

ABAG PLAN CORPORATION

To: Board of Director
ABAG PLAN Corporation

Fr: Kenneth K. Moy
Legal Counsel

Re: Revisions to MOC – Board Presentation

Dt: June 23, 2008

At the June 11 Board meeting, The Board of Directors authorized revisions to the Memorandum of Coverage (MOC) to be effective July 1, 2008. There were some slight modifications from the language presented under my June 3 memorandum. None of the modifications affects the substance of the June 3 memorandum.

This memorandum memorializes representations made by me at the June 11 meeting regarding the intended effects of the proposed revisions and by the PLAN staff regarding claims current practices and how they would be affected by the proposed revisions. The revisions restate the ongoing intent of the members with respect to inverse condemnation claims.

A. “Physical” Inverse Condemnation Claims

Sections IV.I and IV.J of the 2008 MOC excludes (1) the claims that assert a cause of action for inverse condemnation (2) based on the non-negligent operation of a public improvement (3) even if the claim also asserts a cause of action listed in IV.J.

These sections do not exclude (1) claims for damages caused by a sewer back up or (2) claims excluded under section IV.G and IV.H or (3) claims for damages caused by a public improvement where plaintiffs allege that the public improvement malfunctioned or was inoperative. Examples of claims that would not be excluded under section IV.I and IV.J are those alleging any one of the following:

- clogged inlets for storm water,
- cracked or leaking pipes and other conveyances, or
- vegetated or silted waterways.

Further, if one assumes that legal causation is established and that the alleged damages are otherwise covered, section IV.I and IV.J will not preclude indemnity for the following types of damages:

- ◇ damage to land e.g. subsidence, earth movement, crop damage;
- ◇ damage to property e.g. homes, buildings, other structures;
- ◇ bodily injury, personal injury or economic damages.

Two circumstances in which sections IV.I and IV.J will exclude a claim were described:

The claim asserts an inverse condemnation cause of action based solely on allegations that a public improvement functioned properly but that it was undersized. Thus, a claim based solely on the fact that a sanitary sewer system designed to accept surges caused by a 100 year storm event operates properly and

expels the overflow from a 200 year event into a river/lake/bay/ocean will not be covered.

- ❖ The claim asserts an inverse condemnation cause of action based solely on the non-negligent operation of a storm water drainage system. Thus, a claim that a storm water outfall pipe that is not cracked, clogged or otherwise malfunctioning delivers water directly onto a bare hillside will not be covered.

B. “Regulatory” Inverse Condemnation Claims

Sections IV.G and IV.H of the 2008 MOC excludes (1) claims that assert a cause of action for inverse condemnation (2) if the claim does not assert physical damage to tangible property (3) even if the claim also asserts a cause of action listed in section IV.H.

These sections do not exclude (1) claims for damages caused by a sewer back up or (2) claims excluded under sections IV.I or IV.J. Examples of claims that would not be excluded under section IV.G and IV.H are attached and marked Attachment A-1 (presented at the Board meeting) and A-2 (not presented at the Board meeting).

Two circumstances in which sections IV.G and IV.H will exclude a claim were described and are attached and marked Attachment B-1 and B-2 (both presented at the Board meeting).

Sections IV.G and IV.H of the 2008 MOC may also exclude claims that do not assert a cause of action for inverse condemnation. Such claims will be evaluated as presented. No specific examples were provided at the meeting.

C. Multiple Coverage/Continuous Trigger

Revisions to Section VII.C.2 were identified as technical changes made to ensure that members understand that only one MOC, and its accompanying coverage limit, applies to a claim.

Attachment A-1

OVERVIEW: A felony suspect, reputed to be armed and dangerous, took refuge in a store and refused to surrender. In the course of apprehending the suspect, the police fired tear gas into the store, causing extensive property damage.

Customer Company brought suit against City of Sacramento to recover for damage that had been caused to appellant's convenience store. The suit was based on inverse condemnation only.

OUTCOME: Claim is not excluded. Under section IV.G.3(i) claims with physical damage to tangible property are not excluded.

CUSTOMER COMPANY, Plaintiff and Appellant, v. CITY OF SACRAMENTO et al., Defendants and Respondents.

10 Cal. 4th 368; 895 P.2d 900; 41 Cal. Rptr. 2d 658; 1995 Cal. LEXIS 3373; 95 Cal. Daily Op. Service 4459

Attachment A-2

OVERVIEW: The City of Long Beach (City) recorded a declaration of substandard property 1462-1468 Henderson Avenue (Building). Several months later, the Building was sold. The City did not follow its customary practice of obtaining a title report before sending a 10-day notice of intent to demolish on February 26, 2001. D & M Financial, the record holder of a trust deed on the Building did not receive the notice.

On August 7 and 10, 2001, the City obtained warrants to inspect the Building for the purpose of demolition. The City sent a copy of the August 7, 2001, warrant to D & M Financial by certified mail. It was delivered to D & M on August 13, 2001. It is the City's policy to issue a 48-hour notice of intent to demolish before demolishing a building. On Friday, August 10, 2001, the City mailed a "48-Hour Notice of Intent to Demolish" to the owner, and sent a copy to D & M Financial at its address in Belleville, New Jersey. A City employee did not take into consideration that he was sending the 48-hour notice over a weekend, or that it was being sent to a party in New Jersey. D & M Financial received the "48-Hour Notice of Intent to Demolish" on Monday, August 13, 2001.

On that date DeSantis of D & M Financial spoke to Wiersma, the principal building inspector of the City. DeSantis contacted Wiersma several times on August 13 and 14, 2001. Wiersma had authority to stop demolition. The City began demolition of structures at the property on August 14, 2001, and on that date informed D & M Financial that demolition had already commenced. Cleanup of the site was concluded by August 28, 2001.

OUTCOME: Claim is not excluded. Under section IV.G.3(i) claims with physical damage to tangible property are not excluded.

D & M FINANCIAL CORPORATION v. CITY OF LONG BEACH

136 Cal. App. 4th 165; 38 Cal. Rptr. 3d 562; 2006 Cal. App. LEXIS 117; 2006 Cal. Daily Op. Service 935; 2006 Daily Journal DAR 1284

Attachment B-1

OVERVIEW: Border is a real estate development company which was developing a business park in Otay Mesa. Otay Mesa was then an unincorporated area in San Diego County adjacent to the Mexican border, and was later annexed by the city.

Border asserted two causes of action for inverse condemnation. The first arose from the city's actions in connection with its announcements of a plan to create an international airport in Otay Mesa.

Border contended that the city's announcements of airport construction plans, some of which showed possible configurations of the airport that would place runways directly through the owner's business park, substantially interfered with sales of property within the business park and diminished the value of the property.

The second inverse condemnation cause of action arose from the city's diversion of truck traffic, engendered by a newly opened crossing at the Mexican border, which caused frequent traffic congestion on nearby streets, hampered access to the business park.

OUTCOME: The claim is denied under section IV.G.3. Only inverse condemnation is pled and none of the exceptions in IV.G.3(i) – (iii) applies.

BORDER BUSINESS PARK, INC., Plaintiff and Appellant, v. CITY OF SAN DIEGO, Defendant and Appellant.

142 Cal. App. 4th 1538; 49 Cal. Rptr. 3d 259; 2006 Cal. App. LEXIS 1439; 2006 Cal. Daily Op. Service 8909; 2006 Daily Journal DAR 12713

Attachment B-2

OVERVIEW: In June 2000, the City of Los Angeles (City) undertook a beautification program aimed at enhancing the appearance of Century Boulevard, a primary access route to and from Los Angeles International Airport. As part of this project, the City planted mature palm trees along the north and south sides of the road and in the median of the roadway. This landscaping all occurred on property owned by the City.

Regency owned numerous billboard facings located near Los Angeles International Airport. Several of these displays lined Century Boulevard, occupying property leased by Regency for commercial advertisement purposes. Regency protested when the City planted the palm trees along the road. Regency claims that the trees screened at least six of its billboard facings from motorists traveling along Century Boulevard. Since fewer people could see its billboards clearly with the trees in the way, Regency argues that the City must compensate it for the supposedly reduced value of the obscured facings.

Regency pursued these arguments by way of an inverse condemnation claim alleged in a complaint filed in Los Angeles Superior Court. Regency subsequently filed an amended complaint that added a claim alleging that the plantings breached a contract between itself and the City, pursuant to which the City had agreed not to obstruct the visibility of Regency's billboards.

Outcome: The claim is denied. Inverse is pled and excluded under section IV.G.3 and none of the exceptions in IV.G.3(i) – (iii) applies. The contract cause of action is not excluded under the list in subsection IV.H. However, the contract cause of action is excluded under section IV.W.

REGENCY OUTDOOR ADVERTISING, INC., Plaintiff and Appellant, v. CITY OF LOS ANGELES et al., Defendants and Respondents

39 Cal. 4th 507; 139 P.3d 119; 46 Cal. Rptr. 3d 742; 2006 Cal. LEXIS 9499; 2006 Cal. Daily Op. Service 7197; 2006 Daily Journal DAR 10276