

CITY OF PASADENA

MEMORANDUM

To: Honorable Mayor and Members of the City Council
From: Michele Beal Bagneris, City Attorney *MBB*
Re: Gold Line Phase II Joint Powers Authority Agreement
Date: April 19, 2004

Summary

If the City of Pasadena wishes to participate as a dues paying member of the Gold Line Phase II Construction Authority with liability which has been managed to the greatest extent feasible without carving out special language applicable to Pasadena, the City Council should consider Amendment Number Two, attached as Exhibit 1. Another approach for limiting liability would require virtually a complete restructuring of the Joint Powers Authority from the potential scope of activity implied by its name as a "Construction Authority." There are also some possible approaches to further limiting liability which would require Pasadena-specific language as discussed below.

I. Background

At the City Council meeting of August 18, 2003, the Council directed the City Attorney to present a proposed revised Joint Powers Authority Agreement ("JPA Agreement") at the meeting of September 8, 2003. Based on council direction, at the September 8th council meeting, the City Attorney's Office presented a color coded JPA Agreement reflecting proposed changes directed by the council. At that time, it was proposed that Pasadena, like Los Angeles, the MTA and South Pasadena, not pay dues and, therefore, have its liability limited to the level of contribution (i.e., zero). The minutes of the meetings of August 18 and September 8 are attached as Exhibit 2; the color coded JPA Agreement presented at the September 8 meeting is attached as Exhibit 3. The September 8 minutes reflect the respects in which the council proposed that the JPA Agreement be amended.

The executed JPA Agreement has been provided by the San Gabriel Valley COG (attached as Exhibit 4). We note that the JPA Agreement does not include any of the changes adopted by the City Council at the September 8 city council meeting. We also note that the scope of the JPA Agreement enables the Authority to design and construct Phase II and to incur liabilities and obligations in doing so. The following cities have approved and executed the JPA Agreement:

Arcadia, Glendora, San Dimas, South Pasadena, Monrovia, Irwindale, Duarte, Claremont, Azusa, LaVerne, and Pomona.

Amendment I to the JPA Agreement adds the San Bernardino Association of Governments ("SANBAG") as a member instead of the San Gabriel Valley COG. Amendment I to the JPA Agreement was executed by SANBAG and the same entities that approved and executed the JPA Agreement (attached as Exhibit 5).

At the City Council meeting on April 12th, the City Council directed the City Attorney to prepare proposed language to limit use of dues to specified purposes, and to clarify and/or limit the extent to which Pasadena and other members of the Authority are exposed to financial liability. We have consulted with Joe Silvey, attorney for the JPA, in an attempt to further the City Council's goals in a manner acceptable to members of the JPA. While Mr. Silvey, of course, cannot make representations as to how the members may vote with respect to the City's proposed amendments, he offered comments regarding possible language and provided some background information clarifying the history and intent of some of the language in the JPA Agreement.

II Proposed Amendment Two

A proposed Amendment Two to the JPA Agreement is attached as Exhibit 1 for Council's consideration. The proposed language amending Section 29e would limit the use of dues to advocacy, public education, insurance and other administrative costs. Mr. Silvey indicated that the originally proposed language of the JPA Agreement limited use of dues to these purposes but the language was later expanded. Based on comments made at last Monday night's council meeting, it appears that at least some of the members believe that it is appropriate to again provide for such limitation on the use of dues. Amendment Two reflects this change. Amendment Two also reflects that all members' liabilities are limited to their dues contributions. The legal effect of this change is discussed in the next section.

III Liability

A. General Liability of Agency Members for Joint Powers Authority Obligations

Joint powers authorities are created under authority of state law. California Government Code Section 6508.1 provides that the debts, liabilities and obligations of a joint powers authority are shared by the constituent members "unless the JPA agreement specifies otherwise." Thus, absent a provision in a JPA agreement, each member agency would share in liabilities incurred by the independent legal entity which is created by the joint powers JPA agreement. In practice, joint powers JPA agreements are not silent as to member agency liability. Joint powers JPA agreements typically are written to limit member agency liability as much as possible. A standard provision exempts a member agency from contractual liability for contracts entered into by the Authority. The courts have upheld this type of provision (Tucker Land Company v. State of California (2d Dist. 2002) 94 Cal.App.4th 1191, 114 Cal.Rptr.2d 891).

Member agency liability is more problematic as to tort liability. The JPA agreement should require

the authority to maintain insurance to cover not only its liability, but also the derivative liability of its member agencies. Insurance proceeds furnish the first source of funding for the Authority's tort liabilities. However, to the extent insurance and other available assets of the Authority are insufficient to satisfy a tort liability, the member agencies would likely have legal responsibility to make up the shortfall.

While member agencies may not be able to fully immunize themselves against third party tort liability arising from authority operations, they may attempt to reduce or eliminate their individual allocation of liability by negotiating terms into the joint powers JPA agreement. For instance, the JPA agreement may provide that one or more members would not have the same proportion of liability (or any liability) for obligations of the authority as other members would have. Possible approaches to member liability limitations are discussed below.

B. Member Liability Provisions of the JPA Agreement

The key provisions of the JPA Agreement respecting agency member liability for torts or contracts of the Authority are as follows:

1. Section 17: To the extent allowed by law, the debts, contract liabilities and obligations of the Authority are its responsibility and not member agency liabilities.
2. Section 18a: The Authority shall obtain insurance for its activities and name the agency members as additional insureds. Contracting parties are required to defend and hold members and the Authority harmless.
3. Section 18b: The Authority shall defend, indemnify and hold harmless, the agency members from claims arising from the Authority's operations.
4. Section 26a: A member agency shares in the obligations, liabilities or costs of the Authority "in proportion to the obligation of the Member to participate in the funding of the Authority."
5. Section 29a: Other than the MTA, SGVCOG (now SANBAG), South Pasadena and Los Angeles, members are required to pay dues and "participate in the funding of the Authority". The MTA, SGVCOG (now SANBAG), South Pasadena and Los Angeles are not required to pay dues and have no "obligation to participate in the funding of the Authority."

C. Possible Approaches to Liability Limitations

The most certain way to assure limited liability for all members is to limit the scope of the Authority in a manner narrower than the powers set forth in Section 4 of the JPA agreement as, presumably, the narrower the scope of activity of an organization, the narrower the scope of potential liability becomes. However, it appears that some or all of the members desire to have a broad scope for the Authority as reflected in Section 4, for instance in contracting for the planning, design and construction of Phase II. Thus, narrowing the scope may require a renewed policy discussion among the Members of the Authority. Starting with its name as a "Construction Authority" through provisions in the JPA Agreement allowing property acquisition and issuance

of bonds secured by pledges of "funds to be available for the design and construction of the Gold Line Phase II," and other similar provisions, it is the expressed intent of the parties that this Authority might serve as the body which constructs the Blue Line Phase II. Limiting the scope of the Authority would require numerous changes to the JPA Agreement.

A second way to limit liability, as the JPA Agreement treats L.A., South Pasadena, the MTA and SANBAG in Sections 26a and 29a, is to exempt specified entities from paying dues or funding the Authority's obligations. This does not limit the liability of all members, but only the liability of those specified. (See Discussion under IVb, below).

Another way is to limit liability to the amount of dues paid by each member. However, this creates a problem if the obligations of the Authority exceed the funds available to the Authority. Were the amount of dues collected by members to be less than the amount required to satisfy all obligations of the Authority, the Authority may have no choice but to collect from members to cover any gap in funding.

As to any language which limits the liability of all members, there is a question as to enforceability with respect to a third party tort liability. Given the provision of insurance and the apparent likely operations of the Authority, the risk of residual tort liability is probably remote. However, it is likely limiting contractual liability would be enforceable.

IV Possible Amendments to the JPA Agreement:

a) Limit all members' liability to the amount paid in dues (Exhibit 1).

Proposed language: Amend Section 26a to read as follows: A Member may not withdraw from the authority and shall each year be responsible for any Annual Dues, as defined in Section 29c of this Agreement. *To the maximum extent permitted by law, a Member shall be responsible only for obligations, liabilities and costs of the Authority which arise from activities which are supported by Initial or Annual Dues. To the maximum extent permitted by law, a Member's financial responsibilities for any and all obligations, liabilities and costs of the Authority shall be limited to, and shall in no event exceed, the amount of Initial and Annual Dues paid by that Member over the life of this Agreement.*

Pro: The JPA agreement clearly provides the limits of liability.

Con: There may be a problem with sources of funding if the Authority's obligations exceed amounts received for dues. A court may pierce the veil of the Authority to secure contributions from members, at least with respect to possible tort claims, and perhaps with other responsibilities.

b) City of Pasadena pay an amount equal to dues paid by each member, but limit Pasadena's liability in the same manner as non-dues paying members.

Proposed language: Amend Sections 17, 26a and 29a as follows:

"17. Obligations of Authority and Members. To the extent allowed by law, the debts,

contract liabilities and obligations of the Authority shall be the debts, contract liabilities or obligations of the Authority alone. Further, and also to the extent allowed by law, no Member of the Authority shall be responsible, directly or indirectly, for any obligation, debt or contract liability of the Authority. A Member's share in the obligations, liabilities and costs of the Authority shall be calculated in proportion to the obligation of the Member to participate in the funding of the Authority. To the maximum extent permitted by law, Members who are not required to pay dues pursuant to Section 29 shall not be liable, and shall be indemnified and held harmless from the debts, liabilities and obligations of the Authority and from the debts, liabilities and obligations of the other Members relating to the Authority. (Same as orange from September 8th meeting)

"26 a. Withdrawal not Permitted. Limitation on Liability. A Member may not withdraw from the Authority and shall each year be responsible for any Annual Dues, as defined in Section 29 c. of the Agreement and for its annual share of any and all obligations, liabilities or costs that are the responsibility of the Authority. A Member's share in the obligations, liabilities and costs of the Authority shall be calculated in proportion to the obligation of the Member to pay Annual Dues."

Add to end of 29a.: "Notwithstanding any provision of this JPA Agreement to the contrary, the City of Pasadena may, without incurring financial responsibility or obligation to pay Annual Dues or for any annual share or other share of obligations, liabilities or costs that are the responsibility of the Authority or any member, make a monetary payment to the Authority in the same manner and in the same amount as provided herein for Annual Dues. This shall not be construed as a requirement to participate in funding of the Authority. Upon making such payment, the City of Pasadena shall be entitled to exercise all rights and privileges of a Member for that year."

Pro: The City's potential liability exposure would be equal to the Phase I entities, which envisions no liability. As a contributor, the City would be a voting member and full participant as other members.

Con: The City does not have the same risk of liability as other members and this may not be acceptable to other members.

c) Do not amend the existing language regarding liability.

Pro: The language has already been approved by all members of the Authority. There is a requirement for insurance and provisions for contracts entered into by the Authority for indemnification for members, all which are designed to protect the members.

Con: The language of Section 26c that the members are responsible for the "annual share of any and all obligations, liabilities or costs that are the

responsibility of the Authority", while seemingly narrowed by language in Section 17 attempting to limit liability "to the extent allowed by law," leaves open the possibility for members' liability for obligations beyond the resources of the Authority.

- Attachments: Exhibit 1 - Proposed Amendment No. 2 to JPA Agreement
Exhibit 2 - Minutes of Pasadena City Council meetings of August 18, 2003 and September 8, 2003
Exhibit 3 - Color coded JPA Agreement (presented at September 8 meeting)
Exhibit 4 - Executed JPA Agreement
Exhibit 5 - Executed Amendment No. 1 to JPA Agreement

AMENDMENT TWO
JOINT EXERCISE OF POWERS AGREEMENT
GOLD LINE PHASE II CONSTRUCTION AUTHORITY

This Amendment Two to the Joint Exercise of Powers Agreement for the Gold Line Phase II Construction Authority (“Amendment Two”) is approved and executed by the current members of the Gold Line Phase II Construction Authority as set forth in Exhibit 1-A, attached hereto, and each of which must approve and execute this Amendment Two in order for Amendment Two to be effective. This Amendment Two is also approved and executed by the City of Pasadena, which approval and execution shall allow the City of Pasadena to become a member of the Gold Line Phase II Construction Authority should all of the current members listed in Exhibit 1-A approve this Amendment Two.

WITNESSETH:

The parties hereto do agree as follows.

Section 1. Recitals. This Amendment Two is made and entered into with respect to the following facts:

a. The Gold Line Phase II Construction Authority (the “Authority”) was formed pursuant to Section 6500 *et seq.* of the Government Code to enable its member cities and agencies to participate as fully as is necessary and appropriate in the planning, funding, design and construction of the Gold Line Phase II light rail project (“the Gold Line Phase II”);

b. The City of Pasadena has asked to join the Authority in order to work cooperatively with the Authority and its member cities and agencies to complete the Gold Line Phase II including a possible extension to the City of Montclair;

c. The City of Pasadena has agreed to pay dues and assume other required financial responsibilities as a condition of its membership in the Authority consistent with and as limited by this Amendment Two.

Section 2. Terms Remain in Effect. All terms of the Joint Exercise of Powers Agreement for the Gold Line Phase II Construction Authority (the “Agreement”) that are not deleted or amended by this Amendment Two remain fully in effect and the execution of this Amendment Two by each of the parties hereto signifies approval and acceptance of the Agreement as modified by this Amendment Two.

Section 3. Change to Section 18a. The following sentence is added to the end of Section 18a of the Agreement.

"In addition, the Authority shall require that all parties with whom the Authority contracts both agree that the sole responsibility for payment under the contract is the Authority's and, to the maximum extent permitted by law, agree and covenant not to sue any Member of the Authority for any claim, dispute or action arising out of any contract with the Authority."

Section 4. New Section 26a. Section 26a of the Agreement is deleted in its entirety and replaced with the following new Section 26a.

"a. Withdrawal not Permitted, Limitation on Liability. A Member may not withdraw from the authority and shall each year be responsible for any Annual Dues, as defined in Section 29c of this Agreement. To the maximum extent permitted by law, a Member shall be responsible only for obligations, liabilities and costs of the Authority which arise from activities which are supported by Initial or Annual Dues. To the maximum extent permitted by law, a Member's financial responsibilities for any and all obligations, liabilities and costs of the Authority shall be limited to, and shall in no event exceed, the amount of Initial and Annual Dues paid by that Member over the life of this Agreement."

Section 5. New Section 29e. Section 29e of the Agreement is deleted in its entirety and replaced with the following new Section 29e.

"e. Use of Dues. Members' Annual Dues shall be used only for project advocacy and public education concerning the Gold Line Phase II and for insurance and other administrative costs of the Authority in support of project advocacy and public education."

Section 6. Effective Dates. The effective date of this Amendment Two shall be the first date on which each of the current members of the Authority, as listed in Exhibit 1-A, shall have approved and signed this Amendment Two. The effective date of the City of Pasadena's membership in the Authority shall be the first date on which each of the current members of the Authority and the City of Pasadena shall have approved and signed this Amendment Two.

Section 7. Counterparts. This Amendment Two may be executed in several counterparts, and all counterparts so executed shall constitute one Amendment Two, binding on all the parties hereto, notwithstanding that all of the parties are not signatory to the original or same counterpart.

The current members of the Authority and the City of Pasadena have caused this Amendment Two to be executed on their behalf, respectively, as follows:

Mayor/Chief Executive Officer/
Executive Director

ATTEST

City Clerk/Secretary

Date