

Kenai Peninsula Borough Legal Department

MEMORANDUM

TO: Brent Johnson, Assembly President
Members, Kenai Peninsula Borough Assembly

THRU: Peter A. Micciche, Mayor *PAM*

FROM: Sean Kelley, Borough Attorney *SK*
Sovala Kisena, Risk Manager *SK*

DATE: May 4, 2023

RE: Ordinance 2023-12, Amending Borough Code Relating to Bonding, Equal Opportunity Employment, Protection Against Certain Conduct, Liability for Conduct, and Indemnification (Mayor)

This Ordinance amends Borough Code as follows:

Section 1 through Section 5 of the Ordinance repeals five sections of KPB Chapter 2.34 relating to defense and indemnification.

Intent: The repealed language is reworked into a single defense and indemnification section, as set forth in Section 11 of the Ordinance, and moved under KPB Chapter 3.04 relating to personnel. The coverage of Borough and School District employees remains the same; the Borough will defend, indemnify, and hold harmless acts or omissions that are within a public official or employee's scope or course of duties. Acts that are not within an individual's course or scope of duties will not be indemnified.

Section 6 of the Ordinance adds a new section of Borough Code relating to Surety Bonds.

Intent: These changes will require bonds for the faithful performance of the principal's (the elected official or employee) official duties. The list of bonded employees will be subject to annual approval by the Assembly.

Section 7 of the Ordinance repeals KPB 2.34.170 relating to Public Official's and employee dishonest bonds.

Intent: A claim against the Public Official's Bond for Mayor Pierce was denied by the surety due to their determination that Borough Code only required a fidelity bond and that was the intent of the bond that was issued. While the Borough disagrees with this determination and intends to appeal the decision, the changes to Borough Code relating to bonding are meant to address this conflict and will plainly state that bonds for the mayor and other elected officials or employees as designated by the Assembly will obligate the faithful performance of official duties.

Section 8 of the Ordinance repeals and replaces KPB 3.04.040 relating to Equal Opportunity employment and nondiscrimination.

Intent: This section repeals the current code section title "Nondiscrimination" and

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replaces it with an updated equal opportunity employer section to better mirror requirements under federal law. The section codifies current employment practices and will ensure continued compliance with requirements related to federal grant funds.

Section 9 of the Ordinance adds a new section of Borough Code, at KPB 3.04.225, relating to protection against certain conduct.

Intent: This section is derived from AS 39.26.010 relating to “State employees protection against certain conduct”. This section differs slightly from the State statute in that it includes protection from unlawful harassment, threatening or retaliatory behavior or initiating unwanted physical contact. It also includes protection from such behavior from members of the public or a Borough contractor while conducting business on borough contracts, or within or using Borough facilities.

Section 10 of the Ordinance repeals and replaces KPB 3.04.230 relating to “Legal liability—Conduct”

Intent: Current code only provides that an employee acting “outside of the scope of employment, or working within the scope of employment but acting in a grossly negligent manner” may be denied legal support. The new code language addresses when an elected or appointed official, former or current employee’s conduct may subject the individual to personal liability. An individual who acts outside the scope of employment, commits an intentional tort, or is grossly negligent may be held personally liable for such conduct.

Section 11 of the Ordinance adds a new section of Borough Code, KPB 3.04.235, relating to defense and indemnification of elected or appointed officials and former or current employees.

Intent: Generally, acts or omissions within the course or scope of duties are covered and acts or omissions outside the course or scope of duties may not be covered. The section enumerates six situations where the Borough would not have a duty to defend, indemnify or hold harmless. This section provides a clear criterion for requesting indemnification and a decision making process. This section provides that the Borough has the sole authority to handle and settle a claim where the borough is indemnifying an official or employee and that individual will incur no personal liability. This section also clarifies that a duty to defend or indemnify does not waive governmental immunity defenses and does not waive potential subrogation claims. It is also noted that State statute provides a specific indemnification section for school district personnel. This section should not conflict with State statute but to the extent it does, State law will control.

Prior to introduction, the Borough Administration met with School District Administration to discuss this Ordinance and provided the Ordinance to the heads of Borough departments and service areas for input.

Your consideration is appreciated.