



ABAG PLAN CORPORATION
Executive Committee
Regular Meeting
Summary Minutes

Thursday, May 15, 2008
101 Eighth Street
Oakland, CA 94607
Conference Room B

Presiding

Julie Carter, Chair

Jurisdiction

Dublin

Committee Members Present

Laura Allen
Tina Reza, for Jack Dilles
Emma Karlen
Shawn Mason
Jim Steele
Orry Korb

Colma
Morgan Hill
Milpitas
San Mateo
So. San Francisco
Los Gatos

Committee Member Present via Teleconference

Cecilia Quick &
Peter Urhausen

Pacifica
Pacifica's Legal Counsel

Committee Members Absent

Jeff Maltbie

San Carlos

Staff Present – ABAG PLAN Corporation

Henry Gardner, ABAG Executive Director
Marcus Beverly, Risk Manager
Gertruda Luermann, Risk Management Analyst
Carol Taylor, Recording Secretary
Ken Moy, Legal Counsel

1. Call to Order:

Julie Carter called the meeting to order at 10:00 a.m. A quorum was present.

2. Public Comments:

None

3. Approval of Minutes for March 11, 2008:

Minutes of March 11, 2008, approved as presented.
/M/Korb/S/Karlen/C/unanimously approved

4. Election of Officers for FY 08-09 & Approval of Committee Schedules:

The Committee was asked to nominate officers to fill the Board Chair and Vice Chair positions for FY 08-09, recommend committee appointments, and recommend dates for the committees' regular meeting dates.

After a brief discussion, Committee members nominated:

Board Chair: Emma Karlen. /M/Steele/S/Allen/C/unanimously approved

Vice Chair: Laura Allen. /M/Karlen/S/Steele/unanimously approved

Recommended dates for the Committees' regular meetings were accepted as presented.

The members also discussed the makeup of the Executive Committee and staff's recommendation to consider changing the makeup to ensure membership does not fall below a quorum of five members. After discussion, the members agreed to recommend amending the Bylaws to increase Committee membership to 9 members. The number of at-large members would increase from two to three, and committees would be able to appoint an Executive Committee representative to fill the vacancy created when their Chair is also the Chair or Vice Chair of the Board.

Staff will prepare an amendment to the Bylaws reflecting these changes and present the Committee's recommendation to the Board of Directors for approval.

/M/Mason/S/Allen/C/unanimously approved

5. Actuary Committee Report

A. Funding Policy Revisions

Marcus Beverly presented a request to recommend revising the PLAN's Funding Policy to reflect updates since the last change and to add an additional financial benchmark.

The updates include the use of Net Assets instead of Fund Balance or "Retained Earnings on Balance Sheet", to reflect changes in the terms used in the PLAN's audited financial statements. Additions include the method for calculating ULAE approved by the Board and a benchmark comparing Net Premium to Net Assets. The goal is to maintain a 1:1 ratio or less and the result is used to measure susceptibility to pricing errors.

After presentation and a brief discussion by the Committee the recommended Funding Policy updates were approved as presented.

/M/Steele/S/Korb/C/unanimously approved

B. Program Status and Funding for FY 08-09

Beverly provided an overview of Bickmore Risk Services' report regarding the PLAN's Liability Program as of June 30, 2008. Estimated Ultimate Losses are down \$946,743 overall, even with an increase of \$1,764,000 in 2001-02 for the Pacifica settlement. The full payment of \$3,350,000 is reflected in the analysis of outstanding liabilities and contributes to an expected decrease in net assets of \$5,100,000. In addition, the PLAN has an exposure up to \$5,000,000 from an inverse related claim re-submitted in February that will further impact liabilities and/or net assets.

The funding for FY 08-09 is relatively stable, with the base rate remaining at \$1.03 per \$100 of payroll and a projected increase of \$364,317, or 4.6%. Administrative expenses are \$100,000 of the increase, with the rest for loss funding. The increases in both the administration and loss funding are due mainly to payroll increases.

The recommendations in the staff report and by the Actuary Committee were discussed, with members provided funding options for 2008-09. Staff is working with the PLAN's actuary and broker to provide options for a \$2.5 million SIR.

The members agreed to recommend the \$15 million insurance excess a \$5 million SIR option, the same as the current program, pending the options for a lower SIR to be presented at the Board meeting on June 11.

/M/Korb/S/Mason/C/unanimously approved.

Beverly also presented analysis of the Property Program funding. Rates are expected to decrease slightly, with coverage terms stable to slightly improved. Total premium will be allocated based on total insured values.

The key change is additional pool funding for properties in flood zones. Members wanted a way to fund the \$150,000 difference between the \$100,000 deductible for most losses and the \$250,000 deductible for flood losses to properties in flood zones. Using an estimate of two such losses every ten years, staff recommended an annualized amount of \$30,000, allocated based on the insured values of the properties in those zones. An additional \$10,000 for all members was also recommended to cover other deductibles greater than \$100,000.

After discussion by Committee members the recommended funding increases were approved.
/M/Karlen/S/Steele/C/unanimously approved.

6. Risk Management Committee Report

Risk Management Programs and Funding

Gertruda Luermann, Risk Management Analyst, presented an overview of member progress in implementing the Risk Management Policy, including feedback and suggestions for the FY 08-09 risk management programs. She presented the total spent so far this year by member and category, hours billed by member and consultant, and the scorecard results showing progress over the last three years.

Member interest, participation, and training attendance continue to increase, with the sewer, police and defensive driving programs especially active this year. Staff and members discussed the programs, upcoming training topics, and ideas for increasing participation.

Marcus Beverly presented the recommended funding for the FY 08-09 programs. The proposed budget formula for services and grants is the same as the current year, with a couple of exceptions. Members without police are given an additional \$5,000 matching grant, and the amount for risk management training is increased from \$2,000 to \$3,000.

Other recommendations presented included an increase in the defensive driving and sewer program budgets, continued funding of the analyst position from reserves, and authority for the Risk Management Committee to approve software purchase up to \$300,000.

After the Committee members' review and discussion the recommended action to fund the risk management Programs for FY 08-09 and provide authority for software purchase was approved as presented.

/M/Karlen/S/Steele/C/unanimously approved.

7. Finance Committee Report:

Marcus Beverly presented an overview of the Committee's activities, including the audited financials as of June 30, 2007, and the PLAN's Investment Performance Report as of December 31, 2007.

Given the changes in the PLAN's financial position over the last year, the audit results were discussed briefly, with note that PLAN received an unqualified, or clean, opinion. Net assets increased by \$7.4 million, with outstanding liabilities steady at approximately \$17 million and claim payments of \$1.9 million.

The investment portfolio remains within policy guidelines, with an overall yield of 4.56%. The investment duration is below our target due to the continuing inverse yield curve that makes short-term investments more attractive.

After presentation and a brief discussion the audited financials of June 30, 2007, and the PLAN's Investment Performance Report of December 31, 2007, were approved as presented. /M/Mason/S/Allen/C/unanimously approved.

8. Claim Committee Report:

Marcus Beverly provided a list of claims by amount incurred and a verbal overview of the current year's paid and pending claims. The only significant payment beyond the Pacifica settlement was \$700,000 paid for a police claim. Otherwise, the PLAN enjoyed a below average year for claim payments, with trends other than the inverse exposure favorable.

Committee members and staff discussed the claims report and lessons learned from the police case. There was no action taken.

9. Proposed ABAG PLAN budget – FY 2008-09:

Beverly presented the proposed budget for PLAN administrative expenses for FY 08-09. He explained the areas of increase and decrease in the budget. Consultant expenses are down and personnel costs are increasing, with a net increase of \$100,000, or 4%. A projected deficit of \$65,000 is offset by projected reserves of \$350,000.

After review and discussion the committee approved the recommended administrative budget for FY 08-09. /M/Mason/S/Korb/C/unanimously approved.

10. Strategic Planning Discussion

A. Coverage and Loss Sharing Policy Issues

Marcus Beverly presented a report outlining a number of strategic issues that needed to be addressed in the wake of recent litigation, including coverage for inverse claims, resolving coverage questions, and allocating losses among the members. The committee was asked to give direction regarding a process to address the issues and present them to the Board of Directors for resolution.

The committee members and staff discussed the issues raised in the report, with the focus on how to present them to the members in a way to get them engaged. The process will begin with a special 90 minute presentation for Member City Managers and City Attorneys prior to the next Board meeting. Members discussed the goal of the presentation and the questions the members may want answered.

Julie Carter and Jim Steele volunteered to make the presentation and will recruit other Board members to assist. Staff agreed to provide an outline for the members to use as a starting point for further discussion to complete the presentation. No action was taken.

B. Memorandum of Coverage (MOC) Revisions:

Kenneth Moy, Legal Counsel, presented a brief update on the progress of drafting recommended changes to the Liability MOC, including revisions to the inverse exclusion. The language is not complete but will be sent to a number of Member City Attorneys for review and feedback prior to presentation to the Committee members and Board for approval.

Committee Members agreed with staff direction regarding revisions and feedback process. No action was taken.

11. Conference with Legal Counsel – anticipated or existing litigation.

***Yamagiwa vs. the City of Half Moon Bay**

The meeting was called into closed session at 12:59 p.m.

Item 11. was discussed in closed session pursuant to the requirements of the Ralph M. Brown Act. All actions taken were announced in open session prior to the adjournment of the meeting.

12. Announcements

Meeting was called into open session at 1:18 p.m. Julie Carter made announcement that the committee met in closed session and no reportable action was taken.

13. Other Business:

Marcus Beverly announced that recognition awards for achieving Best Practice status will be given at the Board of Directors meeting on June 11, 2008.

14. Adjournment:

Meeting adjourned by Julie Carter at 1:20 p.m.

Respectfully Submitted,



Marcus Beverly
Risk Manager and Secretary



Staff Report

Date: August 7, 2008
To: Executive Committee
From: Marcus Beverly
Re: Dispute Resolution

Recommendation: Staff requests the Committee review the PLAN's current method of resolving coverage disputes and make a recommendation to the membership as to whether it should be changed or expanded to other decisions such as loss and premium allocation.

Background: The PLAN Claim Policy was originally approved by the Board on October 8, 2003, and serves as a guide for standards and management of the PLAN's claims. The Policy was amended on May 19, 2004, to add a process for resolving coverage disputes. See attached section 3.3, Coverage Determination, for reference.

The process calls for staff and/or counsel to make initial coverage decisions, with Members able to appeal the decision to the Claims Committee, Executive Committee, and finally the Board. Appeals from the Board's decision are limited to binding arbitration.

The dispute resolution process has so far not been tested. The process was not followed in the Pacifica litigation for a number of reasons, primarily because the underlying claims had been tendered and rejected prior to its approval. However, certain aspects of the judge's decision in that case call into question whether or not the process will be respected by the courts and further, whether or not any weight would be given to the Board's rationale for its decision.

Analysis: The judge in the Pacifica case recognized the PLAN does not provide insurance and therefore "defense and coverage in a JPA risk pool are analyzed based on rules of contract law that emphasize the parties' intent" and not the special rules used in insurance law. Cases involving insurance coverage may still serve as applicable legal authority insofar as they address contract interpretation issues unique to insurance policies and contracts for services that closely resemble insurance.

The judge rejected the PLAN's argument that the Board's coverage decision itself establishes, as a matter of law, that the parties did not intend for PLAN to have a duty to defend the Pacifica claims. The judge stated that position was not supported by the contractual language or any extrinsic evidence of the parties' intent. PLAN "failed to point the Court to any language in the MOCs or other contract documents to support their position that the Board's decision - made years after the parties entered into either of the MOCs - is determinative as to the parties' intent at the time of contracting regarding the scope of coverage and of the duty to defend."

Based on the judge's decision in the Pacifica litigation, staff recommends that the Board of Directors, or some other decision making body ("tribunal"), be granted the authority to resolve coverage disputes under the MOC. If the Committee wishes to provide the greatest assurance that the tribunal's coverage decision will be upheld, staff recommends appeals be limited to a writ action under Code of Civil Procedure section 1094.5.

Staff recommends this authority be made applicable to any and all claims filed against the PLAN, regardless of the date of loss. This may allow the members to decide coverage for all claims going forward, regardless of when they occurred, and enable the PLAN to manage the tail claims that have potentially been created by the Pacifica case.

Staff also recommends, in furtherance of the PLAN's mission and objective to settle disputes fairly, promptly, and efficiently, that the Committee consider whether disagreements over premium setting or risk sharing, or other group decisions should be resolved under Code of Civil Procedure section 1094.5. Without this explicit authority, the members run the risk of a judge ignoring the group's decision and deciding these issues on his or her own by trying to determine the parties' intent from the contract language and extrinsic evidence.

A separate memorandum from legal counsel describes the process provided under Civil Code section 1094.5, the advantages and disadvantage of that process and what the group needs to ensure that appeals of the group's decisions are limited to that process.

Requested Action: staff requests the committee provide direction to staff regarding the PLAN's coverage dispute resolution process, whether or not it should be changed, and whether or not it should be expanded to other disputes.

Claim Policy
Adopted 10/8/03
Revised 5/19/04

3.3. Coverage Determination

It is the PLAN's policy to provide each Member the full benefits of the MOC when analyzing coverage for a claim while protecting all Members by denying payment of uncovered claims and/or providing a defense under a reservation of PLAN's right to decline indemnity.

- ◆ ABAG PLAN staff, legal counsel, or designee (Coverage Counsel) shall be responsible for informing Members of coverage decisions.

A member may accept as final a coverage decision made by ABAG PLAN staff, legal counsel, or Coverage Counsel, or any subsequent coverage decision as outlined below, or may appeal said decision by submitting a written notice of appeal submitted within ninety (90) days of the date of the previous written determination of coverage.

- ◆ A Member may appeal the coverage determination made by PLAN staff, legal counsel, or Coverage Counsel to the Claims Committee.
- ◆ A Member may appeal the coverage determination made by the Claims Committee to the Executive Committee.
- ◆ A Member may appeal the coverage determination made by the Executive Committee to the Board of Directors.

A Member may require binding arbitration of the coverage determination made by the Board of Directors by submitting a written notice requesting such arbitration within ninety (90) days of the date of the Board of Director's written determination.

If the Member and the PLAN Risk Manager cannot agree on an arbitrator within thirty (30) days of the Member's request for arbitration, each party will choose an arbitrator. The two arbitrators will select a third arbitrator within thirty (30) days of their appointment.

The parties shall submit their cases to the third arbitrator by written and oral evidence at a hearing. The arbitrator shall be relieved of all judicial formality and shall seek to enforce the intent of the parties.

The decision of the arbitrator shall be binding and final and not subject to appeal except for grounds of fraud and gross misconduct by the arbitrator. The award will be issued within thirty (30) days of the close of the hearings. The parties shall jointly and equally share with the other the expense of the arbitrator.



TO: Executive Committee
ABAG PLAN Corporation

FR: Kenneth Moy 
Legal Counsel

RE: ABAG PLAN Program – Dispute Resolution

DT: August 1, 2008

SUMMARY

The ABAG PLAN Program can significantly increase the likelihood that its coverage determinations will be upheld on appeal if such appeals are limited to a *writ of administrative mandamus* under Civil Code Section 1094.5. Staff recommends that it do so with respect to coverage determinations for inverse condemnation and requests for the committee to consider the options for doing so and the possibility of expanding the application of the *writ of administrative mandamus* to other types of decisions.

BACKGROUND

A writ of administrative mandamus (writ) is a legal device used to appeal the decisions of a nonjudicial body¹. The use of this device is governed by California Code of Civil Procedure Section 1094.5. Usually, if a writ is available to appeal a tribunal's decision, it is the only way to do so. This and the advantages that a writ confers on the tribunal make it the dispute resolution mechanism preferred by decision makers. By the same token, it is available only in limited circumstances.

The members of the ABAG PLAN Program will be considering how to respond to the trial court decision in the Pacifica matter. One possible choice is for the group to require that appeals of coverage decisions be through a writ. To inform the group's discussion, the balance of this memorandum describes:

- A. the advantages and burdens conferred by a writ,
- B. when is a writ available, and
- C. options for how the group can avail itself of the writ.

ANALYSIS

A. Advantages and burdens conferred by a writ

Advantages:

1. Decisions rendered by the trial court within ninety (90) days.

¹ In line with language used by the courts, this memorandum will use the term "tribunal" to generically refer to the body whose decision is challenged.

2. Decision is made by the court sitting without a jury.
3. Scope of review is limited to the record of the proceeding before the tribunal.
4. Court may overturn the tribunal's decision only if is not supported by substantial evidence².

Burdens:

1. The proceedings of the tribunal are more formal and require a statement of governing rules and findings of fact that support the decision.
2. A contemporaneous "record" of the tribunal's proceedings must be made and maintained.
3. The decision of the tribunal must be framed so that it turns on the application of the rules to the facts before the tribunal.

B. *Decisions that can only be appealed through a writ*

A writ is used to inquire into the validity of any final administrative order or decision³ made as the result of a proceeding:

- √ which by law
- √ requires a hearing
- √ at which evidence is required to be taken, and
- √ discretion in the determination of facts is vested in the tribunal.

Typically, a statute or ordinance that creates or empowers a public entity to act as a tribunal also requires a hearing that meets the final three criteria listed above ("evidentiary hearing") and clearly states that appeals can only be made through a writ.

This is not the case for the ABAG PLAN Program as currently constituted. The process for determining coverage does not explicitly require an evidentiary hearing. Even if the ABAG PLAN Corporation explicitly required an evidentiary hearing to determine coverage and explicitly restricted appeals to a writ, there is a measure of uncertainty as to whether a court would enforce the writ requirement. The uncertainty centers on the statutory language that evidentiary proceeding be one that is "required by law". In our case, no law requires the ABAG PLAN Program to make coverage determinations through an evidentiary hearing.

Given the advantages conferred by a writ, many non-public entities that must make adjudicatory decisions will establish a process that requires an evidentiary hearing before a tribunal and limit appeals to a writ. When confronted with this question of whether a non-public entity tribunal could limit appeals of its decisions to a writ⁴, courts have upheld such limitations "if a[n evidentiary] hearing is required by . . . an organization's *internal rules and regulations*, or due process"(emphasis added).⁵ However, in each such,

² In circumstances where an individual's "fundamental vested right" is at issue, the court may apply its own independent judgment to the record, i.e., substitute its judgment for the tribunal's. However, this standard has never been used when only economic interests are at stake.

³ This is limited to adjudicatory decisions - those that determine the rights of an individual who is before the tribunal.

⁴ If the appellant does not challenge use of a writ, the courts have generally allowed it.

⁵ *Pomona College v. Superior Court* (2nd Dist. 1992) 45 Cal. App. 4th 1716 at 1727 *fn* 10; 53 Cal. Rptr. 2d 662; 1996 Cal. App. LEXIS 500; 11 I.E.R. Cas. (BNA) 1368; 96 Cal. Daily Op. Service 3974; 96 Daily Journal DAR 6383 and cases cited therein.

the courts have also found a “public policy” is served by limiting review of a tribunal’s decision. These public policies have included the academic freedom that informs tenure decisions⁶ and administration of academic standards⁷ at public and private colleges and universities, and rights of self-governance accorded trade unions⁸. In my opinion, this latter requirement stands in lieu of a factor that usually comes into play when a court is asked to review the policy decisions of a public entity - the deference that courts usually give to other branches of government.

Thus, absent an explicit statutory requirement, a writ is available if

- ❖ a non-public entity
- ❖ establishes through its internal governance mechanisms
- ❖ a tribunal that makes adjudicatory decisions
- ❖ through an evidentiary hearing and
- ❖ a public policy is served by insulating the tribunal’s decision from *de novo* judicial review.

C. *Options for limiting challenges to a writ*

1. The group may wish to consider pursuing legislation that allows self-funded municipal insurance pools to choose to restrict challenges to the pool’s decisions to a writ if the decision is made by the tribunal at an evidentiary hearing. This involves some delay and risks and the need to coordinate with other pools.
2. Reconstitute the ABAG PLAN Program as a stand alone joint powers agency. This largely eliminates the need to establish a public policy argument for limiting appeals from the tribunal’s decision to a writ. This may also make option 1 easier.
3. Revise the ABAG PLAN Program internal governance mechanisms. This requires unanimity of the current membership.

Under each option, the membership will need to:

- devise the process for evidentiary hearing and the composition of the tribunal,
- define the group decisions that are subject to challenge in an evidentiary hearing before the tribunal,
- agree to limit appeals of such decisions to a writ,
- articulate for the group (and for the court) the public policy served by so limiting appeals⁹, and
- document the process and the public policy in the organic documents of the group.

The form of the evidentiary hearing is a matter of preference as to who decides and the degree of formality desired. This decision can be deferred until more substantive issues are resolved.

⁶ *Pomona*

⁷ *Gupta v. Stanford University et al.*, (6th District 2004) 124 Cal. App. 4th 407 at 411; 21 Cal. Rptr. 3d 192; 2004 Cal. App. LEXIS 1985; 2004 Cal. Daily Op. Service 10393; 2004 Daily Journal DAR 14097

⁸ *Bray v. International Molders and Allied Workers Union et al.* (1st District 1984) 155 Cal. App. 3d 608; 202 Cal. Rptr. 269; 1984 Cal. App. LEXIS 2013.

⁹ Necessary for option 2 and recommended for the others.