COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
CIVIL DIVISION

David Hopkins, et al.,	:	
Appellants,	:	CASE NO. 22CVF03-1758
-vs-	:	**JUDGE CHRIS M. BROWN**
City of Dublin, Board Of Zoning Appeals,	:	
	:	
Appellee.	:	

DECISION AND ENTRY ON MERITS OF APPEAL

BROWN, JUDGE

I. INTRODUCTION

This action is before the Court upon appeal of David and Beryll Hopkins (hereinafter "Appellants") from a decision by the City of Dublin Board of Zoning Appeals (hereinafter "the BZA").

The legal issues have been briefed, and the record of the administrative proceedings has been filed. The Court will address the issues raised by Appellants.

II. FACTUAL AND PROCEDURAL BACKGROUND

Appellants own property located at 9376 Nicholson Way in Dublin, Ohio (hereinafter "the Property"), which has been zoned as a single-family district. They are the original owners of the Property and built an at grade patio as part of the original construction. In July of 2021, Code enforcement officers for the City of Dublin (hereinafter "the City") observed what they characterized as "an unpermitted pergola" that was constructed over Appellants' permitted patio.

After receiving notice that a building permit was required for this type of structure, Appellants applied for a retroactive building permit to the City's Division of Building Standards.

After that application was denied, Appellants sought a retroactive variance from the City. Once the City Planning Division reviewed this history, they determined that the application should aptly be considered an administrative appeal of City Code §153.071(B)(1)(c), which permits only open and uncovered porches to encroach into the rear yard setback five feet.

On November 15, 2021, the City Planning Division issued a report to Appellants that their pergola was in violation of City Code because it encroached into the rear yard setback and did not meet the Planning Division's interpretation of an open and uncovered porch. Next, Appellants appealed to the BZA.

A hearing was held by the BZA on February 24, 2022. After hearing argument and examining the evidence in the record, Appellants' application was rejected at the conclusion of the hearing by a member vote of 3-1. (Tr. 122). It is from this finding that Appellants base their current appeal.

III. STANDARD OF REVIEW

Review of this matter is governed by Chapter 2506 of the Ohio Revised Code. R.C. 2506.01 provides for an "[a]ppeal from final order, adjudication, or decision of political subdivision officer or division." Under that provision, along with R.C. 2506.03, the Court must determine from the record whether the administrative order is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence. *Henley v. Youngstown Bd. of Zoning Appeals*, 90 Ohio St.3d 142, 147 (Ohio 2000).

R.C. 2506.04 provides: "[t]he court may find that the order, adjudication or decision is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable and probative evidence on the whole record. Consistent with its findings, the court may affirm, reverse, vacate, or modify the order, adjudication or decision, or remand the

cause to the officer or body appealed from with instructions to enter an order consistent with the findings or opinion of the court." *Cincinnati Bell, Inc. v. Glendale*, 42 Ohio St. 2d 368 (Ohio 1975); *Athenry Shoppers, Ltd. v. Planning & Zoning Comm'n of Dublin,* 10th Dist. Franklin No. 08AP-742, 2009-Ohio-2230.

The Court must evaluate the whole record to determine if there is substantial, reliable and probative evidence. *Dudukovich v. Lorain Metro. Housing Auth*., 58 Ohio St.2d 202, 206 (Ohio 1979). Determination of the sufficiency of evidence requires the Court to assess the credibility of the witnesses and the probative value, keeping in mind that the administrative tribunal is entitled to due deference in areas of its expertise. *Athenry Shoppers, Ltd. v. Planning & Zoning Comm. of Dublin*, 10th Dist. Franklin No. 08AP-742, 2009-Ohio-2230, ¶17; *Elbert v. Bexley Planning Comm*., 108 Ohio App.3d 59, 66 (10th Dist.1995). In making its assessment, the trial court is not permitted to blatantly substitute its judgment for that of the agency, especially in area of administrative expertise. *Dudukovich*, *supra* at 207.

IV. ANALYSIS AND FINDINGS OF THE COURT

Appellants maintain that the crux of this appeal centers around the application of City Code §153.071(B). Directing the Court to that City Code section, it is alleged that the terms "open and uncovered", "pergola", "awning", "canopy", "porch" and "patio" are not defined, leaving them to varying degrees of interpretation. Appellants submit that this renders the City Code to be ambiguous, arbitrary and unreasonable due to the lacking definitions, and such ambiguity should be decided in their favor. Relying on discussions between members of the BZA themselves, Appellants note that one member reasoned that "uncovered" to her means "without a roof", while others admitted that improvements can be made within the Code where definitions need to be reworked.

Appellants argue that the meaning of §153.071(B)(1)(c) must be derived from a reading of the entire ordinance. To this end, they direct the Court to the sections of the City Code addressing fencing, walls and landscaping under §153.071(B)(1)(a), as well as §153.231(F)(4) dealing with accessory uses and structures. As to fences, Appellants note that when used as an open fence, an arbor or trellis is incorporated into the term "fence". As a result, they argue that because there is no lattice work used as a screen or support for climbing plants, Appellants pergola is more open than an arbor or trellis used as a fence. Moving to the definition of "accessary structures", it is further submitted that this section of the City Code provides "Gazebos, trellises and arbors or other open and unenclosed structures" are not counted toward the maximum square footage.

It is suggested by Appellants when the Zoning Code is taken as a whole, that these other sections provide guidance as to what "open" means and what "uncovered" means as it applies to the relevant City Code section at issue. According to their position, "open and uncovered" appears to be somewhere between the extremes of 100% open and 100% uncovered, and therefore, the BZA's application of this provision is vague, arbitrary and unreasonable.

Appellee responds by arguing that the BZA duly formed its decision using the proper requirements and standards in City Code §153.231(F)(4). According to Appellee, a representative from the Planning Division explained at the hearing that Appellants' pergola does not meet the "open and uncovered" requirement under City Code §153.071(B)(1)(c) because it is partially covered. It is argued that while these terms are not defined in the City Code, they are unambiguous and have been consistently applied by the Planning Division. Appellee submits that a majority of the BZA determined that Appellants' pergola is by its very nature a covered structure, drawing attention to the included joists and permanently attached awning.

According to Appellee, when an administrative body reviews reasonable facts regarding a particular matter before them and applies common definitions to those facts, the resulting decision is supported by a preponderance of substantial, reliable and probative evidence. Here, it is stated that the BZA considered reasonable evidence as to the fact the pergola is not open and uncovered using ordinary definitions, while further relying on depictions and pictures of the pergola. Moreover, Appellee maintains that there is evidence that the Planning Division considers open and uncovered to be clear and these terms have been consistently applied to structures under this same code section. Consequently, Appellee takes issue with any attempts by Appellants to conflate unrelated ordinances of the City Code that govern total-area restrictions for accessory structures such as gazebos, trellises, arbors, fences or walls. It is submitted that examining the potential applicability of these provisions is irrelevant in this instance, given the lack of ambiguity.

While Appellee concedes that the BZA did request that the Planning Division in the future draft definitions for certain terms to avoid confusion, it was emphasized that the BZA also determined after conducting lengthy discussions and deliberations that Appellants' pergola was not "open" and "uncovered" under their current and common understanding of those terms. Lastly, Appellee responds to arguments by Appellant regarding unconstitutionality that R.C. 2506 appeals are not designed as a mechanism to bring facial constitutional challenges. In the alternative, it is argued that C.O. 153.071(B)(1) is not unconstitutionally vague because a person of ordinary intelligence can determine what conduct is prohibited under the City Ordinance, and Appellants' pergola violates the plain language of this section without falling into any of the exceptions. Therefore, Appellee requests that the Court affirm the decision of the BZA.

It is from these assignments of error and arguments that the Court reviews the decision issued by the Board. This requires an examination of the record and transcript from the administrative

hearing.

Section 153.071 of the City's General Development Standards provides the following in pertinent part:

> LOT AND SPACE REQUIREMENTS
> (B) *Lot area and yard space preserved*. The lot area and yard space required for a use or structure shall be maintained during its life and shall not be reduced below the minimum requirement, occupied by another use or structure, or counted as yard space for any other use or structure.
> (1) *Open yards required*. The yard space required for a use or structure shall, during its life, remain free of all uses or occupancy except as follows:
> [***]
> (c) Open and uncovered porches may project beyond the front building setback line or into a required rear yard distance not to exceed five feet.

In interpreting zoning ordinances, reviewing courts should give the words in a zoning regulation the meaning commonly attributed to them unless a contrary intention appears in the regulation. *JP Morgan Chase Bank, Inc. v. City of Dublin*, 10th Dist. Franklin No. 10AP-965, 2011-Ohio-3823, ¶10. The meaning of relevant provisions, however, must be derived from the context of the entire ordinance. An administrative agency's reasonable interpretation of local zoning codes is recognized as an area of administrative expertise and is to be presumed valid. *Id*. at ¶11; *Pro-Tow, Inc. v. Columbus Bd. of Zoning Adjustment,* 10th Dist. Franklin No. 18AP-629, 2019-Ohio-3462, ¶30.

When an ordinance is unambiguous and conveys a clear meaning, a court must only read and follow the words of the ordinance. *4522 Kenny Rd., L.L.C. v. City of Columbus*, 152 Ohio App.3d 526, 2003-Ohio-1891 (10th Dist.). In such a case, there is no need to apply any rules of construction. An ordinance is ambiguous when it is subject to various interpretations. *Id*. at ¶13, citing *Cline v. Ohio BMV*, 61 Ohio St.3d 93 (Ohio 1991). Specifically, an ambiguity exists if a

reasonable person can find different meanings in the ordinance and if good arguments can be made for either of two contrary positions. *Id*.

Upon undertaking a complete review of the record, the Court determines that competent evidence exists to support the conclusion reached by the City and BZA. Taken as a whole, the Court finds that the record and hearing transcript demonstrates that the BZA applied a commonsense and ordinary understanding of the terms "open and uncovered", as applied to Appellant's pergola. It is also evident that the members were mindful for consistency's sake in addressing this appeal in the manner they have with comparable applications regarding this requirement in previous circumstances. While the BZA members freely admit that future disputes of this nature may be avoided by expanding the definition section of the City Code to include terms such as: "open", "uncovered", "pergola", "patio", "trellis" and "porches", this does not change the recognized rules of construction or the weight assigned to the BZA's interpretation, so long as it is reasonable. (Tr. 117-119).

At the hearing before the BZA, Tammy Noble testified on behalf of the City's Planning staff. (Tr. 53). Ms. Noble explained as follows:

> "For planning analysis, we did want to look at the site in totality. Again, the sequence of events, the applicant did construct an at-grade patio, and to be very clear, the at-grade patio is permissive to encroach into the rear yard setback as open and uncovered. The provisions, we determined, did not apply to, in this case, a pergola, which we believe is partially covered and does not reflect that provision of the code."

(Tr. 6). After conceding that the City Code does not define "open and uncovered", Ms. Noble stated "we focused our discussion on how this code section has been applied to properties in the past, as well as some analysis of the definitions that [Appellants] provided." (Tr. 8). She added that this caused her to reach out to the City's law director to confirm that the dictionary is an

acceptable source for common definitions, as suggested by Appellants. (Tr. 96). However, after listing and commenting on the five components that are incorporated into the provided definitions, Ms. Noble insisted that Appellants' pergola fails to qualify. According to her, "we've never – we, the City of Dublin – have never used this code provision for anything that's not completely open. So, that's the first part of your question. The second part is, do I agree with your assessment that it meets this definition? And I do not." (Tr. 64).

Thomas McCash, counsel for Appellants, stated the following at the hearing:

> "Members of the Board of Zoning Appeals, the particular section that was cited as being open and uncovered, it says specifically open and uncovered porches. Those definitions aren't within this code. Its vague. It needs to be corrected. This issue has come up in the past from various different things on how to apply this particular section of the code. Is a trellis open and uncovered? I say that a trellis is because if you look at how its lumped in with other open and uncovered structures in various sections of the code, it could be considered open and uncovered."

In response to Appellants' arguments, a member of the Board asked the following questions:

> BOARD MEMBER JOSEPH NIGH: Counsel, while she's looking that up are you telling us that its your belief that this structure meets your definition of open? It doesn't have a roof, top, or lid, has no protective covering; it doesn't have any obstacle to passage or view; Its completely free of concealment? Because she's saying that. Are you telling us you believe it meets that?
>
> THOMAS MCCASH: I believe that it meets that. (Indiscernible) typically have.
>
> BOARD MEMBER JOSEPH NIGH: Well, that's what I'm asking. You're telling me it doesn't have a top on it or lid or any covering over top of it?

> THOMAS MCCASH: It does not have a covering that provides any type of protection from the weather.
>
> BOARD MEMBER JOSEPH NIGH: Okay. I didn't, again, I didn't ask if it provides protection from the weather. Were attorneys too. So, I'm not -- its not a game for me. This is, does it have a lid or covering on top of it? Yes or no.
>
> THOMAS MCCASH: I would say no.
>
> BOARD MEMBER JOSEPH NIGH: So, the picture we have with the awning pulled over is not there, that's the wrong picture?
>
> THOMAS MCCASH: Not, its got what's called a canopy, but its not a top.
>
> BOARD MEMBER JOSEPH NIGH: The canopy that's covering the top of it?
>
> THOMAS MCCASH: It doesn't fall into the definition of what a roof covering is.
>
> [***]
>
> THOMAS MCCASH: There are cables that are along where, well call them the joists, for lack of easier definition, that's where this canvas opens and closes. Similar to the retractable awning that staff hasn't figured out how to deal with a retractable awning, is that permanent or is that -- does the awning section encroachment only apply to retractable awnings or permanent awnings? Does it apply to both? There's ambiguity that's in that.
>
> BOARD MEMBER JOSEPH NIGH: The joists are permanent, through right? The joists that are across the top of it, right?
>
> THOMAS MCCASH: The joints are permanent, yes.

(Tr. 66-67, 69).

Appellant David Hopkins also briefly testified at the BZA hearing. In explaining the permit history, Mr. Hopkins attested:

> "So, number one, I want to apologize for not getting the permit. That's on me. There was no intent to deceive or anything but I'm naive and whatever it is, I'm responsible. I should have known better.
>
> What Mr. McCash said was true that the HOA did say it was approved. It was approved. The initial comment that it was not what we submitted, they said it was polyvinyl something or PVC or plastic. It wasn't. Its aluminum. The pictures that she showed are correct. It has an awning or a canopy. It is retractable.
>
> You talked earlier about a retractable awning versus, you know, is that covering? There's some discrepancy there. She showed pictures of it closed, if you will. The awning extended.
>
> I have pictures when its retracted. There's two posts. There's five - on the span of 20 feet -- there's five spaces[joists]. [***]
>
> If you look at it, it its not covered, and it is opened. If you look at these pictures -- she's presenting one picture. If you're allowed to have a retractable awning, that's a retractable awning." (Tr. 87-88).

Because the definitions of "open and uncovered" are not in the City Code, ordinary dictionary definitions of those terms can be instructive and of assistance to the Court. *JP Morgan Chase Bank, Inc. v. City of Dublin*, 10th Dist. Franklin No. 10AP-965, 2011-Ohio-3823, ¶14. "Open" as an adjective is commonly defined as follows: (1) having no enclosing or confining barrier; (2) being in a position or adjustment to permit passage, or having a barrier so adjusted to allow passage; (3) commonly free from concealment; (4) not covered with a top, roof, or lid; (5) having no protective coating; or (6) presenting no obstacle to passage or view. The Merriam Webster Dictionary (Revised Edition, 2022). "Uncovered" as an adjective is commonly defined as follows: (1) not covered; or (2) not supplied with a covering. The Merriam Webster Dictionary (Revised Edition, 2022).

The Board reviewed and discussed this matter at length. Board Chairperson Jason Deschler declared: "I'm in favor of affirming the City's decision with respect to the open and uncovered decision primarily because the awning is attached, in my opinion. And based on the prior history of other variances that would kind of come in, that had to have asked for permission because it's not open and uncovered." (Tr. 117).

Board member Clower noted: "We agree that the definition needs to be reworked. But in past cases here, we have had people who have had open and uncovered patios which are literally just concrete pavers or something similar. They want to put up a pergola and then we say, okay, no, that would be covered. We need to actually discuss this in the Board of Zoning Appeals. In these past cases, if they have that type of structure and then they want to put up a pergola, they have to come to us in order to get it approved because it would cover up that area." (Tr. 99-100).

Along with his comments above, Board Member Nigh added:

> "The word uncovered to me, I felt exactly the same way you did, but the opposite. Uncover means without a cover. Its very simple to me. I don't know how you get to any other conclusion but that. But I will tell you this. I agree that there are numerous things that need to be fixed in this and I appreciate Mr. McCash pointing them out and I would ask the city to reach out to him because I know this isn't the only time he's been here doing this. (Tr. 98).

The single dissenting Board Member, Sarah Herbert, provided the following reasoning: "If you look at the, if you look at the building codes as it pertains to roofs and roofing systems, it's a nonporous surface, it's shingles, it's metal. You know, this comes up in my job working for a builder. So I would agree that, you know, and I didn't think that the awning in and of itself was even a subject of open and uncovered." (Tr. 67). "It's got a nonpermanent, porous, retractable

awning that, and that, you know, probably isn't up three quarters of the year. And that's kind of where I fell on this. So, you know where I stand." (Tr. 94).

However, in reconciling Ms. Herbert's statements, it is apparent that such an explanation is based on this Board Member's personal experience, and that she adopts a far stricter understanding of the common meaning associated with "uncovered", so as to require a permanent roof or nonporous surface, with metal or shingles. Such an approach was not only unpersuasive to the three other Board members, but also appears to be a departure from the common definition that is reflected above.

At the discussion's conclusion, the BZA voted to affirm the finding of the City's Planning Division by a margin of 3 to 1. (Tr. 96).

As summarized above, the majority of the BZA take issue with Appellants attempts to argue that the pergola is only partially covered or partially open. The issue presently on appeal is not whether this Court would have reached the same outcome, but rather, whether the Board was reasonable in its holding and analysis. As indicated above, an agency's reasonable interpretation of local zoning codes is recognized as an area of expertise, and unless the interpretation is clearly in error, a court should defer to the administrative interpretation. *Access Ohio, LLC v. City of Gahanna*, 10th Dist. Franklin No. 19AP-64, 2020-Ohio-2908, ¶16. After reflecting on the evidence and argument before the BZA, this Court finds that the City's determination that Appellants' pergola is not "open and uncovered", as required by City Code §153.071(B)(1)(c), is reasonable and not clearly in error. It is well recognized the deference afforded to this interpretation "is based upon an awareness that an administrative judgment is [* * *] the product of administrative experience, appreciation of the complexities of the problem, realization of the statutory policies and responsible treatment of the facts." *Id*. at ¶16; See also *In re Aultman Hosp*., 80 Ohio App.3d

134 (10th Dist.1992), citing *Hamilton Cty. Bd. of Mental Retardation & Dev. Disabilities v. Professionals Guild of Ohio*, 46 Ohio St.3d 147 (Ohio 1989). Consequently, the Court declines to substitute its judgment for that of the BZA.

Finally, Appellants ask that the Court review other sections of the City Code that apply to fences and total-area restrictions. Generally, statutes and ordinances which relate to the same general subject matter must be read in pari materia. *Neary v. Board of Zoning Appeals*, 2d Dist. Montgomery C.A. CASE No. 17428, 1999 Ohio App. LEXIS 3464 (July 30, 1999); *Johnson's Markets, Inc. v. New Carlisle Dept. of Health* (1991), 58 Ohio St. 3d 28, 35 (Ohio 1991). Accordingly, a court must give such a reasonable construction as to give the proper force and effect to each and all such statutory provisions relating to the same subject matter. *Id*. It is also a well-established principle of statutory construction that specific statutory provisions prevail over conflicting general statutes. See R.C. 1.51 and *Schisler v. Clausing*, 66 Ohio St.2d 345, 347 (Ohio 1981). Nevertheless, the Court finds the canon of pari materia is not applicable to this appeal. First, the ordinances referenced in the Dublin City Code by Appellants' counsel does not concern the same subject and are not instructive by reading them in context with City Code §153.071(B)(1)(c). Secondly, the plain meaning of the terms "open" and "uncovered" are not abstruse or ambiguous when applied to Appellants' structure. Thirdly, these terms are not provided with a definition elsewhere in the City Code, thereby rendering any inferences Appellants are attempting to make of very limited use.

Upon review of the record, arguments of counsel, and applicable case law, the Court finds the BZA Decision is not unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence. Based on the foregoing, the Court hereby **AFFIRMS** the BZA's Decision.

Rule 58(B) of the Ohio Rules of Civil Procedure provides the following:

> **(B) Notice of filing.** When the court signs a judgment, the court shall endorse thereon a direction to the clerk to serve upon all parties not in default for failure to appear notice of the judgment and its date of entry upon the journal. Within three days of entering the judgment on the journal, the clerk shall serve the parties in a manner prescribed by Civ. R. 5(B) and note the service in the appearance docket. Upon serving the notice and notation of the service in the appearance docket, the service is complete. The failure of the clerk to serve notice does not affect the validity of the judgment or the running of the time for appeal except as provided in App. R. 4(A).

The Court finds that there is no just reason for delay. This is a final appealable order.

The Clerk is instructed to serve the parties in accordance with Civ. R. 58(B) as set forth above.

Electronically signed by:

JUDGE CHRISTOPHER M. BROWN

COPIES TO: **(via e-filing notification):**
All counsel of record

Franklin County Court of Common Pleas

Date: 06-11-2024

Case Title: DAVID HOPKINS ET AL -VS- CITY OF DUBLIN OHIO

Case Number: 22CV001758

Type: DECISION/ENTRY

It Is So Ordered.

/s/s Judge Christopher M. Brown

Court Disposition

Case Number: 22CV001758

Case Style: DAVID HOPKINS ET AL -VS- CITY OF DUBLIN OHIO

Case Terminated: 18 - Other Terminations

Final Appealable Order: Yes

MEETING MINUTES

Board of Zoning Appeals

Thursday, February 24, 2022

CALL TO ORDER

Mr. Deschler, Chair, called the January 27, 2022, meeting of the City of Dublin Board of Zoning Appeals (BZA) to order at 6:34 p.m.

ROLL CALL

Board Members present:	Mr. Deschler, Mr. Nigh, Ms. Herbert, and Mr. Clower
Board Members absent:	Ms. Miller
Staff present:	Ms. Noble, and Ms. Martin for operations early, only

ACCEPTANCE OF DOCUMENTS/APPROVAL OF MINUTES

Mr. Clower moved, Mr. Nigh seconded, to accept the documents into the record and approve the meeting minutes from January 27, 2022.
Vote: Mr. Deschler, yes; Ms. Herbert, yes; Mr. Nigh, yes; and Mr. Clower, yes.
[Motion carried 4-0]

CASES

~~1. Tu Residence at 7605 Bellaire Avenue, 21-143V, Non-Use (Area) Variance~~

~~Ms. Noble - This is an application for a Variance to allow a 2,400-square-foot accessory structure to exceed the maximum allowable square footage for detached accessory structures. The 2.70-acre site is zoned Restricted Suburban Residential District and is located south of Bellaire Avenue, ±1,100 feet east of the intersection with Dublin Road. An aerial view of the site revealed the unique shape of the lot and showed it was surrounded by Donegal Cliffs to the north, the Scioto River to the east, large residential lots to the south, and Dublin Road to the west. The site is part of Dublin Estates, which is a smaller platted community. The site contained two lots (lots 5 and 6) that have been combined to increase the size of the property. When Dublin Estates was platted, it contained a total number of 19 lots. Larger lots along the Scioto River are elongated and rectangular in shape and average sizes ±2.5 acres. The center of the applicant's site contains a 4,912-square-foot residential dwelling with a pool to the west, an exercise court to the north, and a 120-square-foot shed.~~

~~The applicants proposed to construct a 2,400-square-foot, detached, accessory structure where the Code permits only 1,500 square feet on this site and the maximum square footage for any accessory structure permitted by Code is 2,000 square feet, hence the Variance request for 1,020 square feet. The Code states accessory structures shall be permitted in association with a principal use or structure. Permitted structures shall be subordinate and proportional in area to their location. For larger residential lots, accessory structures shall be proportional to the size of the property on which they are located.~~

~~The proposed general character appeared in a graphic for all four elevations. The dimensions for the proposed building are 40 feet by 60 feet. The building is required to be constructed with "similar materials~~

~~Mr. Deschler – He reviewed the criterial that must be met for the Board to recommend approval. The Board found that the special conditions that exists for the property is topography. The second and third criterial is met as well, based on the correlation Ms. Noble noted. Unfortunately, he stated that he was still not comfortable with granting the size proposed by the applicant. He asked if it was attached it would need to be the same.~~
~~Ms. Noble - She confirmed the primary material for the main structure is shingled and the exterior walls are wood siding. The accessory structure would be wood siding, the same as primary. To answer, staff will work with the applicant during the building permit process to ensure there is some components between the two buildings that complement each other. This could be windows, lighting features, etc., something to draw the two structures together.~~
~~Mr. Deschler – He asked if that should be a condition of approval.~~
~~Ms. Noble – That is not necessary. She assured the Board that staff and applicant would work with the Building Department.~~

~~The Chair – Determined there had been enough deliberation to go forward with the vote. He requested a motion.~~
~~Ms. Herbert moved, Mr. Clower seconded, to approve the Non-Use (Area) Variance to permit the construction for a 2,400-square-foot accessory structure to exceed the maximum allowable square footage for detached accessory structures, based on the discussion in the meeting this evening.~~
~~Vote: Mr. Nigh, yes; Mr. Clower, yes; Mr. Deschler, no; and Ms. Herbert, yes.~~
~~[Motion carried 3-1]~~

2. Hopkins Residence at 9376 at Nicholson Way, 21-186AA, Administrative Appeal

This application is a request for an Administrative Appeal of a determination made by the City of Dublin Planning Division regarding a provision of the Code that addresses "open and uncovered structures" and how this provision relates to a pergola over an existing patio. The current application involves the construction of a pergola that encroaches 5 feet into a required rear yard setback. The 0.17-acre site is zoned Planned Unit Development District, Tartan Ridge and is located west of Nicholson Way, ±215 feet north of the intersection with Enfield Court.

Ms. Noble - This application is an Administrative Appeal to a decision rendered by the City of Dublin regarding whether a structure, specifically a pergola, that encroaches five feet into a rear yard setback. The City of Dublin Zoning Code allows structure to encroach in rear yard setbacks up to five feet if the structure is considered "open and uncovered". In this instance, the City of Dublin has determined that a pergola does not meet this requirement and therefore is not permitted to encroach in the rear yard setback.

Ms. Noble – Described the site using an aerial view. She stated that the site is located in the southern portion of Tartan Ridge and is surrounded by other lots of similar character and use. The site contains a single-family, residential dwelling with a single access from Nicholson Way. There is an existing, at-grade patio that has been constructed at the rear of the existing residence. The patio contains a seating wall, which meets the requirements of the City of Dublin Zoning Code. A recently constructed pergola over the patio which is the subject of the appeal encroaches 5 feet into the 25-foot setback to the east. Immediately east of the site is a small section of a reserve area and a neighboring property. The exterior space was originally proposed to be a Variance application for the BZA based on the fact the pergola encroached into the rear yard setback by five feet. After discussions with the applicant, and based on their Applicant Statement, Staff suggested that the applicant may which to pursue an Appeal based on the information submitted. The applicant's position in their submission was that the pergola did encroach five feet into the setback and that it met Code based on it meeting the "open and uncovered" provision of the Code.

Staff looked at the site in totality. The sequence of events was as follows: the applicant constructed an at-grade patio that encroached the rear yard setback by five feet, which is permitted by Code under the provision that allows "open and uncovered" structures to encroach an additional five feet into the required setback. Staff determined the provision did not apply to pergolas or trellises based on the design of both structures being "partially covered" by slats to provide shading from light trespass.

For edification for the Board, Administrative Appeal - Zoning Code §153.231(F) states that an appeal may be taken from any person or any governmental department affected or aggrieved, and review any order, requirement, decision or determination where it is alleged by the appellant that there is error or misinterpretation in any order, requirement, decision, grant or refusal made by an administrative official or body charged with the enforcement and administration of this Code. In deciding the appeal, the Board is to determine whether or not the decision that was made was done so using the proper requirements and standards in this Code. The Board may reverse or affirm, wholly or partly, or may modify, the order, requirement, decision or determination appealed from, and may make an order, and requirement, decision or determination should be made.

This applicant is appealing the decision by the City of Dublin that a pergola is not "open and uncovered" and therefore not applicable to extend five feet into the rear yard setback based on §153.071(B)(1)(c), as follows:

"Open and uncovered porches may project beyond the front building setback or into a required rear yard a distance not to exceed five feet". The Applicant's Statement focused on portions of the Code Section that included definitions for "open", "uncovered/covered", and "porches". Planning concedes that the Code does not clearly define "open" and "uncovered". Planning focused on how this Code has uniformly been applied to properties in the past as well as some analysis of the definitions the applicant provided. The applicant's statement included that because a pergola is open on all sides and does not have a roof, it is therefore, similar to a fence or wall as part of the applicant's first analysis. The applicant's second analysis was a common reference for definitions, which was found in the Webster dictionary for "open" and "uncovered".

The analysis provided a basis for allowing a pergola to be considered a porch, which is the basis of the Code section and provides definitions for "open" and "covered" by Mirriam-Webster, as well as a definition for "porch" that allows a pergola to apply to this section of Code. This is in lieu of definitions provided by the City of Dublin Zoning Code.

The Applicant's Statement included the following definitions:
Open - Having no enclosing or confining barrier; accessible on all or nearly all sides; Completely free from concealment; exposed to general view or knowledge; Not covered with a top, roof, or lid; Having no protective covering; Presenting no obstacle to passage or view; and not enclosed, obstructed, or filled with objects.

Staff found that "uncovered" was not defined in the dictionary but will allow the applicant or their agent/representative to confirm.

Per the materials submitted, **Covered -** Protection, shelter, or concealment
If that logic was reversed for "uncovered", it would be unprotected, and unconcealed.

The Code provision that applies here "open and uncovered" specifically applies to porches. The applicant has provided a definition for a "porch". For a direct correlation of this portion of the Code, the applicant provided the following definition:

Porch - A covered area adjoining an entrance to a building and usually having a separate roof.

Staff takes the applicant's statement/analysis and provides their own analysis. Staff provided a three-part analysis. Staff believes a pergola is not completely open nor completely uncovered; it is partially both. A pergola, in Staff's determination, does not meet the criteria that was taken from the Webster's Dictionary and to further that point, Staff highlighted the areas that they do not believe that it meets as underlined below:

Open - Having no enclosing or confining barrier; accessible *on all or nearly all sides*; completely free from concealments: exposed to general view or knowledge; *not covered* with a top, roof, or lid; having no protective covering; *presenting no obstacle to passage or view*; not enclosed, obstructed, or filled with objects.

- Staff believes a pergola is not accessible on all or nearly all sides because in this instance, the pergola is connected to the primary structure and not accessible from three of the four openings.
- Staff presented the awning system that is attached to the pergola, providing a covering so it does not meet "not covered".
- Staff believes one cannot see completely through a pergola, only partially so it does not meet "presenting not obstacle to passage or view.

Cover - *Protection, shelter, or concealment*

Porch - A covered area adjoining an entrance to a building and usually having a separate roof.

The applicant determined that a pergola is a 'porch' based on the definition that a porch is "a covered area adjoining an entrance to a building and usually having a separate roof". Staff noted that if the applicant is using this definition to allow the pergola to qualify for "open and uncovered", the definition starts out with the contrary description as "a covered area…".

The Zoning Code states that "open and uncovered" porches can encroach five feet into a required setback. Staff's interpretation is "open" and "uncovered" means entirely open and uncovered. The pergola by design is partially open and uncovered and therefore does not meet the provisions of the Code.

- Staff determined a pergola does not meet the definition provided in the applicant's statement. If the Board would concur that a pergola is a 'porch' and therefore an applicable structure to apply to this provision, there would need to be an agreement that a pergola can have a "roof".

The application was reviewed against the Administrative Appeal criteria and the criteria was met.
Administrative Appeal to the Board of Zoning Appeals Basis of Decision [§153.231(F)]

1) The Board shall determine whether or not the decision that was made was done so using proper requirements and standards in this Code.

The Zoning Code clearly identifies that only "open and uncovered porches" are permitted to encroach within the required rear yard setback. Planning determined that a pergola is not "open and uncovered" based on both the interpretation of the Code, as well as the definitions provided by the applicant.

Planning recommended that the Board of Zoning Appeals **affirm** Staff's determination that a pergola structure is not considered an open and uncovered porch, which is allowed to encroach five feet into the required rear yard setback.

Public Comment

A significant amount of public comments was provided well before the meeting that included video, pictures, rebuttals, and neighbor testimony; it is quite lengthy in nature.

The applicant and their representative are present to address the Board.

Questions for Staff

Ms. Herbert – The Zoning Code does not define "porch" or "patio". She asked if the awning would be permitted on its own.
Ms. Noble – We have consulted with our legal council regarding the awning, specifically a retractable awning, and how we would classify it. We are awaiting a response.
Ms. Herbert – The awning is not part of this case but asked if the awning in this application is attached to the house and if it was retractable.
Ms. Noble – Deferred to the applicant for this response.

Mr. Clower – For clarification, the applicant purchased this house and built a patio that was open and uncovered. Then added a pergola, at which time the City stated the pergola was not permitted and the homeowner had overstepped and now this is before the Board.

Mr. Deschler – Asked when the decision by the City was made that this structure was in violation of being open and uncovered under the provision.
Ms. Noble – If the Board is asking when the applicant was notified and the construction occurred, it was in July 2021.
Mr. Deschler – Asked when the City went out to inspect and make the determination of non-compliance.
Ms. Noble – Code Enforcement would have visited the site in July 2021, to verify that the pergola was constructed. The open and uncovered discussion came later when Planning became involved and evaluated the case. The actions that occurred in July would have simply been that the pergola was constructed without a permit.
Mr. Deschler – Asked when Staff got involved and notified the applicant that the pergola was in violation via the open and uncovered requirement.
Ms. Noble – These actions would have progressed through Code Enforcement up until the later part of October, 2021. Code Enforcement then connected with Planning Staff to apply for an application in November, 2021, approximately. The applicant applied for a Variance, initially, for all of the same reasons variances come before this Board. Planning reviewed their application as such that included the applicant's statement. Staff determined that the discussion seemed more appropriate to an Administrative Appeal rather than a Variance during the writing of the Staff Report when this was supposed to be presented.
Mr. Deschler – He began to create a timeline to ensure procedurally, the Board was dealing with this appropriately. He specifically referenced that an Administrative Appeal is required to be applied for no more than twenty days upon notification of a decision (in which they are appealing).
Ms. Noble – Confirmed the applicant was notified of not being compliant when Code Enforcement determined the applicant did not apply for a permit to construct a pergola, which was July 2021. In November 2021, the applicant was notified the structure was not in compliance to the Code as it was not "open and uncovered".
Mr. Deschler – In Zoning Code Section 153.231(F), with respect to the Administrative Appeal, once a decision has been made, an appeal must be filed within 20 days. The timeline will determine if this is an appealable order in front of the Board.
Ms. Noble – The Staff Report was sent to the applicant's agent on November 15, 2021. That is when the applicant would have been notified that Staff determined the pergola was not "open and uncovered". The

applicant had 20 days beyond that date to file the Administrative Appeal. The Appeal was filed December 6, 2021. The 20th day would have been somewhere within the weekend. The Law Director ensured that the Monday that immediately followed the 20th day was acceptable and met the criteria.
Ms. Herbert – The 20th day was a Sunday. She asked how the information was provided to the applicant on November 15th.
Ms. Noble – An email was sent to the attorney, the applicant's representative, as they were the direct point of contact.
Ms. Herbert – Agreed that when an occurrence falls on a non-business day, to then go to the next day for the deadline.
Mr. Nigh – The problem he had was that same language "when an event occurs on a Sunday, the next day is acceptable" was not written in the Code. He asked if the Board had all the information to make a determination.
Mr. Deschler – Asked if Ms. Noble had a copy of the email that was sent.
Ms. Noble – Answered no, but had a copy of Law Director's determination with the dates included.
Ms. Herbert – Requested the determination be stated for the record.
Ms. Noble – Confirmed the application for the Administrative Appeal on December 6th was submitted electronically.
Mr. Deschler – Asked if the website is closed down on Sunday and if there was anything that prohibits someone from submitting materials on any weekend.
Ms. Noble – She was certain one could submit information on a Sunday but Staff would not receive the information until the next business day. Materials can be submitted at any time but is not considered an application until Staff reviews it. There are dates associated with every submission.
Mr. Deschler – Had more questions to address the procedural issue before going forward with the merits of the case.
Ms. Noble – The applicant had applied for a permit to build a pergola but were not approved. Code Enforcement found the pergola had been constructed through a site visit in July 2021 and confirmed there was no approved permit.
Mr. Deschler – Confirmed the appeal was not for the permit (that was rejected) for the construction of the pergola.
Ms. Noble – There would be nothing to appeal. The pergola exists and the property owner did not have a permit. At that point, Code Enforcement would have reached out to the property owner stating a permit is required. Staff worked through a duration of conversations. Code Enforcement gave the property owner a deadline to remedy the issue. Whether it was to remove the pergola, apply for a pergola permit, or apply for a Variance and that was in the later part of October. There was dialogue between the parties, during that timeframe. The applicants responded within three business days of that deadline by filing a Variance. That was the direction the applicant's took, originally, before Staff determined an Administrative Appeal was more appropriate of the two options.
Mr. Clower – July does not have any relation to the 20-day calculation. The applicant did have the determination the applicant was appealing at that point.
Mr. Deschler – A complaint must have been filed by the neighbors in order for Code Enforcement to even make the site visit to determine and identify there was a pergola constructed in July; that is generally how Code Enforcement is notified of an issue.
Ms. Noble – Yes.
Mr. Deschler – Code Enforcement told the homeowner the pergola was not allowed without a permit. He questioned the process as four months went by and the applicant did not resolve this within the timeline.
Ms. Noble – If the applicant is working with the City to secure an end result, Code Enforcement would give the property owner time to remedy the issue. She was not saying that was the totality of four months. She said the City thought a conclusion was being reached. The end of the conclusion was the later part of October 2021 when the property owner was told they had a deadline to correct this problem and within days of the deadline, the applicant filed the Variance.

Mr. Deschler – Confirmed there was no permit request made post Code Enforcement coming out and identifying the pergola and that it was constructed in violation of the Code.
Ms. Noble – No, the applicant actually applied for a building permit. Once the building permit is requested, the Building Department will review it and if it does not meet Code requirements, the permit will be denied.
Mr. Deschler – Confirmed that happened. He asked when the Building Department rejected the permit for the pergola.
Ms. Noble – Between July and October of 2021. Code Enforcement would become involved, only after the applicants are notified there was a property violation per not meeting Code.
Mr. Nigh – Between July and October, when the property owner brings the application in, and they were told it did not meet the criteria, is there a formal document handed to the applicant that it was rejected and would walk away knowing the request for a pergola had been rejected.
Ms. Noble – A comment letter is sent to the applicant stating what they have to do to get an approved permit. Zoning is just one part that could be wrong with an application.
Mr. Nigh – A comment letter is basically a Rejection Letter stating "unless the property owner does…" to get an approval, to which Ms. Noble agreed. He asked if Ms. Noble had a copy of the "rejection letter" in her possession that was provided to the property owner.
Ms. Noble – That was not part of the packet material based on the conclusion that is was not the appealable decision. She further stated that several Staff were coordinating with the applicant with the intent the applicant would move forward in a positive direction to resolve the problem.
Mr. Nigh – If the goal is to work with the residents, then it is not to forcibly take the pergola down, for example.
Mr. Clower – Confirmed the property owner never secured a permit, prior to Code Enforcement's visit.
Ms. Noble – To her knowledge that was true but the applicant may refute that.

Ms. Herbert – In November, the applicant received a letter and at that point, decided to appeal. The Code does not have the wonderful civil rule language but as the Law Director, Thad Boggs stated, it is the Board's determination whether they have jurisdiction. The Appeal is reasonable, the date falls on a Sunday so materials could be filed on a Monday, which in this case was within the 20 days. She was supportive of reviewing the Administrative Appeal.
Mr. Deschler – He disagreed with Ms. Herbert on what the appeal was for and without the City Attorney present to help clarify, he inclined to, if they were to proceed, to object to the day period of the appeal.
Mr. Clower – The purpose of all of this is to work with the citizens of Dublin to come to a good resolution. That is what we are doing with hearing the appeal.
Mr. Deschler –The structure does not have to be destroyed. The property owner could submit another application but not knowing what the Staff's conversations were, there might be ways to get post-building approval. That is not what is before the Board. This is not a post –Variance request whereas somebody did something and they are asking for permission that they should have asked for before. This is an appeal of a decision by the City about the structure.
Ms. Herbert – About the interpretation of "open and uncovered"; that is what the appeal is of. And according to the lawyer, it is our determination to figure out whether this Board has jurisdiction. She suggested doing that and then move on.
Ms. Noble – Suggested it is the Board's determination of whether it believes that the 20-day appealable timeframe was met. The Board could call a motion, vote, and the majority vote would dictate whether the appeal is heard.
Mr. Nigh – His determination was falling right in between Ms. Herbert and Mr. Deschler. He disagreed with Mr. Deschler as to what is being appealed and agreed with Ms. Herbert on that, he does not agree on the 20 days. The Board does not make language of this Code including when a deadline falls on a Sunday, Monday is permitted. If the Board was provided with language the deadline does not include weekends then he is supportive of moving forward with everything. He would not make the determination to make 20 days as this Board does not have the luxury of the language that addresses when a deadline falls on a

weekend. Mr. McCash may state he submitted materials for appeal on Sunday. The Board does not know the answer yet. If it was submitted on Sunday and the applicant can prove that, then the Board can go forward. The notifications in July and October 2021, are irrelevant to him; there were on-going communications. He agreed with Ms. Herbert that it was not until the applicant had the decision of the determination of the "open and uncovered", which is what the applicant is appealing. The applicant had to have a Final Appealable Order – a document that stated what the City was determining, for them to appeal. So until the applicant had that document telling them what was being decided upon, the applicant would not know to appeal it. He was not willing to extend his views on what the Code should say, what he wanted the Code to say or what the Code states.

Mr. Herbert – Asked what the City has done in the past.
Mr. Deschler – Asked what the permanent rejections state and if a copy could be provided.
Ms. Noble – The determination that this was not an open and uncovered structure was in the primary part of the analysis written in the Staff Report.
Mr. Deschler – He understood that from November. He asked what the Comment Letter stated was wrong and reason for disapproval.
Ms. Noble – It is a comment letter would include any information that needs to be corrected in order to secure a permit and is a fairly generic response that the structure did not meet the setback requirements.
Mr. Deschler – He has not seen one of the letters to know what it states and to him, that seemed important to this case as it described the entirety of the whole situation. Cutting that out unnecessarily is not appropriate, just from a historical standpoint. He asked what the City has done in the past on filing deadlines, with regards to this specific statute, first. If there is no historical information for this specific ordinance, the Board can explore something else.
Ms. Noble – The Board has actually waived the 20-day provision in the past and noted that these decisions were made at the Board's discretion. The information provided to the Board was based on the final decision on November 15, 2021.
Mr. Nigh – If there has been a determination on an exact issue that is before the Board that has already happened, he needed to see what that was, when it was, and why it was. The Board this evening is hearing an appeal that may have been decided upon by the Board's predecessors and that precedent would be important.
Ms. Herbert – That would bolster the matter but the Board needs to use its discretion here, for even one day/24 hours and hear this citizen's appeal.
Mr. Clower – Asked if the Board states this is out of line and the applicant did not meet the 20-day requirement, what the end result would be.
Ms. Noble – The applicant already has a Variance on file and the case has not been closed so the applicant has the option to return to the Board under that case type.
Mr. Nigh – Ms. Noble is under oath and stated that there have been extensions given by this Board in the past; therefore, he would be supportive.

Ms. Herbert moved, Mr. Nigh seconded, that the Board had jurisdiction to hear this Administrative Appeal based on the applicant filing 20 days from a determination of the City.
Vote: Mr. Deschler, no; he needed more information and requested to review all documentation. He requested the vote be held and read more Code. It does not matter if there is more documentation as the Code states no more testimony can be applied.

(Discussion continued)

Ms. Noble – Part of the Variance application led us to this process. When Staff read the applicant's statement as part of the Variance application, the applicant did not state they had special conditions on the site; they

stated they did not agree with Staff making this determination. To provide a fair format, an Administrative Appeal was decided upon for resolution.

Ms. Herbert – There has just been one other time while she has been sitting on this Board, that the Board has actually done this administratively to hear the appeal. For that case, there was a lawyer involved and a statement was submitted as part of the discussion but not really any facts. It was a Code provision interpretation just like the present case. The applicant's attorney was allowed to speak and it facilitated discussion, many years ago.
Mr. Deschler – The applicant seems to be in a position to go forward on it. The roll can be called again, he would restate his position, and they could go from there, if desired. He is hearing a lot the Board has deference on many of these cases on dates and rules. Personally, he was not in agreement with it and could be discussed off-line.
Ms. Herbert – There was a motion and a second and we can move forward.
Mr. Deschler – He asked to be recalled and restate his position.
Mr. Deschler voted no based on the reasons there was not enough history on the allowance of the 20-day appeal. Additionally, there was information in regard to the rejection of the permit that may be pertinent to this issue.
Mr. Clower, yes; because this Board has discretion to what the 20-day allowance is.
Mr. Nigh, yes; based on the clarification from counsel and the testimony under oath from Ms. Noble about the Board's prior handling of this type of matter; and
Ms. Herbert, yes. [Motion carried 3-1]

Mr. Deschler – He did not believe Mr. McCash had been sworn in to provide testimony on this case.
Mr. McCash, Attorney – That was correct because he would not be testifying; he is the representative for the applicant before the Board. Mr. Deschler had pointed out from the Administrative Appeal, additional testimony is not permitted.
Mr. Deschler - Yes, but information would be provided to the Board related to the applicant, on his behalf. He asked Mr. McCash if he was going to be dishonest to the Board.
Ms. Herbert – Mr. McCash stated he does not have to be sworn in because he is not testifying.
Mr. Deschler – He asked what information Mr. McCash was going to provide. If he is going to be talking about dates or rehashing issues, per his personal knowledge. He concluded that we would begin discussion.
Mr. McCash – The question is and has typically been addressed by the legal staff here for the City of Dublin, they are not testifying they are presenting. But if the Chair would like to swear me in, that is fine. At this point, an Administrative Appeal is based upon Staff's determination at the time of making that decision. There is no new evidence or testimony, per se. There would be perhaps cross-examination of Staff as far as what it was that they used to make their determination.
Mr. Deschler – Asked Mr. McCash to proceed.

Applicant's Presentation

Mr. McCash – To help clarify some of the issues with the 20-day time period, he provided the July 12th letter from the original application; a determination was not made at that time, the setbacks were just sighted. The determination came on November 15th and was received by email. The 20 days from that was on a Saturday, December 4th. In an email that he saw from Mr. Boggs, determined that the applicant was within the filing period. There is no language in the Code on how to compute time for filing provisions. Per Civil Rule 6, the 15th is not counted, which means 20 days would have been not on December 4, it would have been on December 5, which is still the weekend. The rules state if a deadline falls on the weekend, it goes to the next business day, December 6, 2021, the day they filed.

Mr. McCash – As far as status of determination, Ms. Noble had indicated in the presentation that reflected 19 feet from the pergola to the rear yard.
Ms. Noble – For clarification, this would have been submitted by the applicant with the Variance application for the grade of the patio. The point of the graphic was to show it did not meet the 25-foot setback.
Mr. McCash – There is a 25-foot rear yard setback and the pergola encroaches 5 feet into the setback. Ms. Noble indicated from the pergola to the rear property line is 19 feet. 25 feet minus 5 equals 20 feet not 19 feet.
Ms. Noble – The scale drawings received from the applicant, showed from the building line to the rear property line was 31 feet. Encroaching 5 – 6 feet into 31 feet is how 19 feet was calculated. The purpose of the slide was to show encroachment into the setback and not the actual number of feet, as that is not the topic of discussion this evening.

Mr. McCash – Ms. Noble referenced the section not "open and uncovered" and asked if fences would be the same.
Ms. Noble – There are different requirements for fences but they have to meet setback requirements.
Mr. Deschler – Informed Mr. McCash to address the Board and not to argue or cross-examine Staff.
Mr. McCash – If presenting to the Board, how should Staff be questioned about a particular Code Section that was referenced during Staff's interpretation of that section in order to make the final determination.
Mr. Deschler – That was fair. For situations such as this, Staff can be subject to questions. He asked if Ms. Noble was the one that made the final determination.
Ms. Noble – Planning made the final determination.
The Chair – He asked if Ms. Noble was answering questions on behalf of the Planning Staff and Ms. Noble answered in the affirmative.
Mr. McCash – He inquired about regulations for this particular situation and definitions of any of the following: fences, walls, trellis, pergola, arbor, porch, awning, patio, walkway, structure, and such.
Ms. Noble – She answered each with what she could find by reading from the Zoning Code.
Ms. Herbert - A definition for pergola could not be found.
Ms. Noble - Agreed as stated in the Planning Report.
Mr. Clower – The definition for a trellis states it is detached from the building. He asked if the structure they are discussing currently is attached or detached from the building.
Ms. Noble – Staff provided information that the existing structure on the site is attached to the house and attached means secured to the building. Staff is not calling this an accessory structure. A structure is part of the principle structure as it is attached.
Mr. McCash – Inquired about "open and uncovered" terms.
Ms. Noble – She repeated the Applicant's Statement that included the definitions the applicant had provided.
Mr. Nigh – He asked Mr. McCash if it is his belief that this structure meets his definition of "open" as presented in his submission, they concur that it does not have a roof, top or lid, no protective covering, no obstacle to passage or view and completely free of concealment. He asked again if the applicant believes this structure does not have any top or lid. The picture provided to the Board included an awning.
Mr. McCash – Canopy does not fall under "roof".
Ms. Herbert – She agreed with that according to the section of Code pertaining to awnings and roofs. A pergola is not an awning and a pergola is only what is included in the appeal.
Ms. Noble – The awning is part of the proposal.
Ms. Herbert – That awning is not a roof system.
Mr. Nigh – He clarified he did not state roof; he only used the applicant's own definition. When he had asked the applicant if the structure was covered; Mr. McCash answered it was not covered.
Ms. Herbert – Asked if the awning was affixed to the pergola.
Mr. McCash – There are cables along the joists of the pergola that open and close the canvas strips that is similar to a retractable awning. Staff has not yet determined if a retractable awning was permanent and would encroach or otherwise. There is ambiguity in that section of Code.

Mr. Nigh – Confirmed the joist for the pergola encroaches the setback.
Mr. Clower – Even if the awnings were not there, the vertical pergola joists could provide some protection from the sun.
Mr. McCash – The protection from the sun would be minimal as the joists face the east.
Mr. Deschler – Asked if the awning is permanently affixed to the pergola.
Mr. McCash – Responded affirmatively but added the awning is not permanently extended. He stated an awning and a canopy are different in that an awning is attached to the building itself. A canopy can be attached but has poles and such. The definitions are not clear in the Zoning Code, therefore the Building Code has to be referenced. The property owner approached the Board with his phone with pictures to share. He asked Mr. Clower to take the phone at which time he asked the property owner to step back and stated the Board could not look at pictures on his phone, at this point.
Ms. Herbert – The Board can use their discretion to view the pictures.
Mr. Deschler - Agreed and suggested there was probably a related photo in the materials.
Mr. Nigh – The photo is in the packet to which Ms. Noble presented on screen. The beams and the strips of canvas were clearly visible (Ms. Noble indicated the picture on the screen for all to view).
Mr. McCash – There are not definitions in the Code for "open and uncovered" or "pergola" to name just a few.
Mr. Deschler – Mr. McCash keeps using the term "trellis" and he wanted to use "pergola" as that was the term used in the documentation.
Mr. McCash – The manufacturer calls the product a pergola.
Mr. Nigh – In Mr. McCash's letter dated December 6, he referred to the product as a pergola.
Mr. McCash – Different terms have been applied by Staff from the Code, which needs to be clarified. Staff may be applying the Code consistently but he did not believe their interpretation was applicable. To demonstrate a timeline: The homeowner purchased a pergola from the manufacturer. The homeowner went through the process and received approval from their HOA that reviewed it against the PUD requirements, etc. The HOA saw the pergola, the canopy structure that was part of this structure, the site plan that reflected the structure encroached five feet into the rear yard setback, and granted approval as they determined it met the criteria. They went back to the pergola manufacturer stating they received the HOA approval and asked if they needed to obtain building permits. The manufacturer was the installer and they were told they did not have to obtain a building permit. The homeowner had the pergola installed and found a neighbor that had the retractable awning. There has been a history of other issues between these two neighbors and therefore, do not get along. That is when his client applied for the building permit. They did not do it to overlook the regulation. They got approval. The got the HOA's approval who they in essence agreed, grant it, the HOA is not the City authority but believed this was allowed to encroach into the rear yard setback meeting PUD requirements.
Mr. Clower – We have on record two public comments that state the pergola was not built according the plans submitted to the HOA. There was not just the original neighbor that objected, there were two other neighbors. He asked Mr. McCash for the plan that was submitted to the HOA, originally.
Mr. Nigh – This applies to what Mr. Deschler brought up earlier. He said this interpretation has nothing to do with the opinion of the neighbors. He read Mr. McCash's letter where it cited his own definition of a pergola "an arbor with a covered roof" and referenced throughout all this paperwork; it stated the structure was covered. Mr. McCash's own letter stated it was covered and completely free from concealment. Not partially but completely. Mr. McCash had described it as having beams and canvas covering it. And yet Mr. McCash stated it is not covered with a top or lid, having no protective covering. The documentation written by Mr. McCash references the client has skin cancer and wants to be protected from the sun. It went on to state there is no obstruction to passage or view. The Board was provided with a photograph from underneath to show it was obstructed. Mr. McCash's own letter defines all these terms and yet you say how it should be defined and yet the information the Board has supports that. The documentation included definitions from the city of Phoenix, AZ where open and uncovered should be 75%.

Mr. Nigh – Addressed his fellow Board Members by stating "uncovered" is not covered and 75% would be partially covered.
Ms. Herbert – The language states it is not entirely covered or entirely uncovered, either.
Mr. Nigh – Uncovered is not covered but partially covered could be applicable. He asked for agreement.
Mr. McCash – It depends on the Board's definition of covered.
Mr. Nigh – He clarified he was using Mr. McCash's definition "without a top or roof". The applicant is providing definitions that do not go with what is being asked of the Board and does not make sense.
The homeowner, Mr. Hopkins requested to address the Board.
Mr. Deschler - Agreed as he had been sworn in.
Mr. Hopkins – Apologized for not obtaining a permit. There was no intent to deceive anyone; he should have known better and took full responsibility. The HOA said it was approved. For the comment made that the end product was not what was submitted – it was not plastic or pvc material, it was aluminum. The pictures Staff shared are true; it has a canopy that is retractable. There is discrepancy as to whether a retractable awning is covered. Staff shared pictures of the product closed or rather the awning extended. He offered pictures that show when it was retracted. There are two posts and within a span of 20 feet, there are five spaces or rows between the pergola joists. If a retractable awning is permitted, this is a retractable awning.
Mr. Deschler – Clarified the awning is on the structure and not on the house, which is the differentiating factor. He understood Mr. Hopkins hired a contractor who did not obtain the appropriate permits. This Board has had applicants testify to that, which then becomes a Variance request and that is not what this is. He made it clear the aspect of relying on what the contractor said or did not say or install and whether they were obligated to obtain a permit. Sometimes a homeowner believes it is the contractor's responsibility and may be accurate but what is before us is not a retroactive Variance request. This is an Administrative Appeal based on a decision made by the City with regard to "open and uncovered."
Mr. Hopkins – He asked the Board to acknowledge what he considers is that it is "open and uncovered".
Mr. McCash – For clarification, we applied to this as Variance before Staff directed us to apply as an Administrative Appeal so the Board could hear all the issues and how the Code does not relate to current day as it has not been updated since 2006 and not properly applied.
Ms. Noble – She made the suggestion to modify the request to an Appeal purely based on the applicant's statement that did not suggest that it had practical difficulty.
Mr. Nigh – Let us call them joists. If he were to pass a four-foot long board upwards, if it would hit something.
Mr. Hopkins – Yes, a longer board would hit something.
Mr. Nigh – The applicant just acknowledged there is an obstacle to passage.
Mr. McCash – It depends on what you are trying to pass.
Mr. Nigh – It is not what Mr. McCash's letter states.
Ms. Herbert – She did not agree with Staff's explanation or the applicant's. She applied her own knowledge and experience and determined it was accessible on three sides as well as the fourth, if the door to the home was used. This has been reviewed against the Code to find the Code does not define many of the terms that apply here. She analysed surrounding cities' definitions, which would make this a porch without a roof. She reviewed the Building Code and determined it was not a roof as defined as a non-porous surface. This was how she processed the implications. It is clearly open and uncovered when the non-permanent retractable awning is probably not utilized three quarters of the year.

Ms. Noble – The Board can make a determination and part of that determination is based on a Code that needs clarification and that could be part of the recommendation.
Ms. Herbert – Agreed that "pergola" needs to be somewhere in the Code. A pergola is open and uncovered because even if one is sitting under it, the person will get wet, if it is raining. This is not a protection or a cover and is closer to a trellis or an arbor. Just driving around her neighborhood, there are many pergolas in Dublin and yet we do not have a definition. The Board is seeing an increase in Variances as people want

to spend more time in their backyard because nobody wants to leave their house anymore. She would love for that to become a recommendation that comes out of this meeting this evening.
Ms. Noble – Staff has acknowledged the Code needs definitions and that will be an outcome of tonight's meeting.
Ms. Herbert – At least it is a definition that is adopted in the context of development and construction building – not just in a vacuum as how Webster's Dictionary defines it. Other municipalities are redoing their Code, and will look towards other municipalities for information. Whether that should be Arizona or Westerville, she did not know. It makes sense to look to others and not re-invent the wheel.
Mr. McCash – They looked to Arizona as they are always dealing with shade structures and have more comprehensive definitions.
Mr. Nigh – Still disagrees with the meaning of uncovered. If uncovered, it is not covered and is simple as that. He agreed there are numerous items that need to be fixed in the Code and appreciated Mr. McCash pointing them out. He suggested the City reach out to him because he knows this is not the first time he has gone through this with the Board. He could certainly point out some problems that need to be fixed because he has brought up reasonable points that need to be addressed.
Mr. McCash – He understood the issues with getting a Code re-written.
Ms. Herbert – Asked if an open and uncovered porch would be a patio.
Mr. Clower – A concrete slab with walls at a maximum height of 18 inches at a maximum.
Ms. Herbert – Asked if that is a paver patio then.
Ms. Noble – Yes, and that is how Staff has applied it as open and uncovered. We have allowed minimum seating walls.
Mr. Clower – In past cases, residents put in a patio and then decide they want a pergola. Then they have to come before this Board for approval because it would cover up that area.
Mr. Deschler – There were two very similar cases a couple of months ago. Those applicants had to obtain a Variance to put up the pergola with barely anything over the top and a couple of slats.
Mr. Nigh – There is a big difference between the Variance, which is still pending and this definition. This is not saying the applicant can never get a Variance. This is saying whether the determination by the City of open and uncovered was correct.
Mr. Deschler – There are areas that can be improved with regard to the Code. On this case, the awning makes a difference for him. If the awning was not there, he could support that the pergola is open and uncovered.
Mr. Clower – With the applicant's own definition that he got for open and uncovered would clearly not have a top, and this definitely has a top. He agreed, that section in the Code needs to be rewritten to better identify these terms.

Mr. Deschler – We have an option here that the Board can move to vote, if we have enough of the members in support of voting. A second option would be the Board can recommend that the Code is addressed or updated or further defined before the Board makes a decision. In the Code, the Board may reverse or affirm, wholly or partially be modified of the appeal. Or make an Order Requirement decision determination that ought to be made and to that end will have all the powers of administrative. This essentially is a "stay".

Mr. Nigh – A Variance could still go forward for approval or would that be impeded by a Stay.
Ms. Noble – To answer Mr. Deschler's question, the Board could direct Staff to redefine or update this Code. The Board could vote on whether they affirm Staff's decision with a caveat that the Staff then review and update the Code and provide further definition, which could be as specific as the Board would like. Or, just direct Staff to process a Code Update with the assumption this would not be determined until the end of that process. She has completed four Code Modifications in the past year and they can be quite lengthy, especially a Code Section like this that is complicated.
Mr. Deschler – It can be a lengthy process but it does not impact the pergola with the awning. It is not as though the homeowner will be asked to take it down in the interim because it is 'stayed'.

Mr. Nigh – He did not want to vote for a "stay" and then Code Enforcement goes out there tomorrow and tells them to remove the pergola and awning because he does not know what the new definition is going to be. Or maybe the homeowner chooses to go ahead with the Variance in the middle of this. He asked if there was another option that the Board can state they affirm the decision that was made by the City and and direct the City to define all the terms in this section of Code.
Mr. Deschler – Per the Code, they have various options.
Ms. Herbert – Asked if when the City is doing a Code modification, is public comment is sought?
Ms. Noble – Yes. The proposed modifications are reviewed first by the Planning and Zoning Commission and recommended to City Council to approve. Both of these processes are public processes.
Ms. Herbert – Suggested that information be posted on all the Boards, Commission, and Council's websites so the people can make their thoughts known as pergolas have become very popular. She preferred the "stay" option. It would be fairest to the homeowner to see where they land on that definition.
Mr. McCash – When he was on Council, the update process is a long time – sometimes one to two years.
Ms. Herbert – We typically take into account what the applicant wants. She was supportive of the applicant's definition and not the City's but it did not seem to matter.
Mr. McCash – Agreed there needs to be Code update. Technically, the applicant has two cases. He offered a few options.
Mr. Deschler – Applicants have been before the Board requesting Variances for pergolas.
Mr. Clower – The problem is we keep running into this pergola issue. Could the Board direct Staff to fix this small piece of vague Code by figuring out exactly what the definitions are to mean.
Mr. Nigh – He would like the Board to affirm Staff's determination and direct Staff to update the Code. The Variance request is still available to the applicant to run its course though the Board.
Mr. Clower – Asked what approval means, exactly.
Mr. Nigh – The way he interprets approval would be to affirm the City's determination of what open and uncovered means to this application.
Mr. Clower – That would still allow the homeowners to go through this particular Variance request. And, all other people could apply for a Variance request.
Mr. Deschler – Asked the applicant if he would be in favor of that.
Mr. McCash – Answered in the affirmative. No disrespect to Staff, if Staff makes a determination and then is directed to fix the Code, many times it ends up in a black hole of "we will eventually get to it" and 10 – 15 years from now, Staff might get to it because other issues come in. If a Stay of Action was in place it would create more of an emergency to get Staff to complete the updates.
Mr. Deschler – The Board could set a timeframe. The Board can direct the City in a reasonable time to complete the Code Modifications.
Ms. Herbert – A reasonable timeframe is probably a year and a half.
Mr. Deschler – Six months is reasonable.
Ms. Noble – If the Board directs Staff to do a Code Amendment, it will happen, sooner or later. Staff works for the Boards. These are public processes and could not guarantee when it could be completed. Code modifications become complex, quickly as everyone has different input and opinions, especially when adding or modifying definitions. She could not personally commit to a timeframe as it is out of her control. But if the Board would direct Staff to do this, it would be a priority.
Mr. Clower – Agreed with Ms. Herbert; a year and a half does not seem overly long for this process.
Ms. Herbert – Even a year and a half timeframe would be on a fast track.
Ms. Noble – We have agreement that the Code needs to be revisited. Her hesitation was if we did put a "stay" on this particular application, it would be incumbent on us to stay in contact with the applicant. At the end of the process when we have a modified Code, this may not fix the problem.
Mr. Deschler – He was not in favor of a Stay of Action. He suggested a vote to affirm Staff's decision with respect to open and uncovered, probably only because the awning is attached and based on the history of other Variances. Those applicants had to come in and ask permission from the Board because they were

not open and uncovered. He suggested the Board go that route and direct the City to update the Code section related to open and uncovered, pergola, and trellis, etc.
Mr. McCash – A "stay" at least allows my client to have the pergola remain until the City makes these updates and determines whether or not they meet them or not. Uphold the City's decision means for his client's standpoint where a 2506 would appeal to the judicial system, which may or may not speed up staff. Or it may end up a Variance request. It would be one of the two options for his client.
Mr. Nigh – He would like to make a motion.
Ms. Herbert – She preferred the Stay of Action and then see the applicant go through the Variance process, of which they have an option.

Mr. Nigh moved, Mr. Deschler seconded, to affirm Staff's determination that a pergola structure is not considered as an open and uncovered structure, and direct the City to define the terms open, uncovered, pergola, patio, trellis, porch, etc. and request the City starts that process.

Vote: Mr. Deschler, yes; Mr. Nigh, yes; Ms. Herbert, no; and Mr. Clower, yes.
[Motion carried 3-1]

Mr. Deschler – This Administrative Appeal case is concluded.

~~3. Rules and Regulations, 22-017ADMO, Administrative Request - Other~~

~~This is an application for a review and recommendation to City Council for proposed updates to the Board of Zoning Appeals Rules and Regulations.~~

~~Ms. Noble – Before the Board this evening is an amended Rules and Regulations applicable to the Board of Zoning Appeals although similar amendments have been proposed for the Planning and Zoning Commission and the Architectural Review Board. The impetus to the changes is based on Council direction and allows attendance to public meetings to be virtual, in instances of illness related to the pandemic.~~

~~Staff reviewed the proposed changes including the second and third paragraphs that state it's the Mayor's discretion to determine whether a meeting could be wholly attended virtually and if so, there would be time requirements in place. This just provides more parameters to those meetings.~~

~~Mr. Noble stated that the recommendation from this Board would then be forwarded to City Council. The Planning and Zoning Commission and the Architectural Review Board have approved the modifications with the request that Staff provide further clarification to the term "emergency".~~

~~Ms. Herbert – We need to equally define that because having the meetings in person are the best avenue for the applicant, the City, and citizens in general that want to participate. Zoom is easy but it is also 'not your day in court' kind of process. Out of clarity, 'emergency' will not be used just because it is snowy out, for example~~
~~Mr. Deschler – This states in an emergency situation, that the applicant cannot attend, virtually.~~
~~Mr. Nigh – It could also mean if a Board Member could not attend or the applicant had a health issue or delayed, their case would not be heard. That was the part he supported. He provided an example where the applicant's car broke down and they could not make it due to unexpected delays in travel. He is in favor of this addition.~~
~~Ms. Noble – Clarified that an emergency, under the proposed modifications, is strickly related to Covid. The other Boards have said there should be more clarification and part of Council's considerations.~~

Mr. Nigh – If there is a chance you are not going to have quorum, we are serving the public. If someone is out, the application cannot move forward if there is not going to be a quorum. As Board Members, we serve the public. If Ms. Herbert's plane could not arrive in time, she could join virtually if that situation was considered an emergency. Understanding, it would have to be a substantial reason in order to do that.
Mr. Clower – Agreed.

Mr. Nigh moved, Ms. Herbert seconded, to recommend approval to City Council for the Administrative Request to update the Board of Zoning Appeal's Rules and Regulations by this draft language but with the caveat that Council explore more definitions of emergency situations.
Vote: Mr. Clower, yes; Mr. Deschler, yes; and Mr. Nigh, yes; and Ms. Herbert, yes.
[Motion carried 4-0]

COMMUNICATIONS

The Board was asked to adopt the proposed meeting dates for March 2022 through February 2023. The Board unanimously decided to adopt only the meetings from March 22, 2022 – July 28, 2022.

Mr. Deschler adjourned the meeting at 10:10 p.m.

Tammy Noble, Senior Planner
Chair, Board of Zoning Appeals

Administrative Assistant II, Recorder