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When Disaster Strikes: What will your city be expected to do
and defending Municipalities against disaster related claims

**WHEN DISASTER STRIKES: WHAT WILL YOUR
CITY BE EXPECTED TO DO?**

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On September 9, 2010, at 6:11 p.m., a 30" natural gas transmission line owned by PG&E exploded in San Bruno. The explosion, which occurred in a single-family residential neighborhood known as "Glenview," burned eight people alive, injured scores of others, and destroyed or damaged dozens of homes. It left a crater that was 167' long, 27' wide, and 40' deep.

This paper explores the legal and policy issues that any city would have to confront in responding to a disaster or emergency. While some of these issues are unique to human-caused disasters, some apply equally to natural disasters. In either case, your city will need to be prepared to deal not only with the immediate aftermath and short-term impacts of the incident, but also the often-surprising medium- and long-term expectations of your residents and elected officials.

I. What qualifies as a disaster or emergency?

At first glance, this appears to be an easy question: a gas explosion, an earthquake, or perhaps an electrical substation that provides power to the whole city taken out by criminals. In California, Government Code section 53019 declares that "...the control of fires and dangerous conditions caused by great public calamities is a matter of statewide concern and interest to all inhabitants and citizens." Government Code section 53021 provides that "Services performed or expenditures made by a local agency within or without its territorial limits are conclusively deemed for the direct protection and benefit of its inhabitants and property if made or performed for..." a military emergency, national or local defense, or "a local emergency as defined in subdivision (c) of section 8558." That section states:

(c) "Local emergency" means the duly proclaimed existence of conditions of disaster or of extreme peril to the safety of persons and property within the territorial limits of a county, city and county, or city, caused by such conditions as air pollution, fire, flood, storm, epidemic, riot, drought, sudden and severe energy shortage, plant or animal infestation or disease, the Governor's warning of an earthquake or volcanic prediction, or an earthquake, or other conditions, other than conditions resulting from a labor controversy, which are or are likely to be beyond the control of the services, personnel, equipment, and facilities of that political subdivision and require the combined forces of other political subdivisions to combat, or with respect to regulated energy utilities, a sudden and severe energy shortage requires extraordinary measures beyond the authority vested in the California Public Utilities Commission.

Three aspects of this section are noteworthy. First is the breadth of the definition of a "local emergency," which lists "such conditions as..." That means the list is non-exclusive. Second is the fact that the definition is a function of whether the conditions "...are or are likely to be beyond the control of the services, personnel, equipment, and facilities of that political subdivision." That means an emergency in one city may or may not qualify as an emergency in another city. It also means that the extent of a city's discretionary response to an emergency may factor into whether an emergency actually exists. Third is the absence of any geographic extent

in the definition. The condition need not be widespread, all-encompassing, or affect a large number of people.

A. Emergency, public nuisance, or both?

This raises an interesting question: how does the definition of a “local emergency” differ from that of a public nuisance? California Civil Code section 3480 states: “A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal.” A recent case defined a public nuisance as substantial and unreasonable offense against, or interference with, the exercise of rights common to the public. (*County of Santa Clara v. Atlantic Richfield Co. (2006) 137 Cal.App.4th 292*) That case went on to define “substantial” as causing significant harm and “unreasonable” if its social utility is outweighed by the gravity of the harm inflicted. Your local city code may have a similar definition.

While the annotations to section 3480 contain dozens of examples of public nuisances, many of those could also qualify, perhaps in some cases more easily, as a local emergency. No balancing test is necessary, no large number of people need be affected, and no public rights need be infringed. When a Bay Area refinery caught fire, spewing noxious fumes into the air and sending thousands to the hospital, it became both a public nuisance and a local emergency. When a chemical company contaminated a city’s drinking water, it was definitely both. A much smaller or more localized incident might have been classified as a local emergency but not a public nuisance. On the other hand, odors of roasted chilies from a hot sauce factory is probably not a local emergency, though it may be a public nuisance.

Every city has underground utility lines. It’s a good bet that the utility companies haven’t recently inspected, evaluated, maintained, or repaired them according to the standards set forth by the regulatory agencies. Ask yourself: isn’t this as much of a public nuisance as a dilapidated unoccupied building on Main Street? In fact, given the potential for death or serious bodily injury resulting from a utility line failure, and given that regulation of the utility is mostly beyond the control of the city, might this state of affairs qualify as a local emergency?

The legal remedies available for emergencies and public nuisances also differ. Your city’s code likely allows for inspection warrants, abatement of public nuisances, and enforcement of city and state codes with fines, penalties and legal action, all of which are broad powers. But once a city declares a local emergency, even broader powers kick in. The city can spend money making repairs without public bidding, and request financial assistance from the Federal Emergency Management Agency (FEMA) and its California counterpart CalEMA (see Exhibit 1, Resolution of Local Emergency).

B. Other consequences of declaring a local emergency

Consider also that a local declaration of emergency will be very persuasive if you have to ask a local court to provide some interim injunctive relief. For example, over three years after the San Bruno explosion, a memo written by a PG&E engineer was brought to the attention

of a neighboring city. The memo expressed concern about the operating pressure in a gas line in that city, warning that it could represent “another San Bruno.” Not surprisingly, the city council was outraged at not having known about the memo previously, and demanded action. A local emergency was declared, and the city attorney immediately requested an ex parte injunction from the Superior Court requiring PG&E to lower the pressure in the line until further studies could be completed. Despite the fact that the California Public Utilities Commission (CPUC) has exclusive jurisdiction over PG&E’s operations, the court nevertheless issued the order, which remained in effect until the CPUC held proceedings that ultimately restored the prior operating pressure. In this case, the “emergency” may have been more about the city’s lack of knowledge than any actual danger to the public, but the emergency declaration was both justified and useful.

Another consequence of an emergency declaration is the media attention that it will garner. This has advantages and disadvantages. Initially, the city can control the message by issuing a press release that explains the emergency, why it was declared, and what the city is doing about it. The city manager or mayor can hold a press conference, to potentially great effect in a media splash. But the next day, the media will start asking questions: Didn’t the city say it would do X? Wasn’t X supposed to happen yesterday? Why didn’t the city know about this earlier? Do you have all public records relating to the emergency declaration? The city will also attract the attention of other local, regional, or state politicians, all of whom have their own agendas that may or may not coincide with the city’s goals. As a result, before declaring a local emergency, make sure that your city has a scripted plan to deal with and respond to the inevitable questions; in many cases, a well-worded press release or well-orchestrated press conference can address and deflect these issues. Call the politicians in advance, let them know what you’re planning to do, and gauge their reaction. And if the outcome is positive, consider issuing another press release describing how the emergency was resolved due to the diligent efforts of the city council and the staff.

C. How long does an emergency last?

In California, a local emergency lasts as long as the city council says it does. Government Code section 8630(c) requires that the city council review the need for a local emergency at least once every thirty days until it terminates the local emergency. So long as the city council can make the findings, the emergency can continue (see Exhibit 2). San Bruno terminated its emergency declaration in February 2011, about five months after the disaster (see Exhibit 3).

If the city has declared a local emergency, but is also pursuing (or considering pursuing) legal claims against a potentially responsible party on a public nuisance theory, be sure to word the termination resolution carefully so as to not undercut those claims. The city can terminate the emergency based simply on not needing assistance from other jurisdictions, leaving open all of the other potential arguments in favor of a public nuisance.

II. **First Steps in Responding to an Emergency**

The immediate aftermath of an emergency is chaos. In the minutes following the San Bruno explosion, there were reports of an earthquake, a jet liner that had crashed, and a terrorist

attack. While the first responders responded brilliantly, as they are so well-trained to do, one of the first responses the city was called on to provide, literally minutes after the explosion, was information. What happened? Who was killed or injured, and how badly? Are people unaccounted for? Can anyone return to their homes? Are there temporary shelters? Who's to blame? The media will be on the scene in minutes.

The city attorney is in a unique position to guide the city through an emergency. While many other employees will be engaged in the immediate response to victims, the city attorney should step back, survey the big picture, and think strategically. This will provide invaluable assistance to city staff, management, and the city council in navigating the complex and difficult tasks to come.

A. Communication strategies: External and Internal

There are two problems with providing information to those outside the city about an emergency: when it's still happening, the information is usually wrong (or at best incomplete), and there are too many people providing it. However, the media will usually report virtually anything anyone says. The best remedy is to establish a single point of contact with the media, a task that's easier said than done. The city manager or public information officer is usually the best choice here, as they can acquire information from others, filter it, and disseminate it appropriately to all the media at the same time. That person should also: 1) instruct all employees to refer all requests for information to that person; 2) distribute a single phone number for updates; and 3) create a list of short, informative, and not overly detailed talking points for the elected officials to use when the media comes to them for comment.

One important communication principle that San Bruno implemented was that it avoided, at all costs, ascribing blame to anyone for the incident. It would have been very easy to do so; it was obvious soon after the explosion that the pipe that blew up was owned by PG&E. Management staff and the entire city council never strayed from the message that this was a tragic event, and that the appropriate government authorities would be conducting a thorough investigation into the cause. There were several advantages to this strategy. First, there was no reason to foment ill will with PG&E when the city and its residents were depending on them to cooperate with the first responders and city staff. Second, the media and trial attorneys were quickly blaming PG&E without the city having to do anything. Third, taking a neutral position in public made it difficult, from a public relations standpoint, for PG&E to blame the city in public for the incident. Fourth, it served the city well in the future negotiations with PG&E.

Internally, it's critical to appoint someone to oversee what staff is doing, otherwise you'll not only be responding to the actual emergency, but also the emergencies created by those trying to help. While the emergency responders have their own structure, other city employees will need to be assigned and deployed to assist with other tasks. Depending on the size of your city, it may make sense for someone other than the city manager, such as an assistant city manager or human resources director, to be in charge of internal staff management. San Bruno experienced the problem of staff volunteering to work long hours without much rest; it was hard

for them to leave the scene of an emergency. Someone needs to make them go home to sleep, while others take their place.

B. Immediate tasks while the first responders are responding

Every emergency is different, and every emergency response will therefore be different. But these are some things that San Bruno found to be helpful, both during the emergency itself and after post-emergency debriefs had been concluded:

1. Appoint specific staff members to:
 - a. interface with volunteers and NGOs like the Red Cross and other local organizations;
 - b. manage ancillary government organizations like the County Environmental Health Department;
 - c. ensure that city staff is rested, fed, and properly hydrated;
2. Establish separate staging areas for volunteers, the media, and staff;
3. Make sure police are on site for security;
4. Establish emergency shelters and staff them with personnel and supplies; order portable toilets
5. De-brief more frequently than you think is necessary;
6. Ensure city staff can be identified and distinguished from non-employees;
7. Set up a system for tracking the time of all city employees, both exempt and non-exempt, so they can be appropriately compensated and those costs can be recovered later.

C. Mutual Aid

The city will no doubt have mutual aid agreements in place, and this will be the time to use them. Make sure each agency is keeping track of its expenses, as those will be submitted to the City and then to FEMA and/or CalEMA (or their counterpart in your state) after the incident for reimbursement.

D. Is the city potentially liable?

It's not too soon to think about whether the city, or someone else, might have any liability for either the incident or some aspect of the aftermath. Now's the time to gather any relevant documents before the media starts in with its requests under your state's Public Records Act (PRA). Those documents will also be critical for determining the potential insurance coverage available and whether there might be other potentially responsible parties. In San Bruno, staff quickly gathered all documents from the public works department that reflected all work in the area of the explosion. As it turned out, a city contractor had done a sewer pipe-bursting project in the vicinity of the gas line several years before the explosion. We could anticipate that PG&E would blame the city for having done something to disturb their gas line, making it more susceptible to catastrophic rupture. The city was ready to counter that argument at the subsequent National Transportation Safety Board (NTSB) hearings when a national organization funded by gas companies alleged that the explosion was the city's fault. Eventually,

the NTSB found to the contrary, based partly on the city's expert who had carefully reviewed the sewer project and blast site before PG&E could fill up the crater and bury the evidence that favored the city. The NTSB found that the root cause was a defective pipe that PG&E had incorrectly identified in its records as seamless.

Think also about whether there's something the city didn't do. While state laws may provide immunities that protect cities from liability in these situations, lots of people can still sue for lots of money. The media won't care about the City's immunities and defenses; the media will just report the amount demanded in the lawsuit. Were appropriate permits issued for prior work in the area? Did citizen complaints about a potentially-contributing condition go unanswered before the incident? Did the city postpone a remedial project that might have reduced or eliminated the risk of the incident?

E. Insurance: What's Covered?

It's amazing how much you find out about how little your insurance covers after a disaster. While the discussion below is not comprehensive, it outlines the various policies that might be applicable.

The first order of business is to get a complete copy of all of the most current insurance policies that potentially cover the city. Many cities belong to risk pools, and so if you can't find the policies, one call to the risk manager should do it. Be sure to get primary as well as excess policies. Sit down with your broker or risk manager and go through them all, page by page. Note which endorsements are applicable to which policies. Then send every carrier or risk pool a letter notifying them of the incident. Unless you know a lot about insurance law, consider retaining an outside attorney who specializes in coverage.

Property damage policies cover damage to property owned by the city. Some of that property will be "scheduled," or listed specifically, with an insured value, like city hall. Other property is "unlisted" and will be covered by another limit, usually an aggregate limit. Streets, sidewalks, and other appurtenances are generally excluded from property coverage (but would be covered by the liability portion of the policy if there's third-party negligence). Not all unlisted property is created equal. There will be separate exceptions and exclusions applicable to various types of unlisted property. For example, San Bruno discovered that city trees damaged in the incident were covered, so long as we could specify which ones were planted by humans.

On the plus side, some property policies cover losses such as business interruption, lost revenue, and public relations costs. The city will likely end up rebating or crediting the cost of municipal services to residents affected by the disaster. For example, in a full-service city, there will be water and sewer revenue lost, and the city will be pressured to reduce or waive permit fees for rebuilding. Overtime will be incurred by non-exempt staff; exempt staff will work long hours. The finance department should set up a separate account for both hard and soft costs associated with the incident. In San Bruno, we developed a spreadsheet with every possible loss, which was regularly updated by staff in the finance department. It was very helpful to have all losses summarized in one place.

Liability policies cover damage or injuries to others caused by the city's acts. Work with the carrier or pool to assign outside counsel right away if your city doesn't have the in-house capacity. The assigned attorney can help you anticipate issues, retain experts to evaluate the incident (which will also protect the consultants' work from disclosure per the attorney work product privilege), work with staff to minimize exposure, and gather relevant documents.

F. Speaking of documents...

Almost immediately after the incident, requests under your state's Public Records Act (PRA) will come streaming in. The media will be first in line, and they'll want the sensational things immediately: 911 calls, and photos and video of the incident. The attorneys for the injured residents will follow, with requests for police and fire reports, as well as documents relating to any city work done in the vicinity. Next will be the attorneys for the private property insurance carriers whose insured property was damaged. On their heels will be representatives of other potentially responsible parties. These requests will arrive at random times, and will ask for different documents or combinations thereof. The requests may continue for months or even years after the incident.

The first order of business is to place a litigation hold on destruction of emails and other documents. The city doesn't want to be accused of having deleted documents related to the incident. Next, establish a single point of contact for all PRA requests, and that should probably be the city attorney's office. Set up a system so that all documents generated by anyone are copied and sent to you. It's critical for you to know the entire universe of documents. Then, follow your existing protocols for disclosure, or if you don't have such protocols, establish and implement them consistently. Everyone who asks for "all documents related to the incident" should get basically the same set of documents. Decide up front whether you're going to produce the 911 calls, for example. In San Bruno, there were local, state and federal officials from various law enforcement agencies on scene that were conducting a criminal investigation, so the city was able to defer producing police and fire reports until those investigations were concluded per California Government Code Section 6254(f), which exempts law enforcement investigative reports from disclosure. Also consider other exemptions that your state law might include, such as for drafts under GC Section 6254(a) (there can be several drafts of various official reports), personal contact information per GC Section 6255(a), the attorney client and deliberative process privileges that can shield any communications with both attorneys and consultants, the official information privilege per Evidence Code Section 1040, and of course the catch-all exemption under GC Section 6255.

Because documents produced in response to a PRA request are also documents that you might have to produce in response to a future subpoena, it is doubly important that you know exactly which documents were produced for which requestor. You may decide to retain a separate company or consultant to manage the documents, as well as potentially scanning and organizing them in a searchable database. While San Bruno decided against incurring that expense, that decision was partly informed by the fact that we correctly predicted that there would be no litigation filed either by or against the city.

One wrinkle in the San Bruno disaster was that the NTSB assumed primary jurisdiction over the investigation. While that process is beyond the scope of this paper, you should know that they will demand, and you will produce, every document to them as part of their investigation. Their rules require all documents to be kept confidential until they determine otherwise, at which time the documents from all parties are posted on their website. Thus, while some documents (such as official city council staff report, emergency declarations, and resolutions, for example) are clearly public and may already have been produced, many of the reports about the incident were not produced to the public until months after the incident because they were subject to NTSB document protocols.

G. Mental Health: Employees and Residents

It goes without saying that employees who respond to an emergency may suffer short-term or even long-term mental health issues. Experiencing the aftermath of a disaster is at best emotionally draining and at worst extremely traumatic. You should anticipate worker's compensation claims (whose costs should be reflected on your master spreadsheet), but in the meantime, be sure to encourage all employees to contact the city's employee assistance plan early and often. Many employees will be reluctant, especially in the face of the grave injuries or death suffered by the victims. It should be acceptable, and indeed encouraged, for employees to attend to their own mental health, so they can be as productive as possible in responding to the emergency. As it turned out, many employees in San Bruno deferred taking scheduled vacations or other time off, some for over a year following the incident. This was itself a significant burden.

In the immediate aftermath of the explosion, San Bruno created and implemented a unique program for residents: the human resources department identified several local mental health care providers and entered into contracts for them to provide services, paid for by the city (see how, below), for any resident affected by the disaster. The city's only involvement was in receiving and processing the bills from the providers. Those bills reflected only the name of the provider, the name of the resident, and dates of service. The services were well-utilized, but never abused, by many residents for over two years after the explosion. The good will that this program engendered in the community, and especially among the hardest-hit victims, was invaluable and paid dividends later.

III. Anticipating the city's needs, and the residents' expectations, in the short term

Responding to any emergency costs money, usually lots of money. Unless your city is fortunate enough to have an emergency reserve, the city will have to rely on its general fund, insurance coverage, and money from FEMA and CalEMA or your state's counterpart. The latter sources are set up to reimburse, not advance funds, which means that the city will foot the initial bill. The city will need right-of-entry agreements for most non-emergency work done on private property, and a sample is attached (Exhibit 4).

A. Tips and Pitfalls for dealing with the city's insurance companies and FEMA

By now, you've taken the advice to create a single spreadsheet with all possible losses. You're ready to tackle the separate problems of dealing with your insurance company and the reimbursement process from state and federal agencies.

As noted above, the city can recover for damages to its own property from its property insurance policy. But before you submit a claim, make sure it's 100% documented with back-up data, receipts, invoices, and information. It will save time and money later. For a complex loss, it's likely the insurance company will retain an audit firm to review, question, and ultimately delay reimbursement. It will be an arduous process, which is one of several reasons to consider not submitting a formal claim immediately. First, you won't be ready to submit a claim immediately, because you won't have all of the back-up ready for many months. The choice will then be to submit piecemeal claims, which is not recommended, or wait until the large bulk of the claim is ready. Second, some of the claim items will be covered by FEMA, and then you'll be involved in the complex process of those agencies either denying that portion of the claim or requesting subrogation from your insurance company.

Instead, if you start by submitting your claim to FEMA in the first instance, there are several advantages. The city will generally know, and be able to document, mutual aid and first responder costs fairly quickly. The state and federal agencies will automatically pay a percentage for overhead on top of your claim. That's a bonus that no insurance company will ever pay. You also won't waste your time making duplicate claims to the insurance company. Finally, once the agencies have paid, you'll know exactly what's left to claim from your insurance company. It makes sense to simplify your insurance claim before it's submitted. One tip is to retain a consultant familiar with the reimbursement process early so that person can help your finance staff create the correct form of documentation the first time.

After you've recovered from the agencies, then consider submitting the remainder of your claim to your insurance company. And while it's recommended that you go through all of your policies with a fine-toothed comb, the best approach is to claim every loss item, regardless of whether anyone thinks it's covered by the policy or subject to some exemption, exclusion, or limitation. Don't leave anything out; let the insurance company tell you it's not covered. It's sometimes surprising that they'll cover things that appear at first glance to be excluded.

But as a practical matter, things can become even more complicated. FEMA will soon take the position that the city should be recovering from its own insurance company. The insurance company will insist that the city should first recover from those agencies instead. Both will point the finger at the other to pay first, and both will want to protect their right to subrogate against any potentially responsible party. The result will be that no one will pay for an extended period of time.

B. San Bruno's Unique Solution: The "Trust"

Shortly after the explosion in San Bruno, PG&E approached the city and offered to provide \$3,000,000 in unrestricted funds, with no release required. The city gratefully agreed; PG&E had also instituted a program of providing similarly unrestricted funds in amounts of \$10,000, \$25,000, and \$50,000 to the many families most directly affected.

City management then had an audacious and never-before-tried idea: if PG&E was willing to provide the city with a substantial, but ultimately insufficient amount of unrestricted funds to pay for rebuilding the destroyed neighborhood, perhaps they'd agree to a sufficient amount of restricted funds to do just that. California Public Utilities Code Section 6295 provides that a gas franchisee "shall pay to the municipality on demand the cost of all repairs to public property made necessary by any of the operations of the grantee under the franchise." Your state may have a similar provision. The concept was that PG&E would establish an irrevocable trust, administered by an independent trustee (a former city manager, as it turned out), and for the sole purpose of reimbursing the city for all of its expenses incurred that were related to the incident. The trust would be initially funded by some sufficient amount, and as the city incurred expenses, it would submit them to the trustee for approval. Additional funds would be deposited as needed, up to a maximum of, in San Bruno's case, \$70 million.

The operative language of the trust allows the trustee to advance funds or reimburse the city for any and all unreimbursed and uninsured costs incurred or paid by the city in connection with, related to, or caused by the incident. Included are professional, consulting, travel, increased staffing and municipal costs, work and clean-up, repairs and remediation, attorney's fees and costs, and investigation and response costs. Not covered are costs or damages paid or incurred in any lawsuit in which the city and PG&E are parties, or claims or judgments against the city resulting from its liability. The trust's life is until 2017.

This changed everything. There was no longer any need to submit claims to FEMA or CalEMA, because not only could the city get paid from the trust, but that would avoid the problem of those agencies subrogating back to PG&E. At first, PG&E balked at the city submitting expenses for reimbursement to the trust before going to its risk pool. After all, the trust language specified that the expenses would have to be "unreimbursed and uninsured;" that was to avoid a double recovery by the city. But in fact, it would have been more expensive for PG&E if the city had first submitted its claims to its risk pool. That's because for every dollar that the city got from its pool, the pool would subrogate to PG&E, who would end up paying that dollar back to the pool, in addition to having incurred its own transaction costs. In addition, the risk pool would pass on any claims costs and payments to the pool members in the form of increased premiums for the next several years. PG&E would have been faced with the prospect of claims from other cities who were paying more in premiums due in part to another city's disaster. As a result, the city committed to not making a claim with its risk pool and certifying that the expenses sought for trust reimbursement were not covered by insurance. This saved the city from having to go through the inevitable audits by the risk pool, and saved both the pool and PG&E the expenses of having to subrogate.

The trust allowed the city to plan, enter into construction contracts, and rebuild the neighborhood much more quickly, certain in the knowledge that its costs would be reimbursed. But looming was California's 6-month claims statute that represent a prerequisite to filing in court: once claims were filed, followed by lawsuits, the city would face the inevitable specter of paying attorney's fees in what would amount to mass tort litigation involving hundreds of

claims. None of those costs could be reimbursed by the trust; the city would have had to consider using PG&E's unrestricted \$3 million instead.

C. Tolling Agreements Come to the Rescue

In mass tort litigation, victims will want to sue those who are responsible. Those who are responsible will want to sue others to deflect their own blame. In the mix will be the insurance carriers for the victims, who have paid for destroyed homes and property losses, seeking to subrogate against the responsible parties. They'll all be dealing with insurance coverage issues, especially if punitive damages are alleged by the victims. Shareholders of the responsible parties will also sue, claiming that the stock price went down because the company knew or should have known about whatever problem caused the incident. It's one big mess, certain to be the subject of a coordinated proceeding in court, destined to last anywhere from three to five years, and you can bet that the city's interests will be at the bottom of the court's calendar. This is something every city should try to avoid if possible: there will be court hearings every week, discovery, depositions, and continuous negative media attention that the city will receive.

Consider a tolling agreement: the city can toll the tort claims statute with the victims, and any similarly applicable statute with the responsible parties and the first-party insurance carriers for the victims. The result is that everyone else can fight it out, with the city on the sidelines. This result is a media "win," because the media will focus on the parties to the case and generally leave the city alone. From the city's standpoint, the tolling agreements defer litigation against the city, while maintaining intact the city's right to sue. In addition, remember that the city is immune from suit for punitive damages, but a non-public-entity responsible party is not immune. Thus, the city maintains all of its strategic leverage.

Undeniably, tolling agreements can be problematic. Most litigation attorneys will counsel against them, citing loss of control and the disadvantages of being dragged into a case much later than the other parties. It's also possible to consider a tolling agreement after the initial claims are filed. But in San Bruno's case, the victims didn't really want to sue the city, at least not right away, because the city had established an extraordinarily positive relationship with them. PG&E didn't want to sue the city, even if they thought the city might have been partially responsible, because that would have been a media disaster at a time when they were trying desperately to garner any bit of positive press they could: "PG&E Provides \$70M Trust Fund to City, then Files Claim." Not tolling the claims period would have forced both victims and PG&E into a legal corner. In addition, had they had filed claims, the city would have been forced to reject them, breaking the city's unwritten decision to not ascribe blame until after the NTSB had concluded its report. Finally, with a rejected claim, any disincentive to sue would have been eliminated. As it was, the tolling agreements preserved a tenuous but tolerable status quo, which allowed the city to focus its full efforts on rebuilding the neighborhood.

D. Communicating with the Public

In most disasters, human-caused or otherwise, it's not difficult to imagine all of the different scenarios in which that the city could be exposed to litigation. If you decide that a

closed session with the city council is warranted under your state's open meeting laws, use the opportunity to discuss how the city's legal strategy will be explained to the public. If possible, hire a PR expert with local knowledge and connections to the media. Some insurance policies actually cover the cost of post-incident communications experts: a good one can significantly lower the city's litigation exposure. Being proactive, and then sticking to the talking points that have been developed, is crucial. "Test" the talking points, and discuss their implications, with the city council and city management. Ask yourselves what the media will say and what follow-up questions they will ask, and make sure you have good answers that pre-empt the questions. If you can get the entire city council on the same message, all the time, the city will be well-served because the media will be unable to extract the conflicting statements from city officials.

In the short-term aftermath of a disaster, everyone wants information, usually more information than is available. Consider holding periodic public meetings so that staff can present and explain the available information. Starting with a staff presentation allows control over the initial message, and then listening to the public allows the city to anticipate, evaluate, and address those needs, if possible, or explain why it can't at this time. The city can also anticipate that victims may create a blog or email list to communicate amongst themselves; if city staff can monitor it, or even be a participant, it may help address issues as they arise. Finally, the city can offer to coordinate and/or sponsor informal periodic gatherings of the victims, perhaps in a park or other venue. Residents will appreciate the gesture.

IV. The "New Normal:" Managing the Medium Term

Once the city has gotten past the initial aftermath of a disaster, the dynamics of the situation will change. Initially, victims are focused on the immediate response and caring for themselves and their families. But as time goes on, their focus will shift to also include trying to find a sense of normalcy in their disrupted lives. They will want to rebuild, and the city will find that this raises many other expectations.

A. Zoning Ordinance and Building Permit Issues

If homes have been damaged or destroyed in the incident, the city will have to deal with residents who want to return, those who don't, and those who can't decide. While basic services such as electricity, sewer, and water are being restored, and as building officials are evaluating the safety of the residences, the victims will have been in temporary housing, and they will want to explore their options for returning, if possible. Their first-party insurance carriers are in the process of adjusting their claims for property damage, have likely made advances for temporary living expenses, and may be housing victims in a hotel. Soon, victims will want to rebuild with the insurance money they receive.

It's likely that zoning and building codes have changed between the time that damaged or destroyed properties were built and the disaster. Residents will ask whether they can rebuild the same home they had before, or whether they can rebuild a larger home that might have been allowed before but is now no longer permitted. Consider adopting a zoning ordinance that allows one or both, but only for the displaced victims of the disaster. While some residents will build larger, many will not. Announce and implement an expedited plan check and

expedited building permit process, and consider waiving the fees. Remember that lost revenue is often covered by the city's insurance policy, so the city can be reimbursed. Consider assigning staff persons from the planning department to specific residents for the duration of their project; this helps with continuity and will be much appreciated in the long run.

In the case of human-caused disasters, a potentially responsible party may implement a program to buy distressed or damaged homes. If that's the case, eventually the neighborhood will contain multiple reminders of that party's continuing presence, evidenced by vacant lots scattered about. In addition, some victims won't be in a position to decide what to do, and so their properties will remain in a state of disrepair or disuse. Victims who return to the neighborhood will ask what the city is doing about the problem. The explanation that the city cannot force a private property owner to develop or build will be an unsatisfactory response. One option is for the city to enter into an agreement with the potentially responsible party such that the city will issue a Request for Proposals (RFP) to develop all lots in common ownership at about the same time. That party would agree to sell the lots to the chosen developer at the price offered in the RFP. The potentially responsible party may be anxious to divest itself of the lots, and may be less concerned about making a profit than getting out of the neighborhood. The city's RFP can request that a developer buy the lots and develop them at once, complying with all building and zoning codes currently in effect. Alternatively, the city should strongly encourage the potentially responsible party to develop the lots as soon as possible.

B. Timing of Infrastructure Repairs

One of the first orders of business to restore a sense of normalcy is to rebuild the public infrastructure. However, the timing of this work can be challenging, depending on the scale of the disaster and the location of the incident. For people to move back in, infrastructure must be in place; but when victims start to rebuild, the infrastructure can be damaged. There's no reason to completely reconstruct and repave the streets and sidewalks before all of the homes have been rebuilt, for example. The city will need an experienced construction management firm to coordinate all of this work, keeping in mind that some work will inevitably have to be redone, something that should be reflected in the contingencies for each project.

The city may find that victims can become increasingly demanding as the repairs and rebuilding wears on. There are several reasons for this. First, many of them may be in the throes of disputes with their own insurance carriers over property losses. Most people don't have experience dealing with such matters, and they will become easily infuriated. Second, if residents are involved in litigation against a potentially responsible party (and certainly if the litigation involves the city), that litigation will not be going well from their standpoint. The victims will have had their lives upended by voluminous and intrusive discovery into every aspect of their lives, and seemingly-endless depositions at which hordes of lawyers ask irrelevant, repetitive, and impertinent questions.

As a result, victims will transfer their frustrations to the city and to the contractors performing the infrastructure repairs. Everything can become a problem for the city to solve: dust, noise, foul-mouthed workers, insect pests unearthed by the construction, and more. To head

some of these issues off, the city might consider beefing up its standard construction contracts to include specific performance standards that the contractor must adhere to with respect to site operations and behavior. The trick is enforcing those standards, because it won't help to send legal notices or fire the contractor, which will just delay the work. One option is to include monetary bonuses for strict adherence to the performance standards, as measured by the number of resident complaints. If the bonus is significant, the contractor will have a powerful incentive to take care of the residents. For example, when the residents complain about their cars and homes being filthy as a result of the construction, consider offering car wash coupons and periodic power washing of the exterior and windows of the remaining homes.

C. Distribution of Donated Funds

Several months to a year into disaster recovery, the city may have accumulated a sizeable amount of funds donated by individuals, charities, and others. Most of those funds will be unrestricted, and a major problem will be their distribution, which is virtually guaranteed to create divisions among the victims as well as possibly the city council.

An alternative that will sound good at first will be developing a process through which victims can make a request for some amount of the funds. The city can surely develop an application, similar to a grant request, and establish various levels of funding based on the degree of injury. But this quickly becomes a morass of moral and value judgments that cities are ill-equipped to make. Who's eligible? All victims, or just those with injuries? Do those who have suffered just property damage get anything? What about those who have received, or might receive, reimbursement from insurance, or from a potentially responsible party, or even from litigation against the city? Are renters treated the same as property owners?

San Bruno used this alternative, and in retrospect it was not perfect. The city council appointed a subcommittee of two councilmembers to accept and review applications, and established a process they thought was reasonable. While the city received requests from truly deserving individuals, it also received applications from individuals who had done nothing more than watched the disaster unfold on TV and claimed emotional distress, as well as from someone who wanted extra gas money because she had to drive around the area that was destroyed by the blast. While there's no perfect answer, it would probably have been easier, and less time-consuming and controversial, to simply define the affected area and split the money equally among everyone in that area.

D. City Repairs of Private Property Improvements

When homes or commercial establishments are damaged or destroyed, property owners may ask that previously-existing improvements on their property with some connection to city infrastructure be rectified. Those improvements may not even have been damaged in the incident. For example, a private sewer lateral may straddle two properties, or a private drainage swale that empties into a storm drain might extend along the rear yards of several lots. The property owners, some of whom may have had previous disputes with the city over maintenance or repair of these improvements, will see an opportunity to shift those obligations to the city. Conversely, the city can use this as an opportunity to rectify an ongoing problem as part of

rebuilding the neighborhood, but the consideration should be entering into a written, recorded agreement with the property owner who will repair and maintain the improvement. This ends up being a “win-win,” because the property owner gets a new, better-functioning improvement, and the city absolves itself of future responsibility (see Exhibit 5 for such a form).

E. Acquisition of Private Property by the City and by Others

Condemning private property after a disaster is beyond the scope of this paper, but two aspects of property acquisition bear a short summary. It’s possible that one or more property owners may not wish to return to their old neighborhood, and they might want to either sell or donate their property to the city for some sort of public memorial or improvement. There can be several motivations: often these owners suffered a great loss and cannot bear the thought of returning to the scene, or they may have tax or financial considerations, or perhaps both.

From a legal standpoint, remember that city acquisition of property for a public purpose is subject to several requirements in the California Government Code (Sections 7260 et seq.), as well as a finding of consistency by the planning commission with the city’s general plan (Section 65402). But the practical problem is that not everyone will necessarily want a park, memorial, or other public space in their neighborhood that reminds them of the disaster. Before buying into what seems like a good idea, the city council should vet the proposed use with the neighborhood, both informally and in formal public meetings.

The other wrinkle is that some property owners will want to return to the neighborhood, rebuild their homes, and then acquire other properties in the neighborhood. They will ask the city to facilitate that process. The stated reason will be so they can move their family into the house next door, or so they can build the dream family compound their family always wanted, which will help them recover from the trauma of the incident. While it will be difficult for the city council to say “no” to such schemes, that’s the best answer, as nothing good can come from the city embroiling itself in private deals between neighbors and from favoring one neighbor over another.

F. Regulatory Agency Involvement

Whether the disaster is human-caused or otherwise, there’s probably one or more local, state, or federal agencies with jurisdiction over some portion of the investigation, response, and/or recovery. The city may find it essential to participate in these governmental processes, often at great expenditure of time and money. Governmental agencies may dispatch investigators, request documents, hold hearings, and write reports, all while demanding the city’s constant involvement and cooperation. One way to plan ahead for this is to retain well-connected consultants who can guide the city through the process. Retention of such experts should be done as soon after the disaster as possible, lest they be retained by another party, resulting in a conflict. It is not uncommon for large companies to retain virtually all available experts so as to prevent others from retaining them, so act quickly.

Residents are also likely to request, or demand, that the city become involved in regulatory or investigatory proceedings. They will want to know what happened, why it

happened, why no one prevented it from happening, why the emergency response was so slow or inadequate, and what can be done in the future. All of these topics are within the purview of other government agencies, many of whom also have their own political agendas. Residents may want to testify at these proceedings, and depending on the agency, the agency may solicit them to score political points in whatever arena they operate. These proceedings are potential minefields, not just because of the media attention, but because of the potential litigation risk created by the city's participation. It cannot be overemphasized that the city must be exquisitely well-prepared to survive these proceedings.

In San Bruno's case, and in cases involving any natural gas pipeline disaster, the NTSB will assume primary jurisdiction. The city spent the better part of the first year after the incident participating in its investigatory process. Had it not been for unfailingly dedicated city management, and extremely competent outside counsel and consultants, that process might have turned out differently. PG&E knew that the NTSB report would be given great weight in the media and by the courts in the inevitable settlement process that would accompany the litigation filed by the victims. Even though the report itself would not necessarily be admissible, PG&E did everything possible to influence the outcome of the NTSB's investigation. At the NTSB hearings, a PG&E engineer testified that the people killed and burned by the explosion would not have been saved if automatic gas shut-off valves had been installed in the line, despite the fact that the gas fueled the fire for almost 90 minutes. Just before the NTSB was about to issue its final report, a national gas industry group issued a report blaming the city's sewer pipe repair project several years earlier as the cause of the explosion. A video, supposedly taken by a resident, purported to show the allegedly-shoddy work done by the city's contractor. The state regulatory agency, the California Public Utilities Commission (CPUC), quickly adopted the findings of that industry report, without any independent analysis. It was only through the city's diligence, and the NTSB's unwavering professional commitment to getting it right, that these unfounded allegations were resoundingly refuted. The final NTSB report implicated not only PG&E's defective pipe as the primary cause of the explosion, but also blamed the CPUC for its too-cozy relationship with the utility and its lax oversight. That report paved the way for the final stage of managing the disaster.

V. Planning for the Long Term

If there's litigation in the wake of a disaster, the city needs to plan for how to manage that process. If the city isn't being sued, it should nevertheless actively monitor the case between the victims and the responsible parties, because doing so can allow the city to predict how the victims will react to city initiatives. Most likely, the cases will be coordinated and assigned to a specific judge. It's very useful to attend all case management conferences as an observer, because you'll gain valuable insights about what the parties are saying and how the judge will process the claims. For example, you may learn when document discovery and depositions will occur, or if the more serious injury cases will be advanced for trial. Other parties, such as the shareholders of potentially responsible parties, may come out of the woodwork to sue, as will all of the property insurers to subrogate. Knowing which cases will proceed first, and how the court is managing them, will be very helpful in dealing with the expectations of the residents.

A. Who's Liable, and For What?

If the victims are suing a potentially responsible party or parties over the disaster, should the city sue those parties, or at least submit some sort of settlement demand?

Of course, the answer depends on a careful evaluation of liability, but perhaps more importantly, recoverable damages and timing. Regarding liability, the trial attorneys representing the victims will mount a relentless assault on liability, not just to prove negligence, but also to establish punitive damages, all of which will inure to the city's benefit. The other side will seek to poke holes in every argument. The evidence developed by their collective efforts will apply to the city as well, so there's little compelling reason to jump into the litigation immediately: why spend the money duplicating that work, while also subjecting city staff and possibly elected officials to discovery and depositions?

In cases involving a gas or electric franchise, California Public Utilities Code Section 6296 provides that the franchisee "shall indemnify and hold harmless the municipality and its officers for damages proximately resulting from any operations under the franchise." This statute is as close to strict liability as you can get, as it's not necessary to prove negligence. In addition, note that the statute isn't limited to claims by the franchisor against the franchisee; it also covers potential claims by a third party against the franchisor arising out of the franchise operations. Check to see if your state has a similar statute.

As for recoverable damages, cities are not entitled to emotional distress or pain and suffering damages. Most other recoverable damages will have been paid by FEMA or by the city's insurance company, who will then subrogate to the responsible parties. What's left?

In *United States v. CB&I Constructors, Inc.* (2011) 685 F.3d 827, the 9th Circuit provided a partial answer with respect to compensatory damages. In that case, the federal government sued a contractor to recover damages it had caused when it started a wildfire in the Angeles National Forest. A jury awarded the government \$7.6 million in damages for fire suppression, emergency mitigation, and resource protection costs. The jury also awarded \$28.8 million for "intangible environmental damages." The contractor appealed the latter portion of the verdict, and the appellate court affirmed. The court first noted the general standard for tort damages includes "the amount which will compensate the plaintiff for all the detriment proximately caused thereby, whether it could have been anticipated or not." (California Civil Code Section 3333.) In cases involving wilfully or negligently set fires, California Health and Safety Code section 13007 allows recovery of "any damages to the property caused by the fire." After citing to cases espousing a broad interpretation of these statutes, the court found that general environmental damages are recoverable. As to the type and measure of such damages, the court found that "mathematical precision" is not required. Instead, the court could consider the loss of animal and plant habitat, the loss of soils and open space recreational opportunities to the public, and the destruction of a historic mining camp. The government's expert witness had valued these losses at \$1,600 per acre, which when multiplied by the 18,000 acres involved, resulted in an award of \$28.8 million, an award that the appellate court said was supported by the evidence.

Accordingly, a city could value its losses by a price-per-acre method for the public property damaged. In addition, it may be possible to obtain expert testimony to set damages for the “stigma” to the damaged area, and indeed perhaps the entire city. Factors such as loss of property tax, sales tax, and general loss of development opportunities may also be considered. If public or private projects were deferred or cancelled as a result of the disaster, it’s worth asking your expert to evaluate those losses.

With the ability to claim and document compensatory damages comes the specter of punitive damages. While the courts have generally capped punitive damages to a multiple of no more than about nine times the compensatory damages, punitive damages remain a powerful lever because they are not covered by insurance. Therefore, there will be additional pressure on the responsible party to settle to avoid a coverage dispute with its own carrier.

As for timing, consider the status of the ongoing litigation with the individual victims. There will be occasions at which leverage is maximized. For example, the court may have just scheduled settlement conferences with the victims, and that’s a time when settlement of the city’s claims may also be possible. There may be media pressure on the defendants to settle, or political pressure applied by elected officials.

B. Litigate or Settle?

There’s never a clear answer, and every disaster is different.

Litigation may be inevitable, because of the types of claims, the fact that the city may truly be responsible in some way, or the dynamics of the situation. Litigation may also represent the best chance of a recovery for the city, especially when the responsible party is uncooperative. But the experience in San Bruno provides a way through without the time and expense of a suit.

In San Bruno, the city had already received \$3 million in unrestricted funds from PG&E (which the city had not spent), and a \$70 million trust fund that covered every conceivable cost the city had incurred or would incur. Only about four acres of public property were damaged, and even using a price-per-acre of \$1 million, the city could have recovered that \$4 million from the trust. Aside from punitive damages, there was virtually nothing else. But it wasn’t clear that the city would have been able to claim punitive damages at trial anyway, because the city would first have to show that it was entitled to compensatory damages. But didn’t the irrevocable trust eliminate the city’s entitlement to compensatory damages against PG&E by guaranteeing payment of any losses?

Given these considerations, the city embarked on a two-pronged approach: it called for settlement discussions with PG&E’s top management, while also implementing a media campaign to pressure them into settling. The city’s negotiating team, working under the direction of the city manager and city attorney, consisted of two outside attorneys and an investment banker with broad knowledge of capital markets, municipal finance and California politics. The media campaign was run by a well-known local PR firm, who developed press releases and staged press conferences at which the Mayor called on PG&E to do the right thing by resolving the victims’ claims as well as the city’s.

After several intense months, including stops and starts in the process, San Bruno was able to secure a negotiated settlement of an additional \$70 million (funded by a stock offering) in exchange for a release of claims. The City was unable to identify any other instance in U.S. history in which a public utility paid a city money directly to settle claims over and above the amounts actually expended by the city. PG&E also signed a separate indemnity agreement to defend and indemnify the city in the event of any claims by any other party as a result of the explosion; this covered situations in which a victim might have sued the city after expiration of the tolling agreement, as well as a cross-complaint from another party (such as the gas pipe manufacturer) that PG&E might later sue for contribution. The city agreed that PG&E's maximum contribution to the irrevocable trust would be reduced from \$70 million to \$50 million, still sufficient to completely rebuild the entire neighborhood, including all-new sewer, water, streets, sidewalks, street lights and a park, plus some other safety-related projects.

The \$70 million settlement was pledged to a non-profit that was to be established by the city for the benefit of all residents of the community. The city council then appointed seven community members to head that organization, which then obtained 501(c)(3) status. A portion of the settlement will be treated as a permanent endowment to fund new and ongoing community programs (including college scholarships for students and grants to local organizations), while the majority will be used for renovation and construction of community facilities.

In all, the \$123 million recovered from PG&E was accomplished without any claims or litigation of any kind being filed by any party against the city, or by the city against PG&E. The only depositions taken were of four firefighters, who vividly described their efforts to extinguish the fire and save as many lives as possible.

Within three years after the explosion, the victims and their property damage carriers resolved all of their claims against PG&E for undisclosed, confidential amounts; the total amounts reported in the media are in the range of \$500-600 million, likely also including their attorney's fees.

All incumbent city council members were re-elected in the next two elections following the explosion. A survey conducted by a polling firm for an unrelated ballot initiative found high levels of trust and satisfaction with city officials.

C. What Ever Happened With the Regulatory Agency?

As the CPUC was considering what fines and penalties to levy against PG&E, the City began to suspect that PG&E was lobbying the agency behind the scenes in violation of the agency's own rules prohibiting "ex parte" communications. When the City asked the CPUC for what should otherwise have been public records to discover if this was indeed occurring, the agency didn't respond, responded late, or responded without producing the records. Eventually, after many months during which the CPUC failed to produce the records, the City took the bold step of filing a suit against the CPUC for violating the Public Records Act. While a detailed discussion of that case is beyond the scope of this paper, the case was settled with the CPUC producing about 7,000 documents that it had previously withheld, some of which did establish

improper ex parte communications. The CPUC also agreed to reform its public records procedures.

The City could not have anticipated what happened next: PG&E soon released over 65,000 additional documents, many of which implicated its own executive employees and lobbyists, in addition to high-level CPUC employees, in improper ex parte communications, and more disturbingly, in “judge-shopping” for favorable administrative law judges for proceedings involving the company. The scandal quickly and unexpectedly spread to an unrelated matter pending in a formal hearing at the CPUC: the costs associated with decommissioning a nuclear power plant in Southern California. The records documented a meeting between CPUC’s former President and a PG&E executive at a hotel in Poland to sketch out a plan determining how much of the cost should be paid by the ratepayers.

In the midst of the daily media frenzy over these and other revelations, and following strong and relentless advocacy by the City and others, the CPUC levied a fine against PG&E of \$1.6 billion, the largest such fine against a utility in U.S. history. This came after the CPUC had been negotiating with PG&E for a fine of about \$500 million to be funded primarily by ratepayers or by the taxpayers of the state through favorable tax deductions for safety improvements that were long overdue. The final penalty decision determined that PG&E had committed a total of 3,798 violations of the law, and directed that \$850 million of the fine be used for gas infrastructure improvements. The decision also provided a \$400 million credit to ratepayers who had already paid for safety improvements, but had seen that money diverted elsewhere in the company, and a \$300 million fine to the state’s general fund, also paid from shareholder dollars. There are still ongoing proceedings to levy additional fines and penalties against PG&E for its violation of the CPUC’s ex parte rules.

D. The Criminal Case

As the CPUC was concluding its proceedings, the US Attorney’s office was serving subpoenas at company headquarters and at the homes of former PG&E and CPUC officials for possible criminal violations of the federal Pipeline Safety Act. A Grand Jury then issued an indictment against PG&E for a dozen such felony violations, including an obstruction of justice charge arising out of alleged misrepresentations that PG&E had made to the NTSB during its investigation. In August, a federal jury convicted PG&E on six felony counts, including obstruction of justice.

E. Lessons Learned

Every disaster presents an opportunity to learn from mistakes and to carry forward the successes. Here are a few tips:

1. Prepare for the expected. Underground gas, sewer, and water lines are a disaster waiting to happen. Make sure your city’s disaster plans are current, and engage in practice drills as often as required. Find out where the underground lines are, and if they belong to a utility company, demand that they provide records of all tests

and evaluations, and consider adopting a strategy to ensure they are in good operating condition.

2. Check your insurance policies or risk pool agreements to make sure they cover important city assets.
3. Retain experts and attorneys who are willing to get the details right, and work collaboratively with you, as early as possible. There's no substitute for thorough preparation.
4. Hire a great PR firm and use them to vet all messaging and public outreach.
5. Avoid ascribing blame in public to anyone; others will do that for you.
6. Keep the city council informed and on message; consider obtaining their common agreement that they won't seek to undercut each other's statements or staff's efforts.
7. Do whatever you can for the victims, but understand that it will never be enough, and that lots of good will can be spoiled by a small miscue.
8. If possible, stay out of litigation, as it will consume the city and divert attention away from the important task of helping your residents rebuild their lives. If you're into litigation, definitely pay for a PR consultant so you and your city council can deliver the message before the media reads it in your outside counsel's court filings.