

Memo

To: Mayor Moore and Town Council Members
Cc: Kirk Blouin, Town Manager
From: Joanne M. O'Connor
Date: June 5, 2024
Re: Litigation Status Report – June 2024

This report provides a brief summary of litigation against the Town that is pending as of June 1, 2024 and that concluded in the preceding quarter.

PENDING LITIGATION

1. Form 6 Litigation

By Resolution 005-2024, the Town Council authorized participation by the Town and any elected officials that wished to participate in lawsuits seeking a declaration that the provisions of Section § 112.144(1)(d), Florida Statutes that require municipal elected officials to file Form 6 financial disclosure forms is unconstitutional and invalid. The Town, Mayor Moore and all the Town Council members have elected to participate. The law firm of Weiss Serota Helfman Cole & Bierman has filed two separate lawsuits against the members of the Florida Commission on Ethics, which is the agency charged with implementing and enforcing the State's financial disclosure laws:

a. **The Federal Form 6 Suit:** *Loper v. Lukis*, Case No. 1:24-cv-20604 (S.D. Fla.). This suit is brought only on behalf of the elected officials, asserting that the Form 6 requirement compels content-based, non-commercial speech in violation of the First Amendment to the United States Constitution.

b. **The State Form 6 Suit:** *Loper v. Lukis*, filed in the Circuit Court of the Second Judicial Circuit in and for Leon County, Fla. This suit is brought on behalf of the municipalities and elected officials, asserting that the Form 6 requirement violates the right to privacy under the Florida Constitution.



On April 22, 2024, U.S. District Judge Melissa Damian held an evidentiary hearing on the Elected Officials' **Motion for Preliminary Injunction** in the Federal Form 6 Suit. Following the hearing, Judge Damian requested supplemental briefing. It has been three (3) weeks since that briefing was completed. A ruling is anticipated any day.

2. Midtown Beach: Private Property Rights Challenges.

a. ***George A. Cloutier, Tiffany Dawn Cloutier v Town of Palm Beach***, Case No: 502022CA003744XXXXMB AN (15th Jud. Cir. in and for Palm Beach Cnty, Fla.).

b. ***The Condominium Association of Ocean Towers, Inc. and Warden House Association, Inc. v Town of Palm Beach***, Case No: 502022CA005042XXXXMB AO (15th Jud. Cir. in and for Palm Beach Cnty, Fla.)

Residents who own oceanfront property between Sunrise Avenue and Wells Road sued the Town in 2022. These residents own parcels that encompass a portion of the dry sand beach upland of the Erosion Control Line ("ECL") that was recorded on January 7, 2003 (the State holds title to land seaward of the ECL).

Plaintiffs ask the Circuit Court to declare their respective property rights in the beach areas and their ability to post the boundaries of their private beach areas with post and rope and "no trespassing" signs. They have also alleged that the Town's failure to enforce trespass ordinances—including as to persons using their beach areas for traditional beach uses, such as sunbathing and dog walking—constitutes a temporary "taking" of their property without compensation.

The Town has asserted numerous defenses, including that the additional sand added to Plaintiffs' private beach areas upland of the ECL following publicly funded beach renourishments are "subject to a public easement for traditional uses of the sandy beach" pursuant to Florida law. Fla. Stat. § 161.141.

Deposition discovery is nearly concluded. A hearing is set on July 9 on Plaintiffs' motion for summary judgment. This case has a projected trial date in November 2024. The cases have been unsuccessfully mediated.

4. ***State of Florida ex rel. Virginia E. Dadey, Gregory J. Englesbe and Peter Kaupe v Town of Palm Beach***, Case No: 502022CA008479XXXXMB AI (15th Jud. Cir. in and for Palm Beach Cnty, Fla.). Town residents in the 200 Block of Atlantic Avenue challenge the status of the beach access at the east end of Atlantic Avenue. Certain owners in the 100 Block of Atlantic Avenue asserted a private ownership right to the access point based on a recorded plat. In December 2020, the Town publicly announced that it agreed with this determination. The 100 Block owners have locked the access at Atlantic Avenue.

Plaintiffs bring two-counts: (1) a claim to abate a purported public nuisance (the gate and any other obstructions of the access); and (2) a claim that the Town has violated the Public Records Act. As to the first claim, Plaintiffs rely on a statute that provides for dedication of public roadways to

assert that title to the beach access became vested in the Town. The Town has asserted numerous defenses, including that Plaintiffs failed to join the 100 Block owners, who are indispensable parties.

Discovery is largely concluded, with a deposition of Plaintiffs' surveyor remaining. It is anticipated that deposition will be done by an extended discovery deadline later this month. The summary judgment deadline has been extended to mid July. A prior mediation was unsuccessful. The case will be determined by the Court, either at summary judgment or a non-jury trial. No trial date has been set.

5. Alef Preschool Challenges

a. ***Palm Beach Biltmore Condo. Ass'n v. Town of Palm Beach, Biltmore Galleria, LLC and Alef Preschool of Palm Beach, Inc.***, Case No. 22-012348 (15th Jud. Cir. in and for Palm Beach Cnty., Fla.) (Appellate Division)

b. ***Parc Regent Condom. Ass'n, Inc., Linda Landis, Jamie Stern, Steven Brown and Judith Berkowitz v. Town of Palm Beach, Biltmore Galleria, LLC and Alef Preschool of Palm Beach, Inc.***, Case No. 22-012330 (15th Jud. Cir. in and for Palm Beach Cnty., Fla.) (Appellate Division)

Two appeals seeking review of the Town's zoning approvals for the Alef Preschool have been filed, and consolidated, in the circuit court appellate division by the Palm Beach Biltmore Condominium Association, Inc. and by Parc Regent Condominium Association, Linda Lewis, Jamie Stern, Steven Brown and Judith Berkowitz. The Biltmore Galleria, LLC and the Alef Preschool of Palm Beach, Inc. are named with the Town as respondents. Filed on December 15, 2022, these petitions for certiorari review assert that the Town Council wrongly granted a parking variance and approved a site plan and special exception to permit the preschool project.

As of August 30, 2023, this matter has been fully briefed and awaiting a decision from the circuit court appellate division.

6. ***Robert F. Greenhill v. Town of Palm Beach***, Case No. 502023CA002478 (15th Jud. Cir. in and for Palm Beach Cnty., Fla.) (Appellate Division): This appeal filed by Mr. Greenhill challenges the designation of his property at 686 Island Drive as a historic landmark.

As of September 14, 2023, this matter has been fully briefed and awaiting a decision from the circuit court appellate division.

7. ***Thomas O. McCarthy v. Town of Palm Beach***, Case No. 502023CA012789 (15th Jud. Cir. in and for Palm Beach Cnty., Fla.) (Appellate Division): This is an appeal by neighbors challenging the Town's grant of variances to permit the rehabilitation of a two-story accessory structure designated as a historically significant building to be raised 16 inches and to increase the first-floor ceiling height from 7 to 8 feet.

As of October 20, 2023, this matter has been fully briefed and awaits a decision from the circuit court appellate division.

