

# **DESK PACKET**

**(MATERIALS RECEIVED AFTER THE PACKET  
PUBLICATION DATE OF 9/29/23)**

## **J. NEW BUSINESS**

### **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**

# Kenai Peninsula Borough

## Legal Department

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### 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:** October 9, 2023

**SUBJECT:** Timeline for ITMO: Setback Encroachment Permit Along GL Hollier Street

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On September 27, 2022, David and Nancy Whitmore applied for a building setback encroachment permit for a garage they had built that encroaches into the building setback for their lot. The Planning Commission approved the application, subject to conditions, by unanimous consent through Planning Commission Resolution 2022-46 at its regular meeting on October 24, 2022. On November 8, 2022, Troy and Autumn Taylor appealed the Planning Commission's decision to the Office of Administrative Hearings ("OAH"). The Taylors live on GL Hollier Street across from the Whitmores' lot.

On February 23, 2023, a telephonic hearing was held before OAH's Administrative Law Judge ("ALJ") Sullivan. On April 18, 2023, OAH's *Decision* was issued. In the *Decision*, ALJ Sullivan determined the Planning Commission's findings regarding the standards in KPB 20.10.110(E) were not supported by substantial evidence in the record. Further, ALJ Sullivan ruled that the first standard was not met and therefore must be denied. Accordingly, ALJ Sullivan reversed the Planning Commission's approval of the Whitmores' building setback encroachment permit reflected in Resolution 2022-46.

The Borough sought reconsideration on several grounds, particularly that KPB 21.20.330(B) requires remand to the Planning Commission – not reversal – if findings of fact are not supported by substantial evidence. On May 22, 2022, OAH issued its *Order Granting Reconsideration* and a separate *Decision After Reconsideration*. Both were authored by ALJ Toussaint. ALJ Toussaint agreed there was not substantial evidence to support the Planning Commission's conclusions that the standards in KPB 20.10.110(E) had been met; however, remand was the appropriate remedy under Borough Code. Accordingly, ALJ Toussaint remanded the matter to the Planning Commission.

In the interim, the Whitmores have appealed OAH's *Decision After Reconsideration* to the Kenai Superior Court. They have not requested a stay of OAH's remand, and the appeal to the Kenai Superior Court is pending.

At the Planning Commission meeting on September 25, 2023, the Planning Commission voted to re-open the record for new evidence before considering the matter on remand.

October 6, 2023

*Via Email: [planning@kpb.us](mailto:planning@kpb.us)*

Planning Commission  
c/o Beverly Carpenter, Planning Department  
Kenai Peninsula Borough  
144 North Binkley Street  
Soldotna, AK 99669

**Re: Written Comments in Support of Lot 10, Lake Estates Subdivision  
Building Setback Encroachment Permit**

**KPB File No. 2022-121**

Dear Planning Commission,

We are the homeowners of 43664 Ross Drive in Soldotna. We initially submitted this application for a setback encroachment permit in July 2022. As we explained in our initial permit application, the detached garage that we built on our property extends by approximately 10 feet into the 20-foot setback along GL Hollier St.

We acknowledge that an error was made when selecting the location for this building. In trying to find a location for our well and onsite septic system, we encountered a challenge due to the shape of our lot, the locations of the existing well, the location of the septic systems of our neighbors, and the wetland area near the lake. We worked with our builder and excavator, using a 100-foot tape measure and walking back and forth diagonally across the lot to ensure safe distances between the existing wells and septic systems on the adjacent lots. Our only real option for the well and septic system was located in the southeast corner of our lot, along Ross Dr. This led us to locating the garage in the southwest corner of our lot near the intersection of GL Hollier St. and Ross Drive. *See* Meeting Packet at J-15 to J-17 and J-22 to J-25. We are attaching additional photographs of the property and garage. *See* Figures 1-7.

After the Planning Commission unanimously approved our initial permit application last October, there was an administrative appeal to the Office of Administrative Hearings. Ultimately, the administrative law judge concluded that the Planning Commission's original decision, which relied on the Planning Department's Staff Report "Findings," was not supported by substantial evidence. Because we have the burden of showing that the setback encroachment meets each of the three standards in the Code for a permit, we submit this letter with additional explanations and evidence supporting our permit application.

We have also included a report dated October 6, 2023, from Kinney Engineers LLC, a traffic engineer that we hired to provide an expert opinion on the encroachment. The report includes the following conclusions:

"A common reason for building setbacks is to ensure adequate space for parking outside of the [right of way]. The Whitmore parcel has plenty of parking on-site so they will not be reliant on the building setback area in front of their garage for parking, ensuring their parked vehicles will not encroach into the [right of way] or traveled way . . .

Based on the preceding discussion, it is my opinion that the proposed setback encroachment does not adversely impact road maintenance (or the potential for road maintenance), sight distances, or traffic safety."

**Standard 1: "The building setback encroachment may not interfere with road maintenance." [KPB 20.10.110(E)(1)]**

There is substantial evidence in the record that the setback encroachment will not interfere with road maintenance. The Planning Department's Staff Report described five factual findings supporting the conclusion that the permit application meets this standard. We offer the following additional explanations to the Staff Report's findings and we also offer additional ("New") evidence and responses to concerns that have been raised regarding road maintenance.

- *Finding 10.* The shop is slightly angled with the northeast corner being the furthest encroachment into the setback at 9.8 feet into the setback.

- *Additional Explanation:* This finding is supported by the as-built survey prepared with the permit application. *See* J-32. The survey identifies that the garage is between 10.2 and 10.7 feet from GL Hollier St.

This finding supports the conclusion that the setback encroachment will not interfere with road maintenance because there is a minimum of 10 feet of setback remaining for the length of the garage that is unaffected by the encroachment. The encroachment takes up less than half of the original setback, which is enough space for parking, backing up, and any road maintenance that may be required in the future. *See* Figure 1.

- *Finding 12.* The road is privately maintained.

- *Additional Explanation:* The Borough has stated that it does not maintain GL Hollier St. and does not perform snow removal on the road. But GL Hollier St. is not a private driveway; it is a public right of way.

This finding supports the conclusion that the setback encroachment will not interfere with road maintenance because the property owners, including us, are responsible for road maintenance and snow removal. There is no indication of how specifically the encroachment could interfere with our snow removal, and we do not believe that road maintenance will be affected by the encroachment.

- *Finding 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.

- *Additional Explanation:* This finding is supported by the vicinity map depicting that there are only three lots located along GL Hollier St. and that the road ends near the lake at the curve. *See* J-15.

This finding supports the conclusion that the setback encroachment will not interfere with road maintenance because it is not possible for the road to be used as an access road for any other lots or developments other than those that already exist. There is no reason

why the road would become a thoroughfare or have increased traffic from its present use.

- *Finding 14.* The encroachment is along a straight portion of the right-of-way.
  - *Additional Explanation:* This finding is supported by the vicinity map depicting GL Hollier St. *See* J-15; Figure 1.

This finding supports the conclusion that the setback encroachment permit will not interfere with road maintenance because there are no physical obstacles that would impair road maintenance.

- *Finding 15.* There are no terrain issues within the dedication.
  - *Additional Explanation:* This finding is supported by the aerial photos and maps depicting the area. *See* J-22 to J-24; Figure 1.

This finding supports the conclusion that the setback encroachment will not interfere with road maintenance because there are no physical obstacles that would impair road maintenance.

- *New Evidence.* We have installed gutters on the garage that drain into our side yard and we installed a culvert to deal with runoff from our side yard.
- *New Evidence.* We hired Steam on Wheels to perform road maintenance on GL Hollier St. during and following construction of the garage. An invoice showing that we installed screen gravel for “touch up and blending to GL Hollier” is attached.
- *New Evidence.* We have performed extensive sloping/ditching to our lot to control drainage and prevent runoff into GL Hollier St. The sloping and ditching on our property will prevent runoff from creating any new road maintenance issues and will improve road maintenance. *See* Figure 2.
- *New Evidence.* We have been informed from the Planning Department that we may install a see-through fence on the property line with GL Hollier St. That

means that we could legally block any use or access across the setback area, which is our private property.

- *New Evidence.* We have been informed by the Borough attorneys that snow from GL Hollier St. is not permitted to be pushed onto our property or stored on our property, including the setback, without our permission. Unauthorized snow storage is a trespass. We understand that one of the main concerns with road maintenance on GL Hollier St. is snow removal and snow storage; however, the garage will not interfere with snow removal because it has never been an option to push the snow from the street onto our setback.
- *New Evidence.* We hired Steam on Wheels to build a snow storage area in our lower yard that we will use to store snow from our driveway and lot. This snow storage area will also help reduce snow berms from blocking the driveway or road access. *See Figures 2, 3.*
- *New Evidence.* We have been informed from the Borough that we are allowed to park cars in the setback up to the property line. Because we can park a car between the garage and GL Hollier St. within the setback, there are no additional issues with road maintenance that will be caused by the garage.
- *New Evidence.* We hired Kinney Engineers LLC to study the potential effects on road maintenance. The report makes the following conclusions regarding road maintenance:
  - There is adequate room on our property to accommodate snow storage from our driveway and garage access routes;
  - The full width of a standard road could still fit in between the centerline of GL Hollier Street and the Whitmore garage, in the unlikely event GL Hollier Street were ever to be upgraded to KPB standards as a publicly maintained road;
  - There is adequate space in the [right of way] to accommodate drainage-enhancing grading if it becomes necessary.

**Standard 2: “The building setback encroachment may not interfere with sight lines or distances.” [KPB 20.10.110(E)(2)]**

There is substantial evidence in the record that the setback encroachment will not interfere with sight lines or distances. The Planning Department’s Staff Report described six factual findings supporting the conclusion that the permit application meets this standard. We offer the following additional explanations to the Staff Report’s findings and we also offer additional (“New”) evidence and responses to concerns that have been raised regarding sight lines or distances.

- *Finding 10.* The shop is slightly angled with the northeast corner being the furthest encroachment into the setback at 9.8 feet into the setback.
  - *Additional Explanation:* This finding supports the conclusion that the setback encroachment will not interfere with sight lines or distances because the garage is located at least 10 feet back from GL Hollier St. and it does not block any sight lines, either from the road or from any driveways entering the road. *See Figures 1, 2.*
- *Finding 11.* There does not appear to be any line of sight issues.
  - *Additional Explanation:* Although this finding is conclusory, there are no obvious sight lines or distances issues that have been raised in the record. *See Figures 1, 2.*
- *Finding 12.* The road is privately maintained.
  - *Additional Explanation:* This finding supports the conclusion that the setback encroachment will not interfere with sight lines or distances because Borough standards for road sight lines do not apply. But even if the road was maintained to Borough standards, there would be no sight line or distances issues. *See Report from Kinney Engineers LLC at 2.*
- *Finding 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.



- *Additional Explanation:* This finding supports the conclusion that the setback encroachment will not interfere with sight lines or distances because it is unlikely that any additional development or will occur in the area or create new traffic problems. The encroachment is not likely to have cumulative impacts on sight lines or distances issues. *See* Figures 1, 2.
- *Finding 14.* The encroachment is along a straight portion of the right-of-way.
  - *Additional Explanation:* This finding supports the conclusion that the setback encroachment will not interfere with sight lines or distances because the road is straight, resulting in clear views and sight lines. *See* J-15; Figures 1, 2.
- *Finding 15.* There are no terrain issues within the dedication.
  - *Additional Explanation:* This finding supports the conclusion that the setback encroachment will not interfere with sight lines or distances because the road is straight and flat, resulting in clear views and sight lines. *See* Figures 1, 2.
- *New Evidence.* Our neighbors often use GL Hollier St. as a driveway even though it is a public right of way. There are frequently many vehicles, including large trucks and trailers, parked in our neighbors' setback, which makes turning around difficult. Although we have no control over parking in other setbacks, any traffic issues or parking problems are not caused by our garage. *See* Figure 4.
- *New Evidence.* We hired Kinney Engineers LLC to study the potential effects on sight lines and distances. The report makes the following conclusions regarding sight lines:
  - "The Whitmore garage has no effect on sight distance for motorists traveling on the road. It also has no effect on motorists looking to leave the public roads."

- “A forested yard, which is allowed in the building set back, would have much more effect on sight distance.”

**Standard 3: “The building setback encroachment may not create a safety hazard.” [KPB 20.10.110(E)(3)]**

There is substantial evidence in the record that the setback encroachment will not create a safety hazard. The Planning Department’s Staff Report described three factual findings supporting the conclusion that the permit application meets this standard. We offer the following additional explanations to the Staff Report’s findings and we also offer additional (“New”) evidence and responses to concerns that have been raised regarding potential safety hazards.

- *Finding 10.* The shop is slightly angled with the northeast corner being the furthest encroachment into the setback at 9.8 feet into the setback.
  - *Additional Explanation:* This finding supports the conclusion that the setback encroachment will not create a safety hazard because there is still more than 10 feet of space between the garage and GL Hollier St, which provides an adequate buffer and space between the structure and road. *See* Figures 1, 2.
- *Finding 11.* There does not appear to be any line of sight issues.
  - *Additional Explanation:* This finding supports the conclusion that the setback encroachment will not create a safety hazard because line of sight issues for traffic could potentially create a safety hazard. There are no line of sight issues caused by the setback encroachment, and thus, no resulting safety hazards. *See* Figures 1, 2, and 5.
- *Finding 12.* The road is privately maintained.
  - *Additional Explanation:* This finding supports the conclusion that the setback encroachment will not create a safety hazard because the road is not maintained by the Borough and it is unlikely to see increased traffic or development in the foreseeable future. The current level of usage does not raise safety concerns. *See* Figure 6.

- *New Evidence.* We hired Kinney Engineers LLC to study the potential effects on safety hazards. The report makes the following conclusions regarding safety hazards:
  - “Since the garage provides space for adequate sight distance, the primary traffic safety concern would be the need to maneuver in the [right of way] when pulling out of or into the garage space on the north end of the garage . . . However, this conflict would exist for any driveway that does not have turn-around space on site, such as the neighbors across the street who access their garage and parking directly off of the GL Hollier Street [right of way].”

\* \* \*

Finally, we want to briefly address some of the concerns that we’ve heard from our neighbors. During the previous Planning Commission hearing and the administrative appeal, we understand there to be three main concerns. First, we heard concerns about parking and turning vehicles around in GL Hollier Street. It appears that before we moved to the property, the area where we built our garage was used for some neighbors to turn their vehicles and trailers around. Some neighbors park vehicles and trailers within their setbacks, leaving little room other than in the road (GL Hollier Street) to turn around. *See* Figure 4; Report from Kinney Engineers LLC at 2 (Figure 1). But we want to make it clear that our property including the setback within our property was never available for other people to use as a turnaround. Our garage does not make that existing problem worse. *See* Figure 2. We have abundant parking areas on our property (in front of the house and behind the house), as noted in the Report from Kinney Engineers LLC.

Second, we have reviewed a “report” that was submitted by our neighbors during the administrative appeal describing purported safety problems with the garage’s location, including that it may increase fire risk to neighbors. We want to be clear that we do not think such a report is credible. It does not appear that the report is based on any first-hand information, and it does not explain the bases for its conclusions or the likelihood that any safety risks would occur. The Commission should not rely on worst case scenarios for denying a permit application.

Third, there has been a lot of discussions about snow storage and snow plowing. As we described above, the setback on our property is not available for snow storage for snow plowed from GL Hollier Street without our permission. The setback is part of our private property. Snow from any public right of way, including GL Hollier Street should remain within the right of way. Last winter we had problems with snow that was plowed from GL Hollier Street and the neighbors' property into our driveway creating snow berms and making it difficult for us to plow out. We hired a contractor to create a separate snow storage area on our property, which we think will help alleviate some of the snow storage issues. *See* Figure 3. We want to work with our neighbors to share the costs for plowing and snow removal, but we think the garage's location does not contribute to that problem in any way.

We hope that the Planning Commission will agree that there is substantial evidence for each of the three standards in KPB 20.10.110 for granting the setback encroachment permit. We are happy to address any questions the Commission may have during the public hearing.

Sincerely,

Craig and Nancy Whitmore

Encls.



Figure 1. Aerial photo of our garage (right) and GL Hollier Street. October 4, 2023.





Figure 2. GL Hollier Street and our garage (right) from intersection of Ross Dr. and GL Hollier Street. Note the road maintenance at our request / expense.



Figure 3. North end of GL Hollier Street. Our lower driveway to the right, our snow storage area in the center, the Markham's driveway on the left. The orange cones indicate our property line, with the cone on the far left being the lot corner.





Figure 4. View of GL Hollier Street looking from our property to the neighbors across the street (Taylors).





Figure 5. View from south side of Ross Drive towards GL Hollier Street and our garage (right); cones indicate lot line.



Figure 6. Our home and garage on left looking south toward Ross Drive.





Figure 7. View from intersection of Ross Drive and GL Hollier Street, our garage on right.

12/16/2022

Dear Neighbor,

We'd like to take this opportunity to introduce ourselves and try to add some perspective to the variance issue related to the placement of our garage on Lot 10 of Lake Estates Subdivision. We hope you will take the time to read this letter.

We are full-time residents of Alaska: Craig arrived in 1957 and Nancy in 1977. We have worked in Alaska for more than 40 years, Craig initially as a biologist and Nancy as a teacher. We currently work as Appraisers. Our children and grandchildren are all Alaska born and raised: our reason for moving from Homer to Soldotna is to be closer to our young grandchildren.

Our .84-acre lot is oddly shaped with less than 85' of frontage on Ross Drive. In working with our builder and excavator we struggled with how to build a home and detached garage on this lot given the adjacent well and septic systems: the location for our own septic system was severely restricted. Together we decided to locate the garage along GL Hollier St, which is a substandard KPB road. Unfortunately, we weren't aware of the setback and the garage was built on our private property 9.8' into the setback.

We were notified of a potential issue during construction (concrete was poured, walls were in place). When we asked for more information, the KPB code enforcement officer specified that "we are not telling you to stop work" and no order was ever issued to stop work. The elevated building pad was in place and visible from the street through the winter of 2021/2022 and no one contacted us expressing concerns about the location of this future building: we wish someone would have expressed a concern so we could have moved the footprint of this building to be in compliance.

During the October 2022 hearing, the KPB Planning Commission granted a variance for the garage, after deciding unanimously that the location of this garage did not violate any of the criteria used by the Planning Commission to make determinations. The Taylors have appealed this decision and shared their concerns broadly through the neighborhood as evidenced by the letters in their appeal packet.

It is unfortunate that the garage was built 9.8' into the setback on our private property, has caused so much concern in the neighborhood. A setback is an invisible line **on private property**. An easement (rather than a setback) would allow for shared use: no easement exists. The limitations the Taylors experience turning their vehicles and trailers around would be no different than if the building was not located in the setback: they are not entitled to use our private property for any reason without permission.

The Taylors have a 1.94-acre lot and chose to build their home on the setback line: they use their setback area (private property) for parking, which leaves them with only the 30' roadway (GL Hollier St) to maneuver their vehicles and trailers. This appears to be the heart of the problem

In regard to other issues raised by the Taylors, we would like say:

- 1) we were unaware of most of these concerns as not one person has discussed these issues with us.

- 2) we hired a Contractor and professional Excavator to help us navigate the building process.  
Building was hampered by the extensive rain and the Excavator has been aware, since May, that the road will need be restored to pre-construction condition.
- 3) other unresolved issues (downspout drainage, etc.) will be resolved.

We plan to live in the neighborhood and sincerely hope to have an amicable relationship with all of our neighbors.

We are available to talk with you if you have further concerns or questions.

Craig Whitmore                      907-299-5352

[dcwhitmore@gmail.com](mailto:dcwhitmore@gmail.com)

Nancy Whitmore                      907-299-7717

[nancywhitmore@gmail.com](mailto:nancywhitmore@gmail.com)

**STEAM ON WHEELS, LLC**

45240 KNIGHT DRIVE #4  
SOLDOTNA, AK 99669  
US

**INVOICE**

Invoice Number: 14132  
Invoice Date: Sep 1, 2022  
Page: 1

*Duplicate*

Voice: 9072623240

Fax: 9072605230

**Bill To:**

Craig Whitmore

**Ship to:**

Craig Whitmore

Customer ID	Customer PO	Payment Terms	
Craig Whitmore		Net 30 Days	
Sales Rep ID	Shipping Method	Ship Date	Due Date
	Courier		10/1/22

Quantity	Item	Description	Unit Price	Amount
3.00		Grading skid steer for GL Hollier during House Construction	150.00	450.00
3.00		Water truck for compaction and dust for GL Hollier during House and Constuction	150.00	450.00
2.00		Loads for Screen Gravel for touch up and blending to GL Hollier	200.00	400.00
<i>Paid Cash</i>				
Subtotal				1,300.00
Sales Tax				15.00
Total Invoice Amount				1,315.00
Payment/Credit Applied				
<b>TOTAL</b>				<b>1,315.00</b>

Check/Credit Memo No:

Finance Charges will be charged on all overdue invoices.



October 6, 2023

Nancy Whitmore  
Craig Whitmore  
43664 Ross Drive  
PO Box 881  
Soldotna, Alaska 99669

**Subject: Whitmore Residence Setback – Traffic Implications**

Dear Nancy and Craig:

Based on our phone and email conversations, we understand you are petitioning the Kenai Peninsula Borough (KPB) to grant a variance to the 20-foot building setback on your property from GL Hollier Street.

The parcel in question is Lot 10, Lake Estates Subdivision, which is near Soldotna, Alaska and sits north of Ross Drive, east of GL Hollier Street, and south of Sports Lake. Your garage building was constructed approximately 10 feet off of the GL Hollier Street right of way (ROW) line, or right in the middle of the 20-foot building setback identified in the as-built survey by Peninsula Surveying, LLC. GL Hollier Street provides access to 3 parcels (yours and two others). Two of those parcels (including yours) also have road access via Ross Drive. GL Hollier Street has 30-foot wide ROW, does not appear to be constructed to KPB standards, and you have reported that it is not maintained by KPB or a road service area (RSA). The area is relatively flat, with the garage building at the high point of GL Hollier Street.

The photo in Figure 1 was provided by you and has the west edge of your parcel delineated (based on survey markers in the photograph). It shows your buildings relative to the ROW line as well as your vehicle access points onto GL Hollier Street.





Figure 1 – Overhead view of GL Hollier Street and Whitmore Parcel

KPB evaluates 3 standards when considering set back variances:

1. The building setback encroachment may not interfere with road maintenance.
2. The building setback encroachment may not interfere with sight lines or distances.
3. The building setback encroachment may not create a safety hazard.

### Road Maintenance

Road maintenance activities cannot take place outside of the ROW, so the on-property development should have no effect on maintenance practices.

There could be a concern for on-site development to increase run-off into the ROW, block drainage paths, or result in snow being pushed into the ROW. In the case of the Whitmore property, the garage building is sited on an existing high point between Sports Lake and Ross Drive, so does not affect drainage patterns. Furthermore, we understand that the building's gutters and downspout were recently installed and routed to keep roof runoff out of GL Hollier Street, as well as a culvert installed under your north driveway to facilitate drainage away from GL Hollier Street. Finally, there is adequate room on the Whitmore parcel to accommodate snow storage from your driveways and garage access routes.

If GL Hollier Street were constructed to KPB road standards, they would require the road to be 20 feet wide as a category 1 road, with at least 15 feet of clearing on either side of the road to accommodate ditching or sight lines. As Figure 2 shows, the full width of a standard road could still fit between the centerline of GL Hollier Street and the Whitmore garage, in the unlikely event GL Hollier Street were ever to be upgrade to KPB standards as a publicly maintained road. This also shows there is adequate space to accommodate drainage-enhancing grading if it becomes necessary.



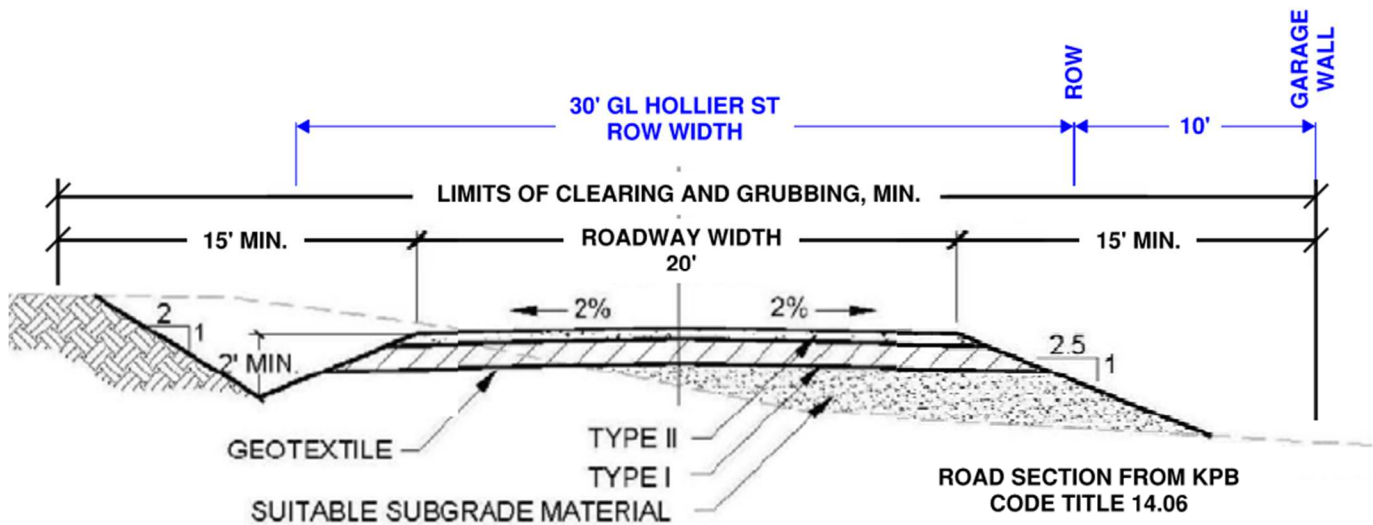


Figure 2 – KPB typical section for Category I roads

### Sight Lines or Distances

Sight distance is an important consideration for motorists for two scenarios:

- For travelers on a road, they need to be able to see a potential hazard in the road, mentally process it, and bring their vehicle to a stop if necessary.
- For motorists entering or leaving a road, they need to be able to see on-coming traffic with enough time to either stop and wait or turn and get clear of on-coming traffic.

The Whitmore garage has no effect on sight distance for motorists traveling on the road. It also has no effect on motorists looking to leave the public roads.

It *could* affect motorists leaving the Whitmore property. Sight distance measurements are guided by the *Policy on Geometric Design of Highways and Streets*, published by the American Association of State Highway and Transportation Officials, which is also referred to as the “Green Book”. Sight distance is measured from a point 14.5 feet back from the edge of the road. The actual edge of the road area of GL Hollier is unclear, but if it were configured to KPB standards, the road would be 20 feet wide in the middle of the 30-foot ROW. This is all illustrated in Figure 3 below, which shows the sight triangle is limited by the length of the road and not affected by the garage. Figure 4 is a photograph showing the sight line between Ross Drive and the Whitmore garage. A forested yard, which is allowed in the building set back, would have much more effect on sight distance.

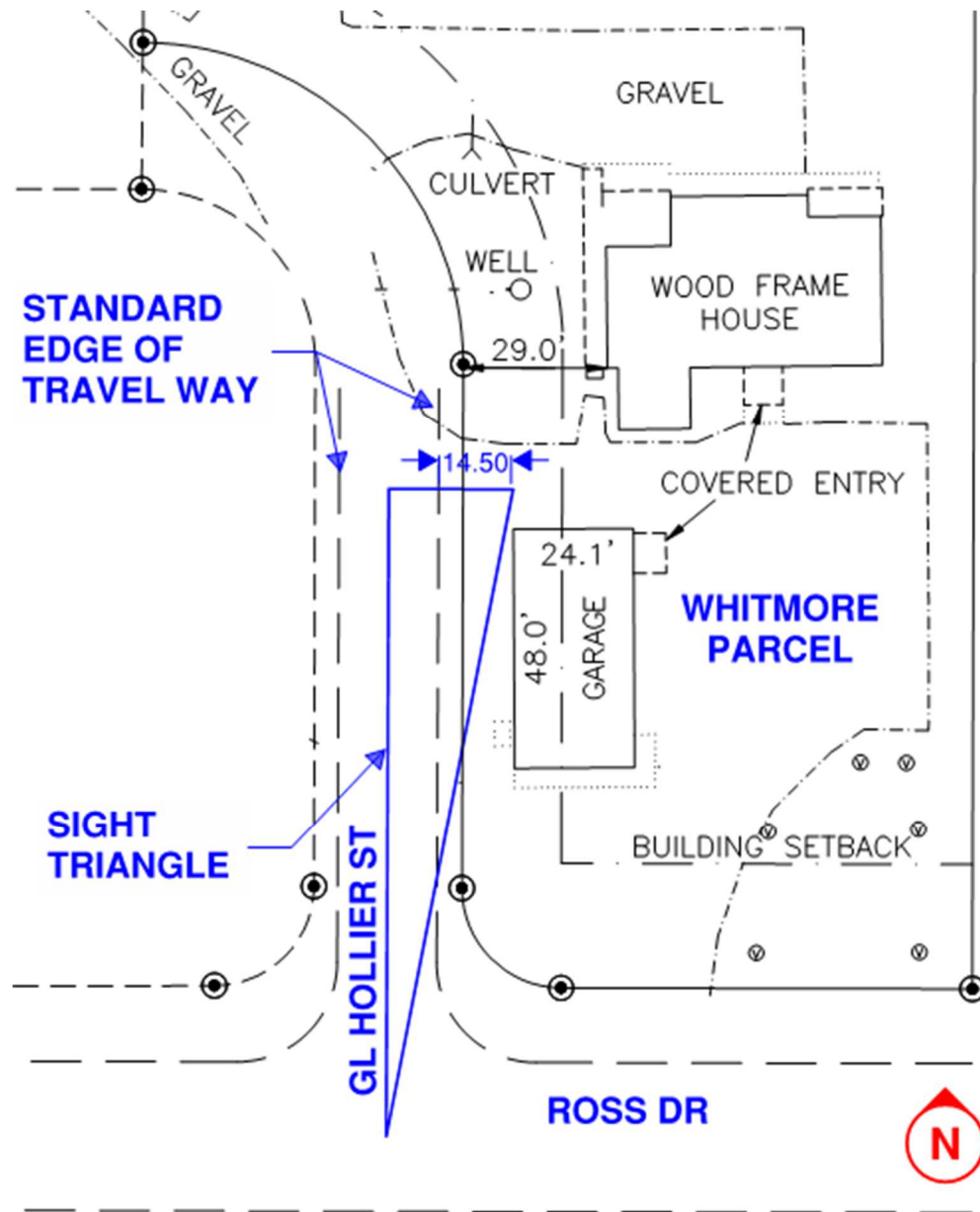


Figure 3 - Sight triangle shown on site as-built from Peninsula Surveying, LLC



*Figure 4 – View of sight triangle from Ross Drive looking north up GL Hollier Street. Construction candles are 1 to 2 feet on-property.*

### Safety Hazard

Since the garage provides space for adequate sight distance, the primary traffic safety concern would be the need to maneuver in the ROW when pulling out of or into the garage space on the north end of the garage. This creates potential conflict points between garage users and through traffic on GL Hollier Street. However, this conflict would exist for any driveway that does not have turn-around space on-site, such as the neighbors across the street who access their garage and parking directly off of the GL Hollier Street ROW. However, driveway access directly onto the street is allowed and the neighbors' wide, multi-vehicle driveway across the street shows it currently functions adequately, so this should not be considered a hazard affected by the requested setback variance.

A common reason for building setbacks is to ensure adequate space for parking outside of the ROW. The Whitmore parcel has plenty of parking on-site so they will not be reliant on the building setback area in front of their garage for parking, ensuring their parked vehicles will not encroach into the ROW or traveled way.

Closing

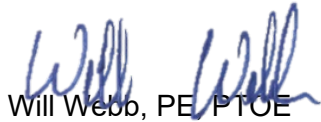
In summary,

1. Road maintenance activities cannot take place outside of the ROW, the requested setback variance reserves space for runoff if required, and there is adequate space on-site for snow storage, so the requested variance should have no effect on maintenance practices.
2. The Whitmore garage has no effect on sight distance for motorists on GL Hollier Street, and no effect on motorists looking to enter GL Hollier Street from the adjacent parcels.
3. The requested setback variance on the Whitmore parcel will not lead to parking in the ROW or more maneuvering in the ROW, so should have no effect on traffic safety.

Based on the preceding discussion, it is my opinion that the proposed setback encroachment does not adversely impact road maintenance (or the potential for road maintenance), sight distances, or traffic safety.

Sincerely,

**Kinney Engineering, LLC**

A handwritten signature in blue ink, appearing to read 'Will Webb', is positioned above the printed name.

Will Webb, PE, PTOE

Senior Engineer

Dear Planning Commission,

We are writing to express our deep concerns regarding a setback violation issue that has had a profound impact on our property and community. Our address is 43680 Ross Dr., and we are adjacent property owners to the Whitmore's, whose recent construction project has encroached upon the setback requirements in Lake Estates Subdivision.

Our story begins on May 4th, 2022, when we reached out to the Borough Code Compliance Officer, Eric Ogren, upon noticing that the Whitmore's had commenced construction, seemingly in violation of setback regulations. At the time of our call, concrete was already being poured, effectively blocking GL Hollier St. and diverting traffic onto our property. We expected swift intervention by the Borough to rectify this situation. (See attachment #1)

Regrettably, the construction continued, and on May 17th, 2022, a Borough Representative inspected the site, revealing that walls had been placed, and construction had proceeded. Our inquiry to Planning Director Robert Ruffner on May 20th, 2022, yielded a response that the Borough was aware of the situation and was awaiting legal clarification on the setback requirements. This delay was concerning, as it appeared that the Whitmore's were building in disregard of established regulations.

The setback requirements were clearly indicated on the plat provided during the property purchase process, a standard practice including the Title Report, which the Whitmore's would have acknowledged. Despite this, the construction seemed to ignore these regulations. Regardless of the

setback regulation the borough was going to enforce, whether it be 20 or 25 foot setback, they were clearly over both of those measurements. The Whitmore's, as owners of Whitmore Appraisal Service LLC, should reasonably be presumed to be well-versed in setback requirements.

As we waited for Borough intervention, the Whitmore's continued construction, even pouring a concrete pad for a generator that further encroached into the setback.

When the Electrical Company wired the shop, they wired it to the corner that was already over the setback. That was intentional, and all parties involved knew of the setback violation before the electrical work had even started, yet they still didn't make those changes. Each act demonstrates their willful disregard. (see attachment #2 and #3)

We were unable to attend the initial public hearing on October 24, 2022, due to our son's scheduled surgery out of state. During this hearing, the Whitmore's stated that the lot was oddly shaped and that they hadn't surveyed the property. The truth is, the lot's shape allows ample space for compliant construction, but the Whitmore's chose an alternative placement to maximize usable space. (See attachment #4)

The impact of their actions extends beyond just us, affecting the Markham Family and all neighbors who use GL Hollier Street.

Our residence is situated along GL Hollier Street, which is not maintained by the Borough and is characterized by substandard road conditions. While the access is theoretically dedicated to a 30-foot width, the road fails to meet these specifications throughout its entirety. This limited space poses challenges, since there is already hardly any room between the road surface itself and the boundary of the GL Hollier access to account for things such as toes and slopes, vehicle adjustments, maintenance and ensuring proper sightlines and distances, and accounting for boundary considerations.



When we initially moved here, GL Hollier Street was in a deplorable state, being nothing more than a dirt road that transformed into mud during adverse weather conditions. In collaboration with our neighbor who previously owned the Markham property, we took it upon ourselves to make substantial improvements. We rented equipment, purchased gravel, and reclaimed asphalt to upgrade the road, effectively mitigating dust issues. This endeavor was a joint effort driven by our shared respect for neighbors and the collective desire to enhance our subdivision.

Regrettably, Whitmore's construction activities have had a detrimental impact on the road improvements we worked diligently to achieve. We have repeatedly requested that they and their dirt contractor, Steam on Wheels, contribute to the road's repair by placing a reclaimed asphalt cap, to control dust. To date, these requests have gone unheeded. It is essential to clarify that we have never implied an exclusive property interest in GL Hollier; we recognize it as a public road. Our aim has always been to enhance the road's condition due to its privately maintained status, a responsibility shared among neighbors.

With the Whitmore's shop encroaching onto GL Hollier Street, snow plowing has become increasingly challenging due to limited space. Their practice of depositing substantial amounts of snow from their private property and the road onto GL Hollier further compounds this issue, essentially obstructing the road (Attachment #7 and #8). This restriction has hampered our snow plowing efforts, making it difficult to keep the road open and creating a massive snow berm that prevented access to our neighbors' home, the Markham family (Attachment #9 ). Emergency services, such as fire trucks and ambulances, would have been unable to reach their property due to this massive snow berm. To address this, the Markham family had to enlist the Whitmore's assistance, utilizing heavy equipment to remove the obstructing snow. We also attempted to engage a professional plow service to push the snow berm back, but these efforts proved unsuccessful. These conditions raise significant visibility and safety concerns for all users of GL Hollier Street.

Furthermore, it's important to address a previous statement made by the Borough attorney,

which suggested that placing snow cleared from the street onto the setback would be considered trespassing. This assertion contradicts the practical reality of snow removal from a 30-foot wide road. As supported by OAH Judge Lisa Toussaint, Snow removed from a 30 foot wide road needs to go somewhere. Logic dictates that when snow is pushed from the road, some amount may need to be placed onto property abutting the road. This would occur whether the road is privately or publicly maintained. The suggestion that the shop will not interfere with road maintenance including snow removal, simply because the setback is on private property where no snow can be placed, is incorrect.

Moreover, it's important to highlight a specific incident that occurred on December 13, 2022, at 10:30 pm. Alaska State Trooper Timothy Collins was summoned to our home by the Whitmore's, who were spending the winter in Hawaii watching their video surveillance. They requested an inspection of their property, alleging that a snow berm was blocking their driveway. However, upon examination, Trooper Collins found that the driveway was not obstructed by a snow berm; and GL Hollier had been freshly plowed (see attachment #10).

This incident occurred the day after a massive snowstorm that brought over 3 feet of snow and high winds, resulting in significant snow drifts throughout the area.

We have diligently sought resolution through the Borough, but the opposition from the Whitmore's, who are seemingly aware of what is required, has been disheartening.

Our introduction here outlines the initial events and concerns that have led us to this point. In the following sections, we will provide evidence to support our case and explain how the setback violation affects the three standards for a setback permit.



Thank you for your attention to this matter.

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

Findings:

1. The encroachment prevents us from adequately pushing snow berms, leading to narrowed roads and road erosion when the snow melts, necessitating costly repairs.

2. The gutter drain spout on the Northwest side of the shop directs water onto GL Hollier Street, making it challenging for us to access our property and posing the risk of accidents in the winter. (See Attachment #11 and Attachment #12)

3. This same drain spout leads to material washout, potholes, washboard, and gullies on the road, further hindering access and requiring repairs.

4. Lack of proper drainage, like ditches, exacerbates these issues, compounding road damage.

5. The shop's location complicates snow plowing, leading to visibility issues and safety concerns for all GL Hollier Street traffic.

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

Findings:

6. The encroachment reduces the setback to a minimal and unsafe distance, impacting sightlines and traffic safety.

7. The shop's location has shifted traffic onto our property, creating a safety hazard for us and our visitors, as well as confusion regarding property boundaries (See Attachment #13)

8. The close proximity of the shop forces us to back larger vehicles onto Ross Drive, a busier road, raising significant safety concerns.

9. The encroachment poses a safety risk for our family, friends, neighbors, and the owners of the shop and generator.

10. The Whitmore's garage door facing GL Hollier Street limits visibility when backing out, endangering pedestrians, cyclists, and drivers.

11. Traffic may need to reroute onto our property to avoid accidents, placing our family and friends in danger.

12. The lack of space prevents us from executing an offensive fire attack, leaving us only with defensive options, and the radiant heat from the shop threatens our home (see Attachments #14)

13. Delivery trucks, like FedEx and UPS, avoid entering our driveway due to insufficient space for turning, impacting package deliveries and accessibility for larger vehicles.

Standard 3. The building setback encroachment may not create a safety hazard.

Findings:

2. The gutter drain spout on the Northwest side of the shop contributes to icy road conditions on GL Hollier Street, making it challenging for us to access our property and posing the risk of accidents.

5. The shop's location complicates snow plowing, leading to visibility issues and safety concerns for all GL Hollier Street traffic.

7. The shop's location has shifted traffic onto our property, creating a safety hazard for us and our visitors, as well as confusion regarding property boundaries

8. To avoid collision with the shop and generator, we are forced to back larger vehicles onto Ross Drive, which is busier and riskier.

9. The shop's closeness to the road raises safety concerns for our family, friends, neighbors, and the shop and generator owners.

10. The Whitmore's garage door facing GL Hollier Street limits visibility when backing out, endangering pedestrians, cyclists, and drivers.

11. Traffic may need to reroute onto our property to avoid accidents, putting our family at risk.

12. Insufficient space prevents us from employing offensive fire tactics, leaving only defensive options, with the threat of the shop's radiant heat igniting our home.

13. Delivery services like FedEx and UPS avoid our driveway due to space constraints, impacting package deliveries and access for larger vehicles.



Attachment #1, Day one of pouring concrete for foundation, blocking access on GL Hollier.



Attachment #2, Generator beside shop in setback.



Attachment # 3, Generator beside shop in setback. The construction candle and whiskers depict the edge of the road.





Attachment # 4, Photo depicts plenty of space on lot for shop to be built within lot limits.



Attachment #5, Survey stakes on Lot 10 before construction began.



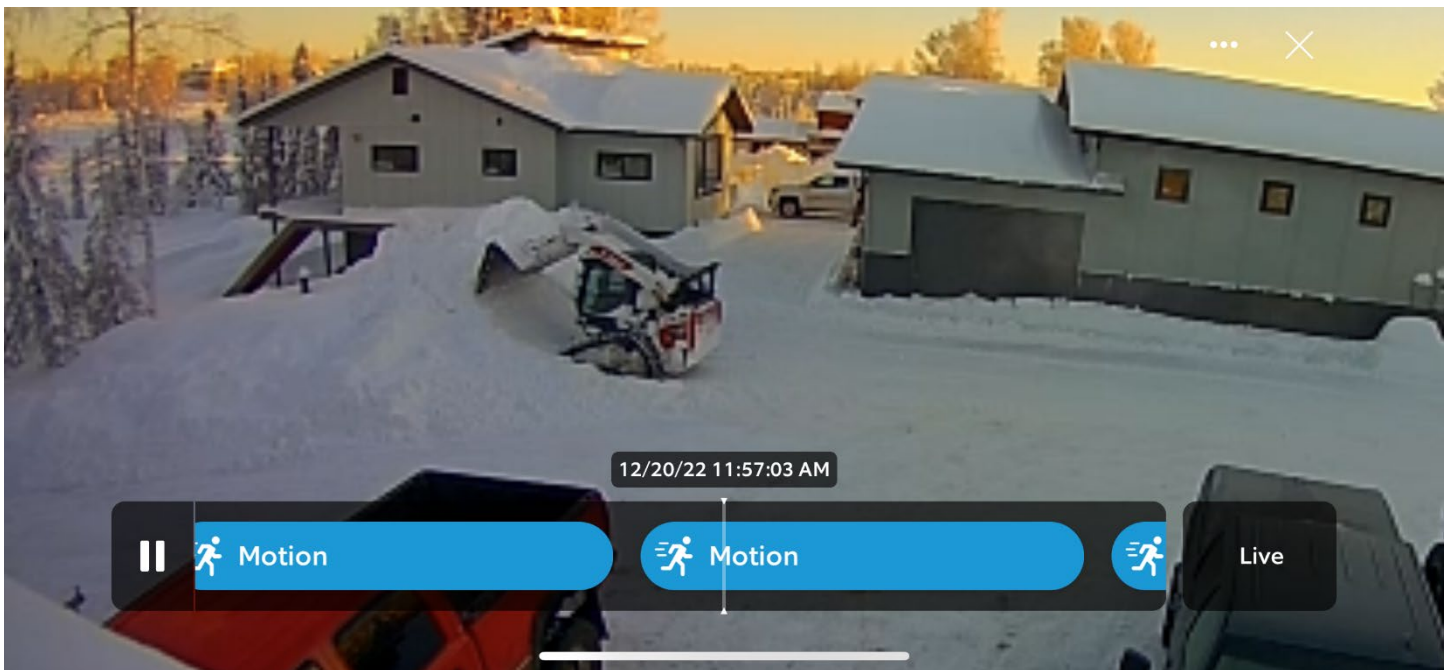


Attachment # 6 Survey stakes of Lot 10 before construction began.






Attachment # 7 Plowing snow from private property into GL Hollier



Attachment #8 Plowing snow berm in GL Hollier, essentially blocking access.



Attachment #9 Orange paint marks property line of Taylor’s lot 9 and left side of road.



Alaska Department of Public Safety

Incident Report

Incident: AK22128235

Incident Type:

Civil Issue [CIVL]

Incident time:

12/13/2022 20:07-

Reported time:

12/13/2022 20:07

Incident location:

43664 ROSS Drive, Soldotna, Kenai Peninsula Borough AK USA 99669

Incident status:

Closed non-criminal

Summary:

CFS #4188 / Caller reported that the neighbors were pushing snow in front of her driveway. I responded to the area and found that the driveway was not blocked by snow and freshly plowed.

Incident Activities/Offenses

• Civil Problem()

Involved Persons/Organizations

TAYLOR, AUTUMN ROSE

Gender:

Female

TAYLOR, TROY RICHARD

Gender:

Male

WHITMORE, NANCY STORY

Gender:

Female

Involved Officers

• Reporting officer; Reporting unit/ #TKC1COLLINS, TIMOTHY K/ DPS

Attachment # 10 Trooper Collins incident report





Attachment #11 Gutter draining into GL Hollier and creating gullies



Attachment #12 Gutter draining into GL Hollier creating icy road conditions.



Attachment #13 Pump truck had to back onto GL Hollier street from Ross Drive, another example of not enough space and the property stake behind the truck indicates the edge of Taylor Property. This pump truck was accessing the Whitmore's portable toilet. He backed over the stake.



SLP Alaska, LLC: 46540 Jo Avenue Kenai, AK 99611: (907) 202-3274 [brian@slpalaska.com](mailto:brian@slpalaska.com)

To whom it may concern,

My name is Brian Walden. I am a Certified Safety Professional (BCSP #21908), Associate Safety Professional (BCSP #A15379), Occupational Health and Safety Technologist (BCSP #3303), Certified Safety and Health Manager (CSHM #2556), and I am qualified as an expert in premises liability law as presented in the Alaska Court System. I have provided expert witness testimony in numerous litigations in the State of Alaska with specific regard to premises liability. I am an expert incident investigator and pre-incident planning expert as well. I have over 20 years' experience in this field and possess degrees in Fire Service Administration and Occupational Safety and Health. I have extensive training in incident investigation, incident prevention, causal factors analysis, critical human action profiling, fire safety inspections, fire investigation, transportation safety, public safety, and have demonstrated the ability to solve problems as related to these subjects which deem me qualified to provide these services.

I was contracted by Troy and Autumn Taylor to conduct a safety and premises liability inspection at their residence (43680 Ross Drive Soldotna, AK 99669). I arrived at the residence on 11/28/2022 and subsequently observed the neighboring garage/shop nearly in the road. My first concern was the ability to safely get a range of view for driving on GL Hollier Street. With the positioning of the shop/garage (basically) in the roadway, it is difficult to get a full view of the cross traffic on Ross Drive and for people entering or exiting the residence across from the Taylor's home while driving on GL Hollier Street.

My next observation was the rain gutter runoff directly from the shop/garage flowing into GL Hollier Street. This creates troughs in the snow/ice as well as the dirt surface of GL Hollier Street, which may impact the safe usability of

the street. Accordingly, liability may be imposed on an adjoining landowner or lessee if they create a dangerous condition (as clearly described herein).

Further, the closeness of the proximity of the shop/garage to the Taylor's home creates an exposure risk to their home in the event the neighbors' shop/garage were to be involved in a fire event. Although Central Emergency Services (CES) is within 15 minutes to the residence, there are no hydrants in the neighborhood for the response teams to use. This means they will need to access Sports Lake (directly down GL Hollier Street from the Taylors' home). Responders will need to have access to the lake to use as supply water in an offensive fire attack as their tanker holds (approximately) 5,000 gallons of water. A fully involved structure of that size would require more than the capacity of the tanker to extinguish. Additionally, this puts the responding fire service personnel at risk due to the siting of the structure. How does the Borough expect the fire response teams to set up to fight a fire in this neighborhood? As a former professional firefighter/engineer I would find it difficult to stage more than one apparatus in the area to attempt an offensive fire attack.

If we examine the encroachment to the roadway caused by the structure built across the street from the Taylor residence, it is clear the approval to build (approximately 14.5 feet) into the easement causes liability concerns for the neighbor and the borough approving the encroachment. There was actual knowledge of the encroachment at the time of the build, as the Taylor's provided notice to the Borough and the build was suspended for two days. The build negligently creates a hazardous situation for line of sight, street damage from water runoff, difficulty in staging firefighting apparatus, snow removal, daily traffic, etc.



SLP Alaska, LLC: 46540 Jo Avenue Kenai, AK 99611: (907) 202-3274 [brian@slpalaska.com](mailto:brian@slpalaska.com) I assume GL Hollier Street has been in place for some time, and that the Taylor's and their neighbors have the rights to use the entirety of the street. If the borough has easements recorded that outline the ability of the neighbors, as well as the public, to use the road, it is my assumption the borough is vicariously liable for allowing the building to be sited as built for any damages resulting from the hazards listed in this report. There is a concept in law relating to implied or required easements given certain specific circumstances. That is to say, if an easement must be implied given the prior use of a roadway and that easement is necessary for access, the law may create and imply that easement even when there is no paper document.

Finally, the roadway is necessary for life, fire, and safety requirements, and is encumbered by the encroachment into the roadway. In general, the underlying theme is that adjoining landowners are expected to use their property reasonably without unduly interfering with the rights of the owners of contiguous land. Actions taken by a landowner that appropriate adjoining land or substantially deprive an adjoining owner of the reasonable enjoyment of his or her property is an unlawful use of one's property. According to *Abbinett v. Fox* (103 N.M. 80 Ct. App. 1985) the general law of most states is put well: in that case it is observed that a landowner is entitled to use his/her property in a manner that maximizes his/her enjoyment. However, the enjoyment must not unreasonably interfere or disturb the rights of adjoining landholders or create a private nuisance. It is the duty of the landowner to utilize his/her property in a reasonable manner, avoiding potential injury to, or displacement of, adjoining property owners or causing unreasonable harm to others in the vicinity. In most jurisdictions, compliance with a zoning ordinance will not immunize one from the consequences of an unreasonable use of one's property that results in the invasion of the private rights of his/her neighbor. Invariably, however, violation of zoning ordinances is powerful evidence that the use is unreasonable and, of course, liability for violation of zoning ordinances can be imposed independent of legal actions by the adjoining landowners.

It is the Taylors' assessment that the building of the structure pushed the road traffic further into their property and creates the hazards as described above. I tend to agree after conducting my assessment. I contest that the Borough should never have allowed the construction in the easement for the purposes of permanent structures given all the considerations listed. The structure should be moved back from the roadway which would allow fire response services to adequately stage for fire and life safety response scenarios; safe snow removal considerations; and daily traffic use of GL Hollier Street and Ross Drive.

Thank you,



# Brian Walden

Brian Walden  
Founder & CEO  
SLP Alaska, LLC

## Attachment #14

In conclusion, our journey to address the setback violation issue has been marked by a deep sense of frustration and concern. From the moment we alerted the Borough about the violation and throughout the appeals process, we have consistently encountered obstacles and challenges that seemed to favor our neighbors' interests.

Despite our genuine efforts to seek resolution through proper channels, we couldn't shake the unsettling feeling that the Borough's handling of this case was marred by undue influence and a lack of transparency. The fact that the first administrative judge reversed the Borough's decision, only to see it appealed and remanded back, speaks volumes about the serious flaws in the initial approval process.

We cannot help but question whether our neighbors received preferential treatment or guidance during this ordeal, particularly given their own knowledge of borough codes and their evasive actions, such as paying cash to avoid inspections. Additionally, the dismissive and adversarial stance of the Borough's attorney towards our concerns has been disheartening.

Despite these challenges, we have persisted in our pursuit of justice, as we believe that fairness and adherence to regulations should prevail. We have provided substantial evidence of our standing and the significant errors in the original permit approval. Our commitment to upholding the integrity of the regulations has not wavered.

As we approach the upcoming remand hearing on October 9, we hope that our concerns will finally receive the attention they deserve, and that the process will be guided by fairness and a genuine commitment to upholding the borough's regulations.

We are not seeking special treatment or favoritism; we are simply asking for a level playing field where rules and regulations are applied consistently and without bias. We trust that the Planning Commission will carefully consider the evidence, the flaws in the original decision, and the potential influence that may have affected this case.

We remain hopeful that justice will ultimately prevail, and that our community can continue to rely on the Planning Commission to uphold the integrity of our zoning regulations. We look forward to a fair and just resolution in the upcoming remand hearing.

Thank you for your attention to this matter.

Sincerely,

Troy and Autumn Taylor