City of Melbourne, Florida
Agenda
Zoning Board of Adjustment

City Hall Council Chamber
900 E. Strawbridge Avenue
Melbourne, FL 32901

August 26, 2024, 6:30 p.m.

A. Opening

1. Pledge of Allegiance.
2. Roll call.
3. Approval of Minutes – July 29, 2024
4. Declaration of Conflict
5. Requests for Dismissals, Postponements, or Withdrawals

B. New Business

6. **APL2024-0003 Mitchell Needelman, 2317 Bignonia St.**

In an R-1AA zoning district, the following appeal is requested:

An administrative appeal of the June 26, 2024, written interpretation letter from the Community Development Director regarding accessory structures and navigable waterways, in accordance with Chapter 2, Article IV, Division 11, Section 2-420.

C. Future/Additional Business

D. Adjournment

Note: More than one member of the City Council may be in attendance at the meeting and may participate in discussions.

Pursuant to 286.0105, Florida Statutes, the City hereby advises the public that if a person decides to appeal any decision made by this Board, agency or meeting or hearing, he will need a record of the proceedings, and that for such purpose, affected persons may need to ensure that a verbatim record of the proceedings is made, which record includes the testimony and evidence upon which the appeal is to be based. This notice does not constitute consent by the City for the introduction or admission into evidence of otherwise inadmissible or irrelevant evidence, nor does it authorize challenges or appeals not otherwise allowed by law.

In accordance with the Americans with Disabilities Act and Section 286.26, Florida Statutes, persons with disabilities needing special accommodation to participate in this meeting should contact the Community Development Department at (321/608-7500), no later than 5:00 p.m., at least 48 hours prior to the meeting.

City of Melbourne, Florida
Minutes — Zoning Board of Adjustment

City Hall Council Chamber
900 E. Strawbridge Avenue
Melbourne, FL 32901

July 29, 2024, 6:30 p.m.

A. Opening

1. Pledge of Allegiance.

2. Roll Call.

Present:	Brenda McManus, Vice-Member Charles Jackson, Member Ravi Shah, Member Natalia Brauner, Member Jennifer Cope, Member
Absent:	Peter Kostrzewa, Member (Excused) Thomas Herbert, Member
Also Present:	Jeffrey Higgins, AICP, Planner Adam Conley, Assistant City Attorney Samantha Buck, Recording Secretary

The meeting started at 6.36 pm due to a lack of a quorum.

3. Approval of Minutes – June 24, 2024, Meeting

Moved Jackson/Cope to approve the minutes from the June 24, 2024 meeting, as presented.

Motion carried unanimously.

4. Declaration of Conflict.

There were no conflicts of interest declared for this item.

5. Requests for Dismissals, Postponements, or Withdrawals

Assistant City Attorney Conley confirmed that he had spoken to the applicant prior to the meeting to explain his option to postpone if only five Board members were present. Mr. Kohler confirmed that he wished to proceed if that was the case.

B. New Business

6. **VAR2024-0006 – Rafaela Kohler, 2981 Pineapple Ave.**

In a R-1AAA zoning district, the following variance is requested:

A variance in the amount of sidewalk trust fund payment.
Part III, Appendix D, Chapter 9, Article VII, Section 9.105.(c) payment in lieu of constructing a sidewalk.

Mr. Higgins was sworn in by Assistant City Attorney Conley.

Mr. Higgins showed the Board an aerial photograph of the property located at the north end of Pineapple Avenue. He summarized the findings contained in the staff recommendation memo dated July 17, 2024.

The property is currently under construction and City Code requires that a sidewalk is installed along the street frontage. The criteria are that if no sidewalks exist, or there are no plans to construct sidewalks in the vicinity, a fee can be paid into the Sidewalk Trust Fund in lieu of this. This fee is has remained unchanged at $30 per linear foot despite construction costs increasing, and the fee has been in place for many years. The lot frontage on this property is 226 ft., so a $6,780 fee could be paid into the fund in lieu of constructing a sidewalk. The fee has been invoiced to the Kohler family, but the property owners are requesting a reduction in the fee.

Mr. Higgins reminded the Board of the six criteria that need to be met in order to grant a variance. It is staff's opinion that this request does not meet any of these criteria. This is a narrow lot that has received variances to both sides of the property along with a variance for a reduced lot width. The City acknowledges that this is a unique site, however, there is no uniqueness on the street side of the property, and nothing to prevent a sidewalk being constructed. The applicant's request is a financial request, and approving a variance would be granting a special privilege based on financial considerations; which is something that the Board has never allowed in the past.

In summing up, Mr. Higgins confirmed that staff is recommending denial of VAR2024-0006 based on the request not meeting any of the six factors for granting a variance.

Ms. McManus asked if the Board had any questions for Mr. Higgins.

Mr. Jackson asked what a typical lot size was, and Mr. Higgins replied that a minimum residential lot size would be 100 ft. wide by 110 ft. deep. A 200 ft. plus lot width is not unusual in this zoning district.

Mr. Brauner noted that the neighboring property to the north did not have a sidewalk, and asked if this property owner had paid a fee to the Sidewalk Trust Fund.

Mr. Higgins replied that he was unable to find any records to confirm that this was the case.

There were no further questions for Mr. Higgins, so the applicant addressed the Board.

Mr. Kohler explained that although he was here to represent the property owner; he was also one of the property owners who had built the house.

The property owner, Charles Kohler, Melbourne, was sworn in by Assistant City Attorney Conley as he had an ownership interest in the property.

Mr. Kohler told the Board that unlike his neighbor to the north, he made the decision not to construct a seawall on the east side of his property. This is an environmentally sensitive area with a seagrass bed where Manatees gather to feed. There are no sidewalks constructed in this entire stretch of Pineapple Ave. Initially, his first request was to not have to construct a sidewalk. He spoke with the City Engineer who has confirmed that the City has no intention of adding sidewalks in this area as impervious sidewalks cause run-off into the Indian River Lagoon. At that time, he was told he could pay a fee in lieu of constructing a sidewalk, but he feels that once this has been paid it becomes an excise tax where the property owner is made to pay a tax to the government in order to be able to use his own property. This is an unlawful tax and he is asking for the fee to be reduced to $2,780, which he has calculated would be the typical fee for an infill lot. When impact fees are paid when developing a property, there has to be a relationship between the developer and what the government wants. The government's view is that a house will bring pedestrian traffic to an area, but in this case, his property is located in an area where there is no nexus as there are no sidewalks, nor will there ever be a sidewalk; this is a dead-end street and it is not a connector road.

Mr. Kohler added that in Florida, the person paying the money (the developer, or the homeowner paying into a fund) has to have a relationship between the payment of the money and the benefit they receive. In this instance, $6,780 will be used to develop sidewalks across town, and there will be no substantial benefit that could be linked to the homeowner, which brings about the question if this is even a lawful impact fee. After speaking to the City's Engineering Department, it was suggested that he seek a variance from this Board to reduce this fee.

Mr. Kohler said he is requesting a variance that no sidewalk is required at this address and a compromise on the significant fee that has been charged. He appreciated the Board's time on this, and asked them to remember that this is an unconstitutional tax placed on a homeowner.

Ms. Cope referenced on Mr. Kohler's comment about the benefit and nexus with the government. This Code has been on the books for many years. She suggested that his best avenue would be to challenge the City in court over this section of Code.

Mr. Kohler said that there are two vehicles to address on this incorrect collection of taxes. The first vehicle is to exhaust his appeal. After this, he can then take the matter to a court who can decide what to do with this. The City's Engineering Department suggested that a compromise vehicle would be to request a variance from this Board for a lesser amount to be paid into the fund.

Mr. Higgins asked to clarify a section of Code regarding the allocation districts created within the Sidewalk Trust Fund. Funds collected through this fund are expended via capital improvement projects to construct sidewalks within the allocated district where the funds are collected in order to benefit the citizens and businesses within the district. Mr. Kohler's property is located within Trust Fund District 1 which covers the area of the City located north of the Eau Gallie River from the Indian River Lagoon to west of I-95.

Mr. Shah commented that many people have already paid the required fee for their properties. He that granting this variance would be a disservice to them and may lead to them requesting a refund. He also believed that the Board would be opening Pandora's Box in granting this reduction.

Mr. Higgins agreed with Mr. Shah's comment, adding that approving this request would ultimately be conferring a special privilege to the applicant and may set a precedent. The $30 per linear foot fee has remained unchanged for many years.

Mr. Kohler agreed with Mr. Shah's comments but stated that this is a unique situation due to the property's proximity to the Indian River Lagoon. His variance request was that no sidewalk be built next to the river. Other infill areas are not environmentally sensitive as there are very few infill lots adjacent to waterways left in the City. This is why he sees this as a unique property. When applied to other infill lot where connections are available, then a sidewalk should be built, and the City would have a strong reason to deny the variance.

Mr. Shah asked Mr. Kohler to explain what he felt his hardship was.

Mr. Kohler replied that the homeowner can pay the fee, but it is an excessive amount which is unconstitutional for the City to collect. He is seeking a compromise on this matter. As far as a hardship is concerned, he feels that the unique shape of the lot, along with a government who has passed law after law which has made the site totally unusable. Without a variance, the property would have been unusable and would have denied the owner all the value of the property. It is true these variances were granted, however if the property had been platted in 1995, the Code of Ordinances did not require a sidewalk to be built. After 1995, the requirement for a sidewalk was added. The hardship is paying money that the homeowner really should not have to make, especially as money is hard to earn.

Ms. Cope noted Mr. Kohler's concerns about pollutant loads into the river. She stated that sidewalks are typically 3 ft. wide with approximately 12ft of impervious surface from the edge of the street to the edge of the right of way. In addition, there is usually at least 9 ft. of grass or crushed Coquina to percolate pollutants. She was interested to hear Mr. Kohler's thoughts and reasoning why not to construct a sidewalk.

Mr. Kohler referred to the aerial photograph provided by Mr. Higgins. He said that in his opinion, there should be no sidewalk on any road adjacent to the river. When it rains, a sheet-flow from US 1 goes straight into the river. Pollutants from the highway go straight across whatever is there. Adding sidewalks would only increase sheet-flow as you have taken away permeability. This problem only gets worse when travelling south on Pineapple Avenue. There is still sheet-flow that goes over the top into the river in that area, and this

happens throughout the basin. Any concrete in this area exacerbates the problem. In his opinion, anywhere within 100 meters of the Indian River Lagoon should not have concrete poured.

Ms. Brauner referred to the amount of fee that Mr. Kohler stated that he was willing to pay, and asked what his calculation had been based upon.

Mr. Kohler replied that it was based on an infill lot on a similar secondary road which would typically be 100 ft. to 150 ft. wide. This figure, multiplied by $30 is what someone would pay. As an Attorney, he is willing to argue the unfairness. He wants to pay what the owner of a normal lot would be paying. Although he did know the answer to whether his neighbor to the north had paid into this fund, he was unwilling to divulge this information at this time. He would be happy with whatever the Board felt would be an appropriate fee. If the Board could reach a compromise number, his party would be happy and he would not have to take this matter further.

Ms. Brauner asked Mr. Kohler if he had worked with the City to see if there was any section of the 236 ft. lot that was unique and could be excluded from the calculation.

Assistant City Attorney Conley responded to this question. He told the Board that technically, the purpose of the hearing tonight was because the applicant disagreed with the application of Code and was asking for a variance from it. Mr. Kohler and City staff had numerous conversations on this lot and the options available. There is a section of Code that addresses the standard requirement for sidewalks to be developed and the fee in lieu of a sidewalk option. Section 9.105. Subsection D which Mr. Kohler alludes to is a section of Code allowing certain properties with eligibility qualifications to further reduce their fee in lieu amount. The applicant's variance application came in as a product to these discussions. The actual variance application received by staff was specific to the amount of the fee, and this is the first time that Assistant City Attorney Conley had heard of a request for a variance to waive the underlying requirement for a sidewalk and as this request had not been advertised, he recommended that the Board not consider this request. Tonight's request is specific to the fee in lieu amount under Section 9.105 Subsection C.

Assistant City Attorney Conley also said that he respectfully disagreed that this fee in lieu represented a tax. It is a standard in Code when developing properties that a sidewalk is built and placed. There is a nexus and a rationale for that amount. Code does recognize that there are circumstances where it may not be feasible or it may not be best development practice to put in sidewalks. This is why the Sidewalk Trust Fund and the fee in lieu is established. A geographical district has been established so there is a nexus to ensure funds are used in a specific area. In addition, the underlying fee in lieu amount is probably quite a reduction compared to the actual construction costs to develop a sidewalk.

Lastly, Mr. Higgins referred the Board to an aerial photograph showing a series of retention ponds on the east side of US1 and the applicant's property on Pineapple Avenue and Parkway. These ponds collect and percolate stormwater away, so there are control structures in place to address stormwater in the area fronting Mr. Kohler's property.

There were no further questions for the Board for Mr. Kohler.

Mr. Conley prompted Vice-Chairman to ask if there was any public comment on this item.

There were no members of the public present at this time to provide public comment.

There were no disclosures or site visits declared by the Board, and Mr. Higgins confirmed that he had receive no correspondence on this item.

There was no public comment, or further comments from the Board, so Vice-Chairman McManus asked for a motion.

Moved Shah/Cope for denial of the variance VAR2024-0006, based on the request not meeting any of the six factors for granting a variance.

A roll call vote was taken as follows:

Aye: Jackson, Shah, Brauner, Cope and McManus

Nay: None

Motion carried unanimously.

C. Future/Additional Business

8. **Election of Chairman and Vice-Chairman**

Mr. Higgins reminded the Board that the vote for a new Chairman and Vice-Chairman had been continued at the last meeting. Unfortunately, there was not a full Board present, so he asked the Board to decide if they wished to vote, or continue the item again until the August meeting.

Moved Jackson/Brauner to continue this item to the August 26, 2024 meeting.

Motion carried unanimously.

Mr. Higgins confirmed that there will be a meeting on August 26. Staff is currently reviewing the application and will be getting the material out to the Board in due course.

Ms. Brauner told Staff that she will not be available for the September meeting.

D. Adjournment

As there was no further business to discuss, the meeting was closed at 7.29 pm.

Samantha Buck, Recording Secretary – July 29, 2024

Approved by Zoning Board of Adjustment: _____

TO: Zoning Board of Adjustment

THRU: Cindy Dittmer, AICP, Community Development Director
Cheryl A. Dean, AICP, Planning Manager

FROM: Jeffrey Higgins, AICP, Planner

RE: **APL2024-0003 / MITCHELL NEEDELMAN / 2317 BIGNONIA ST. APPEAL OF ZONING CODE INTERPRETATION**

DATE: August 16, 2024

City of Melbourne
Community Development Department

Request/Code Reference

In an R-1AA zoning district, the following appeal is requested:

> **An administrative appeal of the June 26, 2024, written interpretation letter from the Community Development Director regarding accessory structures and navigable waterways, in accordance with Chapter 2, Article IV, Division 11, Section 2-420.**

The property owner, through legal counsel, has submitted an appeal of a written interpretation letter issued by the Community Development Director regarding 2317 Bignonia Street (the "Subject Property"). This memo will identify the property owner's (hereinafter referred to as the Appellant), stated reasons why they believe that the interpretation is in error, as well as responses from the City supporting the written interpretation, as originally issued.

Background

The Subject Property is a single-family residential lot zoned R-1AA, measuring 0.57± acres in size, and bound on two sides of the property by water. On or about May 16, 2023, the City of Melbourne Code Compliance Division issued a Notification of Violation (CE#2023-00461) to the owners, identifying construction occurring on the Subject Property without a required building permit. In an effort to correct this alleged Code violation, an after-the-fact building permit application (RALT2023-01758) was submitted on or about June 14, 2023 for two "pergola" structures with solar panels attached on top of the structures (the "Subject Structures"). Per the survey/site plan submitted for a building permit from the city, attached hereto as Exhibit A, it identifies a structure measuring 470±-square-feet in size immediately behind the residence, and a second structure measuring 940±-square-feet on the north side of the home that also appears to serve as a carport. Neither structure is attached to the residence.

During the building permit review for construction of the Subject Structures, city staff must identify the type of structures one seeks to construct on their property, leading to the corresponding zoning code requirements (height, area, placement limits) a property owner must follow for the specific type of structure. Identifying the abutting property boundaries leads to the corresponding structure setback requirements from those property lines.

Following the City's building permit review for code compliance of the Subject Structures, the Community Development Department received a request for a written interpretation of City Code regarding the property at 2317 Bignonia Street, owned by Appellant Mitchell Needelman. The requests were for an interpretation and determination whether the Subject Structures constitute an "accessory structure" by the City Zoning Code, and whether the Subject Property is subject to

waterfront or waterway setback standards under the City Zoning Code. These items are analyzed separately below.

Basis for Appeal by Appellant

For the appeal, the Appellant must provide a basis for such appeal, identifying alleged errors made by the Community Development Director in the Interpretation of the Zoning Code. The Appellant has identified the following issues associated with the Interpretation Letter.

1. The City made an error in determining that the waters abutting the Subject Property are portions of the navigable waterway of Crane Creek. More specifically:
   - The City lacks regulatory authority to make the determination whether the waters abutting the property are a portion of Crane Creek or otherwise jurisdictional waters.
   - The waters abutting the property were man-made and not historical waters of Crane Creek.
   - The waters abutting the property are the receiving body of the City's stormwater within the watershed drained in that area.
2. The City made an error in determining that the Subject Structures are accessory structures and not pergolas. More specifically:
   - City Code does not define pergola or garden amenity.
   - Interpretations are to be interpreted in favor of the landowner in the event of any question regarding its meaning.
   - The City exceeds its authority to create definitions for legislative terms.
3. The City made an error in asserting additional purported code violations outside the scope of the Request for Interpretation.

Analysis of the Appeal

This section will respond to the appeal by the Appellant.

1. Authority of the Community Development Director. First and foremost, the Community Development Director does have the authority to make interpretations and determinations regarding the Zoning Code. Section 2-420 of City Code, states that questions of interpretations of appendices A, B, and D of the land development code are first presented to the Community Development Director (see Section 2-420, attached).

   The Community Development Director in making an interpretation, is guided first by the plain meaning of the words and terms in the Code and second by the intent expressed therein. It is within the authority of the Community Development Director to interpret undefined terms within the Zoning Code and determine their scope and purpose, given the context of the City Zoning Code. In addition, the Community Development Director uses other sources, such as state law and associated regulations, to give context to the terms and the Zoning Code and amplify their meaning.

2. Accessory Structures. The City acknowledges that there is no definition of "garden amenity" or "pergola" within the Zoning Code. Therefore, consistent with Section 2-420 of City Code, the Community Development Director is authorized to interpret and determine the meaning and intent of these undefined terms. The Community Development Director started with the definition of Accessory Structures in the Zoning Code (Appendix B, Article II); the term is further broken down into subcategories and detailed in Accessory Structures, (Appendix B, Article VII). A "garden amenity" is a subcategory of Accessory Structures and a "pergola" is

listed under the garden amenity subcategory. In addition, the Community Development Director found evidence from previous Zoning Code interpretations that the term "garden amenity" has been identified as "a structure intended for decorative purposes to provide support for plants" and are not used by people and animals. Garden amenities have limited function, and therefore are given more latitude in the accessory structure standards of the Zoning Code than other categories of accessory structures where such use by people and animals occurs.

In the case of the term "pergola," for the purposes of interpreting the accessory structures located on the Subject Property, the Community Development Director needed to rely on more than just the plain meaning of the word, but also the use and function of the proposed accessory structures.

- Northern Structure. As identified in the building permit submitted to the City, the structure located along the north property line is 940± square feet in area and located across the driveway directly adjacent to the single-family home (see attached photo, taken by City staff on August 12, 2024). Although this structure has an appearance that could colloquially correspond to a pergola, based upon use and function of this structure, it is not a pergola as a garden amenity as set forth in the Zoning Code. Rather, this structure is a carport. The Zoning Code has a definition of carport: "*a roofed structure, not enclosed, covering a parking space*."
- Eastern Structure. As identified in the building permit submitted to the City, the structure located along the east side of the property is 470± square feet in area and located directly behind the single-family home. Colloquially, the structure has the appearance of a pergola; however, based upon use and function, this is not a pergola; the structure functions as a porch. The Zoning Code has a definition of porch: "*a roofed-over space, made of pervious or impervious materials, attached to the outside of an exterior wall of a building and with no enclosure other than the exterior walls of the principal building…*" While not attached to the single-family home, this accessory structure directly abuts the back of the residence at the back door to the residence, and serves the same use and function as a porch.

These accessory structures are allowed within the Subject Property, subject to the accessory structure standards of Appendix B, Article VII, Section 1, and proper permitting through the Code Compliance Division.

In summary, the Community Development Director, under the authority provided within City Code, correctly interpreted the Subject Structures as being accessory structures and not garden amenities.

3. Waters Abutting the Subject Property. The City agrees with Appellant that it is not the governmental entity that makes formal determinations of the boundaries of navigable waterways, stormwater retention areas, or wetlands, and Page 5 of the Interpretation Letter acknowledges this point. The Community Development Director did not make a formal determination on whether the waters abutting the Subject Property are a part of the navigable waterway of Crane Creek – instead, the Interpretation Letter only determined how the City Zoning Code was most appropriately applied to the Subject Property to satisfy the plain meaning and intent of the Zoning Code.

   The St. Johns River Water Management District, through its authority granted in the Florida Administrative Code, makes a formal determination on the boundaries of wetlands, surface waters, jurisdictional waterways and stormwater systems. In addition, Florida Statutes

provides support for how to distinguish between artificial and natural waterways (F.S., Sec. 373.019(20).

Consistent with the authority granted in City Code, the Community Development Director determined that the waters abutting the Subject Property are best categorized as a navigable waterway, rather than a canal or stormwater retention/detention area, for the purposes of applying the accessory structure waterfront setback requirement of Appendix B, Article VII, Section 1(E)(7), City Code. In doing so, the Community Development Director reviewed the Zoning Code definition of Waterway – "any natural or manmade navigable water body, including but not limited to canals, lakes, rivers, the Atlantic Ocean and the Intracoastal waterway but excluding drainage facilities." In addition, City Code identifies that public drainage facilities used solely for the conveyance of water shall be prohibited from containing any marine facilities (Appendix B, Article VII, Section 2(F)).

Through the process of elimination identified in the Interpretation Letter, including the use of other sources, such as Florida Statutes and relevant adopted regulations, to provide support for how to distinguish types of waterways, the Community Development Director interpreted and applied the waterfront/waterways setback to the Subject Property, determining that treating the waters abutting the Subject Property as the navigable waterway of Crane Creek best aligned with the plain meaning and intent of the City Zoning Code.

4. Other Code Violations. The Community Development Director acknowledges that the Interpretation Letter cannot make a final determination on the existence of a City Code violation. The purpose of this paragraph on Page 7 of the Interpretation Letter was to inform the property owner that such alleged violations would be referred to Code Compliance staff, and eventually presented to the City of Melbourne Code Enforcement Board. As to the purported violations, City staff have inherent administrative authority to coordinate with the Code Compliance staff to present items to the City's Code Enforcement Board.

Recommendation:

Staff recommends **Denial of APL2024-0003,** thus upholding the Community Development Director's interpretation.