

Wally Kaapcke and the Birth of BART

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There is some room for dating the birth of an institution like BART. Riders of the transit system might think the right date is 1972, when the trains first began to run thirty-five years ago. Lawyers like us at Pillsbury might mark the formation of the San Francisco Bay Area Rapid Transit District fifty years ago, in 1957. And politicians might note that sixty years ago, in 1946, their predecessors first assembled a study team that conceived the vision and launched this extraordinary public work.

However, the region as a population center—what we now call a “metropolitan area”—dates from immediately following the 1906 San Francisco earthquake, when refugees teemed across the bay. It was then that the ranches and orchards of the surrounding countryside began to transform into the cities and suburbs we know today. By 1911, visionary proposals began to appear in the “yellow press” newspapers of our client William Randolph Hearst, describing electric trains underneath and ringing the San Francisco Bay. It all looked like something out of Jules Verne or Buck Rogers. But the need for regional transit became increasingly clear as California’s extraordinary growth progressed throughout the twentieth century. So in 2007, we can fairly say we are celebrating the centennial if not of BART, then of the dream and the demand for a public transportation system that BART satisfies.

Going way back into history in this manner allows me also to relate a brief biography of a wonderful and important partner at the Pillsbury law firm by the name of Wallace L. Kaapcke (pronounced CAP-key), depicted unusually sternly in Figure 1. I worked for him at the outset of my own career, and will put both him and us at ease by addressing him as “Wally.”

Based on remarks at Pillsbury School, April 6, 2007, San Francisco. Photographs except Figure 3 from Wallace L. Kaapcke, “General Civil Practice – A Varied and Exciting Life at Pillsbury, Madison & Sutro” (oral biography) (University of California, 1990), copyright © 1990 The Regents of the University of California.



WALLACE L. KAAPCKE
1972

Figure 1

Born in 1916, Wally came from a family of German immigrants first to Canada and then to Oregon. He spent time at the Yale Law School and the New York law firm of Hughes Hubbard before coming to California.

The way Wally tells the tale, he made up his mind to move after contrasting two decidedly different transit experiences. First, on a sweltering and sticky summer day, Wally was being jostled on the New York subway when he saw no less a celebrity than Wendell Willkie, who was then running for President of the United States. Here was one of the most powerful men in the world, sweating in the heat with his shirt collar jutting straight up in the humid air. That subway trip was followed by a cross-country train ride, culminating in a journey from Oakland across the San Francisco Bay on a ferry. The view of San Francisco, set like a jewel in the water on a gorgeous June day, convinced Wally that this was the place he wanted to be. Many of us have formed the same satisfying thought seeing this beautiful city from the bridges or the air.

Wally was hired by Felix Smith, newly the first managing partner of Pillsbury who was not a member of the founding families. The managing partnership had long been held by the almost mythical Civil War veteran E. S. Pillsbury and the other name partners.

Wally was the 45th attorney of Pillsbury, Madison & Sutro when he was hired in early 1941. By 1942, Wally was ranked the 25th attorney in the firm. This was not the product of extraordinary promotions in recognition of his raw talents, remarkable as they were. Rather, it was due to the dispersal of many Pillsbury attorneys in the nation's war effort. At the same time, more and more complicated legal work was coming to the firm than had been received in the late stages of the Great Depression. As a result, Wally faced a unique opportunity—literally incredible to those of us living in age of specialization—to practice and to master a diverse range of legal disciplines.

Summoned into Smith's office, Wally was asked "Wally, are you an admiralty lawyer?" Wally replied "No, sir, I am not." He was then told "Well, now you are." He responded by reading every admiralty case in the library, and proceeded to handle the firm's collision cases, vessel business disputes and maritime contracts for the duration of World War II as an associate.

Wally was a tax lawyer of some renown. He was a litigator who once defied the command of a grand jury, thereby exposing himself to jail time for contempt of court, but whose position was upheld in the nick of time in an important decision by the Ninth Circuit. He was something of a corporate lawyer, notably in connection with the sale to General Electric of our client Utah International (now the U.S. core of the Australian natural resources company BHP Billiton). His principal work was as a consummate adviser to Standard Oil Company of California (now Chevron) on its marketing and trading operations in the United States. Wally worked for and with Felix Smith's successors as managing partner, Marshall Madison, Jack Sutro and Turner McBaine. Wally was one of Pillsbury's great business and antitrust counselors, and a tenacious champion of the attorneys in the group that he led.

But back to BART. A study team was formed in 1946, formally becoming the Bay Area Rapid Transit Commission in 1951. BARTC was formed to study transportation options for the nine counties comprising the San Francisco Bay Area. The appointees were transportation

experts, instructed to develop a transportation plan that would accommodate the region's future development.

These commissioners naturally asked what the development plan was—in what areas and in what time periods would population and employment grow in the Bay Area, so that transportation options could respond? They were told in effect that no such development plan existed, and that they would simply have to create one as their first order of business. This they did, in a comprehensive plan that ultimately led to the formation of ABAG, the Association of Bay Area Governments. (There are about 200 counties, cities and districts that constitute the Bay Area's "government," using "government" advisedly in quotation marks. This can be contrasted with urban areas such as that to the south, where two entities, the City of Los Angeles and County of Los Angeles, have far greater ability to control development and infrastructure over a comparable territory.)

BARTC proposed as part of its transportation plan that a regional rapid transit system be installed in an inner five-county area, including San Francisco, Contra Costa, Alameda, Marin and San Mateo counties. Finally, legislation was enacted in 1957 creating the San Francisco Bay Area Rapid Transit District, immediately shortened to the "District" or "BART."

This legislation, found in the Public Utilities Code of all places, created BART as a state district. This is in contrast with local governmental units below the size of a county, such as school, water, sanitation and similar districts. There is a subtle but important distinction between state districts and local districts that has eluded many generations of Pillsbury associates—myself among them. Several rules applicable to local districts are of no help or hindrance to BART. Suffice it to say that it is important to know what type of entity your client is when you are performing research!

In 1958, Pillsbury was appointed as counsel to BART, and Wally himself was formally designated its general counsel (and carried two business cards around thereafter). Figure 2 is a certificate of the appointment of Wally, a partner at an outside law firm, as the general counsel of the client.

CERTIFICATE CONCERNING OFFICERS OF SAN FRANCISCO BAY AREA RAPID
TRANSIT DISTRICT AND EXPIRATION OF TERM OF OFFICE OF EACH.

I, RICHARD J. SHEPHARD, Secretary of the Board of Directors of
San Francisco Bay Area Rapid Transit District, do hereby certify that
the present officers of San Francisco Bay Area Rapid Transit District
are as follows:

President - Adrien J. Falk, whose term of office expires
December 31, 1963.

Vice President - Marvin A. Joseph, whose term of office expires
December 31, 1963.

General Manager - John M. Peirce, whose term of office is subject
to the pleasure of a majority of the members of the Board of Directors.


Secretary - Richard J. Shephard, whose term of office is subject
to the pleasure of a majority of the members of the Board of Directors.

General Counsel - Wallace L. Kaapcke, whose term of office is
subject to the pleasure of a majority of the members of the Board of
Directors.

Treasurer - John J. Goodwin, whose term of office is subject to
the pleasure of a majority of the members of the Board of Directors.

Controller - Harry D. Ross, whose term of office is subject to
the pleasure of a majority of the members of the Board of Directors.

IN WITNESS WHEREOF, I have executed this certificate this
18th day of January, 1963.


Secretary, Board of Directors
San Francisco Bay Area
Rapid Transit District

(S E A L)

Figure 2

The questions arise, why Pillsbury, and why Wally? Wally's own answer is that one of the original BART directors was Allan Charles, a name partner in the law firm of Lillick, McHose & Charles. (Pillsbury merged with the Southern California branches of Lillick in 1991.) Mr. Charles observed Wally's performance in a transaction involving another Pillsbury client, the Pacific Lumber Company, and decided then and there that Wally was the lawyer he wanted to head this unprecedented effort. (It is reminiscent of Pillsbury's more recent engagement for the San Francisco Giants at the time of the team's threatened departure to Florida, where our business work for Shorenstein and Safeway led the city's leading figures to name us to lead the legal efforts to save a great community institution.)

A BART directorship was once purely a patronage position, with each seat filled by powerful mayors or county boards of supervisors. The directors are now fiercely independent, being directly elected by the populace in separate district elections. Many of these directors run on reform, anti-BART or even anti-government platforms, leading to an arms'-length and sometimes tense relationship between the District staff and the District directors. Faced with this situation, the General Counsels starting with Wally have maintained a strict independence, regarding the entity itself as their client, rather than any particular staff department or directors. This independence would be the envy of private company counsel in the era of Sarbanes-Oxley.

Figure 3 is a depiction of the original BART system as it was ultimately built. It was very hard for me to find a map of the initial system. The poster shown here was a prop in the recent Will Smith movie, *The Pursuit of Happyness*, whose supporting actress, if you will, was the city of San Francisco in the late 1970s. You will see in the background an anachronistic advertisement displaying a laptop computer.

The poster shows the extent of the system as it was initially created, and you will see that it covers three counties rather than five—only San Francisco, Alameda and Contra Costa counties. In 1961, San Mateo County dropped out of BART. Figure 4 is the matter-of-fact resolution exercising the withdrawal option. Behind the scenes, ultimately the San Mateo supervisors concluded that the property tax, the adverse impact on the county's own borrowing capacity, and the prospect of further taxes would take more from San Mateo citizens than they would receive in the form of BART infrastructure and service. Moreover, they already enjoyed the benefits of the Southern Pacific Railroad commuter service, now known as CalTrain, connecting their bedroom communities with the city of San Francisco itself.



Figure 3

RESOLUTION NO. _____

BOARD OF SUPERVISORS, COUNTY OF SAN MATEO, STATE OF CALIFORNIA

RESOLUTION WITHDRAWING THE COUNTY OF SAN MATEO FROM
THE SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT AND
REQUESTING APPROVAL AND ACCEPTANCE FOR FILING THEREOF
BY BOARD OF DIRECTORS OF SAID DISTRICT

RESOLVED, by the Board of Supervisors of the County of San Mateo, State of California, that

WHEREAS, the California Legislature, at its 1962 First Extraordinary Session amended the San Francisco Bay Area Rapid Transit District Act in part to add Section 29650.1 to the Public Utilities Code of the State of California and to add Section 54914 to the Government Code of California; and

WHEREAS, the said Section 29650.1 of said Public Utilities Code provides that any county may withdraw from the said district at any time prior to the adoption by the board of directors of said district of a resolution calling a special election to submit a proposition for incurring a bonded indebtedness to the qualified voters of the district; and

WHEREAS, the said Section 29650.1 of said Public Utilities Code is, in its terms, an additional right of withdrawal available to counties within the said district, over and above the right of withdrawal provided in Section 29650 of said Code; and

WHEREAS, the said 1962 amendment to the said Rapid Transit District Act was enacted as an urgency measure to go into immediate effect; and

WHEREAS, this Board has heretofore, on January 9, 1963, found that the County of San Mateo should withdraw from the said San Francisco Bay Area Rapid Transit District, and no resolution calling a special election to submit a proposition for incurring a bonded indebtedness has heretofore been adopted by the Board of Directors of said Rapid Transit District;

Figure 4

I had long assumed that representatives of Marin County were similarly skeptical and isolationist. However, it appears from the historical records that Marin folks in general were enthusiastic supporters of the BART concept—that is, until San Mateo’s own withdrawal meant that Marin would have to bear extraordinary tax and other obligations to remain in the system.

The link to Marin would no doubt have been one of the greatest (and most expensive) engineering feats of modern times. The plan was for BART trains to ride snugly underneath the roadway on the Golden Gate Bridge, over 200 feet above the Pacific Ocean. (This would have called for “anti-Zephyr” railcars with glass bottoms for whale-watching.) Some engineering risks were cited but were not fully explored—it is clear that economics drove the separation. In any event Marin withdrew in 1962, and it is certainly hard to contemplate that such a project could be built today. By the way, a tube akin to that constructed between San Francisco and Oakland would not have been an easy option across the Golden Gate, because of the intense energy of the water and sand in scouring the depths where the bay and the ocean meet.

The first major actions after formation of the District that BART and Wally undertook occurred in Sacramento. It was critical to establish good relations with powerful legislators and the California Department of Transportation, also known as Caltrans. As a matter of fact, the most important early step was that of consensual delay. State Highway 24, from the Caldecott Tunnel to Walnut Creek, was being built, and the schedule had to be decelerated to afford enough time for BART to develop its trackwork inside the highway median and several stations along its length. They also serve who slow things down!

Land acquisition and public financing were pursued, each with considerable complexities. Some of the most controversial aspects were the engineering, procurement and construction contracts, to which Pillsbury and Wally devoted particular attention (along with me many years later). These were unusual agreements for innovative systems and equipment. Both the unique work and the flexible contracting arrangements rendered many of the competitive bidding and other public works statutes inappropriate. BART employed cost-plus pricing for a number of these contracts, which was quite controversial though reflective of the evolving and uncertain nature of the scope of work.

Advanced systems such as automated train control and automated ticketing were handled under special design-build contracts, for which special statutes were enacted in Sacramento. BART was one of the first entities to employ owner-controlled insurance programs or “OCIPs,” meaning that the owner procured one policy of insurance covering all contractors and subcontractors, rather than having each and every party charge for its own insurance policy to deal with any dispute over liability or property risks. Many of these contracts are associated with bulging files at Pillsbury dealing with the contracts, amendments, claims, litigation and audits.

The original expense budget for BART’s fixed assets was the odd figure of \$996 million. It is possible that this number is not so much a conservative cost estimate as it is the result of everyone’s inclination not to ask the public to support a public works project in excess of \$1 billion. To fund the \$996 million price tag, \$133 million was to be derived from tolls on the Bay Bridge and dedicated to construction of the Transbay Tube. Most of the rest, a further \$762 million, was to be obtained from proceeds of municipal bonds whose issuance required 60%

voter approval. Figure 5 is the excerpt from the 1962 voter pamphlet, asking the question in one run-on sentence.

DISTRICT		
SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT MEASURE		
<p>A</p> <p>MEASURE: Shall San Francisco Bay Area Rapid Transit District incur a bonded indebtedness in the principal amount of \$792,000,000 for the object and purpose of acquiring, constructing and operating a rapid transit system for the transportation of passengers and their incidental baggage, including rights of way, rail lines, bus lines, stations, platforms, switches, yards, terminals, parking lots and any and all other facilities necessary or convenient for rapid transit service within or partly without the district, underground, upon or above the ground and under, upon, or over public streets, highways, bridges, tubes, tunnels, or other public ways or waterways, together with all physical structures necessary or convenient for the access of persons and vehicles thereto, including lands, easements, rights to the use or joint use of any or all of the foregoing and all other works, property or structures necessary or convenient to carry out the objects, purposes and powers vested in the District under the "San Francisco Bay Area Rapid Transit District Act"?</p>	YES	
	NO	

Figure 5

The bond measure passed narrowly, by 61%, or only 1% over the minimum required. Many had confidently predicted that the measure would fail, and the day after the election one executive was heard to say, “If I’d known the damn thing would have passed, I’d never have supported it.”

Lawsuits challenging the election were immediately filed, and an investigation into electoral improprieties was launched by an assistant U.S. attorney. Figure 6 is a photograph of a couple of very prominent San Francisco lawyers of the last century. The gentleman on the left is Cecil Poole, who at the time was the U.S. Attorney for the Northern District of California (and the first African-American U.S. Attorney in the continental United States) and who later became Judge Poole of the Ninth Circuit. Wally is in the center exhibiting the appropriate way to meet a federal prosecutor—attentive, respectful, serious and all business. The fellow on the right is our client, and I think he appears a little over-eager, with his hands folded like a schoolboy’s and an Alfred E. Neuman grin. I do not know what would be made today of the fact that Mr. Poole apparently used or threatened to use an “eight ball” decision-maker to exercise prosecutorial discretion. Nonetheless, the U.S. Attorney’s office did not pursue any charges of misconduct.



Left to right: Cecil Poole, Wallace L. Kaapcke, Adrian Falk. The hatchet was buried between the U.S. Attorney and the transit officials.

Photograph courtesy of San Francisco Chronicle

Figure 6

Although the bond measure passed, the lawsuits were defeated and the bond proceeds and bridge toll revenues started to pour in, large cost increases began to bedevil BART. Some of this was due to each city's unanticipated wish list. No one had ever seen a budget of \$1 billion for a local public works project. It seemed like a huge, even an infinite source of funds. Most cities came back to BART requesting or demanding changes—from a slight movement of the right-of-way, to a moderate delay in construction, to the massive modifications sought by San Francisco and Berkeley, namely the undergrounding of the trackwork and the stations. (Unlike in other cities, the BART route introduced in San Francisco and Berkeley a new piece of infrastructure separating racially and economically divided neighborhoods. This issue came to a head in lawsuits heard in the eventful year of 1968.)

Construction price indexes had been fairly stable during the 1950s when the budget was calculated. But the nation experienced inflation of approximately 7% per year throughout the 1960s. And not all the cost increases were for the original scope; there were also enhancements in the features of the system, such as elevators for the disabled and elderly and electronic train controls. All of these unanticipated expenses led to a fiscal crisis part way through the construction of the project. Wally and BART were faced with the issue of whether to scale back the capabilities and reach of this system, or to seek out new forms of revenue.

Governor Ronald Reagan steadfastly opposed any creation of new state taxes on his watch. At some point, our team and supporters of BART in Sacramento proposed authorizing BART rather than the state to levy a one-half percent sales tax (up to a maximum of \$150 million) in a way that did not require voter approval. When the strategy and legislation became sufficiently clear, Reagan facilitated the sales tax measure in 1969, and you will see here in Figure 7 the smiling faces in Sacramento at that time. The federal government also came through with funding, since the then Department of Housing and Urban Development (now the Department of Transportation) had already launched funding (under the Urban Mass Transportation Act or UMTA) for transit facilities in other cities long after BART had launched its mission. The fiscal crisis was averted (though others have loomed on occasion since that time).



May 1969: Signing the legislation authorizing sales tax to finance BART.
Left to right: Wallace Kaapcke, William Reedy (BART director), B.R. Stokes
 (BART general manager), Governor Ronald Reagan, Arnold C. Andersen (director),
 Frank Chambers (legislative liason officer), James P. Doherty (director).

Figure 7

The actual cost was \$1.6 billion for the original 71-mile system including the revolutionary Transbay Tube—still one of the longest and deepest passenger vehicle tunnels in the world. While this tally certainly exceeds the original budget, it can be favorably compared with recent experience on the Seattle system—a cheaper light rail system, mind you—of \$200 million per mile. For budget surprises one might cite the Boston Big Dig, which has exceeded its \$2.8 billion original price tag by \$12 billion as of 2006 and counting. But analogies to the Big Dig are not particularly welcome in public transit circles.

BART is characterized throughout by innovative construction and transit-oriented development. “Linear parks” were built in the rights-of-way along several stretches. There are parking and office hubs at a number of locations, which facilitate the concentration of residential and employment opportunities. BART quickly became a standard for other North American transit systems to emulate or improve upon, including those in Washington, Atlanta, Toronto and Seattle.

Figure 8 shows a very proud Wally Kaapcke on the opening day of BART in 1972, unfortunately bearing the date of September 11. You will see the thirty-cent fare on his souvenir ticket, and a carnation in his lapel. A common sight during summers on the streets of San Francisco was Wally sporting a boutonnière and a straw boater, and carrying it off without trying to look like Maurice Chevalier.



State Senator Jack McCarthy and Wallace L. Kaapcke. September 11, 1972.

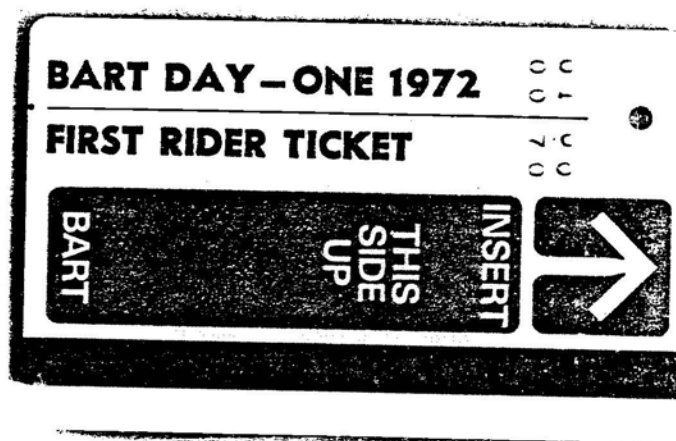


Figure 8

And what of Wally's later career? He himself succeeded Turner McBaine as managing partner of the firm. He was followed by Jack Bates, George Sears, Neal McNamara, Al Pepin, Mary Cranston, and now Jim Rishwain. To bring us full circle, Jim came to us from the Lillick firm that Allan Charles led, and from whose offices Wally was identified and recruited as BART's general counsel. Not having enough else to do, Wally served as general counsel to the San Francisco Opera, where one of his thorniest tasks was dealing with the separation from the opera company of the renowned but volcanic conductor Kurt Herbert Adler.

In 1969, Wally resigned as general counsel in favor of his longtime deputy Malcolm Barrett. The Pillsbury firm became outside counsel to BART, and continues to this day to handle a wide variety of complex and important matters for the General Counsel's office. Wally died in 1994 after a healthy and vigorous retirement.

The law function for BART is now headed by General Counsel Sherwood Wakeman. His assistant general counsels have included the late Rollie Naish and John Vickland, who is retiring this week after a distinguished career.

Some of the prominent Pillsbury lawyers who worked on matters for BART in prior years included Jim Wanvig, John Hartman, Jim Tingle, Sharon Solomon, Anne Libbin, and the Honorable Bernie Zimmerman, Magistrate of the Northern District of California. Pillsbury attorneys advising on the account today include Dave Hopmann, Joe Tiffany, Fred Lowell, Jan Webster, Laura Hannusch and especially Norman Carlin. The District makes particularly intense use of the Pillsbury environmental group because of our extraordinary success in navigating their expansion projects through the permitting process. The current Pillsbury team serving BART, like Wally Kaapcke decades ago, is very proud to be associated with a great public institution of the San Francisco Bay Area.