

# **STAFFING OF GEOLOGIC HAZARD ABATEMENT DISTRICTS**

## **PREPARED BY THE CALIFORNIA ASSOCIATION OF GEOLOGIC HAZARD ABATEMENT DISTRICTS**

October 2011

This white paper addresses staffing of Geologic Hazard Abatement Districts (“GHADs”). A GHAD Board of Directors (“Board of Directors”) must appoint a clerk of the district and treasurer of the district and may also appoint other officers. Over the lifetime of a GHAD, the Board of Directors or other officers of the GHAD will hire parties to provide services to the GHAD. In this paper the positions of GHAD Clerk, Treasurer, Manager and Attorney are discussed in some detail. In addition, potential liability issues are discussed in relation to hiring city or county employees to perform GHAD services.

### **Clerk and Treasurer of the District**

As one of the duties of the GHAD Board of Directors (“Board”) it must appoint a clerk and a treasurer for the district (Public Resources Code Section 26584 and 26585). The California Association of GHADs is aware of Boards of Directors that have appointed the clerk of the local formation agency as the GHAD clerk when the legislative body appoints itself as the GHAD Board (use of the city clerk to act as the GHAD clerk).

For most GHADs, a private GHAD clerk and treasurer fulfill the duties of these officers. In these cases, the Board’s decision to use a private clerk and treasurer was based in part on a discussion of the potential liability issues as discussed below.

### **GHAD Manager, Attorney, and Additional Staff**

In addition, Public Resources Code Section 26586 allows the Board to appoint other officers and delegate powers to these officers as appropriate to the GHAD's circumstances. In virtually all GHADs, the Directors appoint a GHAD Manager with the authority to perform the day-to-day operations of the GHAD. In some cities, a member of the city staff, usually from the Public Works Department, acts as the GHAD Manager. The city employee acts as the GHAD manager through the use of a contract or Joint Powers Agreement which may also allow the use of other city employees to provide GHAD services. Importantly, public-agency staffs who also serve as GHAD staff should be clear about the distinction and, when serving a GHAD, represent the interests of the GHAD.

In most GHADs, the Boards have determined that it is in the best interest of the GHADs that public agency staff are not, and should not, be involved in GHAD operations including the GHAD Attorney. The position taken by the GHAD Board for the City of Oakland GHADs is discussed in more detail below.

## Liability Issues

There are few court decisions that provide guidance regarding GHADs, their structure, authority, and liability issues associated with them. There are no cases that address liability issues with respect to GHADs; therefore, it cannot be concluded with absolute certainty how a court would rule on the question of the extent to which a public agency is responsible for a GHAD's liabilities. Because a GHAD is an independent governmental district, legally distinct from the City or County, the local legislative body should not be liable for the GHAD actions/inactions that are independent of the City/County. However, the potential risks of City/County liability would increase to the extent that the City or County undertakes GHAD-related functions. As a result, in forming a GHAD, the preferred practice is to specify in the GHAD formation resolution that the GHAD will be responsible for hiring its own staff (or contract with non-City/County parties), including all workers who will undertake operation, maintenance, replacement, repair and other activities, and that no City/County employees will be relied upon to perform such services. GHAD operations should be completely independent of the City/County, including, without limitation, no City/County funding, administration or ownership of facilities or improvements. In addition, adequate funding for these costs must be fully provided for in the GHAD budget and in the assessment authorization.

Because a GHAD is a separate political subdivision of the state, not an agency or instrumentality of the city or county in which it is formed, even if the Board of Supervisors sits as the Board of Directors of a GHAD, the City/County generally would not be liable for actions or inactions of the GHAD or its Board. In analyzing the extent of the City's/County's potential liability associated with GHADs, we have reviewed case law that addresses the question of the liability of a governmental body, such as the Board of Supervisors, for the liabilities of another governmental body that the Board forms. In general, the question of liability of separately formed governmental bodies hinge on the extent to which the body is truly separate and distinct from the body that created it, or as one court put it, whether or not the one entity enjoys a "legal personality" separate from the body that formed it. *Bauer v. County of Ventura*, 45 Cal. 2d 276 (1955).

A reviewing court will look not only at the Council's/Board of Supervisor's action to form a GHAD but at the *true independent nature* of the district. A district's independence is determined by analyzing such factors as: (1) whether there is an express statutory declaration that the district is a body corporate and politic; (2) whether the district has a separate governing body; and (3) whether it has the statutory power to own property, levy taxes, or incur indebtedness in its own name.

City/County/GHAD independence could become diluted over an extended period during which the Council/Board of Supervisors serves as the governing body of the GHAD. For example, the extent to which (1) the Council/Board of Supervisors includes City/County staff in the activities of the GHAD, (2) the Board of Supervisors enforces County policies through the meetings and activities of the GHAD, and (3) City/County/GHAD functions are interwoven will affect the likelihood that a court would conclude these entities are "independent." Over time, the more that a GHAD operated by the Council/Board of Supervisors takes on a City/County- run affair, the greater the probability that any protection the City/County obtains by creating an independent government body could be eroded. In addition, the interests of the City/County and the GHAD

may not always be aligned, and individuals serving both may be conflicted when performing their duties.

### **An Example of Forming a GHAD – City of Oakland**

To date, the City of Oakland has created two GHADs. In 2005, the Leona Quarry Geologic Hazard Abatement District was created and in 2006, the Oakland Area Geologic Hazard Abatement District was created. The Leona Quarry GHAD was created for the development on the former Leona Quarry site and the Oakland Area GHAD was created for the Sienna Hills development and to take in future “smaller” development projects in the City.

The City of Oakland was concerned that the GHAD may create potential liability for the City, especially since the GHAD Board members would be the same individuals serving on the City Council. In order to minimize potential liability, the City established a process to clearly demonstrate that the GHAD was a separate and independent body from the City Council. Specifically, the City requires that the GHAD’s formation resolution specify that it will be responsible for hiring its own staff (or contract with non-City parties), including all workers who will undertake operation, maintenance, replacement, repair and other activities, and that no City employees may perform such services. The GHAD operations are completely independent of the City, including, without limitation, no City funding, administration or ownership of facilities or improvements. Adequate funding for these costs is fully provided for in the GHAD budget and in the assessment authorization.

While the GHAD Board consists of members of the City Council, the GHAD Board appointed an independent GHAD Treasurer/Clerk, GHAD General Manager and GHAD Attorney. These GHAD officers are not employees of the City. Oakland City staff does not work on the GHADs and if the City is asked any question regarding a GHAD, that question is immediately referred to the GHAD attorney.

At GHAD Board meetings, the City Attorney removes himself or herself from the dais and City staff does not prepare or present the staff report. Rather, the GHAD Attorney, Treasurer/Clerk and General Manager sit at the dais and present the staff report. GHAD Board meetings are agendized as a separate meeting and all actions are clearly taken by the City Council acting as the GHAD Board. The GHAD Attorney also prepares the agenda for and minutes of the meeting.

In conclusion, in order to protect itself from liability to the extent possible, the City Council established GHADs that do not and cannot rely on City resources for operation, maintenance, repair or any other functions. The City recognized that the extent of City liability increases in proportion to the amount of control and involvement it has with the GHAD. So, the City’s control and involvement in GHADs is absolutely minimized.

Disclaimer: The materials provided are for informational purposes only, and are not offered as, and do not constitute engineering or legal advice or legal opinions and do not form a professional services relationship. Due to the changing nature of this area and the importance of individual facts, readers should not act or rely upon the information without seeking the advice of a lawyer. For more information please contact the California Association of Geologic Hazard Abatement Districts. Haley Trindle @ (925) 230-9544