

# **DESK PACKET**

**(MATERIALS SUBMITTED AFTER MEETING PACKET PUBLICATION)**

## **G. OTHER**

### **1. Remand Hearing**

**Building Setback Encroachment; KPB File 2022-121**

**Lot 10, Lake Estates Subdivision, Plat KN 1648**

**Applicants: David & Nancy Whitmore**

**General Location: GL Hollier Street**

**Ridgeway Area**

**(First Heard At October 24, 2022 PC Meeting)**

**MEMORANDUM**

**TO:** Jeremy Brantley, Chair  
Members, Kenai Peninsula Borough Planning Commission

**FROM:** A. Walker Steinhage, Deputy Borough Attorney

**CC:** Robert Ruffner, Director of Planning

**DATE:** September 25, 2023

**SUBJECT:** Setting the Remand Hearing Date in ITMO: Setback Encroachment Permit Along GL Hollier Street

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**The purpose of this scheduling discussion is for the Planning Commission to set a date to consider this matter consistent with the Office of Administrative Hearings's ("OAH") *Decision*. The Commission should not discuss the merits during the scheduling discussion.**

On May 22, 2023, OAH Administrative Law Judge Lisa M. Toussaint issued her *Decision After Reconsideration* in the matter of the Commission's decision through Commission Resolution 2022-46 to approve Lot 10, Lake Estates Subdivision building setback encroachment permit located on GL Hollier Street, OAH No. 22-0925-MUN (the "OAH *Decision*"). The OAH *Decision* is attached. An excerpt from pages 17 through 20 of the OAH *Decision* is provided to highlight direction and guidance from OAH:

In deciding how to proceed on remand, the Borough is advised that the record developed before the Planning Commission to date is exceedingly sparse as to information relevant to *each* of the three criteria in KP.B 20.10.110(E). The Commission should be mindful that issuing a building setback encroachment permit is an exception to the rule prohibiting such encroachments. The Commission may only approve such an encroachment permit if there is substantial evidence showing that each of the three criteria is met – i.e., that the encroaching shop will not interfere with road maintenance, it will not interfere with sight lines or distances, and it will not create a safety hazard. If this threshold is not met as to any of the three criteria, the permit may not be issued. These are affirmative findings, and the applicant has the burden to demonstrate with substantial evidence that they are true. It is immaterial whether there is substantial evidence showing the opposite conclusion (that the shop will interfere with road maintenance, will interfere with sight lines or distances, and will create a safety hazard), because that is not the applicable standard. I caution the Commission against trying to do the required analysis under KP.B 20.10.110(E) with an extremely thin record.

Further, the Commission should be cognizant that it must apply each of the three criteria in KP.B 20.10.110(E). There is evidence that at least some Commissioners may have applied a different standard, rather than

those in KPB 20.10.110(E), in voting to approve the permit. Comments by Commissioner Morgan and Commissioner Gillham during the October 24, 2022 public hearing suggest they may have felt compelled to approve the permit because they believed the Whitmores' contractor was to blame for the shop encroaching into the setback.

...

But whether the contractor or the homeowner failed to determine that the shop would be an encroachment into the building setback is not relevant to the analysis under KPB 20.10.110(E). Thus, it cannot be used as an independent basis for the Commissioners to approve the permit.

I also am concerned that some Commissioners may have misunderstood how to evaluate whether road maintenance will be impacted by the present of the shop on Lot 10. A comment by Commissioner Stutzer suggests that the fact that the road is privately, rather than publicly, maintained may have influenced his vote on the permit[.]

...

But as Judge Sullivan correctly pointed out in the April 18, 2023 decision, it is immaterial for the analysis whether the road is privately or publicly maintained. The Planning Commissioner was required to determine whether the shop will interfere with road maintenance, irrespective of whether the road is publicly or privately maintained.

Finally, a comment by Commissioner Brantley suggests that he voted in favor of the permit because the encroachment was into the building setback, which is the Whitmores' private property, rather than into the public right-of-way.... But as explained previously, whether the encroachment is into the right-of-way is not the end of the analysis. Said another way, just because the property within the setback is the Whitmores' private property, it is not a foregone conclusion that the encroachment will interfere [*sic*] with road maintenance. The shop could interfere with snow removal, for example, if it is necessary for some snow to be placed in the setback to clear GL Hollier Street, and there is insufficient space within the setback to place the snow due to the presence of the shop. In any event, it is the Commissioners' responsibility to evaluate whether the presence of the shop on the setback will interfere with road maintenance, no matter the nature of the encroachment. It may well be the case that Commission [*sic*] will decide it needs more evidence to make an adequate finding in that regard.

....

There is not substantial evidence to support the Commission's conclusions that each of the mandatory standards in KPB 20.10.110(E) has been met. The matter is remanded to the Commission to (1) make additional findings and conclusions supported by substantial evidence in the existing record as to each of the three criteria in KPB 20.10.110(E), or, alternatively,

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(2) KPB 20.10.110(E), take additional evidence from the parties and the public and make new findings and conclusions under each of the three criteria, based on the augmented record.

There are no items on the agenda for the Commission's regularly-scheduled meeting of October 9, 2023. As such, it is recommended the Commission first consider the viability of that date for the remand hearing. The other alternatives are to schedule the remand hearing for another regular meeting or to set a special meeting. The other matter for the Commission to decide is whether to reopen the record for additional evidence and, if so, the deadline for submittal. If the Commission elects to reopen the record, it should also consider and decide whether it desires a new staff report after additional information and investigation in light of OAH's guidance. Deputy Borough Attorney Todd Sherwood will attend to advise and assist the Planning Commission as needed.

Finally, this is a quasi-judicial matter. The Commission is reminded to be aware of and refrain from ex parte communication.

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON  
BEHALF OF THE KENAI PENINSULA BOROUGH PLANNING COMMISSION**

In the matter of the Kenai Peninsula Borough )  
Planning Commission's decision to conditionally )  
approve Lot 10, Lake Estates Subdivision Building )  
Setback Encroachment Permit, KPB File )  
2022-121; KPB Resolution 2022-46 located )  
on GL Hollier Street, )  
)  
TROY & AUTUMN TAYLOR, )  
)  
Appellants. )  
\_\_\_\_\_)

OAH No. 22-0925-MUN  
Agency No. 2022-06-PCA

**DECISION AFTER RECONSIDERATION**

**I. Introduction**

Applicants David and Nancy Whitmore were granted a building setback permit by the Kenai Peninsula Borough Planning Commission on October 24, 2022. A garage the Whitmores built on their property encroaches into the building setback for the lot. Troy and Autumn Taylor own the residential lot across the street from the encroachment. They appealed the Planning Commission's decision, asserting among other things that KPB's setback requirements were disregarded. The case was fully briefed, and oral argument occurred. Based on that briefing, argument and record, the Planning Commission's decision approving the setback permit is remanded.

**II. Facts and Proceedings**

**A. *The Property at Issue***

The Whitmores own Lot 10, Lake Estates Subdivision, per Plat Number K-1648, Records of the Kenai Recording District, Third Judicial District (KPB Parcel ID 05724008).<sup>1</sup> The appellants, the Taylors, own Lot 9, Lake Estates Subdivision (KPB Parcel ID 05724001).<sup>2</sup> Below is an aerial image of the parties' respective parcels, showing the approximate location of the Whitmore encroachment with red hash marks<sup>3</sup>

<sup>1</sup> Record (R.) 12, 26.

<sup>2</sup> T. 4, R. 26.

<sup>3</sup> R. 16. The image was taken before the Whitmores constructed their encroaching building, and therefore does not depict it. *See also* R. 13.



The information depicted hereon is for a graphical representation only of best available sources. The Kenai Peninsula Borough assumes no responsibility for any errors on this map.

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The parties' respective parcels were created by the Lake Estates Subdivision Plat in 1969. Per that Plat, all lots within the subdivision, including Lots 9 and 10, were required to have 20-foot building setback limits from all interior sides and 25-foot building setback limits from all sides with street frontage. The owners also explicitly "dedicate[d] to public use and to the use of the public utilities the streets shown hereon."<sup>4</sup> The strip of land referred to in this decision as the "GL Hollier Access," situated between the parties' lots, was dedicated as a 30-foot public use street and Ross Drive, the main roadway leading through the subdivision to the parties' parcels, was dedicated as a 60-foot public use street. The Lake Estates Subdivision Plat was ultimately approved by the KPB Planning Commission on September 8, 1969.<sup>5</sup>

<sup>4</sup> R. 19.

<sup>5</sup> R. 19, 20.

The 1969 KPB Planning Commission minutes approving the Plat acknowledged that the 30-foot road dedication to the Holliers' property did not meet the minimum width required for roads within the subdivision. The minutes approving the Plat state that "[t]he 30 foot road dedication to the Holliers [sic] property would be an exception to the minimum width required by the subdivision; however, *since only one parcel of land is to be served*, 30 feet of right-of-way should suffice and the exception granted."<sup>6</sup> Moreover, the KPB staff report in this matter notes that the width is substandard and contends that a 20-foot setback is justified:

[t]he dedication for GL Hollier Street is only 30 feet wide. **The right-of-way does not meet KPB width standards** and while constructed is not maintained by the Borough. The right-of-way only **provides access to three lots**.

...

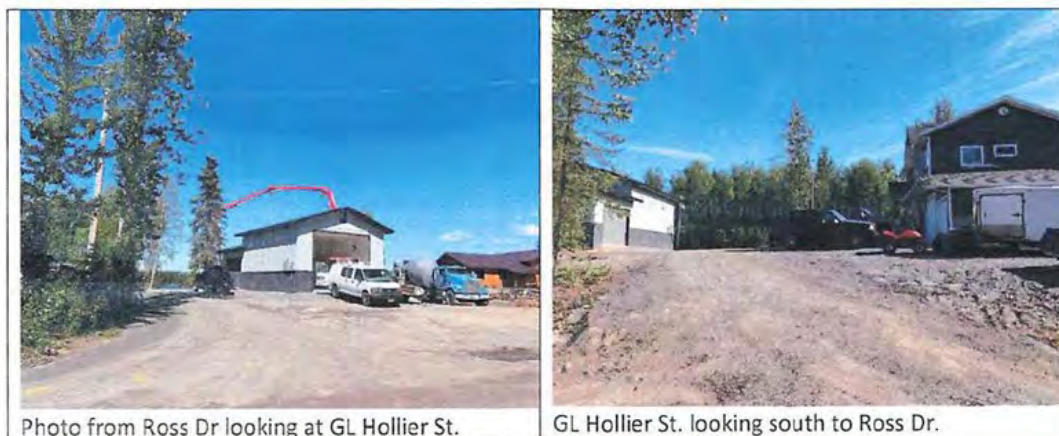
The width that was granted did not fit the width of any of the types of roads defined in the code. Per the staff report it appears an exception to width was granted. This right-of-way fits the definition of Marginal Access Streets in the 1968 KPB code. The definition states 'minor streets which are parallel with and adjacent to arterial streets and highways, and which provide access to abutting properties and protection from through traffic.' **While this width does not comply with the code**, the approval of a substandard width would mean that this is a marginal access street and all streets were subject to a 20 foot building setback at the time. The decision was made that the plat did note setbacks were present, code required a minimal 20 foot setback, the plat did not depict a 25 foot setback, the plat note also included 20 foot setbacks on interior lines, and thus we are enforcing a 20 foot setback along GL Hollier Street.<sup>7</sup>

During the fall of 2021, the Whitmores began prepping for construction of a 24-foot wide by 49-foot-long garage. They began pouring concrete on May 4, 2022. The Taylors saw the garage foundation being poured and realized that it was well within the subdivision's setback requirements per the Plat, and they immediately contacted a compliance officer in the KPB Planning Department. That person said it would take some time for the Borough to look into the issue. By the time the Borough sent staff out to investigate several weeks later, the walls on the garage were already constructed. Below are photos of what the construction project looked like by the time Planning Department staff came out to investigate.<sup>8</sup>

<sup>6</sup> R. 20 (emphasis added).

<sup>7</sup> R. 13 (emphasis added).

<sup>8</sup> T. 2, 4-5; R. 12.



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On May 20, 2022, Mrs. Taylor again contacted the KPB Planning Department and spoke with the Department Director, Robert Ruffner. She asked why work was not being stopped on the Whitmores' garage. She also said that before construction got too far along, it seemed that the Whitmores should be told to stop construction so that the building could be moved to comply with the setback requirements. According to Mrs. Taylor, she was informed that the issue was with the KPB legal department, and they were investigating the setback requirements. She was also instructed that if there were further concerns, she and her husband would be notified by mail about a public hearing.<sup>9</sup>

By July 22, 2022, the Whitmores were actively preparing an application for a building setback encroachment permit. KPB also confirmed that a surveyor performing work for the Borough in the subdivision would prepare an as-built survey so that it could be used for their permit.<sup>10</sup>

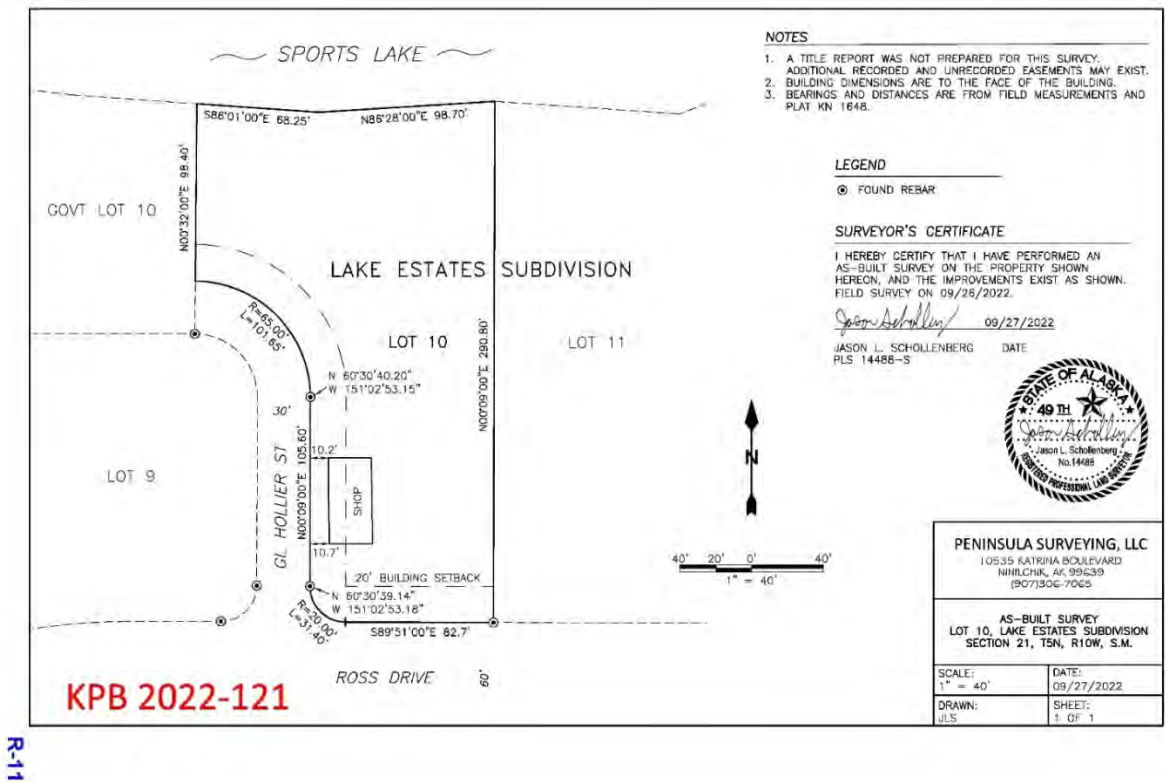
The as-built survey for Lot 10, which was prepared on September 27, 2022, shows that the Whitmores' garage is located between 10.2 feet and 10.7 feet from their property line and the edge of the 30-foot-wide GL Hollier Access. The survey also shows the setback as 20 feet along the two sides of the Whitmores' property.<sup>11</sup>

<sup>9</sup> *Id.*

<sup>10</sup> R. 12.

<sup>11</sup> The Lake Estates Subdivision Plat indicated that all lots would have 20-foot building setback limits from all interior sides and 25-foot setback limits from all sides with street frontage. R. 19. Contrary to the Plat, KPB has taken the position that the setback requirement applicable to Lot 10 is a 20-foot setback along its sides at issue here. R. 11, 13.

A copy of the as-built survey is shown below:



The image below is an aerial image depicting the Taylors' Lot 9, the Whitmores' Lot 10, the parties' respective homes, the Whitmores' garage, and GL Hollier Street, located between the parties' respective properties.



As the record and argument at the hearing confirmed, the specific details of the Whitmores' garage are not disputed. The garage is 49 feet long by 24 feet wide and approximately 1,176 square feet. It has approximately 14-foot-high walls. It also has in-floor heating and a half bath. It has two garage doors for vehicles. One garage door opens onto Ross Drive and the second garage door opens onto GL Hollier Street across from the Whitmores' home. Mrs. Whitmore has indicated that she intends to use the garage entrance opening onto GL Hollier Street to house her personal vehicle.<sup>12</sup>



On October 4, 2022, the KPB Planning Department published notice that it had received an encroachment permit application from the Whitmores for their garage. Nearby property owners were also informed that the Planning Commission would hold a public hearing regarding the Whitmores' application for an encroachment permit on October 24, 2022.<sup>13</sup>

***B. The Proceedings Before the Commission***

The Whitmores' application for an encroachment permit was heard before the KPB Planning Commission on October 24, 2022. Eleven of the twelve Commission members participated, as did Nancy Whitmore, Troy Taylor and KPB Planning Department staff.<sup>14</sup> Prior to the meeting, the KPB staff report regarding the permit was circulated and provided to the

<sup>12</sup> R. 12 – 15; T. 4; Taylors' Opposition to Motion to Dismiss at 18. In addition to the concrete foundation for the garage itself, there is also a concrete generator pad along the wall bordering GL Hollier Street. T. 5 - 6.

<sup>13</sup> R. 22 - 28. As the notice indicated, the Whitmores' application was received by the Planning Department on September 27, 2022. R. 22.

<sup>14</sup> R. 29 – 33.

Commission members.<sup>15</sup> Although the KPB staff report describes the encroaching structure as a “shed,”<sup>16</sup> the building is in fact a detached “garage/shop,” as Mrs. Whitmore herself confirmed in testimony before the Commission.<sup>17</sup> The staff report recommended adopting the encroachment permit application, as Resolution 2022-46, subject to compliance with KPB 20.10.110, Sections F and G.<sup>18</sup>

Per KPB 20.10.110(E), the Commission was required to apply the three standards in considering the permit application: 1) the building setback encroachment may not interfere with road maintenance; 2) the building setback encroachment may not interfere with sight lines or distances; and 3) the building setback encroachment may not create a safety hazard.

After some discussion and questioning by the Commission members, a vote was taken and the Whitmores’ application for the permit was unanimously approved.<sup>19</sup> In doing so, the Commission adopted each of the findings proposed by the Planning Department staff in its staff report and placed the following conditions on the permit’s approval:

Standard 1. The building setback encroachment may not interfere with road maintenance.

*Findings:*

10. The shop is slightly angled with the northeast corner being the furthest encroachment into the setback at 9.8 feet into the setback.
12. The road is constructed by privately maintained [sic].<sup>20</sup>
13. Due to the width of the street, improvements, the location of Sports Lake, it does not appear that this right-of-way will ever serve additional lots.
14. The encroachment is along a straight portion of the right-of-way.
15. There are no terrain issues within the dedication.

Standard 2. The building setback encroachment may not interfere with sight lines or distances.

*Findings:*

10. The shop is slightly angled with the northeast corner being the furthest encroachment into the setback at 9.8 feet into the setback.
11. There does not appear to be any line of sight issues.
12. The road is constructed by privately maintained [sic].

<sup>15</sup> R. 12 – 20.

<sup>16</sup> R. 13.

<sup>17</sup> R. 31; T. 3.

<sup>18</sup> R. 15.

<sup>19</sup> R. 1 (Planning Commission Resolution 2022-46).

<sup>20</sup> It is inferred that this finding was intended to state that “the road is privately maintained.”

13. Due to the width of the street, improvements, the location of Sports Lake, it does not appear that this right-of-way will ever serve additional lots.
  14. The encroachment is along a straight portion of the right-of-way.
  15. There are no terrain issues within the dedication.
- Standard 3. The building setback encroachment may not create a safety hazard.

*Findings:*

10. The shop is slightly angled with the northeast corner being the furthest encroachment into the setback at 9.8 feet into the setback.
11. There does not appear to be any line of sight issues.
12. The road is constructed by privately maintained [sic].
13. Due to the width of the street, improvements, the location of Sports Lake, it does not appear that this right-of-way will ever serve additional lots.
14. The encroachment is along a straight portion of the right-of-way.
15. There are no terrain issues within the dedication.

The approval is subject to:

1. Approved a permit to allow only the encroaching portion of the shop that extends 9.8 feet into the 20 foot building setback adjoining GL Hollier Street right-of-way on the west boundary of Lot 10, Lake Estates Subdivision, granted by Lake Estates Subdivision (K-1648).
2. That any new, replacement and/or additional construction will be subject to the twenty-foot building setback limit.
3. That the twenty-foot building setback shall apply to the remainder of said lot.
4. That an exhibit drawing or as-built survey prepared by a licensed land surveyor, showing the location of the portion of the building setback exception to be granted be attached to and made a part of this Resolution, becoming page 2 of 2.
5. That this resolution is eligible for recording upon being signed by the Planning Commission chairperson and will be deemed void if not recorded within 90 days of adoption.
6. That this Resolution becomes effective upon being properly recorded with petitioner being responsible for payment of recording fee.<sup>21</sup>

**C. The Proceedings During This Appeal**

The Taylors, acting *pro se*, timely appealed the Commission's approval of the Whitmores' encroachment permit. They alleged several errors regarding the Commission's

<sup>21</sup>

R. 2 – 3.

findings, and claimed that “all parties involved in the building of this shop disregarded the requirements after it was brought to their attention. . .”<sup>22</sup> The matter was then referred to the Office of Administrative Hearings (OAH).<sup>23</sup> Entries of appearance were subsequently filed by Deputy KPB attorney, A. Walker Steinhage, and by Craig and Nancy Whitmore.<sup>24</sup>

The day after the case was referred to OAH, and before the record was produced, KPB filed a motion to dismiss the Taylors’ appeal and to stay of production of the record.<sup>25</sup> The Taylors submitted an opposition to the motion and provided supporting documentation.<sup>26</sup> The Administrative Law Judge denied KPB’s motion to dismiss.<sup>27</sup>

KPB then produced an initial 33-page record, and a 14-page transcript from the public hearing in the matter before the Planning Commission.<sup>28</sup> Next, KPB filed a motion to strike what it alleged was improperly submitted new evidence from the Taylors and, a motion for reconsideration of the earlier order denying its motion to dismiss.<sup>29</sup> Both motions were denied.<sup>30</sup>

A telephonic hearing was held on February 23, 2023. Following the hearing, an order was issued expanding the record with additional specific items, including items required by KPB 21.20.270(A), such as the Whitmores’ original encroachment permit application and supporting information, and portions of the 1968 KPB Code referenced in the briefing and at the hearing.<sup>31</sup>

### **III. Discussion**

#### ***A. Procedural and Substantive Requirements***

KPB procedures for addressing encroachment issues along lot lines are contained in KPB Title 20, Chapter 10. KPB 20.10.010 specifies that “[t]he purpose of this title is to promote an adequate and efficient street and road system, to provide necessary easements, to provide

<sup>22</sup> Appeal of Planning Commission Decision (November 8, 2022).

<sup>23</sup> Case Referral Notice (December 1, 2022).

<sup>24</sup> Notice and Copies of Entries of Appearance (November 30, 2022). At the hearing, Mr. Whitmore confirmed that his middle name is Craig, his first name is David, and that he generally uses his middle name.

<sup>25</sup> Motion to Dismiss and Request to Stay Record Preparation (December 2, 2022). The primary contention of the motion to dismiss was lack of standing.

<sup>26</sup> Taylors’ Opposition to Motion to Dismiss (December 12, 2022).

<sup>27</sup> Order Denying KPB’s Motion to Dismiss. As the order noted, the Taylors, as the Whitmores’ neighbors closest to the encroachment, plainly have standing.

<sup>28</sup> Appeal Record (December 21, 2022), R. 1 – 56.

<sup>29</sup> Motion to Strike Improperly-Submitted New Evidence and Motion for Reconsideration (December 28, 2022).

<sup>30</sup> Order Denying Motions.

<sup>31</sup> Order for Supplementation of the Record and Opportunity to Object (February 23, 2023).

minimum standards of survey accuracy and proper preparation of plats, and to protect and improve the health, safety and general welfare of the people.”<sup>32</sup>

Encroachment permits under Title 20, Chapter 10, are required any time a person seeks to construct, or cause an encroachment within a building setback. When that occurs, a person must apply for an encroachment permit from the KPB Planning Department.<sup>33</sup> After the application is filed, it is then scheduled to be heard at the next available meeting of the KPB Planning Commission.<sup>34</sup>

The Planning Commission is required to either approve or deny the permit application, considering at the three criteria set out in Part II-B above.<sup>35</sup> Its decision is appealable to a hearing officer.<sup>36</sup>

### ***B. Standard of Review***

The applicable standards of review for the approval of the encroachment permit are set by the KPB Code. On purely legal issues, the standard of review is one of independent judgment. However, “due consideration shall be given to the expertise and experience of the planning commission in its interpretations of KPB titles 20 and 21.”<sup>37</sup>

As to findings of fact, the hearing officer shall defer to the Planning Commission if they are supported in the record by substantial evidence.<sup>38</sup> “Substantial evidence” is “relevant evidence a reasonable mind might accept as adequate to support a conclusion.”<sup>39</sup> Thus, the substantial evidence standard requires the reviewer to uphold the original factual findings if they are supported by substantial evidence, even if the reviewer may have a different view of the evidence.

In a case reviewed on the substantial evidence standard, “[i]t is not the function of the [hearing officer] to reweigh the evidence or choose between competing inferences, but only to determine whether such evidence exists.”<sup>40</sup> This said, if substantial evidence in the

<sup>32</sup> KPB 20.10.010.

<sup>33</sup> KPB 20.10.110(A).

<sup>34</sup> KPB 20.10.110(D).

<sup>35</sup> KPB 20.10.110(E).

<sup>36</sup> KPB 20.10.110(H).

<sup>37</sup> KPB 21.20.320(1).

<sup>38</sup> KPB 21.20.320(2).

<sup>39</sup> KPB 21.20.210(7).

<sup>40</sup> *Interior Paint Co. v. Rodgers*, 522 P.2d 164, 170 (Alaska 1974).

record does not support the Commission's findings the hearing officer may make a different finding on the factual issues based on substantial evidence in the record.<sup>41</sup> Alternatively, the hearing officer has discretion to remand the matter to the Commission for new findings.<sup>42</sup>

When evaluating whether evidence for a finding is substantial, it is proper to "take into account whatever in the record fairly detracts from its weight."<sup>43</sup> The Alaska Supreme Court has adopted the requirement of substantial evidence in light of the whole record,<sup>44</sup> citing approvingly to the U.S. Supreme Court's discussion of this issue:

Whether or not it was ever permissible for courts to determine the substantiality of evidence supporting a Labor Board decision merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn, the new legislation definitely precludes such a theory of review and bars its practice. The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. This is clearly the significance of the requirement in both statutes that courts consider the whole record....

To be sure, the requirement for canvassing "the whole record" in order to ascertain substantiality does not ... mean that even as to matters not requiring expertise a court may displace the Board's choice between two fairly conflicting views even though the court would justifiably have made a different choice had the matter been before it de novo. Congress has merely made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view.<sup>45</sup>

### **C. Analysis**

#### **1. The depth of the setback**

There is a question as to whether the depth of the building setback on Lot 10 is 20 feet or 25 feet. The plat establishing the Lake Estates subdivision in 1969 does not depict a setback on GL Hollier Street, but it does show a 25-foot setback on Ross Drive.<sup>46</sup> The plat also contains a plat note

<sup>41</sup> KPB 21.20.320(3).

<sup>42</sup> *Id.*

<sup>43</sup> *Lopez v. Administrator, Public Employees' Retirement System*, 20 P.3d 568, 571 (Alaska 2001).

<sup>44</sup> *Keiner v. City of Anchorage*, 378 P.2d. 406 (Alaska 1963).

<sup>45</sup> *Delaney v. Alaska Airlines*, 693 P.2d 859, 863, n.2 (Alaska 1985) *overruled on other grounds* 741 P.2d 634, 639 (Alaska 1987) (quoting approvingly, *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-90, 71 S.Ct. 456, 464-66, 95 L.Ed. 456, 467-68 (1950)).

<sup>46</sup> R-19.

stating that “[s]urface building limits from property lines shall be: Interior sides 20’ and *street Frontage 25’*.” KPB staff concluded that the setback is 20 feet, however. This determination was based on language in the Borough Code in place at the time, which allowed for a less restrictive setback, and the staff’s determination that GL Hollier Street is a Marginal Access Street -i.e., a minor street rather than a more substantial arterial street.<sup>47</sup>

Whether a 20 or 25-foot setback applies in this case may be debatable, but it is not a matter that needs to be resolved in the context of this administrative appeal.<sup>48</sup> It is clear that the Whitmores’ shop encroaches into the setback on Lot 10, irrespective of whether a 20 or 25-foot setback applies. No matter the depth of the setback, the encroaching shop is located approximately 10 feet from the property line abutting GL Hollier Street. It is this encroachment – the presence of a shop 10 feet from the property line – that the Planning Commission was required to evaluate against each of the three criteria in KPB 20.10.110(E).

**2. Does substantial evidence support the Planning Commission’s decision to approve the encroachment permit?**

The Commission concluded that the Whitmores met each of the three standards in KPB 21.10.110(E), and made findings that are essentially the same for each. For the first standard, the Commission concluded that the encroachment will not interfere with road maintenance, based on the following findings:

10. The shop is slightly angled with the northeast corner being the furthest encroachment into the setback at 9.8 feet into the setback.
12. The road is constructed by privately maintained [sic].
13. Due to the width of the street, improvements, the location of Sports Lake, it does not appear that this right-of-way will ever serve additional lots.
14. The encroachment is along a straight portion of the right-of-way.
15. There are no terrain issues within the dedication.<sup>49</sup>

The Commission made the same findings for its conclusions that the second and third standards (concerning interference with sight lines or distances, and the creation of a safety hazard, respectively) will be met, but added one more finding, Finding 11, which states:

<sup>47</sup> R. 13 (emphasis added).

<sup>48</sup> It is possible that a 25-foot setback exists on Lot 10, and that it is enforceable by a private landowner against another.

<sup>49</sup> R. 2.

11. There does not appear to be any line of sight issues.<sup>50</sup>

**a. Whether the encroachment interferes with road maintenance.**

The first standard in KPB 21.10.110(E) requires that the encroachment will not interfere with road maintenance.<sup>51</sup> Although the Commission concluded that the first standard will be met, its conclusion is not supported by substantial evidence.

The Commission's conclusion is based on findings that contain largely factually correct information, but they nevertheless do not show how the standard will be met. Finding 12, for example, correctly states that GL Hollier Street is privately maintained.<sup>52</sup> But the standard in KPB 21.10.110(E)(1) is not limited to whether the encroachment may interfere with the Borough's maintenance of a roadway. The standard requires that the encroachment not interfere with road maintenance at all, irrespective of whether the road is publicly or privately maintained. Thus, the Commission's finding that the road is privately maintained is immaterial to and does not advance the required analysis under the standard.

Similarly, findings 13 (the road is unlikely to serve additional lots), 14 (the encroachment is along a straight portion of the right-of-way), and 15 (there are no terrain issues within the roadway) do not show whether or how the encroachment will not interfere with road maintenance. While these findings may contain accurate statements, without further explanation, it is unclear how these findings support the Commission's conclusion that the shop will not interfere with road maintenance.

The truth of the matter is that the record is extremely sparse. The evidence includes the testimony of Ms. Whitmore and Mr. Taylor at the October 24, 2023 public meeting. The testimony was in response to a concern posed by Commissioner Fikes about the potential impact of the shop on road maintenance. The Commissioner asked:

[My] concern is that's really tight, and its not to code, and so its also not maintained, so I would be concerned about snow removal if that setback is already going to be encroached by 10 feet. Is that loss of road maintenance area, is that going to be impacting the person's access to the back land lock[ed parcel]?<sup>53</sup>

<sup>50</sup> R. 2-3.

<sup>51</sup> R. 2-3; KPB 20.10.110(E)(1).

<sup>52</sup> R. 2, 5.

<sup>53</sup> T. 3.

In response to the Commissioner's question, Ms. Whitmore acknowledged that she had not over-wintered on the property but answered that she thought GL Hollier could be cleared by pushing snow towards and across Ross Drive. She stated:

I would think the snow being pushed would probably be pushed from the farthest point of the road out toward Ross and maybe even across Ross. I don't – I mean, I don't know. We haven't been there for a winter, but it seems pretty wide with their 20-foot setback and our 10-foot setback and the 30 feet of road.<sup>54</sup>

But Mr. Taylor, who does the vast majority of the snow clearing himself, later testified that he does not believe pushing snow across Ross Drive is a viable option, and the encroaching shop will in fact impact the removal of snow from GL Hollier Street:

Clearing the snow down through there – like, it is not – yes, it's not a borough-maintained road, which 75 percent of the snow clearing on this road I do myself, and we are not going to – it was stated of possibly pushing snow across Ross Drive. Well, as we know, we're not supposed to push snow across a borough-maintained road and fill up the road and leave it up to the borough maintenance to take care of. The snow is supposed to be cleared off to the sides and not pushing snow across traffic and impeding traffic as well. So this does limit room for snow removal as well with them being 10 feet – approximately 10 to 12 feet with that pad.

It is unclear whether and how the Commission took Mr. Taylor's testimony about road maintenance into account in reaching its conclusions, and how it reconciled Ms. Whitmore's testimony suggesting that snow may be pushed across Ross Drive, with Mr. Taylor's testimony suggesting it cannot be. Nor was there any evidence documenting the Borough's actual requirements as to whether snow may be cleared from a privately maintained road across a publicly maintained one like Ross Drive. Given these deficiencies and the inadequacies in the Commission's findings, I cannot conclude there is substantial evidence to support the Commission's determination that the shop will not interfere with road maintenance. The matter will be remanded under KPB 21.20.33(B) for the Commission to either make new findings and conclusions supported by substantial evidence in the existing record as to the first standard in 21.10.110(E)(1), or to take additional evidence and issue new findings and conclusions.

**b. Whether the encroachment interferes with sight lines and distances.**

The second standard that must be satisfied for an encroachment permit to be issued is that it must not interfere with sight lines or distances. The Planning Commission concluded that the shop meets this standard.<sup>55</sup>

Before standard two is addressed in detail, however, it is important to understand what is meant by the reference in KPB 20.10.110(E) to the terms “sight lines or distances.” These terms are not defined by the KPB Code. As such, we need to look elsewhere to determine their intended meaning.

The purpose of the setback requirement is to promote safe public access, areas for emergency response, and ‘traffic sight distance.’ Permanent structures are prohibited in a setback without a permit, and minor improvements are only allowed in a setback without a permit if they “do not interfere with the sight distance *from the right-of-way*.”<sup>56</sup>

The language of a former KPB design standard further sheds light on the meaning of sight lines and distances.<sup>57</sup> Specifically, the former KPB design standard required that “[c]lear visibility, measured along the center line shall be provided for” within specified distances of different types of streets.<sup>58</sup>

A standard legal treatise specifies that a key purpose of setbacks in planning and zoning law is to “protect[] sight lines for automobiles.”<sup>59</sup> As all the above references demonstrate, the requirement that the encroachment not interfere with sight lines or distances means that for persons travelling on roads near the encroachment, the encroachment itself cannot cause a traveler’s clear line of sight, for things such as vehicles, hazards, obstructions, etc., to be obscured.

Turning to the Commission’s findings, the only difference between the findings relied upon for the Commission’s conclusion regarding road maintenance and the findings relied upon

<sup>55</sup> R. 2-3; KPB 20.10.110(E).

<sup>56</sup> KPB 20.90.010 (definition of “Permanent structures”) (emphasis added).

<sup>57</sup> This standard is not being referenced to suggest that it applies here. Instead, it is merely referenced to demonstrate what is likely intended by the Code’s existing requirement that an encroachment not interfere with “sight lines or distances.”

<sup>58</sup> R. 78.

<sup>59</sup> 83 Am. Jur. 2d Zoning and Planning § 116 (2023).

for its conclusion that there will be no interference with sight lines and distances is Finding 11, which states “[t]here does not appear to be any line of sight issues.”<sup>60</sup>

Although a number of the findings under standard two are factually correct, they do not show how the shop satisfies the standard. For example, Finding 12 (the road is privately maintained) and Finding 13 (the road is unlikely to serve additional lots) appear to have no bearing on whether sight lines and distances are impacted. And Finding 11 is a conclusory statement that is legally insufficient to create a factual basis or support findings of fact for appellate review.<sup>61</sup>

Only Finding 14 - that the road section is straight - and potentially Finding 15 – that there are no terrain issues within the dedication - appear at all relevant to the criteria concerning sight lines and distances. But even so, there is no analysis as to how these findings lead to the conclusion that sight lines will not be impacted. Moreover, the record as to the application of this standard is exceptionally thin. Absent from the record, for example, are any comments from a traffic engineer or other person experienced in evaluating roadway sight lines. Given that the matter must be remanded in any event regarding the other required showings, the Commission will be given the opportunity to better explain its reasoning on the second criterion and to revisit whether there is substantial evidence to support a determination that the shop will not interfere with sight lines or distances under the second standard in 21.10.110(E).

**c. Whether the encroachment creates a safety hazard.**

The third standard that must be satisfied for an encroachment permit to be issued is that the encroachment will not create a safety hazard.<sup>62</sup> Although the Planning Commission determined that this standard has been met, some of the Commission’s underlying findings contain deficiencies similar to those in the findings under the other two standards, and the record is sparse in any event.<sup>63</sup> Because it has already been determined that the matter will be remanded back to the Planning Commission, the Commission may endeavor to make new findings and conclusions, supported by substantial evidence in the existing record, under the third standard in

<sup>60</sup> R. 5.

<sup>61</sup> *Stephens v. ITT/Felec Services*, 915 P.2d 620, 626-27 (Alaska 1996); *Schug v. Moore*, 233 P.3d 1114, 1117 (Alaska 2010).

<sup>62</sup> R. 2-3; KPB 20.10.110(E).

<sup>63</sup> As with the standard concerning sight lines, comments from a person with expertise on road safety issues would have been useful for the Commission’s analysis under this standard.

KPB 20.10.110(E). Alternatively, it may take additional evidence and issue new findings under this standard.<sup>64</sup>

#### **IV. Concluding Guidance**

In deciding how to proceed on remand, the Borough is advised that the record developed before the Planning Commission to date is exceedingly sparse as to information relevant to *each* of the three criteria in KPB 20.10.110(E). The Commission should be mindful that issuing a building setback encroachment permit is an exception to the rule prohibiting such encroachments. The Commission may only approve an encroachment permit if there is substantial evidence showing that each of the three criteria is met – i.e., that the encroaching shop will not interfere with road maintenance, it will not interfere with sight lines or distances, and it will not create a safety hazard. If this threshold is not met as to any of the three criteria, the permit may not be issued. These are affirmative findings, and the applicant has the burden to demonstrate with substantial evidence that they are true. It is immaterial whether there is substantial evidence showing the opposite conclusion (that the shop will interfere with road maintenance, will interfere with sight lines or distances, and will create a safety hazard), because that is not the applicable standard. I caution the Commission against trying to do the required analysis under KPB 20.10.110(E) with an extremely thin record.

Further, the Commission should be cognizant that it must apply each of three criteria in KPB 20.10.110(E).<sup>65</sup> There is evidence that at least some Commissioners may have applied a different standard, rather than those in KPB 20.10.110(E), in voting to approve the permit. Comments by Commissioner Morgan and Commission Gillham during the October 24, 2022 public hearing suggest they may have felt compelled to approve the permit because they believed the Whitmores' contractor was to blame for the shop encroaching into the setback. Commissioner Morgan stated:

I am also included to support this. I think I have a bigger frustration with two contractors in the area who should know all of this. It is the homeowner's job to do research, but we also depend on our contractors to know their business. And so I'm kind of disappointed in their lack of researching before they started the work and not getting good information to the homeowners.<sup>66</sup>

<sup>64</sup> R. 5-6, 13-14.

<sup>65</sup> The language of the KPB Code does not affirmatively state that a building setback encroachment permit must be issued if each of the three standards in KPB 20.10.110(E) is met. It merely states that a person seeking to construct within a building setback must apply for a permit, and the three standards must be considered by the Planning Commission. KPB 20.10.110(A) and (E).

<sup>66</sup> T-7.

Commissioner Gillham commented similarly:

I would have to concur with Commissioner Morgan in that I would put most of the blame on the contractor who should have a little bit more knowledge on this than the homeowner. . . . I am inclined to vote in favor of this, mostly because I feel that this is more due to the contractor's fault rather than the property owner's fault.<sup>67</sup>

But whether the contractor or the homeowner failed to determine that the shop would be an encroachment into the building setback is not relevant to the analysis under KPB 20.10.110(E). Thus, it cannot be used as an independent basis for the Commissioners to approve the permit.

I also am concerned that some Commissioners may have misunderstood how to evaluate whether road maintenance will be impacted by the presence of the shop on Lot 10. A comment by Commissioner Stutzer suggests that the fact that the road is privately, rather than publicly, maintained may have influenced his vote on the permit:

So – and yeah, you've got a neighbor now and a building there and snow removal is a problem, but, you know, the road is always going to be – was designed not – that the borough is not going to take it over. So it's going to be a neighborhood snowplow operation, and you'll just have to figure out where you're going to push the snow.

But as Judge Sullivan correctly pointed out in the April 18, 2023 decision, it is immaterial for the analysis whether the road is privately or publicly maintained. The Planning Commissioner was required to determine whether the shop will interfere with road maintenance, irrespective of whether the road is publicly or privately maintained.

Finally, a comment by Commissioner Brantley suggests that he voted in favor of the permit because the encroachment was into the building setback, which is the Whitmores' private property, rather than into the public right-of-way. He stated, "They are not out in the right-if-way at all, so I don't see how snow removal would be affected anyway since they're not encroaching in the right-of-way at all, just in the setback."<sup>68</sup> But as explained previously, whether the encroachment is into the right-of-way is not the end of the analysis. Said another way, just because the property within the setback is the Whitmores' private property, it is not a foregone conclusion that the encroachment will

<sup>67</sup> T-7.

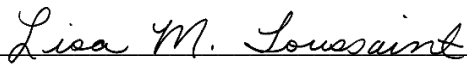
<sup>68</sup> T-7.

not interference with road maintenance. The shop could interfere with snow removal, for example, if it is necessary for some snow to be placed in the setback to clear GL Hollier Street, and there is insufficient space within the setback to place the snow due to the presence of the shop. In any event, it is the Commissioners' responsibility to evaluate whether the presence of the shop on the setback will interfere with road maintenance, no matter the nature of the encroachment. It may well be the case that Commission will decide it needs more evidence to make an adequate finding in that regard.

## **V. Conclusion**

There is not substantial evidence to support the Commission's conclusions that each of the mandatory standards in KPB 21.20.110(E) has been met. The matter is remanded to the Commission to (1) make additional findings and conclusions supported by substantial evidence in the existing record as to each of the three criteria in KPB 21.20.110(E), or, alternatively, (2) KPB 21.20.110(E), take additional evidence from the parties and the public and make new findings and conclusions under each of the three criteria, based on the augmented record.

DATED this 22<sup>nd</sup> day of May, 2023.

  
\_\_\_\_\_  
Lisa M. Toussaint  
Administrative Law Judge

**Certificate of Service:** I hereby certify that on May 22, 2023, a true and correct copy of this document was served on the following by email, or mail if email is unavailable, to the following listed below:

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By: *Haley Canfield*  
Office of Administrative Hearings

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON  
REFERRAL BY THE KENAI BOROUGH PLANNING COMMISSION**

In the matter of the Kenai Peninsula Borough )  
Planning Commission's decision to conditionally )  
approve Lot 10, Lake Estates Subdivision Building )  
Setback Encroachment Permit, KPB File )  
2022-121; KPB Resolution 2022-46 located )  
on GL Hollier Street, )  
)  
TROY & AUTUMN TAYLOR, )  
)  
Appellants. )  
\_\_\_\_\_ )

OAH No. 22-0925-MUN  
Agency No. 2022-06-PCA

**ORDER GRANTING RECONSIDERATION**

**I. Background**

David and Nancy Whitmore built a 49-foot by 24-foot shop on Lot 10 in the Lake Estates Subdivision in the Kenai Peninsula Borough. Because the shop encroaches into the building setback for the lot, the Whitmores applied for a building setback encroachment permit under KPB 21.10.110. After the Borough Planning Commission unanimously approved the permit on October 24, 2022, Troy and Autumn Taylor, the owners of a lot directly across the street from Whitmores, appealed the decision.

The Borough moved to dismiss the appeal, arguing that the Taylors lacked standing. The Taylors filed an opposition, including photos of the shop and its location on the lot and the surrounding area. The photos were eventually added to the record, against the Borough's objection, pursuant to an order explaining that the photos "do not change the facts, nor do they add additional facts," but rather clarified the evidence that had already been presented to the Commission.

Following briefing and oral argument, Administrative Law Judge Kent Sullivan issued a decision on April 18, 2023, reversing the approval of the permit on the grounds that substantial evidence did not support the Commission's conclusion that the encroaching shop will not interfere with road maintenance under the first of the three criteria set forth in KPB 20.10.110(E). Instead, the judge found that substantial evidence supported the opposite conclusion – that the encroachment will interfere with road maintenance – and adopted sixteen new factual findings.

On May 1, 2023, the Borough moved for reconsideration of the decision on several grounds, including that it contained findings based on information outside the record developed before the Planning Commission; misconstrued the depth of the building setback; misconceived the nature of the setback and the encroachment, and road maintenance on GL Hollier Street; and misapplied the relevant sections of KPB 21.20.330 in reversing, rather than remanding, the Planning Commission's decision.

The Taylors and the Whitmores were given until May 11, 2023 to respond to the motion for reconsideration. The Taylors responded on May 8, 2023, arguing that reconsideration is unnecessary because the Commission's findings under the first criterion in KPB 21.20.110(E) were not supported by substantial evidence. The Whitmores responded on May 11, 2023, reiterating many of the same points raised by the Borough but disagreeing that a remand is appropriate. Instead, they argued that the Planning Commission's approval of the permit should be approved because it is supported by substantial evidence as to each of the three criteria.

In accordance with KPB 21.20.350(C), this order responds to the motion for reconsideration and addresses the arguments in the motion. The arguments have led to clarification or correction of language in the original decision, which will be accomplished through a "Decision After Reconsideration" issued later today. The outcome of the case will change, as the matter will be remanded to the Commission to (1) make additional findings and conclusions supported by substantial evidence in the existing record as to each of the three criteria in KPB 21.20.110(E), or, alternatively, (2) open the record to take additional evidence from the parties and the public and make new findings and conclusions under each of the three criteria, based on the augmented record.

## **II. Commentary on the Borough's and Applicant's Arguments<sup>1</sup>**

### ***A. Arguments about findings based on evidence not before the Planning Commission***

#### **1. Argument about Finding 14 (drainage)**

Citing to KPB 21.20.030(3), which allows a hearing officer to "make a different finding on a factual issue, based on the evidence in the record before the planning commission," the Borough asserts that Judge Sullivan improperly adopted findings predicated upon information

<sup>1</sup> Because many of the Borough's and the Whitmores' arguments are largely the same, the Whitmore's arguments will be discussed separately only where they raised new points not presented by the Borough.

outside the record before the Planning Commission. The Borough points to one finding - Finding 14 - which states that “[t]he encroachment has caused drainage issues.” The judge explained that “snow sloughing from the roof could be an issue with this encroachment.” His conclusion was based on “a detailed explanation and photographic evidence” (namely, Photo 3) provided by the Taylors in their opposition to the Borough’s motion to dismiss, which shows “how water from the roof” of the encroaching shop “has drained into GL Hollier Street, apparently causing erosion and impacting maintenance.”<sup>2</sup> The judge eventually expanded the record after oral argument to include the photo, as well as others in the Taylor’s opposition to the motion to dismiss, explaining that the photos did not “change . . . or add additional facts” but rather clarified the evidence that had already been presented to the Commission.<sup>3</sup>

The Taylors may have legitimate concerns about drainage from the shop roof impacting the GL Hollier Street, but they did not articulate those concerns in writing to the Planning Commission (indeed, there were no written comments submitted on the proposed permit at all), or in their testimony at the October 24, 2022 public meeting. They raised those concerns for the first time in their opposition to the Borough’s motion to dismiss. Although that information could have been provided to the Planning Commission earlier, it was not before the Commission when the Commission approved the permit on October 24, 2022. Thus, the information about drainage, while appropriate to consider in the context of a motion to dismiss based on standing, should not have been considered as to concerns not previously raised to the Commission. Finding 14 was based on information not before the Planning Commission when it approved the permit, and was used as an additional factual basis for Judge Sullivan’s conclusion that the shop will impact road maintenance, rather than to merely clarifying existing evidence. The Decision After Reconsideration will remove that finding and make other related adjustments as necessary.

## 2. Argument about fire safety

The Whitmores argue that Judge Sullivan misapplied KPB 21.20.270(c). That section requires that an appeal “shall be on the record,” and that the record may not be supplemented absent a showing that “even with due diligence the new evidence could not have been provided before the planning commission and a reasonable opportunity is provided” for the other parties to respond to it. The Whitmores claim that Judge Sullivan erred in relying on photos and testimonial evidence offered by the Taylors in their opposition to the motion to dismiss because

<sup>2</sup> Decision at 20.

<sup>3</sup> Order Expanding the Record at 3.

that information could have been submitted to the Commission previously, but it was not. They point to the judge's statements in the decision about fire safety. He described the "close proximity of the Whitmore's [sic] garage to the Taylors' home" as creating a "safety hazard in the event the structure is ever fully engulfed in a fire," and noted that "radiant heat from the fire may well cause the Taylors' home to catch fire."

As with the Taylors' concerns about drainage, they may have valid fire safety concerns related to the shop. But those concerns were not before the Planning Commission when it approved the permit on October 24, 2022, because the Taylors did not raise those concerns until they filed their opposition to the Borough's motion to dismiss. They could have provided that information in writing or orally at the public hearing, but they did not do so. Thus, the information should not have been considered in Judge Sullivan's April 18, 2023 decision as to concerns not previously raised to the Commission. Adjustments will be made in the Decision After Reconsideration accordingly.

### 3. Argument about information in opposition to motion to dismiss

The Whitmores broadly assert that the new information in the Taylors' opposition to the motion to dismiss, including the photos, were "highly prejudicial" to them. No examples were provided other than those concerning drainage (Finding 14) and fire safety, which have already been discussed above. Nonetheless, new information in the opposition to the motion to dismiss will not be used as a factual basis for any of the conclusions in the Decision After Reconsideration. The photos will only be used to the extent they help clarify the location of the shop on the lot and in the surrounding area.

#### ***B. Arguments about the depth of the setback***

The Borough alleges that Judge Sullivan erred in finding the building setback on the lot to be 25 feet from the property line, rather than 20 feet, and that this error impacted three of his findings (Findings 3, 4, and 5). The judge's conclusion was based on a 25-foot setback specified in a plat note on the 1969 subdivision plat establishing the Lake Estates subdivision. Citing language in a footnote in *Yankee v. City of Borough of Juneau*, 407 P.13d 460 (Alaska 2017), Judge Sullivan determined that the plat note specifying the setback constituted a covenant that runs with the land and binds all subsequent landowners, including the Whitmores, despite

language in the Borough Code in place at the time, which *allowed* developers to specify a less restrictive setback.<sup>4</sup>

The Borough claims Judge Sullivan’s reliance on *Yankee* was misplaced, arguing that provision at issue in that case, a section of the City and Borough of Juneau Code, is distinguishable from the KPB Code. While the Juneau code expressly describes a plat note as a restrictive covenant that runs with the land in favor of the municipality and the public, enforceable against future owners, the KPB Code contained no such language in 1968. Moreover, the *Yankee* court held that the City and Borough of Juneau had discretion, but not the obligation, to enforce the restrictive covenant at issue. Thus, even if were the case that a plat note is a covenant running with the land under the KPB code, the Borough would not be required to enforce it. Thus, the Borough argues that Judge Sullivan lacked the authority to compel the Borough to apply the 25-foot setback in the plat note.

Whether a 20 or 25-foot setback applies in this case may be debatable, but it is not a matter that needs to be resolved in the context of this administrative appeal.<sup>5</sup> It is clear that the Whitmores’ shop encroaches into the setback on Lot 10, irrespective of whether a 20 or 25-foot setback applies. No matter the depth of the setback, the encroaching shop is located approximately 10 feet from the property line abutting GL Hollier Street. It is this encroachment – the presence of a shop 10 feet from the property line – that the Planning Commission was required to evaluate against each of the three criteria in KPB 20.10.110(E).

The Decision After Reconsideration will remove the findings concerning the depth of the setback and otherwise correct the manner in which this subject was handled in the original decision. Because this matter is being remanded back to the Planning Commission to take additional evidence and make new findings, if the Borough believes the depth of the setback is relevant to its analysis under KPB 20.10.110(E), it is free to explore that subject further on remand.

***C. Arguments about the nature of the setback and the encroachment, and road maintenance***

**1. Argument about the nature of the setback and the encroachment**

<sup>4</sup> The 1969 Borough Code allowed for a “minimum 20-foot building setback for dedicated rights-of-way in subdivisions.

<sup>5</sup> It is possible that a 25-foot setback exists on Lot 10, and that it is enforceable by a private landowner against another through a civil action.

Relying on Mr. Taylor’s testimony at the October 24, 2022 public meeting, Judge Sullivan concluded that the encroaching shop will impact road maintenance by making snow removal, the vast majority of which is done by Mr. Taylor, more difficult by limiting the space available for snow cleared from GL Hollier Street. The Borough challenges the judge’s findings (Findings 13, 15, and 16) supporting this conclusion, claiming he misconstrued the setback as an easement rather than private property, and he conflated the building setback encroachment here with an encroachment into the right-of-way. The Borough focuses on the judge’s statement that “KPB was anxious to avoid any conclusion that the encroachment was an encroachment into a public right-of-way,” and statements suggesting the setback may be used for snow cleared from the road. According to the Borough, no portion of the setback was ever available for that purpose because the setback is private property, and pushing snow onto it would be a trespass. The Borough appears to suggest that the shop could not possibly impact road maintenance because any snow removal or other maintenance occurring in the setback, the Whitmores’ private property, would be illegal.

The Borough is correct that the setback on Lot 10 is private property, and the encroachment is into the building setback – not into the right-of-way (GL Hollier Street). But the contention that Judge Sullivan determined otherwise is incorrect. Nevertheless, in the Decision After Reconsideration, adjustments will be made to statements in the original decision that could potentially be misconstrued as suggesting that the encroachment here was into the right-of-way.

## 2. Argument about trespass

Regarding the assertion that Mr. Taylor would be committing a trespass if he were to place any snow cleared from the street onto the setback, this argument strains logic. Snow removed from a 30-foot-wide road needs to go somewhere. Logic dictates that when snow is pushed from a road, some amount may need to be placed (or may incidentally spill) onto property abutting the road. This would occur whether the road is publicly maintained by an entity like the Borough, or privately maintained by a person like Mr. Taylor. But no one could legitimately contend that the Borough would be committing a trespass in those circumstances. Nor can a legitimate argument be made that Mr. Taylor would be committing a trespass in those circumstances either.<sup>6</sup> The suggestion that the shop will not interfere with road maintenance,

<sup>6</sup> There could be a trespass if Mr. Taylor were to remove snow from his own property and place it on the Whitmores’ setback. But there is no evidence of this occurring. Nor is there any evidence that Mr.

including snow removal, simply because the setback is on private property (i.e., the encroachment is not into the right-of-way) where no snow can be placed, is incorrect. Indeed, such an interpretation would effectively render the requirement of KPB 21.20.110(E) meaningless—a result inconsistent with the rules of statutory construction requiring that a statute be interpreted “to give effect to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.”<sup>7</sup>

### 3. Argument about snow clearing across public roads

The Borough also challenges Finding 13 in the April 18, 2023 decision, which reads, “Because the Borough mandates that snow cannot be pushed across public roadways, snow removal is now restricted on three of four sides. . . .” The authority cited for the finding is Mr. Taylor’s testimony before the Planning Commission, summarized on page 18 of the decision, and a footnote referencing a Borough website containing information about illegal snow clearing activities. The website states that “[i]t is illegal to plow snow into the roads, ditches, and rights of way *from private property*,” but, as the Borough points out, it is silent as to snow plowed from a public right-of-way. Thus, the Borough contends that Finding 13 is misconceived.

The Borough’s point is well-taken. Finding 13 will be removed, and other adjustments will be made in the Decision After Reconsideration, accordingly.

### ***D. Arguments about the application of KPB 21.20.320 and 21.20.330***

Claiming that the judge made findings “based upon a mix of misconceived facts” and evidence outside the record before the Planning Commission, the Borough contends the judge misapplied KPB 21.20.330 and 21.20.330, and should have remanded rather than reversed the Commission’s decision. The Borough points to language in KPB 21.20.330(3), which states:

The hearing officer may revise and supplement the planning commission’s findings of fact. Where the hearing officer decides that a finding of fact made by the planning commission is not supported by substantial evidence, the hearing officer may make a different finding on the factual issues, ***based on the evidence in the record developed before the planning commission*** if it concludes a different finding was supported by substantial evidence, or may remand the matter to the planning commission as provided in KPB 21.20.330(B). (Emphasis supplied.)

Taylor places a disproportionate amount of snow removed from the roadway onto the Whitmores’ setback when he plows the road.

<sup>7</sup> *Alliance of Concerned Taxpayers, Inc. v. Kenai Peninsula Borough*, 273 P.3d 1128, 1139 (Alaska 2012) (quoting 2A Norman J. Singer & Shambie Singer, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 46:6 (7th ed. 2007)).

KPB 21.20.330(A) and (B), in turn, provide:

A. *Changed circumstances.* An appeal alleging changed circumstances or new relevant evidence, which with due diligence could not have been presented to the planning commission, shall be remanded to the planning commission.

B. *Lack of findings.* Appeals from the planning commission decisions which lack findings of fact and conclusions by the planning commission ***or contain findings of fact and conclusions which are not supported by substantial evidence*** shall be remanded to the planning commission with an order to make adequate findings of fact and conclusions. (Emphasis supplied.)

As explained previously, the Decision After Reconsideration will reflect adjustments to the original decision to account for problems with some of the factual findings, including that one finding was based on information outside the record before the Planning Commission (Finding 14), and that others were predicated on various misconceptions. I agree that remand is the appropriate remedy here. The matter will be remanded back to the Planning Commission to (1) make findings of fact and conclusion supported by substantial evidence in the existing record as to each of the three criteria in KPB 21.20.110(E), or, alternatively, (2) take additional evidence from the parties and the public and make new findings and conclusions under each of the three criteria, based on the augmented record.

**E. Argument that the Planning Commission's findings should be affirmed**

The Whitmores argue that substantial evidence supports the Commission's conclusions that each of the three standards in KPB 21.20.110(E). I disagree. The record in this case is extremely thin as to evidence relevant to each of the three standards. The matter will be remanded back to the Commission, where there will be an opportunity to take additional evidence and make new findings and conclusions. Because the Whitmores have the burden on each of the three criteria, they may wish to participate in the remand proceeding.

**III. Concluding Guidance**

In deciding how to proceed on remand, the Borough is cautioned that the record developed before the Planning Commission to date is exceedingly sparse as to information relevant to *each* of the three criteria in KPB 20.10.110(E). The Commission should be mindful that issuing a building setback encroachment permit is an exception to the rule prohibiting such encroachments. The Commission may only approve an encroachment permit if there is substantial evidence showing that each of the three criteria is met – i.e., that the encroaching

shop will not interfere with road maintenance, it will not interfere with sight lines or distances, and it will not create a safety hazard.<sup>8</sup> If this threshold is not met as to any of the three criteria, the permit may not be issued. These are affirmative findings, and the applicant has the burden to demonstrate with substantial evidence that they are true. It is immaterial whether there is substantial evidence showing the opposite conclusion (that the shop will interfere with road maintenance, will interfere with sight lines or distances, and will create a safety hazard), because that is not the applicable standard. I caution the Commission against trying to do the required analysis under KPB 20.10.110(E) with an extremely thin record.

Further, the Commission should be cognizant that it must apply each of three criteria in KPB 20.10.110(E).<sup>9</sup> There is evidence that at least some Commissioners may have applied a different standard, rather than those in KPB 20.10.110(E), in voting to approve the permit. Comments by Commissioner Morgan and Commission Gillham during the October 24, 2022 public hearing suggest they may have felt compelled to approve the permit because they believed the Whitmores' contractor was to blame for the shop encroaching into the setback.

Commissioner Morgan stated:

I am also included to support this. I think I have a bigger frustration with two contractors in the area who should know all of this. It is the homeowner's job to do research, but we also depend on our contractors to know their business. And so I'm kind of disappointed in their lack of researching before they started the work and not getting good information to the homeowners.<sup>10</sup>

Commissioner Gillham commented similarly:

I would have to concur with Commissioner Morgan in that I would put most of the blame on the contractor who should have a little bit more knowledge on this than the homeowner. . . . I am inclined to vote in favor of this, mostly because I feel that this is more due to the contractor's fault rather than the property owner's fault.<sup>11</sup>

<sup>8</sup> To approve the permit, there must be substantial evidence to show that each the three criteria will be met. It is immaterial whether there is substantial evidence showing the opposite conclusion (that the shop will interfere with road maintenance, will interfere with sight lines or distances, and will create a safety hazard), because that is not the applicable standard.)

<sup>9</sup> The language of the KPB Code does not affirmatively state that a building setback encroachment permit must be issued if each of the three standards in KPB 20.10.110(E) is met. It merely states that a person seeking to construct within a building setback must apply for a permit, and the three standards must be considered by the Planning Commission. KPB 20.10.110(A) and (E).

<sup>10</sup> T-7.

<sup>11</sup> T-7.

But whether the contractor or the homeowner failed to determine that the shop would be an encroachment into the building setback is not relevant to the analysis under KPB 20.10.110(E). Thus, it cannot be used as an independent basis for the Commissioners to approve the permit.

I also am concerned that some Commissioners may have misunderstood how to evaluate whether road maintenance will be impacted by the presence of the shop on Lot 10. A comment by Commissioner Stutzer suggests that the fact that the road is privately, rather than publicly, maintained may have influenced his vote on the permit:

So – and yeah, you’ve got a neighbor now and a building there and snow removal is a problem, but, you know, the road is always going to be – was designed not – that the borough is not going to take it over. So it’s going to be a neighborhood snowplow operation, and you’ll just have to figure out where you’re going to push the snow.

But as Judge Sullivan correctly pointed out in the April 18, 2023 decision, it is immaterial for the analysis whether the road is privately or publicly maintained. The Planning Commissioner was required to determine whether the shop will interfere with road maintenance, irrespective of whether the road is publicly or privately maintained.

Finally, a comment by Commissioner Brantley suggests that he voted in favor of the permit because the encroachment was into the building setback, which is the Whitmores’ private property, rather than into the public right-of-way. He stated, “They are not out in the right-if-way at all, so I don’t see how snow removal would be affected anyway since they’re not encroaching in the right-of-way at all, just in the setback.”<sup>12</sup> But as explained previously, whether the encroachment is into the right-of-way is not the end of the analysis. Said another way, just because the property within the setback is the Whitmores’ private property, it is not a foregone conclusion that the encroachment will not interference with road maintenance. The shop could interfere with snow removal, for example, if it is necessary for some snow to be placed in the setback to clear GL Hollier Street, and there is insufficient space within the setback to place the snow due to the presence of the shop. In any event, it is the Commissioners’ responsibility to evaluate whether the presence of the shop on the setback will interfere with road maintenance, no matter the nature of the encroachment. It may well be the case that Commission will decide it needs more evidence to make an adequate finding in that regard.

<sup>12</sup>

T-7.

#### IV. Order

The motion for reconsideration is granted. A revised decision will be issued later today.

DATED: May 22, 2023.

By: Lisa M. Toussaint  
Lisa M. Toussaint  
Administrative Law Judge

**Certificate of Service:** I hereby certify that on May 22, 2023, a true and correct copy of this document was served on the following by email, or mail if email is unavailable, to the following listed below:

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