



Legal Department

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Peter A. Micciche
Borough Mayor

LITIGATION STATUS REPORT

TO: Brent Johnson, Assembly President
Debbie Cary, President, Board of Education
Members, Kenai Peninsula Borough Assembly
Members, Kenai Peninsula Borough School District
PAM

THRU: Peter A. Micciche, Mayor **SK**

FROM: Sean Kelley, Borough Attorney

DATE: April 20, 2023

RE: Litigation Status Report – Quarter Ending 03/31/23

This report includes brief descriptions of pending non-routine court cases, as well as administrative appeals and code compliance enforcement actions set for hearing before the administrative hearing officer.

- A. The following is a summary of the non-routine litigation which name the Borough and/or School District as parties. This list does not include the real property tax foreclosures and numerous standard tax collection cases pursued by the Borough:
1. Halstead v. Anderson and Kenai Peninsula School District, Case No. 3KN-18-00744CI. Plaintiff has sued Mr. Anderson and the Kenai Peninsula Borough School District for damages relating to Mr. Anderson's sexual abuse of her as a minor. The complaint against the school district claims the school district failed to protect her from Mr. Anderson and seeks damages and actual attorney fees. Trial has been scheduled for the week of September 18, 2023. Discovery is ongoing.
 2. Kenai Peninsula Borough School District v. Fischer, Case No. 3KN-19-00185CI. This is a subrogation case that was filed against a School District employee to recover substantial health care costs paid by the health care plan ("Plan"). The school district engaged the services of Jermain, Dunnagan & Owens to serve as counsel in this matter. The trial set for September 26, 2022, was vacated due to summary judgment entered in favor of plaintiff. Judgment was entered in favor of plaintiff on October 20, 2022. The defendant has appealed the judgment to the Alaska Supreme Court.

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3. *Furie Operating Alaska, LLC. v. State of Alaska, Department of Revenue, and State Assessment Review Board*, Case No. 3AN-21-06462CI. The owner of oil and gas production property appealed the State Assessment Review Board's decision upholding the tax assessment of the property performed by the State of Alaska, Department of Revenue pursuant to AS 43.56. The borough entered an appearance in this matter and has engaged Jessica Dillon, a partner at the firm Dillon & Findley in Anchorage, to act as lead counsel in this matter. This appeal has been consolidated with the taxpayer's 2022 tax assessment appeal. A non-jury trial is currently scheduled in this matter for the week of July 24, 2023.
4. *Smith v. CES*, Case No. 3KN-22-00444CI. This is a complaint for medical malpractice filed by the plaintiffs against CPGH, various doctors, nurses and CES for actions taken in response to a medical situation and subsequent treatments rendered. On February 23, 2023, the court granted KPB's motion to dismiss CES and its employees from this action with prejudice. As far as the Borough's involvement in this case, this matter is now closed.
5. *Martin v. KPB*, Case No. 3KN-22-00644CI. This is a complaint for automobile-related personal injury filed on behalf of plaintiff, Ms. Martin. The Borough has entered an appearance in this matter and answered the complaint. At the informal pretrial scheduling conference held on January 10, 2023, the court established pretrial and trial deadlines, and set trial for the week of February 5, 2024. Discovery is continuing.
6. *Wastell v. KPB, Pierce*, Case No. 3KN-22-00765CI. This is a complaint filed on behalf of the plaintiff for damages stemming from alleged sexual harassment and other acts committed by former Borough Mayor Pierce. The plaintiff alleges the Borough is liable for damages due to the fact that the Borough Mayor should be considered an employee of the Borough, and alleging that the Borough failed to adequately protect the Plaintiff who was also an employee of the Borough at the time of the alleged wrongful acts. The court granted KPB's motion to dismiss Plaintiff's claims for punitive damages and KPB has filed an answer to the complaint. Subsequently, all parties reached an out-of-court agreement to resolve this matter without trial. Per the settlement agreement, the total settlement owed to the Plaintiff is \$237,500. The Borough's portion of the settlement is \$206,250; Mr. Pierce's portion of the settlement is \$31,250. Upon payment of the settlement this matter will be dismissed with prejudice.
7. *Moody v. Kenai Peninsula Borough*, Case No. 3AN-23-04282 CI. Former service area employee brought suit against the Borough alleging that she was fired in January 2021 in retaliation for reporting sexual harassment by a former service area deputy fire chief. Plaintiff is seeking actual and compensatory damages and costs of litigation. The Borough's answer to the complaint has been filed and a tentative trial date is set for April 8, 2024. Discovery is ongoing.
8. *Beachcomber, LLC, v. Kenai Peninsula Borough*, Case No. 3KN-23-00004CI. This is an appeal to the Kenai Superior Court of OAH's final decision in Case No. 2022-04 PCA, *Bilben, et al. v. KPB PC, Beachcomber LLC, et al* (see below), which upheld the Borough Planning

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Commission's denial of Beachcomber, LLC's CLUP. Appellant's Opening Brief is due Tuesday, May 30, 2023.

B. The following is a summary of open or recently resolved administrative appeals from Planning Commission decisions:

1. Case No. 2020-01 PCA, Beachcomber. Neighboring property owners appealed a Planning Commission's decision approving a modification of a conditional use material site permit. The Borough filed a notice of non-participation in the matter and is not a party to the appeal. This case is currently stayed.
2. Case No. 2022-04 PCA, Bilben, et al. v. KPB PC, Beachcomber LLC, et al., This case involves a second appeal to the Office of Administrative Hearings ("OAH") of the Planning Commission's approval of a conditional land use permit ("CLUP") after the matter was remanded from the superior court. The Borough did not participate in the Superior Court appeal because only private interests were at stake. The Superior Court issued its decision remanding the matter to the Planning Commission for additional findings. Subsequently, Beachcomber, LLC filed an appeal to the Alaska Supreme Court. The Supreme Court denied the petition for review and the matter went before the Planning Commission on remand. On remand, the Planning Commission voted to deny the CLUP. Beachcomber, LLC appealed to OAH. After briefing and a hearing, OAH released its Decision on December 6, 2022, upholding the Planning Commission's denial of the CLUP. Beachcomber has since appealed the decision to Superior Court, see 3KN-23-00004CI, above.
3. Case No. 2022-05 PCA, Kossler. This is an appeal of the Planning Commission's decision to uphold the June 23, 2022, Plat Committee's conditional preliminary approval of East Oyster Cove Subdivision Preliminary Plat as requested by applicant, Alaska Mental Health Trust Authority. The appeal hearing was held April 4, 2023. ALJ Sullivan requested the Borough to supplement the record. Decision in the case is pending.
4. Case No. 2022-06 PCA, Taylor. The Planning Commission conditionally approved a building setback encroachment permit. Neighboring property owners appealed to OAH. The Borough filed a Motion to Dismiss, which OAH denied. OAH held the appeal hearing for February 23, 2023. ALJ Sullivan subsequently requested the parties supplement the record. ALJ Sullivan recently issued a decision reversing the Planning Commission's decision. The Borough will request reconsideration and may appeal the decision to Superior Court.

C. Settlements executed on behalf of the Borough in the quarter ending 03/31/23:¹

1. Wastell v. Pierce, KPB – Borough's portion of the settlement is \$206,250.

¹ This matter was settled on April 19, 2023 following Assembly approval of the settlement.