting a closed session at the next full board meeting?

Mason: Yes.

Killian: We do that my concurrence?

Mason: Yes.

Gardner: I just have a question and comment. From the item that was on the agenda I had no idea what this was referring to. I did call Allen to ask what this was. My question was whether I was going to be asked to respond to something that I had idea what it was about and I did not have a chance to call you. I want to say this for the record: I have been around for a long, long time. I have never seen the likes of this.

Mason: And what am I supposed to take from that comment? What does that mean? That's why I feel throughout this process I have been the subject of comments like that. I have had Ken Moy tell me that my only interest in this information is my curiosity. Those are the words he used. It is insulting to me that I would be subject to comments that question my integrity and my actions in simply trying to understand what happened; what this means to me with a \$700,000 investment my agency made in this PLAN. I don't get it frankly that because I am asking questions that I have to defend those questions.

Gardner: Shawn, what I find stunning is that here is an item on the agenda that had it been properly noticed, you were going to, my your own admission, raise a number of issues that Marcus apparently has raised with you, and you were going to discuss those issues. I never heard of them; I have no idea what they are. Doesn't something not seem quite right about that? It's not an attack on you, it's a process issue. I want to be real clear: this is a process issue.

Maltbie: I agree, Henry. I think the elephant in the room for me is the governance. It's flawed. We have an Executive Director of the PLAN that we don't hire or fire. So you are not accountable to the board. You are a colleague; you are like a fellow board member, not an Executive Director. I can't hold you responsible for any of your actions, as Executive Director, as President of the PLAN. We don't have any tools as board members to try to understand what happened. I just found out at the last board meeting that the Executive Director of ABAG could indeed, and had fired the PLAN Risk Manager. Nine years I have been on the board and didn't know that, and don't agree that should be the case, but that is what happened. Wanting to talk about that is important. I understand your point of view, but I don't understand the animosity. I don't feel like you understand our point of view and why we feel it is different from a Council-Manager situation. I understand where you are coming from, but I still think we ought to pursue this.

Gardner: There is no animosity, I want to be real clear about that. None of this is personal to me. I am raising the process issue and I would ask you that before you pursue any of this, especially if you have had a conversation with Marcus, and it sounds like it, about some specific allegations, that you raise them with me. That's all I am asking, and that is what I am saying I am surprised at; and I am. There is no way I would leave here without saying that.

Mason: My expectation is that you would be at the meeting and you would be able to hear that information and that information would be shared with you as well as the rest of the board.

Allen: You are expecting that to be in closed session?

Mason: Yes.

Gardner: For the things I can respond to, I absolutely will respond to them. I will say again, this agreement was not my idea and I wish we had never entered into it.

Maltbie: I can appreciate that. If PLAN could take legal action and get a copy of the agreement that actually serves your purposes as much as it does ours.

Mason: That is the conversation I had with Moy. I understand where Moy is coming from. If you don't get sued by one side, you get sued by the other. I have had to analyze investigations into misconduct. The law provides that some personnel records in investigations regarding misconduct do get disclosed, and you have to go to a balancing decision if the charge is one that the public has a right to know. It might be very embarrassing, very personal to the individual, but you have to make that disclosure. Moy's response is I don't want to make that disclosure because someone might sue me. And that is not the law; the law is you have to make that tough decision, go by what you think the law actually is, and give your client that counsel. That's what you have to do because that is what your job is.

Allen: Let me ask Mason a process question about your motion. You want to have this conversation with the full board as opposed to the Executive Committee. Can you explain why you want to do it before the full board instead of the Executive Committee.

Mason: Because I want it to be confidential, I don't want it to be taped at an open meeting and reflected in minutes, I want it to be done in closed session, confidentially because of privacy rights of individuals involved.

Steele: Is it clear that we cannot have a closed session as an Executive Committee?

Mason: It is not clear that we can, it is not clear that we can't. I am not the lawyer for this committee. I am not going to take the risk of giving advice in a close question or acting as though it is not an issue.

Allen: Asked for the motion offered by Mason, seconded by Killian.

Killian's motion restated by Mason: Have a motion and a second to place on the agenda for the full board a closed session to allow Mason to reveal to the full board information provided to him by Beverly.

Yes: Silva, Karlen, Broad, Killian, Maltbie, Steele, Mason, Allen

8. Other business

Allen: Next item of business is do we have a board meeting in August and all agreed to August 17th from 1 to 5 p.m. Broad indicated that he would be on vacation. The meeting will be held in Colma at the town facility. Allen suggested the facilitator

attend the August meeting to get a preview of how the group works. She would not be present for the closed session.

9. Adjournment

Meeting adjourned at approximately 4:30 p.m.

Respectfully submitted,

Henry L. Gardner
ABAG PLAN President

DRAFT