

## Expanding the Discussion – Coverage and Loss Sharing

Your comments are needed to shape ABAG PLAN's future operations. Member cities and towns will make major changes at the next Board meeting on October 22, 2008. To participate, you can attend an informative workshop in your city or town to learn about the issues and then attend the Board meeting. The following strategic issues are up for discussion:

- Coverage: What types of risk should members cover?
- Loss Sharing: To what extent do members want to share losses arising from those risks?
- Dispute Resolution: How should disputes over the first two questions be resolved?

A special presentation outlining these issues was made before the June 11th ABAG PLAN Board meeting. More than forty five ABAG PLAN members' city attorneys, city managers, and Board members provided input regarding the issues, questions that need to be addressed, and a process for reaching consensus on key issues.

All ABAG PLAN members should be involved in taking the next step.

### Why Now

ABAG PLAN recently settled litigation for coverage of inverse condemnation damages and has subsequently settled another inverse claim that was previously denied. These coverage issues and court decision have caused members to reconsider what losses are covered, how coverage decisions are made and how the paid amounts are shared among the members.

Members did not intend to cover inverse claims and the claims financial impact has not been factored into the pool funding. If ABAG PLAN continues to pay losses based on the court's rationale in the coverage litigation, members face the prospect of funding shortfalls, assessments, and increases in annual premiums.

### Current Coverage

The ABAG PLAN Liability Memorandum of Coverage provides coverage similar to Commercial General Liability, Auto Liability, and Professional Liability insurance policies. The ABAG PLAN MOC is broader in some respects to cover unique exposures faced by public agencies and is typical of coverage provided by other municipal risk sharing pools.

The MOC also contains exclusions and limitations for public agency risks not found in standard commercial policies.

*Discussion cont. on page 6*

## SCHEDULE OF ACTIONS NEEDED

July 1, 2008

Revise Memorandum of Coverage **DONE**

August & September 2008

Conduct Loss Allocation Formula and Next Steps workshops with 31 member towns and cities

October 22, 2008

Board Meeting to include Approval of Loss Allocation Formula and Dispute Resolution Process

November 1, 2008

Develop Risk Sharing and Coverage Resolution

January 1, 2009

DRAFT document routed to members for recommendations (City Manager and City Attorney review)

January 31, 2009

FINAL documents ready to be approved

February 1 - May 1, 2009

Members report to their Governing Bodies requesting adoptions Council/Board Adoption - Amend Risk Sharing and Coverage Resolution

July 1, 2009

New Risk Sharing and Coverage Resolution Components effective

## What's Inside

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# Coverage Corner

Marcus Beverly, ABAG PLAN Risk Manager

## Coverage Corner responds to members questions about ABAG PLAN.

### This issue explains the changes to the Liability Memorandum of Coverage (MOC)

At the recent ABAG PLAN Board meeting, a revision to the inverse condemnation exclusion in the MOC was adopted to be 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 future 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'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, if not entire, 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 it is 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 if not entire 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 web site.

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.



## ABAG PLAN Corporation A Pooled Liability Assurance Network

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

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## News and Notes

Losses over the past five years are trending down. Over the same five years ABAG PLAN has increased risk management activities such as training. The Risk Management Programs during the past fiscal year had an expanded budget, and are expanding again for fiscal year 2008-2009. The following briefs recognizes achievements and highlights available grants and new information.



### Recognition

Seven members met the *Best Practice City or Town* requirements over the fiscal year and were awarded certificates of recognition at the ABAG PLAN Board meeting in June. Members included: **Benicia, Campbell, Cupertino, Pacifica, Los Altos Hills, Portola Valley, and Tiburon.** The **City of Newark** had the greatest change in “Framework and Best Practices” from June 2007 to June 2008 with its framework score increasing from 52 to 100 and the best practices score increasing from 57 to 93. Congratulations to the City of Newark for their hard work.

### Grant and Training Programs

Attendance is increasing at expanded grant and training program offerings with members using \$550,000 in 2004-2005 and \$700,000 in 2006-2007. As of May 2007, members have used \$450,000. The Board has approved an extension until December to use up the remaining fiscal year 2007-2008 funding for a total of approximately \$800,000. For fiscal year 2008-2009, members can use up to \$3000, an increase of \$1,000 from fiscal year 2007-2008. Members that contract out police services now have access to an additional \$5,000.

ABAG PLAN is also working to keep members up to date with revised training programs and best practices.

### *Employment liability training*

A new focus is employment liability. The ABAG PLAN grant program now covers training sessions from the Northern California Training Consortium. These courses are available on-site or in group sessions.

### *Defibrillator training program*

ABAG PLAN can offer assistance with a lay rescuer Automated External Defibrillator (AED) Program. Requirements call for a medical doctor to develop the program and for notification of AED locations to the county health department. ABAG PLAN is currently looking for a medical doctor to assist. Grant money is available and updated guidelines are on the website at <http://www.abag.ca.gov/plan/pdf/AED-Summary.pfd>.

### *Handheld devices*

As of July 1, 2008, cell phones and other wireless devices cannot be used while operating a vehicle, unless it is a “hands-free device.” Best practice information is available on the ABAG PLAN website.

*News and Notes cont. on back page*

## COURSE OFFERINGS

### 2008

- Employment Practices Liability
- Defensive Driving
- Work Zone & Traffic Lane Safety
- BE SEWERSMART SUMMIT
- Special Events
- Claims Handling
- Ethics for PD
- Back Safety & Ergonomics
- Cash Handling
- Defensive Driving

### 2009

- Volunteer Guidelines
- Root Cause Analysis
- Managing Alertness for Law Enforcement
- Risk Mgmt 101
- Defensive Driving
- Risk & Recreation
- Risk & Road
- Contracts and Insurance
- Aquatics Risk Mgmt
- Workplace Violence
- Outdoor Work Safety / Heat Illness Prevention
- Trenching & Shoring
- Supervisors as Risk Manager
- Conducting Safety Inspections
- Defensive Driving

More details are available on the website at <http://www.abag.ca.gov/plan/training.html> or by contacting Gertruda Luermann at [gertrudal@abag.ca.gov](mailto:gertrudal@abag.ca.gov).

# Member News

ABAG PLAN Recognition Awards and Innovative Risk Management



Marcus Beverly was recognized by the ABAG PLAN Board for receiving a Distinguished Graduate Award in the Associate in Risk Management for Public Entities (ARM-P) Program. He is a new Graduate of the American Institute for Chartered Property Casualty Underwriters.



Photos Top to Bottom, Left to Right: Jesse Takahashi, Finance Director, City of Campbell; Gary Galliano, City Attorney, City of Newark; Kristi Chappelle, Assistant City Manager, City of Foster City; Heidi Bigall, Director of Administrative Services, Town of Tiburon; Jack Dilles, Finance Director, City of Morgan Hill; Nick Pegueros, Finance Director, Town of Los Altos Hills; Cecilia Quick, City Attorney, City of Pacifica; All certificates presented by Julie Carter, ABAG PLAN Chair, Assistant to City Manager, City of Dublin (right).

## Innovative Risk Management on the Web

Foster City has taken a creative approach to risk management with a wiki, a collection of web pages designed to enable anyone who accesses it to contribute or modify content. Wikis are often used to create collaborative websites and to power community websites. For example, the collaborative encyclopedia Wikipedia is one of the best-known wikis. (definition from Wikipedia, <http://en.wikipedia.org>)

The Foster City wiki was designed to standardize processes and procedures for several categories, including budget process and contract and project management. The wiki is used internally, mostly by public works and parks and recreation departments. It has web pages on a variety of topics, which are constantly being updated and expanded as necessary. Training courses were provided for public works and parks & recreation staff.

“The wiki is a good tool for us. It can be developed piecemeal and edited by anyone as needed,” commented Andra Lorenz, Foster City Management Analyst. “There were some

challenges with the technical aspects of the wiki as the editing interface isn’t intuitive, but it got easier.”

For more information about Foster City’s wiki contact Andra Lorenz via e-mail at [alorenz@fostercity.org](mailto:alorenz@fostercity.org).



## Best Wishes

Eileen Barr, a long-time Examiner, is retiring in December 2008. She sat down to talk about her experience with ABAG PLAN and her future.

Eileen has been with ABAG PLAN for 15 years, starting in August 1993. She says, “the nice thing about this job is that it is never boring. Sometimes I can’t believe that people would file claims for some of these minor incidents and sometimes it is really tragic, but it is never the same.” She also commented, “This is the longest I have been at any job. Before this the longest was 11 years as a family law paralegal.”



Eileen started as prior Risk Manager, Albert Fiero’s secretary while working on her B.A. in Political Science from California State University East Bay. She became an adjuster in 1996. One of her first claims was a huge eucalyptus tree that fell in Burlingame, crushing a truck and a bus. Twelve years later Eileen says she can’t help doing risk assessments as she walks down the street.

At Eileen’s home in Dublin risks are well controlled. As this experienced examiner reported, “Dublin has adopted the sidewalk ordinance so any trip and fall in front of my house would be my responsibility, As the owner, I’m the best one to know about any hazards.”

Eileen has lived through many years of changes at ABAG PLAN and stated that “PLAN has changed tremendously.

*Eileen cont. on page 7*

## New Leadership

ABAG PLAN welcomes a new *Chair of the Board*, Emma Karlan, *Finance Director*, City of Milpitas and a new Vice-Chair, Laura Allen. Emma Karlan has been on the Board for many years and the chair of the Actuary Committee since 2005. Laura Allen is profiled in the Committee Chairs article. Many thanks to the previous Chair for all her hard work - - Julie Carter, Assistant to the City Manager, City of Dublin.

Larry Anderson, Burlingame City Attorney and former ABAG PLAN Board Chair, is retiring. Mr. Anderson has been very involved with ABAG PLAN over the years and we want to extend our appreciation for his efforts and congratulations on his upcoming retirement.

## Spotlight ON: Committee Chairs

This is the first in a series highlighting ABAG PLAN committee chairs. **Laura Allen, ABAG PLAN Risk Management Committee Chair** and Board Vice Chair, Assistant City Manager, Town of Colma.

Laura Allen is the assistant city manager for Colma and is responsible for risk management, IT, emergency preparedness, and for providing support to the City Manager and associated policy issues. She was previously with the City of Berkeley as the Lead Administrator in the Planning Department and a Senior Management Analyst.

Initially Allen did not know much about risk management and wanted to get more “hands on” information and to learn more about the pool. She joined the Committee about two years ago and now is the Committee Chair.

She commented on the benefits of serving on the Risk Management Committee, “Being on a committee helps me to really focus on risk management for the Town. I hear what other members are doing and have learned a lot from the membership. Colma participated in the risk management survey, as did the other members, but we took advantage of another follow-up survey. Only three or four member cities participated. The survey highlighted an area that we needed to work on and as a result we have developed a public information program through our internal Safety Committee.”



The Town of Colma has used ABAG PLAN grant money to:

- Put video cameras in police cars, with all police cars having a camera by the end of the year.
- Send staff to emergency preparedness training conducted by State OES.
- Implemented AED policy and installation.

According to Allen, Colma is also looking at using grant money to refurbish a set of ADA compliant doors at the main community center.

When asked what she would say to other members about ABAG PLAN, she said, “Getting involved is the best way to ensure the PLAN’s success. As a participant, you and your community will have a direct say in the decisions that will shape ABAG PLAN’s future.”

Watch for the next installment profiling another ABAG PLAN Committee Chair.

### Police Excessive Force Case Goes to Trial

A recent court case re-affirms the benefits of having ABAG PLAN on your side. A plaintiff claimed race-related action and police excessive force against a East Palo Alto officer and was asking for \$5 million in damages.

The case was tried in San Francisco federal court. After two and a half weeks of presentations, the jury found in favor of the defendant after an hour and a half of deliberation. Counsel for the City, Jeff Vucinich, attorney at Clapp, Moroney, Bellagamba and Vucinich, commented, "The high level of cooperation from the officers and the police chief really made the difference in the case's decision. It (the decision) was a credit to the City of East Palo Alto."

*Discussion cont. from front page*

In evaluating coverage, members will address the following questions:

- Do members want to maintain the current rationale for managing inverse claims?  
If not, what should change?
- Do members want to expand and/or restrict liability' coverage for any other risks?
- Is ABAG PLAN missing any risks that should be covered?

*Julie Carter, Dublin; Kristi Chappelle, Foster City; Jim Steele, South San Francisco; and Larry Anderson, Burlingame prepared and made the special presentation on June 11th.*

#### Loss Sharing

A key question for any pool is defining the extent that members share losses arising from covered risks. This is especially important when determining what a member may owe or be owed in the event of withdrawal from the pool or if the pool was to cease providing coverage and eventually close.

ABAG PLAN staff has analyzed a number of different loss sharing options and is preparing to present to the members for review and discussion. The evaluation criteria selected favors stable long term loss sharing options.

#### Dispute Resolution

The other important question to be addressed is determining a process for dispute resolution over coverage

This decision was important because it represented a potentially large payout for ABAG PLAN, involved an injury, and included a claim of racially motivated action. Jury members commented that they believed the defendant and they hoped he could get his life back on track.

According to Vucinich, "this is an unusual comment from a jury."



and loss sharing. The Board of Directors approved a Claim Policy, amended in 2004, to include a process for determining coverage and resolving disputes. Members can appeal a coverage decision made by Staff or Counsel to the Claims and Executive Committees and then to the full Board of Directors. Any appeal from the Board's decision is limited to binding arbitration.

Members will be asked to decide if this process for resolving coverage disputes should remain in place and/or extended to other areas such as the loss and premium allocation formulas. Other options include resolving in court or resolving by decision of the Board, with no appeal except in limited circumstances. Depending on how members answer that question, new governing documents may need to be presented to member councils for approval.

#### Next Steps

As a stop-gap measure, a revision to the inverse exclusion in the MOC was passed at the June 11th Board meeting. This decision is discussed in the Coverage Corner article on page 2.

ABAG PLAN needs all members' participation in this important conversation. You are invited to participate in a workshop to be held in either August and September 2008 in your city or town. The next Board of Directors meeting is set for October 22, 2008, and you will be asked to make decisions on these issues at that time.

For more information, please contact Marcus Beverly, ABAG PLAN Risk Manager, [marcusb@abag.ca.gov](mailto:marcusb@abag.ca.gov), or 510-464-7969.

## New Ruling on Dangerous Conditions

Under California law, a governmental entity may be sued for an injury caused by a dangerous condition of its property. The statute creating that liability sets forth certain requirements. An affirmation by the California Supreme Court in *Thomas Metcalf v. County of San Joaquin* clarifies the standards for proving a dangerous condition of public property and the facts that a public entity must show to establish a defense. Under these standards, it will be much more difficult for plaintiffs to establish such a case.

The case involved an auto accident at an intersection in San Joaquin County. Thomas Metcalf sued the County for damages alleging that the intersection was in dangerous condition.



Under appeal, the Court stated that public entity liability is statutory. To establish public entity liability for injuries caused by a dangerous condition of its property, one of the

*Eileen cont. from page 5*

The risk management activities, training for all – examiners and the members, and the expanded training courses have really made a difference in the pool.”

When asked about what she is going to do next, Eileen laughed and immediately said, “Never use an alarm clock again,” and then talked about her five grandchildren and one more on the way.

She also has plans to travel to Germany, Israel, and England in 2009 without worrying about being back in time or running out of vacation time. Eileen has done volunteer work for both the League of Women Voters and the Democratic Party, which she says, “Now it won’t have to be done on weekends or evenings.”

Eileen is watching the days on her countdown clock, and

following must be proved:

- A negligent or wrongful act of an employee of the public entity within the scope of his employment created the condition

OR

- The public entity had actual or constructive notice of the dangerous condition a sufficient time before the injury to have taken measures to protect it against that condition.

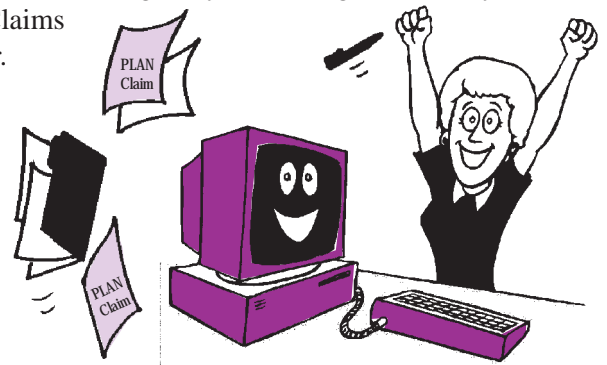
The Court also noted that an affirmative defense is available to the public entity under a separate Government Code section. Under this standard, the public entity may defend on the basis that, because of financial or political constraints, the public entity is not able to accomplish what reasonably it should accomplish.

The Court concluded that negligence under the dangerous condition statute requires the plaintiff to establish the public entity’s conduct was unreasonable or that they had notice. If the plaintiff carries that burden, the public entity may defend by showing it acted reasonably in light of the practicability and cost of pursuing alternative courses of action.

*As discussed in Low, Ball & Lynch’s Weekly Law Resume, February 28, 2008 Issue*



says that “as of today it is 175 days until the big day.” “Eileen’s retirement is a mixed bag. She has worked hard for many years and deserves to retire. However, her co-workers, employees in the agency and the members she serves will miss her greatly.” said Angela Salsbury, ABAG PLAN Claims Manager.



## Meeting Schedule 2008 - 2009

**All meetings are at ABAG's offices unless noted.**

**9/24/08**

Risk Management Committee  
10:00 a.m. to 1:00 p.m.

**10/22/08**

Board Of Directors  
9:30 a.m. to 4:30 p.m.  
San Mateo

**1/29/09**

Claim Committee  
10:00 a.m. to 1:00 p.m.

**2/26/09**

Police Chief Steering Committee  
10:00 a.m. to 1:00 p.m.

**3/18/09**

Finance Committee  
10:00 p.m. to 1:00 p.m.

**4/15/09**

Risk Management Committee  
10:00 a.m. to 1:00 p.m.

**4/29/09**

Actuary Committee  
10:00 a.m. to 1:00 p.m.

**5/13/09**

Executive Committee  
10:00 a.m. to 1:30 p.m.

**6/11/09**

Board Of Directors  
11:30 a.m. to 4:30 p.m.  
TBD

*News and Notes cont. from page 3*

### ***ADA compliance***

A consultant is currently assessing all facilities and evaluating ADA compliance for Campbell and Cupertino.

### **Other Updates**

#### ***New aquatic operational practices***

Operational Best Practices are available online. In addition, nine members have taken advantage of aquatic audits. Audits are offered by Jim Wheeler at 925-788-4951 or [swimnjim@hotmail.com](mailto:swimnjim@hotmail.com).

#### ***Sidewalk ordinance update***

Foster City, Benicia, and San Mateo have adopted the "best practice" sidewalk ordinance. Best Practice Ordinance is available at <http://www.abag.ca.gov/plan/rmm/rmm/sibp/Best%20Practices.pdf>

### **Event Checklist**

This checklist and event evaluation tool was developed to assist ABAG PLAN members anticipate and reduce the uncertainty involved in special events planning and execution. Several members have used the checklist with great success.



### **Urban Forest Management**

Do you have procedures in place? Recent tree limb damage hit the news and the stories included: "Killer tree was flagged as danger" and "Woman dies, hit by tree limb..." You can ensure that your city or town is prepared.

The ABAG PLAN website offers many resources for urban forest management.

Risk management information is available at [www.abag.ca.gov/plan/members/mn-bp.html](http://www.abag.ca.gov/plan/members/mn-bp.html) and scroll for topics or contact Gerruda Luermann at [gerturudal@abag.ca.gov](mailto:gerturudal@abag.ca.gov).