City of Melbourne, Florida
Agenda
Zoning Board of Adjustment

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

June 30, 2025, 6:30 p.m.

A. Opening

1. Pledge of Allegiance.
2. Roll call.
3. Approval of Minutes – September 30, 2024
4. Declaration of Conflict
5. Requests for Dismissals, Postponements, or Withdrawals

B. ~~Unfinished~~ New Business

6. **VAR2025-0001 Alexander Wassuta, 792 Iroquois Ave.**

   In an R-1A zoning district, the following variance is requested:

   A variance of 4ft. 7 in. to allow a 2ft. 11in. side yard setback.

   Part III, Appendix B, Article V, Section 2 (D), Table 2A requires a 7.5 ft. side setback.

C. Future/Additional Business

7. Annual Financial Disclosure Form – July 1, 2025

8. Presentation of Service Pin to Ravindra Shah.

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

September 30, 2024, 6:30 p.m.

A. Opening

1. Pledge of Allegiance.

2. Roll Call.

Present:	Peter Kostrzewa, Chairman Jennifer Cope, Vice Chairman Thomas Herbert, Member Charles Jackson, Member Ravi Shah, Member Linda Cass, Member Dave Bregard, Alternate Member Diane Maynard, Alternate Member
Absent:	Natalia Brauner, Member (Excused)
Also Present:	Cynthia Dittmer, AICP, Community Development Director Cheryl Dean, AICP, Planning Manager Jeffrey Higgins, AICP, Planner Adam Conley, City Attorney Kellen Simmons, Assistant City Attorney Samantha Buck, Recording Secretary

Assistant City Attorney Simmons explained to the Board that he would be acting as the counsel for the Board. City Attorney Conley will be presenting the case on behalf of the City. He first asked for the Board to select Board members to fill the positions of Chairman and Vice-Chairman before proceeding to review the item.

Moved Herbert/Jackson to nominate Peter Kostrzewa for the position of Chairman.

Motion carried unanimously.

Mr. Simmons then explained that the Board would now have to nominate a member for the position of Vice-Chairman, so he asked that Mr. Kostrzewa handle this as his first item of business.

Mr. Kostrzewa asked the Board if they had any nominations for the position of Vice-Chairman.

Ms. Cope nominated herself for the position of Vice-Chairman.

As there were no other nominations for this position, Ms. Cope was made Vice-Chair by consensus of the Board.

Mr. Higgins confirmed that there was a full complement of Board members present, so the Board was able to move forward with the meeting.

3. Approval of Minutes – August 26, 2024, Meeting

Moved Jackson/Herbert to approve the minutes from the August 26, 2024 meeting, as presented.

Motion carried unanimously.

4. Declaration of Conflict.

Mr. Kostrzewa noted that several Board members declared at the last meeting that they were familiar with the property, and the property owner. He asked if they needed to state this again for the record.

Mr. Simmons said this was not necessary, as this was continued from the previous meeting; however, any Board member who were not present at that meeting should make their declaration now.

Ms. Cope declared that she had spoken with Cindy Dittmer, the Community Development Director regarding her experience in water body classification during her employment with the St. John's Water Management District. She confirmed that this would not prejudice her decision on this item.

5. Requests for Dismissals, Postponements, or Withdrawals

Mr. Higgins confirmed that there were no requests to dismiss, postpone or withdraw this application.

Mr. Kostrzewa then introduced the members of staff present.

B. New Business

6. **APL2024-0003 – Mitchell Needelman, 2317 Bignonia Street**

In a R-1AAA 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.

Mr. Simmons summarized the procedure for the meeting. The Board will initially hear argument from the Appellant's Attorney, James Beadle and any witnesses, followed by testimony and argument from City Attorney Conley and City Staff. There will then be an opportunity for the City and the Appellant to cross-examine witnesses, after which the Board will be able to ask any questions. The Board will hear final rebuttal and closing arguments, along with any public comment. Finally, the Board will have the opportunity to ask any questions before engaging in discussion and consideration of a motion.

Mr. Kostrzewa asked for clarification on Mr. Conley's and Mr. Simmons' roles in the procedure and Mr. Simmons explained that his role would be a procedural one assisting the Board, and Mr. Conley would be the Attorney representing the City and would be able to answer any questions specifically on this appeal.

Attorney James Beadle, Palm Bay, attorney representing Mr. Needelman began his presentation. The property at 2317 Bignonia Street is owned by Mr. Needelman. The interpretation request was limited to establishing ground rules associated with actions or activities at his client's property, and how those items will then be addressed at a future time. The first issue, questions the Community Development Director's interpretation of a garden amenity, listed in Appendix B, Article VII, Section 1 Subsection (G)(4) of City Code. The second, addresses her determination about the water to the north and east of his client's property, and more specifically, if they are a portion of Crane Creek and do not constitute a man-made canal or stormwater pond, as this determination on the type of body of water impacts the setbacks on the property.

Mr. Beadle provided the Board with a section of City Code (Appendix B, Article VII, Section 1 – Accessory Structures) for reference.

He referenced two subsections;

Sub-section E.7: *Setback and Location Requirements – Waterfront* which listed setbacks from the shoreline/mean high water line for properties located on canals and other navigable waterways.

Sub-section G.4: *Exceptions – Garden Amenities* – stating that garden amenities such as pergolas, arbors and trellises do not count toward the maximum number of accessory structures allowed on a property, and are allowed to be located in front of the principal structure, as long as they meet the front yard setback.

Mr. Beadle explained that his client's position is that Ms. Dittmer's interpretation of what constitutes a pergola is misplaced. It is clear that the improvements are pergolas, but Ms. Dittmer decided that these did not fall within what she interpreted a garden amenity to be, which is that garden amenities such as a pergola or trellis are purely decorative and cannot be placed on a property unless it is an adjunct to a garden or plants; and cannot be utilized by people or animals. There is nothing in Code to support this interpretation

and it is inconsistent with general laws governing the interpretation of these types of provisions.

He feels that Ms. Dittmer's interpretation that the abutting waterway is not an artificially created canal or stormwater pond, and is in fact, a portion of Crane Creek. This determination is outside the jurisdiction of the City to make and is inconsistent with maps that he and Mr. Conley agreed for consideration by the Board. His client's property is located west of what used to be a tributary of Crane Creek, but the water body, as it exists now, is artificially created, with the junction now being located west of its original junction of Crane Creek. There is a stormwater drain basin and a culvert in this area that discharges stormwater just north of Mr. Needelman's property. Based upon these findings, his client is requesting that the Board reverse the interpretation given by Ms. Dittmer in her letter.

There were no questions from the Board for Mr. Beadle.

Adam Conley, City Attorney for the City of Melbourne, told the Board that he had prepared a presentation to reflect information contained in the staff memo and the interpretation letter drafted in June 2024 that is subject to the appeal.

Mr. Conley referenced Mr. Beadle's question on the scope and authority of the Community Development Director's interpretation and application of the zoning and land development code for the City. He provided three slides containing pertinent information; the first summarizing Section 2-420 of City Code granting the Community Development Director the authority to interpret and make determinations on how the zoning code and land development regulations apply for particular circumstances within the City of Melbourne.

This section instructs the Community Development Director to first consider the plain meaning of Code language, and where the plain meaning may need additional context from other sources of law, it directs the Community Development Director to consider the context and intent, and apply it to those circumstances. This authority includes giving meaning and context to undefined terms to apply those provisions consistent with the plain meaning and intent of City Code.

Section 2-419 lists the duties and powers of the Zoning Board of Adjustment to hear administrative review of the interpretation, and determine whether the Community Development Director is correct and made an appropriate interpretation of City Code, or as Mr. Beadle alleges, whether there are errors where the Board must make a modification to that order.

Mr. Conley provided the Board with an aerial photograph showing the general layout of Mr. Needelman's property. The photograph showed that the property abuts the waterway on the north and east side. Additional photographs from the Brevard County Property Appraiser website were shown highlighting the related accessory structures from several

angles. Mr. Beadle and his client have referred to these structures as ‘pergolas’, and in general, this is the word used to describe these structures

Mr. Conley read the definition of an “accessory structure” shown in Section 2-40 of City Code, and confirmed that the Community Development Director used this definition to determine that the two structures at issue do meet the general definition of an accessory structure.

Mr. Conley stated that Mr. Beadle is asking the Board to consider accessory structures based primarily on their aesthetic look; however, the zoning code considers accessory structures far more based on their use and function. The definition of accessory structures in the zoning code gives numerous examples of different uses and functions, from storage and human habitation to other decorative categories. The zoning code contains these different categories because the development standards of each category differ. The Community Development Director’s determination that these accessory structures were not pergolas was based on their use and function for human use, rather than as a decorative means. A decorative item in an accessory structure may have a lower setback standard, or can placed be in different areas of the property, such as the front or back yard because of their decorative nature, whereas a covered porch or carport needs to meet different setback standards in order to protect neighboring properties.

Mr. Conley referenced Mr. Beadle questioning on the definition of garden amenities within the zoning code, which provides examples of various types of garden amenities in an attempt to give context and meaning in Code. This is a sub-category of accessory structures and is a decorative accessory structure providing support for plants; not for use by people and animals. The zoning code includes a list of examples of garden amenities including the term ‘pergola’. Because the term pergola is particularly listed as a garden amenity, it is the City’s position that the term has a different meaning in the zoning code than it may have in a generic sense. The structures at issue may resemble a pergola, however, because their function and use is different from that, the zoning code must treat them differently. Based on the review of the most likely use and function of the subject structures, the Community Development Director determined that they were not for decorative purposes or a support for plants, but instead for other purposes more akin to a carport and covered porch.

Mr. Conley then moved on to discuss waterfront and waterway setbacks, and the purpose and scope of the Community Development Director’s determination, and Mr. Beadle’s questioning of the City’s jurisdiction. Mr. Conley does not dispute the fact that a formal determination on the nature of waterways for regulatory purposes is not the role of the City, as it may be relevant for the Clean Water Act and St. Johns Water Management District or other regulatory bodies. The purpose and intent of the determination in this case is solely for the purpose of determining the best method and application of the zoning code. The zoning code includes setback standards for accessory structures from waterways and distinguishes between canals and navigable waterways for these

purposes. The setback standard for a canal is 20 feet, where the setback for other navigable waterways is a 35-foot-wide setback. As the subject property abuts a waterway, it is necessary for the Community Development Director to interpret the zoning code and determine which setback standard applies to this property. Consistent with Section 2-420, the Community Development Director considered the nature of the waterway abutting the property in coordination with input from the City Engineer, considered the plain meaning and intent of the zoning code, utilized other sources of law to assist, interpret and give the meaning and context of the zoning code. As seen in the interpretation letter drafted in June, through a process of elimination, Mr. Conley identified that Ms. Dittmer determined that the water abutting the property was best categorized as a navigable portion of Crane Creek for the purposes of applying the zoning code and land development regulations, and not as a canal or stormwater pond. Within the letter, there is discussion between what is a truly artificially created waterway and a natural waterway that may have been dredged or expanded by man-made means. The letter makes the distinguishing point by saying that it is an extension of Crane Creek because there was an historic creek in that location that was modified and dredged at some point.

Mr. Conley then showed several maps, agreed to by both Mr. Beadle and the City, that reflect this point. The maps were vicinity maps from the UF Department of Agriculture taken in 1951 and 1958. Both maps showed a small tributary of Crane Creek east of the subject property, however, the map from 1958 showed that the waterway had been significantly modified, and more resembled the layout as it is today.

In addition, Mr. Conley showed a map obtained from the City's Public Works Department from 1961 showing the general course of Crane Creek and the flow of drainage into it. Importantly an area in black showed the stormwater drainage that is managed and maintained by the City.

He also provided overlay maps created by the City's Engineering Department comparing the historic flow of the tributary and creek from 1951 to its modification and expansion reflected in the 1958 map. These overlays were also added to the maps from the 1950s and the 1961 map provided by the City's Public Works Department.

Mr. Conley also showed a copy of a boundary survey submitted with the building permit application, as set forth in the interpretation letter and the staff memo. Once Code Enforcement observed these accessory structures had been constructed without a permit, the property owner submitted for an after-the fact building permit. This survey shows some of the accessory structures that are at issue, and interestingly, Mr. Conley pointed out that the boundary survey denotes the abutting waterway as "Crane Creek". He also showed section of code that lists the number and size of accessory structures permitted by Code in addition to the setback areas.

Cindy Dittmer, Community Development Director for the City of Melbourne was sworn in by Assistant City Attorney Simmons.

Mr. Conley asked Ms. Dittmer to provide a brief summary of her work and history with the City of Melbourne.

Ms. Dittmer summarized her professional qualifications for the Board and explained that she has been practicing planning for approximately 32 years. She received her certification through the American Institute of Certified Planners (AICP) in 1996, and has been the Community Development Director for the City of Melbourne for 21 years. She confirmed that she had drafted the interpretation letter to Mr. Needelman dated June 26, 2024 that had been included in the Board's agenda packet.

Mr. Conley then asked Ms. Dittmer if it is correct that the City of Melbourne Zoning Code for accessory structures is based on their use and function rather than their aesthetics.

Before Ms. Dittmer was able to answer this question, Mr. Beadle interposed an objection and said that Ms. Dittmer did not have to justify her position for now. As it is his appeal, and he is going to present argument, he felt that it should come from him.

Mr. Kostrzewa asked Mr. Simmons for advice on this, and Mr. Simmons asked Mr. Conley if this was an opening statement or a testimony of his witness.

Mr. Conley answered that he was providing testimony of his witness.

Mr. Beadle stated that it appeared that Mr. Conley was defending his appeal.

Mr. Simmons suggested that as it was Mr. Beadle's appeal, he should be allowed to present his witnesses and whatever evidence he has, then the City can move forward with their defense of their decision. That would be his recommendation in terms of the flow, since it is his appeal.

Mr. Kostrzewa asked for clarification on the proposed procedure, noting that either parties would be able to cross-examine witnesses. He asked at what point cross examination would take place.

Mr. Simmons explained the procedure where Mr. Conley would initially be able to question his witnesses, before allowing Mr. Beadle to cross-examine Mr. Conley's witnesses. Mr. Beadle would not be able to question Mr. Conley, as he is not a witness in this case.

Mr. Kostrzewa then asked if Mr. Beadle had any witnesses, and he replied that he intended to call Ms. Dittmer and Mr. Ennis as witness, although from a procedural standpoint the questions he can ask would be limited to the scope of what Mr. Conley has asked.

Mr. Kostrzewa asked at what point would Mr. Beadle call his witnesses.

Mr. Simmons replied that the Appellant would go first, then after the Appellant rests, the other side would have the opportunity to defend their position. Mr. Beadle is correct in stating that the cross-examination is limited to what has been brought up by the other counsel during their direct examination, however, the Board has broad rules and can decide to allow cross examination on other issues, or restrict questioning to just purely what is said in cross examination.

Mr. Kostrzewa asked if the determination is made by the Board, and Mr. Simmons replied that Mr. Kostrzewa, as Chairman, would make the determination.

Mr. Conley said he was not aware that Mr. Beadle intended to call Ms. Dittmer and Mr. Ennis as witnesses. He was not opposed to a more general procedure and wanted the record to reflect what Mr. Beadle wanted to address as long as it remained within the scope of Mr. Beadle's appeal letter dated August 5th. He did not want to raise new questions during oral argument.

Mr. Kostrzewa asked Mr. Conley if he planned to call Mr. Ennis as a witness. Mr. Conley replied that he would and that he had no objection to Mr. Beadle questioning him following his testimony.

Mr. Beadle confirmed his agreement, and Mr. Conley continued with his questions to Ms. Dittmer.

Mr. Conley asked Ms. Dittmer again if it was accurate to say that the City's zoning code for garden amenities is determined by their use and function, rather than their aesthetics, and if she felt that the two structures in question were best categorized as a carport and covered porch rather than a garden amenity.

Ms. Dittmer confirmed that was correct.

Mr. Conley asked about categorization and application of waterway setbacks and if the City's zoning code for accessory structures distinguished between types of navigable waterways.

Ms. Dittmer replied that it did.

Finally, Mr. Conley asked Ms. Dittmer if it was appropriate to call the abutting waterways part of Crane Creek and not a canal.

Ms. Dittmer responded that was correct.

As Mr. Conley had no further questions for Ms. Dittmer, he called James Ennis, City Engineer for the City of Melbourne.

Mr. Ennis was sworn in by Assistant City Attorney Simmons, and provided the Board with a summary for his professional qualifications and relative experience since qualifying as an Engineer.

Mr. Conley referenced the overlay map exhibits generated by City staff and asked Mr. Ennis if he was consulted on, and assisted Ms. Dittmer in drafting the interpretation letter dated 26 June, 2024 that was sent to the applicant.

Mr. Ennis confirmed that he was consulted, and that the exhibits provided to the Board were created by a CAD Technician from the Engineering Department and were approved by him after being generated.

Mr. Conley asked Mr. Ennis if the aerial maps reflect that a historic natural creek was dredged and modified into the navigable waterway now abutting the subject property.

Mr. Ennis confirmed that was correct.

Finally, Mr. Conley asked Mr. Ennis if his opinion was that the application of the zoning code treating the abutting waterway as a navigable waterway and not a canal was appropriate.

Mr. Ennis confirmed that this was his opinion on this.

Mr. Conley tendered both witness to Mr. Beadle for questioning, and asked to reserve some time for rebuttal and concluding remarks.

Mr. Beadle called Ms. Dittmer back to the lectern.

A discussion ensued between Mr. Beadle and Ms. Dittmer as to whether pergolas are not permitted unless part of a garden amenity; that they cannot be used by humans or animals; and her determination that the water was navigable and considered to be part of Crane Creek.

During this conversation, Ms. Dittmer confirmed that her interpretation was correct and that this had been her interpretation for the last 15 years. The navigability of the waterway was not part of her determination for her to make. The determination was if it is associated with our definition of waterway within the zoning code.

Mr. Beadle asked Ms. Dittmer where the definition of waterways was contained in City Code, and Ms. Dittmer answered that it was contained in Appendix B, Article II, listed alphabetically under the “Waterway” in the Definition Section. She read the definition into record when asked to do so by Mr. Beadle. It read “*Any natural or man-made navigable water body, including but not limited to canals, lakes, rivers, the Atlantic Ocean and the Intercoastal Waterway, but excluding drainage facilities”*.

Mr. Beadle asked how she decided that this was a navigable waterway, as opposed to a canal, and Ms. Dittmer responded that it was a determination that it met the definition of waterway, as mentioned in the interpretation letter, as there is no specific definition of canal within City Code. As Mr. Conley mentioned earlier, staff looks at applicable sources, such as Florida Statute, for their definition of streams and canals.

Mr. Beadle asked if she was familiar with rule that local government ordinances are to be interpreted and construed in the same manner as State statutes, and Ms. Dittmer answered that she did not know that reference.

Mr. Beadle then asked if she was familiar with the “Rules of Construction” that ordinances must be given their plain and obvious meaning, and that it is assumed that the legislative body knows the plain and ordinary meaning of words that are used.

Ms. Dittmer said that she was not sure of the citation Mr. Beadle was referring to.

Mr. Beadle agreed to provide the Board copies of the cases that he was referring to.

He then asked Ms. Dittmer if she was aware of the “Rule of Construction” known as the Supremacy of Text Principle.

Ms. Dittmer responded that she is not an attorney and not familiar with it.

Mr. Beadle clarified that it relates to how ordinances are interpreted, and asked if she is familiar with the “Rule of Construction” that every word employed is to be expounded in its plain, obvious, and common sense unless the context furnishes some ground to control, qualify, or enlarge it.

Ms. Dittmer replied that she is familiar with her interpretation, authority, and City Code.

Mr. Beadle asked if Ms. Dittmer was familiar with the “Rule of Construction” that zoning ordinances are in derogation of private rights of ownership and the common law and are subject to strict construction in favor of the rights of property owners for the unrestricted use of his or her property.

Ms. Dittmer replied that she was unfamiliar with that citation.

Mr. Beadle then asked if she was familiar with the “Rule of Construction” that words or phrases may not be inserted in municipal ordinances in order to express intentions that do not appear, unless it is clear that the omission was inadvertent and must give the ordinance the plain and ordinary meaning of the words employed.

Ms. Dittmer said that she was not familiar with that citation.

He then asked if she was familiar that words take their meaning from the company they keep, e.g. take the words in context and not pick words at random.

Ms. Dittmer replied that this is not a zoning citation that she is familiar with within the City's zoning code.

Mr. Beadle offered to provide Ms. Dittmer with copies of this case law and suggested a break in the meeting so that she could read the documents.

Ms. Dittmer replied that she was unsure what the basis of her understanding case law would be, and Mr. Beadle replied that the case law merely stated what the rules of interpretation are in the Rules of Construction.

A discussion ensued between Mr. Conley and Mr. Beadle as to whether Ms. Dittmer had answered the questions, and Ms. Dittmer stated that she wanted to understand what he was citing. Mr. Beadle clarified that he was citing cases that establish each one of these principles.

Mr. Beadle then noted that Mr. Conley had earlier indicated that conceptually the subject structures in fact would be considered to be pergolas.

Ms. Dittmer disagreed with that statement, adding that it depended on the context, and the context that Mr. Conley actually used was "that at first glance, they may resemble a pergola", but as he presented earlier, the next step is to review the use and function of the structure.

Mr. Beadle said that he did not care how the structure was being used, his question was if she looked at the structure, would she consider it to be a pergola.

Ms. Dittmer replied that she would not consider this to be a pergola due to its size and location. There are other factors to consider other than how the structure is being used. A pergola, arbor or trellis is intended to be something very small in size, that is utilized for plant materials, and at first glance, neither of these structures fit into that category.

Mr. Beadle asked where in Code it stated that the use and function are taken into account, rather than what the structure actually is.

Ms. Dittmer explained that the first step is to determine how a structure is being utilized to determine what a structure is.

Mr. Beadle asked if Code stated that a garden amenity cannot be used by people or animals and Ms. Dittmer confirmed that is how she interprets the Code for garden amenities. She further stated a garden amenity is a very small allowance for a type of an accessory structure that is intended to be utilized as decorative feature and for plant material. It is a section of code that was added in 10-15 years ago for very small garden amenity-type structures that a resident may want to construct, and that is why the outline in Code talks about what the structure is like, e.g. a trellis, an arbor, a pergola and does not infer other structures like porches. "I have to take the actual intent and how it is written in Code. It was not the intent that a pergola, or garden amenity was a broad type

of allowable accessory structure. Code states that I have the ability to interpret where there are things that are undefined".

Mr. Beadle asked where she came up with the definition of a garden amenity, and Ms. Dittmer replied that it was based on the language that is within Code, the section on setbacks of accessory structures; and it is inferred in the description such as pergolas, arbors, and trellises – all things that people put plants on. It is not a type of structure that someone would a place an outdoor dining table or a car under. It intended to be decorative and utilized for plants.

Mr. Beadle asked where she came with the connotation for those structures and she replied that was how she has utilized it within the Code since the section for garden amenities was written. There have been two interpretations written by her in that timeframe, and there has been several cases where this question has arisen.

Mr. Beadle asked where Code states that garden amenities can only be decorative, and Ms. Dittmer answered that it is her interpretation based on the wording in the accessory structure section of Code (G4), and when it talks about garden amenities such as pergolas, arbors and trellises in very limiting words, then she interprets that these are to be utilized for decorative and planting purposes only.

Mr. Beadle asked if she was familiar with the information his office provided to the Board to consider what the definition of a pergola is.

Ms. Dittmer confirmed that she had received this information with the appeal application, however, she maintained these definitions were completely out of context, based upon use and function.

Mr. Beadle commented that Ms. Dittmer's position is that a pergola is not a pergola unless you determine that they meet the purpose for what a garden amenity is.

Ms. Dittmer repeated that a pergola is small in nature in a residential yard and has a decorative or plant-based usage, otherwise they are additional accessory structure expansions.

Mr. Beadle questioned if there was anything in Code that reflected what Ms. Dittmer had just explained, and she answered that City Code allows her to interpret those portions of City Code. She reiterated that she goes by the description of garden amenities such pergolas, arbors and trellises.

Mr. Beadle said her interpretation is irrespective of what historically they may or may not have been; they are what she has decided that they are, and they cannot be used by a human or an animal.

Ms. Dittmer repeated that she has made several interpretations of City Code with the same question on these types of structures based upon use and function.

Mr. Beadle then read out part of the section of Code that gave the definition of an accessory structure. He asked if each of the accessory structures that are named are functionally able to be used by the people that put them on the property, except for garden amenities, which Ms. Dittmer has determined that they cannot be used by humans or animals.

Ms. Dittmer reiterated that the section regarding garden amenities was added for an allowance to be more specific as a type of accessory structure, and to allow a very limited type of garden amenity (pergola, arbor or trellis). The main reason in treating them differently is that because they are small and decorative and they are allowed in a front yard area where most accessory structures are not allowed. This is a limited type of structure, so it is differentiated differently than a gazebo, which may be larger and people would inhabit. There are many accessory structures and they that are not all named.

Mr. Beadle stated again that there is nothing in Code that reflects Ms. Dittmer's determination of what the intent of the Code is.

Ms. Dittmer replied that she interpreted Code relating to garden amenities.

Mr. Beadle asked where it stated in Code that garden amenities can only be used in relation to a garden, but before Ms. Dittmer could respond, Mr. Conley objected to the question, stating that all these questions had been asked multiple times and answered by Ms. Dittmer at this point.

Mr. Beadle then moved on to discuss the issue of the waterway surrounding his client's property. He asked Ms. Dittmer if she agreed that the waterway shown in blue in the photograph was artificially constructed.

Ms. Dittmer agreed that it met the definition of waterway shown within the zoning code.

Mr. Beadle repeated his question, and Ms. Dittmer responded again saying that she only agreed that the natural historic waterway was expanded at some point.

Mr. Beadle then asked if the area in blue shown on the map had been dredged out, and Ms. Dittmer could only answer that the area had been expanded by whatever means used to enlarge a waterway in the mid to late 1950s. Mr. Beadle pressed the point he was making as to whether the area had been artificially created, and Ms. Dittmer responded that she was unable to answer that as she was not there in the mid-to late-1950s. She could only state that at some point in time, it was enlarged from the original tributary. It is larger than what was shown on the 1951 photo, but she could not say that as a statement of fact. She did agree with Mr. Beadle's comment that the outfall entered Crane Creek at a slightly different point.

A discussion ensued between Mr. Beadle and Ms. Dittmer as to whether she relied on any other parameters to determine if the area shown in blue constituted a navigable

waterway versus a canal. Ms. Dittmer confirmed that she utilized the different maps shown in the exhibits, as well as the City's stormwater map from 1961. He asked how the historic maps allowed her to make the decision that it was a navigable waterway and not a canal, and Ms. Dittmer replied that this was a continuous waterway that became part of Crane Creek in the early 1950s.

Mr. Beadle again asked how Ms. Dittmer knew it was a navigable waterway prior to the expansion shown in blue and she replied that it was a historic, naturally occurring portion of Crane Creek.

Mr. Beadle disagreed saying that this did not make it a navigable waterway.

Mr. Conley interjected at this point and asked how the status of the creek in the 1950s was relevant to the proceedings and the interpretation of what it is now.

The FDEP permit acquired by Mr. Needelman was then discussed.

Mr. Beadle asked Ms. Dittmer if she was familiar with the FDEP permit obtained by his client in 2015 showing the waterway as a canal.

Ms. Dittmer confirmed that she had seen the permit, however, the map was a printout from the Brevard County Property Appraiser website with a handwritten annotation of the word "canal". When compared to other surveys of the property, it appeared that the words "Crane Creek" had been removed from the map. She did not know what was attached to the actual permit; she was only in receipt of the document had been provided to staff.

Mr. Beadle stated that Mr. Needelman's property is a single-family residential property. He referenced Appendix B, Article VII, Section 1, subsection E7 of City Code regarding accessory structures that stated accessory structures should meet the setbacks from shoreline or mean or high-water line. He asked if a canal is a navigable waterway because as this subsection is written, it infers a canal is also a navigable water.

Ms. Dittmer agreed, adding this is consistent with the waterway definition.

Mr. Beadle asked how she would distinguish between a navigable waterway, and a canal when a canal is a navigable waterway.

Ms. Dittmer replied that as referenced in the interpretation letter, this is where she referred to Florida Statutes and a definition that Florida Statues outlined (FS 373.019, Paragraph 20). She read this paragraph into records.

Finally, Mr. Beadle asked if the fact that this had been re-aligned or widened, meant this fell into the definition of a stream and not a canal.

Ms. Dittmer replied that was correct.

Mr. Beadle confirmed that he had no further questions for Ms. Dittmer.

Mr. Conley had one last question for Ms. Dittmer. He asked if, in her role as Community Development Director, and as per Section 2-420, was her interpretation and determination about the terms ‘garden amenity’ and ‘pergola’ an attempt to give context and meaning to the Zoning Code as adopted by City Council.

Ms. Dittmer confirmed that was correct.

Mr. Beadle then questioned Mr. Ennis, asking him if he had an independent determination on what constitutes a canal.

Mr. Ennis replied that it is a water course that is installed, and is not natural; not dug out, and did not exist before the instruction of that particular feature occurred. In the case of a man-made canal, in this application there would not be any type of water-course or water feature that was connected to the overall system.

Mr. Beadle asked for clarification of the last phrase.

Mr. Ennis clarified that in this case, there was a natural drainage-way that did connect to Crane Creek. The stream that came through the area before is evidenced in the darker black on the map where it comes into the improved section, and is evidenced by the contours on the map. In this case, he would not consider this a man-made canal because the stream was there before any alterations. It may have been improved, straightened, widened, and material dredged to improve navigability and depth for larger vessels, but it was originally a natural feature before construction activities widened it. A man-made canal would be similar to what is seen on the Barrier Island, in a residential subdivision where a water system was specifically constructed to access properties. There was no pre-existing stream or creek that was used before the improvement occurred.

Discussion then turned to one of the topographic maps, and Mr. Beadle questioned Mr. Ennis about the black area to the north west of the creek. Mr. Ennis replied that this is the natural water-course and drainage basin where rainfall will condense and make its way to an outfall. Improvements were made over time when the street was constructed, but historically, water has flowed through this stream since before this topographic map was generated. The receiving body for the Bignonia Creek is Crane Creek basin with ultimate outfall to the lagoon.

Mr. Beadle asked if this area outlined in black discharges into the water body north of Mr. Needelman’s property, and Mr. Ennis replied that the water course has always discharged there, and the area outlined in blue only reflects areas that were widened or improved, as shown in the topographic bars in this map. A culvert located to the west was discussed, and Mr. Ennis stated that although he could not speak to the original time when this was placed, the culvert would have been installed with the original roadway installation.

Mr. Beadle asked Mr. Ennis, in his opinion, whether the waterway to the east of the property is a man-made canal, and Mr. Ennis answered that it is not; it is a widened, natural waterway that has always conveyed through that area. It may have been straightened or improved, which is typically done with many waterways where channels are dredged to maintain shipping lanes, or to remove sandbars. Just because soil removal occurred, it does not change the nature of the waterway itself.

Mr. Beadle stated that notwithstanding the fact that in this particular case, the mouth of the canal or waterway is different than where it originally discharged into Crane Creek.

Mr. Ennis asked for clarification on this question.

Mr. Beadle said that his interpretation that it is not a canal is notwithstanding the fact that the area in which the current waterway into Crane Creek is in a different location to what it was prior to it being modified.

Mr. Ennis confirmed that Code is set up to differentiate between a natural waterway and a man-made canal.

Mr. Beadle asked if there is a definition for a man-made canal in City Code, and Mr. Ennis identified that there is not.

As Mr. Beadle had no further questions for Mr. Ennis, Mr. Kostrzewa asked the Board if they had any further questions.

Ms. Cope stated that she was previously a Senior Scientist at the St. John's River Water Management District for 23 years, and as a Senior Scientist, she performed site visits, permit reviews, enforcement, and compliance. These duties required a review of historic aerials, especially with respect to enforcement cases, as she had to look at what was there before any dredging occurred. With respect to her opinion on this water body, she believes that it was a historic tributary to Crane Creek, and when looking at the aerials provided, it is narrower upstream, as tributaries are. Starting as a wetland (a low or depression area), and draining naturally through a tributary, going down to a larger water body. Over time, it appears that this tributary was altered by man. She recalled that in the past, she had spoken to the Army Corp of Engineers about what a navigable waterway was, and was told that "if a pencil floats in it, it is navigable". Her opinion is that it was navigable even if only accessible by a canoe, and now it is an altered natural tributary.

Ms. Cope noted that Ms. Dittmer's letter referenced that Mr. Beadle thought that this was part of the City's stormwater system.

Mr. Beadle explained that he has since found the definition of that in City Code and had not disputed this fact because of that.

Ms. Maynard asked if there was ever an intent by Mr. Needelman to enclose the structures, and Mr. Beadle replied that he believed not, but he had not had that conversation with his client.

Ms. Cope asked Staff if a pergola with pavers underneath with a table and chairs would be subject to the requirements for accessory structure square footage.

Ms. Dittmer confirmed that it would if it is being used as a living area. If it was just a wooden structure with vines, with nobody sitting under it, it would be a garden amenity and not count towards the accessory structure square footage for the property.

Mr. Herbert referred to the boundary survey, and asked when it was dated.

Mr. Conley confirmed that the one in the agenda packet is from Campbell Surveying and has a stated date of June 24, 2014.

Mr. Herbert then asked to clarify if City Code shows a definition for roofing.

Ms. Dittmer replied different structures have some mention of roofs throughout them. She noted that the after-the-fact permit submitted for these two structures was proposed with solar panels on them.

Mr. Kostrzewa noted that both packages referenced solar panels. He asked if there are solar panels on the structures.

Ms. Dittmer explained that Code Enforcement cited Mr. Needelman for building structures without permits. When Mr. Needelman’s contractor submitted an after-the-fact permit application to the City for the structures, the submitted plans showed a pergola structure with solar panels on top.

Mr. Beadle stated that this was not what was being discussed today and it will be addressed later. This appeal establishes the basic ground rules for moving forward. Obviously, if there is an issue regarding solar panels, this will be discussed at a later date.

Mr. Kostrzewa asked if the presence of solar panels, either physically or not, entered into the City’s decision as to whether this was a garden amenity or not.

Mr. Conley agreed with Mr. Beadle that this is hypothetical at this point. The interpretation letter stands without regard to whether or not there were solar panels and whether or not the solar panels were, or will be, placed on the structure in the future.

Mr. Kostrzewa noted that the two issues seem to be if this is a garden amenity or a pergola; the nature of waterway and the relevant setbacks. He asked Mr. Beadle if he needed both rulings to go his way as if they are not accessory structures, they are not

subject to setbacks. If the Board decided that the City had erred, would the structures be allowed to remain.

Mr. Beadle said there are other issues involved, which is why he is trying to keep this limited to two issues, and not have the Board have to consider other issues that may come further down the road. The idea of what the setbacks are will dictate one aspect of what they are dealing with, and whether or not these are allowable pergolas or garden amenities will address a lot of other issues about the number of structures and square footage etc. These are basic ground rules that they are trying to deal with and a lot of the other issues will flow from that.

Mr. Conley agreed with Mr. Beadle that there are numerous cascading impacts that will come from a determination on whether or not the interpretation letter is correct, and these are beyond the scope of what is being presented here.

Mr. Kostrzewa referenced the setbacks for water-bodies, and asked how those are determined.

Mr. Conley confirmed that the definition and the term describes the shoreline or mean high-water line, so it would be based on the survey and where that shoreline or mean high-water line is located. This is located in Appendix B, Article VII, Section 1, Sub-section E7 that Mr. Beadle referenced during his presentation.

Mr. Beadle agreed that there is no issue where this line should be.

Finally, Mr. Kostrzewa asked if artificial waterways can be navigable, and Mr. Conley replied that they could, and that is what the Community Development Director determined the meaning of the word canal was within the Code. There is a general definition in Appendix B, Article II for a waterway and it generally describes multiple sub-categories of navigable waterways. A man-made canal can be a navigable waterway and that is why the Code language in that sub-section on the setback standards refers to both canals and other navigable waterways.

Mr. Beadle said that on some level he agreed with Mr. Conley, which is why he asked how staff distinguished what is a navigable waterway.

Mr. Kostrzewa noted that the photographs of the structures provided to the Board showed bare wooden structures.

Mr. Beadle replied that he could not speak to that – he only knows what is shown in the photographs.

As there were no further questions from the Board, Mr. Simmons asked for closing arguments from Mr. Beadle, followed by Mr. Conley with a rebuttal by Mr. Beadle.

Mr. Beadle stated that based on information provided, his client, Mr. Needelman, is requesting that the decision of the building official be reversed. The structures are clearly pergolas, as the term is generally understood. The real issue regarding the improvements is the manner in which the City reached its conclusion. It's his opinion that the City turned the Rules of Construction on its head. Correctly utilizing the Rules of Statutory Construction, the term garden amenity is illustrated and modified by the use of examples such as pergola, arbor and trellis, not that a pergola, arbors and trellis are modified by the term garden amenity. There is nothing in the Code that authorizes staff to add provisions to a duly enacted ordinance by City Council. Here, staff is attempting to make what is included in a list of functional items included in the definition of accessory structure into decorative items; in other words, the list in accessory structures are functional items and staff are now saying that as to those garden amenities, staff are pulling those out and treating them differently to the structures that are listed, and they can only be decorative items. Staff also included a requirement that any garden amenity be part of a garden or plant material. There is nothing in City Code to support those additional requirements. There is also nothing in Code to support the requirement that a garden amenity not be used by humans or animals. Again, the interpretation is supposed to be based solely upon the words that are used in the Code, and not added language.

Mr. Beadle continued, stating that the issue surrounding the water to the east and north of Mr. Needelman's property and whether such waters constitute navigable waterways. It could be argued that the City has the jurisdiction to make the determination, but the City provides no definition of what constitutes a navigable waters or canal. Ms. Dittmer made that decision at her absolute discretion. It appears that she did nothing as far as considering other governmental agencies that do have jurisdiction to make that determination. The conclusion in Ms. Dittmer's letter that the waters are not artificial is also incorrect as they were not historically part of Crane Creek and were in fact dredged, therefore, they are a canal and not a navigable water as she interpreted. Also, he enquired of Ms. Dittmer early on in testimony as to whether she is familiar with the Rules of Construction, and she indicated that she was not familiar with many of them. The terms in question are not defined anywhere in the City Code, other than a partial list of examples of what constitutes a garden amenity. The terms are supposed to be given their plain meaning and strict construction and board interpretation in favor of property owners is the rule for their ability for unrestricted use for their property. They are not allowed to add terms that are otherwise not in the Code, and based upon the forgoing, Mr. Needelman is requesting that the Board reverse this determination in Ms. Dittmer's opinion letter in both regards.

Mr. Kostrzewa asked if the examples of case law referenced by Mr. Beadle needed to be submitted to the Recording Secretary and Mr. Conley replied that he had no objection to them being submitted and would address them in his closing statement.

Mr. Conley said that generally, on this item, the rules of construction that are guiding the Community Development Director in interpreting the zoning code and land development

regulations are set forth in Section 2-430 of Code, that instruct the Community Development Director to first consider the plain meaning of the text and where additional context is necessary to achieve the true intent of the City Code. Some of the references that Mr. Beadle made are more appropriate for State Law and other things that do not necessarily apply in this circumstance. He also noted that it's the City's position that Ms. Dittmer, in her interpretation letter, did not violate any of these Rules of Construction; where the plain meaning made sense and the plain meaning was used in the interpretation letter, and where additional context was necessary because a term was undefined or more importantly because there are multiple different terms within the Code that have different meanings, that those differing and various meanings were used and utilized to distinguish between different things. Mr. Beadle is continuing to ask this Board to consider the broadest and most generic phrasing and terminology of pergola that he can muster up, and as Ms. Dittmer said, and as set forth in the interpretation letter, the term of 'pergola' is specifically used within the zoning code as an example of a garden amenity. It is within that context that a pergola is limited to that context of garden amenity. The moment you start to look at something that may look aesthetically like a pergola, but is used and functions in a different manner, such as a covered porch, or as a carport, its aesthetics at this point are irrelevant and the function and use is what guides the application of the zoning code and the types of accessory structure for the purposes of interpreting and applying zoning code. It is through that method, process, and scope of interpretation, that Ms. Dittmer determined that the use and function of these structures would not be considered pergolas, and as Ms. Dittmer said, based on their size, their location on the property and on the lack of context for them being garden amenities. The Community Development Director is authorized and instructed to interpret the zoning code pursuant to City Code Section 2-420 when determining how to apply it to certain circumstances, and particular properties within the City. The Community Development Director's determination that these two structures are not garden amenities meets the plain meaning and intent of City Code. City Code is structured and set up to consider the use and function of the structures and accessory structures when determining their category and the application of all standards in the zoning code in looking at these structures, their function, their use and the context. The Community Development Director said that, regardless of their aesthetics, their use and function is for something other than a garden amenity, and therefore they do not meet the terminology of garden amenity within the zoning code.

Mr. Conley further stated the Community Development Director's determination that the subject property abuts a navigable waterway other than a canal also meets the plain meaning and intent of the zoning code. The zoning code distinguishes between canal and other navigable waterway and does not define any of those terms and so, using other sources of law as a guide to give meaning and context to the language of the zoning code, the Community Development Director, with the assistance of the City Engineer, determined that the subject waterway in its current form, is better and more appropriately categorized as a navigable waterway and an extension of Crane Creek or

some other navigable waterway and not as a canal, as the term is used within the zoning code. Mr. Beadle did make reference to some of the materials in his packet.

With regard to the FDEP permit that he mentioned, Mr. Conley asked the Board to read the first page of this as it notes that a determination by FDEP was made for an exemption to a permit, and it states very clearly that the issuance of the letter and the determination of FDEP was based upon the representations submitted within the permit. FDEP did not make a formal determination that the area is a canal versus some other navigable waterway. It simply said that the information provided was taken at face value and a determination was made on the information that had been given.

Finally, Mr. Conley said that the City requests that the Board affirm the interpretation letter in its entirety.

Mr. Beadle confirmed that he had nothing further to add following Mr. Conley's closing argument. He provided the Board's Recording Secretary with copies of the case law that he referenced earlier in the meeting.

Mr. Kostrzewa opened the floor for public comment. There was no public comment.

Mr. Simmons confirmed that the next step would be to address any further questions that the Board had after hearing the closing arguments. Following this the Board will enter into discussion on this item.

There were no further questions from the Board.

Mr. Kostrzewa asked if there was any correspondence on this item, and Mr. Conley replied that there had been no correspondence from interested third parties on this item.

Mr. Kostrzewa asked for any further discussion or a motion on the item. He reminded the Board that their option would be to affirm or reject the City's decision and state that the City made an error.

Mr. Simmons told the Board that there is also a third option; where the Board can craft their own decision. An acceptance would require four votes, and a rejection would require five votes.

<u>Moved Cope/Jackson that the Community Development Director correctly interpreted the true intent of Appendix B of City Code to the subject property in her interpretation letter.</u>

Mr. Herbert asked if it was possible for the Board to vote on each issue separately. Mr. Simmons confirmed that this was possible, however, as there was a motion on the floor, Ms. Cope would have to withdraw her motion in order to do this.

Mr. Kostrzewa asked Ms. Cope how she wished to proceed.

Moved Copy/Jackson that, if it pleased the Board, she could withdraw her motion in order for the Board to vote on each issue separately.

Mr. Kostrzewa asked for a substitute motion from the Board. He clarified that the motion would be to affirm or reject the CDDs decision on the accessory structure ruling.

Mr. Conley asked if there is a multiple step, he asked that it all be essentially part of one motion. An affirmance in part as to whatever it is the Board wants to affirm and then a finding or error and a statement of what the correct interpretation should be as a Part 1 and Part 2.

Mr. Simmons agreed that the motion could be made that way but the Board would have to state specifically what the issue is that the Board is finding each issue.

Mr. Kostrzewa asked for clarification on the correct procedure when a motion is made and fails, and Mr. Simmons confirmed that a substitute motion can subsequently be made.

Mr. Kostrzewa suggested that the maker and seconder move ahead with the original motion for the Board to vote on and make a substitute motion at that point.

Moved Cope/Jackson that the Board find that the Community Development Director correctly interpreted and applied the true intent of Appendix B of City Code to the subject property.

There were no further questions from the Board, so a roll call vote was taken as follows:

Aye: Jackson, Shah, Cope, Bregard, Kostrzewa, Cass

Nay: Herbert

Ms. Maynard was not able to vote on this item.

Mr. Kostrzewa confirmed that the vote was six to one so the City's decision was affirmed by the Board, so the issue is concluded.

C. Future/Additional Business

Mr. Higgins explained that is unlikely that there will be a meeting in October as no applications had been received. He will send out a notice to confirm this at a later date.

Mr. Jackson asked if there would be a small Board reception event this year, and Mr. Conley confirmed that there will be a small reception event prior to City Council on October 22.

Mr. Herbert commented that he always enjoyed the Board reception and asked that the larger reception be reconsidered.

D. Adjournment

As there was no further business to discuss, the meeting was closed at 8.35 pm.

Samantha Buck, Recording Secretary – September 30, 2024

Approved by Zoning Board of Adjustment: _____

MEMORANDUM

TO: Zoning Board of Adjustment

THRU: Cheryl A. Dean, Planning Manager, AICP

FROM: Jeffrey Higgins, Planner, AICP

RE: **VAR2025-0001 / ALEXANDER WASSUTA / 792 IROQUOIS AVE.**

DATE: June 19, 2025

City of Melbourne
Community Development Department

REQUEST/CODE REFERENCE
In a R-1A zoning district, the following variance is requested:

Variance of 4 ft. 7 in. to allow a 2 ft. 11 in. side yard setback.
Part III, Appendix B, Article V, Section 2 (D) Table 2A requires a 7.5 ft. side setback.

SUMMARY: The applicant requests a side yard setback reduction for an addition along the north side of their garage. The existing single-family residential dwelling was originally constructed in 1967. Around 2005, an addition was constructed along the north side of the garage. There's no permit identifying the city allowed an addition for this house; particularly one that does not meet the 7.5 ft. side yard setback requirement.

FACTORS TO CONSIDER:

1. **What are the special conditions and circumstances that exist which are peculiar to the land, structure, or building involved that are not applicable to other lands, buildings, or structures in the same zoning district?**

   - There are no special circumstances or conditions along the side and front property lines.
   - Compliance with building setbacks can be measured from those straight property lines.

2. **Will the literal interpretation of the provisions of the zoning ordinance deprive the applicant of rights commonly enjoyed by other properties in the same zoning district resulting in an unnecessary and undue hardship?**

   - The original house footprint was compliant to a 7.5 ft. side yard setback, when the house was constructed under the City of Eau Gallie's R1C zoning district and remained compliant to a 7.5 ft. side yard setback requirement when the subject property become part of the City of Melbourne's R-1A zoning district until the building addition around 2005.
   - There are several areas for additions to the house that could meet setback requirements within the developed conditions of the subject property.
   - There's no history of side setback variances requested/granted in the Indianhead subdivision.

3. **Are there special conditions and circumstances resulting from actions of the applicant?**

   - The applicant constructed this addition without building permit approval.
   - A building permit would not have been issued for a non-compliant structure.
   - There are code compliant areas available for additions to this house.

4. **Will granting the variances requested herein confer on the applicant any special privilege that is denied by the zoning ordinance to other lands, structures, or buildings in the same zoning district?**
   - Yes, granting this setback variance will be a special privilege particularly when code compliant areas to expand are available within the subject property.

5. **Will the variances being requested be the minimum variance that will make possible the reasonable use of the subject land, structure, or building?**

   - No, a variance is not necessary to build code compliant additions to this house.

6. **Will granting the variances requested be in harmony with the general intent and purpose of the zoning ordinance and not be injurious to the neighborhood or otherwise detrimental to the public welfare?**

   - There is no known hardship identified justifying granting this variance.
   - There is discontent with this existing structure bothering the abutting neighbor to the north.

RECOMMENDATION: Staff requests **Denial of VAR2025-0001,** based on not meeting the six city code factors for granting a variance.