City of Dublin
OHIO, USA

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

of the primary structure" but architecture is not regulated. There are height restrictions for accessory structures that will need to be met per the Zoning Code requirements.

The application was reviewed against the Non-Use Variance Review Criteria and staff provided an analysis of the criteria. Staff concluded with a recommendation of denial based on the criteria not being met.

Questions for Staff

Mr. Deschler – There has not been this type of request in the past 10 years that Staff can recall. He asked if there has been one application under this Code Section.
Ms. Noble – She stated that it is not a common request but could not verify that a oversized, detached structure has not been the subject of a variance request.
Mr. Clower – Requested clarifications on calculations prepared by Staff as well as a photo of the existing shed location.
Ms. Noble – The shed might be on the internal portions of the site because it was not visible on a site visit. She deferred to the applicant.

The Chair invited the applicants to address the Board.

Alias Tu, property owner, stated that they plan on removing the shed. The applicant has been a resident for five years. The Tu's were drawn to the interesting and unique property. The residence does not have a basement so they are requesting a structure that their many children can spend time and play in, including sports. Mr. Tu understands the importance of being compliant with Code but believes his property is much different than any other property as the site is an irregular shape and on an 18-foot grade change. The proposed structure would be completely off of the road and tucked away. The house is a "fish bowl" on the site with streets on both sides. Attaching a structure to the house was considered but everything would be on the front side where it would be visible and not be aesthetically pleasing to the neighbors. The couple were volleyball players at The Ohio State University and they are constructing a volleyball court that is meets regulation standards which is a minimum of 40 feet by 60 feet in size. That is the genesis for the size requested.

Questions for the Applicant

Ms. Herbert – Clarified the driveway comes in east of the structure and the L-shaped building is the garage. She asked if a breezeway would be possible.
Mr. Nigh – Also asked if there any way to attach the proposed structure to the house with a 50-foot breezeway, for example.
Ms. Herbert – Pointed out the large distance that a breezeway would have to cover. She asked whether the structure be moved closer to the house?
Mr. Tu – The site slopes down to a 75-year-old pine tree, which the applicant does not want to cut down.
Mr. Clower – What is the benefit of attaching the structure to the house?
Ms. Noble – The requirements for a detached, accessory structure would no longer apply which would omit the need for a variance.
Mr. Clower – What qualifies as a minimum breezeway?
Ms. Noble – Stated that it would need a roof, or be a completely enclosed structure.
Mr. Nigh – Could the applicant have a covered sidewalk from the house to the proposed structure?
Ms. Noble – It would need to meet structural components of a breezeway.
Bryan Roby, Pebble Construction, stated if a breezeway was included, a 4,000 or more square-foot structure could be built.
Ms. Noble – The applicant would only be limited to meeting setbacks and lot coverage requirements.

Mr. Nigh – The point being, a much larger building could be built without these constraints if connected to the primary residence.

Mr. Roby – The Tu's were trying to define the size of the building. If they proposed a large structure, the neighbors would not be satisfied.
Mr. Clower – Seven public comments were received from the neighbors and they were all in favor of this proposal. The applicant did their job well to take the neighbors into consideration.
Mr. Nigh – It is helpful for the Board to know that information but it is not an element to be considered as part of the criteria.
Mr. Roby – It is difficult to do justice to flat drawings to exhibit the proposal, well. The exterior finish of the primary structure is wood siding. The applicants proposed a metal roof but it could be shingled, if required. The applicant kept in mind functionality and value for the proposed structure.

Ms. Noble – In order for the structure to be considered attached, there must be an attached roof with similar design to the principle structure, permitting access between the principle structure and addition, either internally or under a roof, and/or a common wall with the principle structure. If the addition is attached to the primary structure, there are architectural components it must meet; the structure needs to be compatible to the primary structure. All of the regulations are intended to ensure that a detached structure seems cohesive with the site.

Mr. Tu – Asked if Dubscovery provide a better understanding of the topography of the land.
Mr. Roby – There is no other proper location for an accessory structure. It will already be recessed into the ground by 56 inches on one side so the profile will appear lower.

Ms. Herbert – She stated that she is focused on the first three criteria that need to be addressed, the applicant was asked why this property has special conditions. A residence without a basement makes it slightly unusual and the topography the applicant previously mentioned might apply.
Mr. Tu – Their property is different from other properties in the area. There is a significant drop from one side to the other as it is on the high side of the river. The house is on one end and everything else slopes down. It is not a square or rectangular lot. The neighborhood was built before being in the City of Dublin.
Mr. Roby – There is a significant amount of drainage that comes around the property and driveway. The goal is to avoid any area that would prohibit or stop proper drainage and anyone else's water flow.
Ms. Noble – By pure design, the water will drain towards the Scioto River. The center portion of this site appears higher.

Mr. Deschler – Which neighbor had the huge attached structure?
Mr. Tu – The house two houses down?
Mr. Deschler – What is the size of that?
Mr. Tu – He did not know. It is a full-sized basketball court plus a gym and attached to the house.

Ms. Noble – Asked the applicant to identify the structure on the square to the northern part of the site?
Mr. Tu – Beach volleyball court that is covered 90% of the time due to the weather.

Mr. Deschler – Where is there a massive detached structure in Dublin that would match 1,000 or 1,500 square feet?
Mr. Clower – There are two barns off of Coffman Road.
Ms. Noble – Recalled a couple of lots along the river with a breezeway connecting a detached structure. She could not state the size of those breezeways.
Mr. Deschler – A breezeway would make it different, so it is not the same.
Mr. Clower – There are larger structures found.

Public Comment

Ms. Noble – Stated that there were seven comments submitted to the City in relation to this request. She stated they were all supportive and mainly focused on use and aesthetics. She submitted the comments for the Board's review.

Board Discussion

Mr. Clower – Referred to the third criteria that states that there shall be so substantial adverse effect to the surrounding community. He did not agree with Staff's determination because this is the first type of request in ten years and based on the limitations of most lots in the City of Dublin, this type of request is unlikely to be common.
Mr. Deschler – This is a massive lot for Dublin as are many along the Scioto River. On the other side of the river they are large lots and there are large detached garages. The criteria related to "substantial adverse effect" is not going to be a problem, therefore it is met. Ms. Herbert agreed with Mr. Clower and Mr. Deschler on that point.
Ms. Herbert – Stated that the first criteria that focuses on special conditions of the site. She stated that she found that this is an unusual shaped lot and no basement in the residence. She did not agree with Staff's determination.
Mr. Clower – The shape of the lot and the grading change is meets this criteria. It would be awkward to build the structure in the front of the house and the proposed area is the only place to build it, especially with the appearance of the house. He was struck by the glass on the north side of the house, looking out over the volleyball court.
Mr. Nigh – He agreed with Mr. Clower's point.
Ms. Herbert – This totally affects the character of the neighborhood if it were to be constructed on the front of the residence.

Mr. Clower – He did not like adding a breezeway as a solution. The City does not want the applicant to have too large of an accessory structure so building more on their property so this is no longer an accessory structure is counter to the idea of this regulation, which is to have smaller, more compact structures. It did not make sense to have the additional roof structure, concrete, etc. just so the accessory structure would appear to be attached to the house when it is not, directly.
Ms. Herbert – Agreed and did not want to encourage that line of thinking.
Ms. Noble – The primary objective of all of these requirements is so the primary and the accessory are similar in size and not granting a larger detached that would make the building disproportionate.
Mr. Nigh – He could understand the logic if a huge, two-story barn was proposed. The structure proposed is not going to dominate the primary structure.
Mr. Clower – The structure would already be lower based on the grade change and the City had determined there are plenty of old trees that limit it being built elsewhere on the property. If the intent is to minimize the appearance of the proposed structure behind the house, it is not going be visible from anywhere the neighbors would see it from the two adjacent lots. The driveway already curves around so one cannot look straight up the driveway and see a large structure. From any other angle, the house will block the view. If the intent is not to have a giant structure dwarfing the house that is already not necessarily a consideration to be taken into account.

Mr. Nigh – In the second set of criteria, Staff has already stated two of the four have been met and he did not disagree. Therefore the Board should be focusing on the first three criteria that all must be met. He stated that clearly the first criteria is met based on the unique shape of the site and the grade change. In

terms of the second criteria, the applicant did not create these conditions. He also believed the third criterial is met therefore, he would be in favor of granting this Variance at this point.
Ms. Herbert – Agreed.
Mr. Clower – His only hold up was the second criteria related to action or inaction of the applicant. He asked if it is possible to build a smaller structure even if it is not a regulation-size volleyball court and there is an argument to be made that the applicant already has a swimming pool and volleyball court on the property. If the concern is that the children do not have enough places for recreation, he believes they do have adequate space.
Ms. Herbert – In terms of the pool and the other volleyball court, they are not indoor spaces. Based on weather patterns here, that only allows one or two months of use each year. Going back to a case mentioned earlier with the garage with an extra-large garage door to house a transient van, she recalled the City had the same comment on the Action/Inaction criteria where they stated the van could be parked somewhere else. While processing cases, she tries not to make judgements on whether to do something. It is not her place to determine the applicant should have a smaller house or smaller recreational space. She separates that from Action/Inaction, not finding that appropriate to base decisions on.
Mr. Nigh – If the Board is basing it on the applicant's choosing of a size, then every applicant that came before the Board would not meet that criteria.
Mr. Deschler – The reason most of these cases come to us is because the applicant is requesting a building that is larger than permitted by Code.

The Chair – There appears to be two yes votes and two undecided at this point. The Code states the maximum is 2,000 square feet allowed, even if on five acres and in no case would the height exceed 22 feet. He asked if height was an issue.
Ms. Herbert – It must not be an issue because the applicant did not request a Variance for that component.
Ms. Noble – She stated that she has reiterated this requirement recalled speaking to someone about height as she was concerned it might be an issue.
Mr. Roby – The height of the eave is 16 feet and the peak is 25.5 feet in height. He thought the measurement was determined at the mid-point of the roof.
Ms. Noble – That is correct.
Mr. Deschler – Asked for clarification on the Variance, if it was for the space and the height.
Ms. Noble – Confirmed the variance is for size of detached structure.

Mr. Deschler – A 2,400-square-foot structure was proposed. With this, he had a problem. He could agree with some of the Special Conditions and the Action/Inaction but now the Board would be saying, they would grant beyond not only what is allowable based on acreage size but would be beyond what is permitted in the Code.
Mr. Nigh – Asked the applicant for the smallest number for square footage to still be a workable size.
Mr. Tu – Estimated ±2,100 square feet minimum for a doubles court.
Mr. Nigh – Based on that opinion, the Board is stating a full-size, indoor volleyball court would not be permitted anywhere in Dublin, due to the size required.
Mr. Deschler – The Board is stating the applicant does not have a large enough lot; five acres would not be a problem.
Mr. Clower – The request exceeds the 2,000-square-foot maximum but if it were two separate lots, and two neighbors decided to build a structure with half on both properties then the size requested would be permissible. He supported the Variance.

Ms. Herbert – With three out of the four of the Board in support of the Variance, she suggested taking a vote.

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.

Chair, Board of Zoning Appeals

Administrative Assistant II, Recorder