

THOMAS M. McCASH
ATTORNEY AT LAW

55 SOUTH HIGH STREET, SUITE 210
DUBLIN, OHIO 43017
614-408-8367
Fax: 614-408-8282
Web: www.mccashlaw.com

December 6, 2021

City of Dublin, Ohio
Planning Division
Board of Zoning Appeals
5200 Emerald Parkway
Dublin, Ohio 43017

RE: Administrative Appeal
Address: 9376 Nicholson Way, Dublin, Ohio 43017

Attn: Tammy Noble, Planner

Dear Ms. Nobile,

I represent David and Beryll Hopkins in regard to the pergola installed at the rear of their property. The Hopkins purchased this pergola from Share Tree Cool Living, LLC and believed that the supplier and installer would have applied for a building permit for its installation if required. They were informed by the installer that a permit was not required and relied on his "expert" opinion.

The Hopkins applied for their HOA approval, which was granted, even though it apparently violated their deed restrictions.

Shortly after its installation, the Hopkins received a Notice of Non-Compliance from Zoning Inspector Brian Martin indicating that there was no permit applied for the exterior improvements. The immediately submitted for a building permit on July 2, 2021 which was denied indicating that the pergola, which was being considered a structure, was not allowed to encroach into the open rear yard space of the property.

This pergola is placed above an existing concrete patio which is permitted to encroach into the rear yard by 5 feet per DCC 153.071(B)(1)(c)¹ and extends by its overhang 1 foot further for a total of 5 feet into the rear yard.

This pergola is open on all sides and does not have a roof and is similar to a fence or a wall which is permitted under DCC153.071(B)(1)(a) to encroach into a required yard. I would note that that section does not indicate a maximum height of the fence or wall that would be permitted in a rear yard, only the front yard.

Under §153.071(B)(1)(c) open and uncovered porches can project into a required rear yard up to five feet. The pergola meets the five-foot distance however the question is what is meant by the "Open and uncovered porches" language.

¹ The existing patio encroached 4 feet into the required rear yard.

Porch is not defined in the zoning code but the definition of a porch via Merriam-Webster is as follows:

PORCH: a covered area adjoining an entrance to a building and usually having a separate roof.

Therefore, by definition a porch IS a covered area and HAS a roof. Perhaps the correct term to be placed in this sentence is Patio or Deck which are defined as follows:

DECK: an open, unroofed porch or platform extending from a house or other building.

PATIO: an area, usually paved, adjoining a house and used as an area for outdoor lounging, dining, etc.

Assuming that the paved patio is included within the term "porch" in §153.071(B)(1)(c), the question then becomes one of what is meant by "open and uncovered", terms not defined in the zoning code.

Cover/Covering is defined as follows:

COVERING: something laid over or wrapped around a thing, especially for concealment, protection, or warmth

COVER: protection; shelter; concealment.

The main tenets of these definitions are protection and concealment.

Open is defined as follows:

OPEN:

1. having no enclosing or confining barrier: accessible on all or nearly all sides
2. completely free from concealment: exposed to general view or knowledge
3. not covered with a top, roof, or lid
4. having no protective covering
5. presenting no obstacle to passage or view; not enclosed, obstructed, or filled with objects

Under the definition of Open, the statements of not having a protective covering, i.e. roof, and not providing any sort of concealment, enclosing or confining barrier would therefore note that anything that meets the definition of Open, would also not meet the definition of Cover or Covering.

The Hopkins pergola is essentially the same as a trellis, though the term pergola could extend to a roofed type of structure. It does not have a protective covering that provides shelter from rain or snow and the solid joists do not provide and sort of confining barrier or roof and does not present an obstacle to passage or view.

The pergola/trellis is open on three sides, the fourth side abutting the rear of the home and does not present an obstacle to passage or view. I would note that a fence, which is permitted by §153.071(B)(1)(a), does provide an enclosure/confining barrier and an obstacle to passage or view and therefore would not meet the definition of Open.

In the Dublin Zoning Code both Awning and Canopy, which could be a covered element both noted in their definition that these devices provided weather protection. This is essentially a roof assembly that provides protection from the weather.

A pergola/trellis does not provide weather protection and in the case of the Hopkins pergola, their sun shades do not provide any weather protection and are not permanent, being retractable similar to the one on J Liu's in Historic Dublin which was done as an addition to the existing building and encroaches into the front yard setback and approved by the city.

We believe that the pergola/trellis installed on the Hopkins property is Open and Uncovered and that the same interpretation could apply to similar trellises throughout the city. Likewise, non-permanent awnings similar to the Metcalf's next door could be considered Open and Uncovered since it does not provide weather protection.

I reviewed the City of Phoenix's Zoning Code since shade structures as par for the course in Phoenix. For reference here are some relevant definitions that may assist staff in considering an updated interpretation and/or possibly a Zoning Code modification for clarification.

Awning: A structure attached to a building or other permanent structure in a fixed position with a flexible or rigid covering, including such structures which are internally illuminated by fluorescent or other light sources.

Building, Open: A structure which contains a wall or roof, any part of which is not covered by a permanent, solid surface.

Building, Open, Porch: An open building used solely for ingress and egress and not for occupancy, at least two sides of which shall be at least 50% open.

Canopy: A structure attached to a building or other rigid structure in a fixed position with a flexible or rigid covering, including such structures which are internally illuminated by fluorescent or other light sources.

Covered Pedestrian Ways: The provision of pedestrian ways protected from the weather by arcades, pergolas, arbors, or similar permanent structures. Such covered pedestrian ways may be along the perimeter of a building or across open spaces.

Pergola: An arbor or passageway with a covered roof or trelliswork.

Portico: A porch or walkway with a roof supported by columns, often leading to the entrance of a building.

Projection: Any element or embellishment attached to a structure for environmental protection or architectural enhancement which does not support any portion of the structure.

Shade Structure: A structure, such as a pergola, arbor or open porch, which is designed and used for protection from the sun and which contains at least one (1) side which is at least fifty percent (50%) open.

Under Roof, Hillside: The area under roof is considered as all areas covered by any permanent non-permeable roof structures including roof overhangs.

Yard: A space on any lot, unoccupied by a structure and unobstructed from the ground upward except as otherwise provided herein, and measured as the minimum horizontal distance from a building or structure, ***excluding carports, porches and other permitted projects***, to the property line opposite such building line in the side or rear yards, or to the street right-of-way or easement in the front yard; provided, however, that where a future width line is established by the provisions of this ordinance for any street bounding the lot, then such measurement shall be taken from the line of the building to such future width line.

Phoenix concentrates on Open being 50% of the sides. Interesting to note is that a carport in Phoenix is Open if it has two sides open but can have a roof, which is essentially a covering for weather protection and is exempt from yard setbacks.

I believe an interpretation or definition of "Open and Uncovered" can be as follows:

Open and Uncovered: A structure is considered open and uncovered when its sides are not less than 75% open to the environment for its perimeter and does not have an overhead element that is solid for more than 75% of its area and does not provide for permanent weather protection over the area below.

This interpretation would permit trellis type structures and prohibit gazebos, sun rooms, elevated decks, fixed awnings and canopies and similar structures from encroaching into the yard setback by more than 5 feet. If the Hopkins installed a fence along the perimeter of their patio, the visual impact would be far greater than this pergola, yet a fence is permitted to be installed and the pergola is not.

The Hopkins property has an eastern facing rear yard that abuts City of Dublin dedicated parkland. The location of the pergola allows a shade system during the morning and afternoon hours at their existing patio and does not visually detract from the views and vistas of the adjacent properties or the city parkland. Mr. Hopkins suffers from skin cancer and is very cautious to his sun exposure. This pergola and sun shade allow him to use their patio for an extended amount of time without exposure to harmful sun rays.

Sincerely,

A handwritten signature in black ink, appearing to read 'Thomas M. McCash', with a stylized, cursive flourish.

Thomas M. McCash