

STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW COURT DOCKET NO. CUM-25-421

PETER L. MURRAY, ET AL.

Plaintiffs/Appellants

v.

CITY OF PORTLAND, ET AL.

Defendants/Appellees

ON APPEAL FROM THE
CUMBERLAND COUNTY SUPERIOR COURT

BRIEF OF PLAINTIFFS/APPELLANTS

Michael D. Traister, Esq.
MURRAY, PLUMB & MURRAY
75 Pearl Street, P.O. Box 9785
Portland, Maine 04104-5085

Counsel for Plaintiffs/Appellants Peter L.
Murray, Deborah D. Murray, Carol Connor,
Michael Hoover, and Jean McManamy

TABLE OF CONTENTS

Table of Authorities	4
Introduction	6
Statement of Facts and Procedural History.....	7
A. The Project	7
B. Procedural History.....	14
Standard of Review	18
Issues Presented for Review	19
Argument.....	21
I. The Board Erroneously Deferred to the Zoning Administrator in Construing Code Terms Relating to the Measurement of Height and Side Yard Setbacks.....	21
II. The Planning Board Erred in Construing the term ‘Grade’ in Portland City Code § 14-47 to Include an Elevated Artificial Patio Surface to be Created by Walls Around the Building	25
A. The Term “Grade,” Fairly Read, Means the Existing Elevation of the Project Site at Time of Application.....	25
B. The Special Definition of “Predevelopment Grade” in Code § 14-47 Does Not Mean that “Grade” Should be Construed as an Artificial Surface to be Created by Construction of the Project	26
C. The Board’s Construction of the Term “Grade” Creates an Illogical Result Contrary to the Regulatory Purpose of the Ordinance.....	27

III.	The Board Erred in Exempting Constructed Outer Walls up to 14 Feet in Height Capped by Patios from the Definition of ‘Structure’ for Setback Purposes	29
IV.	The Board Failed to Comply with Code §14-526(d)(5)(b) in Considering the Compatibility of the Project with the Adjacent Historic District	35
	A. The Board Was Not Furnished with the Required “Written Analysis” by Historic Preservation Staff Prior to Deliberating the Historic Compatibility of the Project	35
	B. The Board’s Decision was Improperly Influenced by a Board Member’s Intentional Off-the-Record Views of the Neighborhood.....	37
	C. The Joint Memo Given the Board after it had Already Decided Does Not Satisfy the Code Requirement of a Written Analysis by Historic Preservation Staff to “Aid the Planning Board in Its Deliberations.”	39
	D. The Board Did Not Properly Apply the Criteria in the Ordinance	40
	Conclusion	45

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>21 Seabran, LLC v. Town of Naples</i> , 2017 ME 3, 153 A.3d 113	19
<i>Banks v. Maine RSA No. 1</i> , 1998 ME 272	28, 32, 33
<i>Brooking v. Maine Employment Sec. Comm'n</i> , 449 A.2d 1116 (Me. 1982).....	38
<i>Carryl v. Department of Corrections</i> , 2019 ME 114.....	18
<i>City of Biddeford v. Adams</i> , 1999 ME 49	38
<i>DeSomma v. Town of Casco</i> , 2000 ME 113, 755 A.2d 485	26
<i>Dickau v. Vt. Mutual Insurance Co.</i> , 2014 ME 158, 107 A. 3d 621	28
<i>Francis Small Heritage Trust, Inc. v. Town of Limington</i> , 2014 ME 102, 98 A.3d 1012.....	18
<i>Gerald v. Town of York</i> , 589 A.2d 1272	34
<i>Inhabitants of Boothbay v. Russell</i> , 410 A.2d 554 (Me. 1980)	32
<i>Lane Const. Corp. v. Town of Washington</i> , 2007 ME 31, 916 A.2d 973	19
<i>Murray, et al. v. City of Portland et al.</i> , 2023 ME 57).....	15
<i>Odiorne Lane Solar, LLC v. Town of Eliot</i> , 2023 ME 67, 304 A.3d 253.....	18
<i>Portland Reg'l Chamber of Com. v. City of Portland</i> , 2021 ME 34, 253 A.3d 586.....	19, 25
<i>Portland Sand & Gravel, Inc. v. Town of Gray</i> , 663 A.2d 41 (Me. 1995).....	36
<i>Tomasino v. Town of Casco</i> , 2020 ME 96.....	18

Tominsky v. Ogunquit, 2023 ME 30, 294 A.3d 14219

Town of Vassalboro v. Barnett, 2011 ME 21, 13 A.3d 784 19, 25

Winter v. Town of Mt. Desert, 2009 ME 66, 974 A.2d 903.....26

Statutes

5 M.R.S.A. § 9059(4) (1989).....38

Other Authorities

Webster’s New World Dictionary (4th ed. 2002).....26

INTRODUCTION

This appeal presents the question of whether the Portland Planning Board (“the Board”) in reviewing a site plan of a condominium project on the edge of Portland’s Munjoy Hill Historic District (“the Project”), correctly interpreted and applied building height measurement and side lot setback provisions of the Portland City Code and whether the Board properly complied with the requirements of the Code relating to the effect of the Project on the adjacent Munjoy Hill Historic District. For the reasons set forth below, Appellants submit 1) that the Board’s interpretation of the building height measurement requirement in the Code was erroneous, 2) that the Board incorrectly construed the term “structure” for purpose of the Code’s setback requirements, and 3) that the Board initially acted without obtaining a required historic preservation analysis and that its subsequent efforts to cure this defect were improper and unavailing.

The judgment below should be vacated, and the subject application should be remanded to the Portland Planning Board with a direction that the application should be denied.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. The Project.

The Project is a four/five story, flat-roofed, 29,200-square-foot residential block consisting of a ground level parking deck surmounted by four stories of condominiums, 12 units in all. Various elements of the structure would completely cover the entire two-lot building site.



Figure 1. December 7, 2021 version of Sheet A-2.2 (“Montreal St. Elevation”). AR 106.

The proposed building site is an amalgamation of two small lots located in a neighborhood characterized by 1-2 story wood-frame single-family homes, built during the late 19th century when Munjoy Hill was a vibrant working-class residential community. Much of the neighborhood is protected by the Munjoy Hill

Historic District, the edge of which is directly across Willis Street from the Project site.

The houses in the Historic District within 100 feet of the Project site are all typical dwellings of this modest scale. Figure 2 below (App. 154, 2nd Supp. AR 197) shows the row of houses directly across Willis Street from the Project and the house on the corner of Willis and Montreal. As can be readily seen, they are all simple frame structures of a similar 1- to 2-story scale that betokens their origin as 19th century homes for Portland’s working-class residents.





42 Montreal St.



41 Montreal St. 20 Willis St. 22 Willis St. 24 Willis St. 28 Willis St.



12 Montreal St.

Figure 2: Aerial view of Project site and photographs of homes in the immediate vicinity of the Project Site. The Project site is outlined in blue and the white line is scaled at 100 feet from the boundaries of the Project Site. See App. 154 (2nd Supp. AR 197).

The Project site slopes gently downward to the northeast from its highest point on the corner of Willis and Montreal Streets. Going clockwise around the four corners of the building footprint, the site elevations range from 124 feet above datum at the northeasterly corner, to 128.5' above datum at the southeasterly corner, to 138' above datum at the southwesterly corner, to 134' above datum at the northwesterly corner. The difference in site elevation from the northwest to the northeast corner of the proposed building envelope is 14 feet. See AR 727 "Utilities Plan" with indicated elevations. As can be seen from the elevation drawings (*E.g.* AR 131, 724 (full size)), the difference in elevation between the

Willis Street end of the building and the other end on Montreal Street is a full story and permits entry into the ground floor garage at grade.

The Project features a set of exterior concrete, stone and wood exterior walls capped by stone patios surrounding at least three sides of the inner foundation walls of the condominium block and sited right on the property lines between the Project and its neighbor to the northwest and right along Montreal Street. *See* AR 116, App. 157. The walls, stepped in places, would have heights ranging from 4 feet to 14 feet above actual ground level along the boundary with the Willis Street neighbor and 2 feet to 11 feet above actual ground level along the Montreal Street sidewalk.

The Developer proposes to introduce earth between these outer walls and the foundation walls of the condominium proper to establish an elevated “patio amenity,” surrounding the core building at a level ranging from 2 to 14 feet above the existing grade of the site and the neighboring land or sidewalk as the case would be.

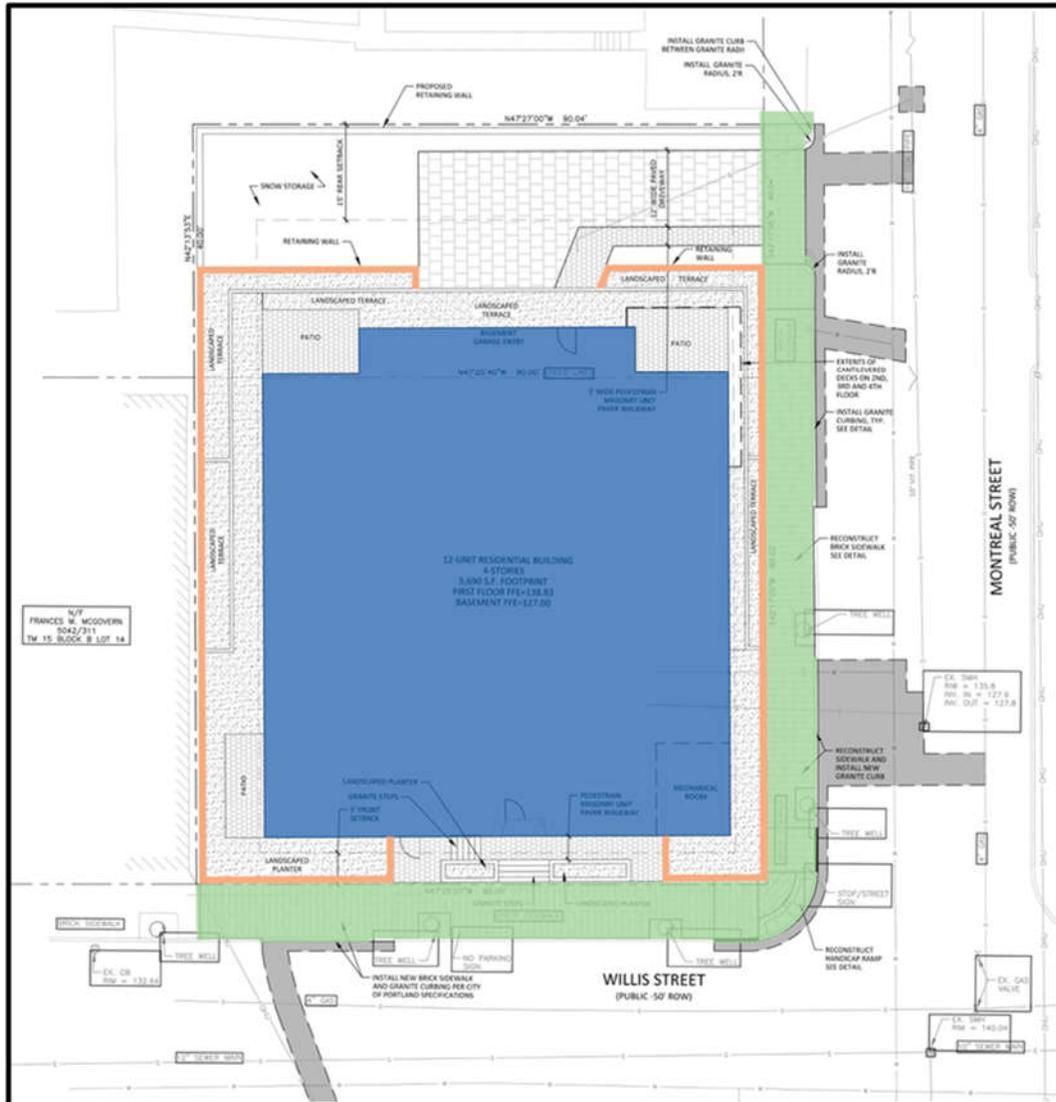


Figure 3: December 3, 2021 version of plan sheet C1.0 (“Proposed Site Plan”). AR. 113. The plan sheet has been cropped and a color overlay has been superimposed thereon to draw the Court’s attention to the enclosed building footprint itself (in blue), the surrounding elevated patio amenities (in orange) and the sidewalks on the Willis Street and Montreal Street sides of the subject property (in green).

The Project site is located within the Munjoy Hill Neighborhood Conservation Overlay District (“MHNCOD”). Code §14-140.5, AR 482-492, App. 50-60. The MHNCOD permits a maximum height for a building of three or more units of no more than 45 feet above grade. Code §14-140.5(c), AR 483-484, App. 51-52. The allowable height of a building on a sloping site is measured from

the average of the grade elevations at the four corners of the foundation of the proposed building, or at various locations around the perimeter of the foundation. Averaging the existing grade elevations at the four corners of the foundation of the building proposed for 19 Willis Street, one gets $124' + 128.5' + 138' + 134' = 524.5' / 4 = 131.125'$ above datum as the starting point. Adding the 45 feet allowed by the Code would result in a maximum building height of 176.125' above datum. Such a maximum building height would have permitted the comfortable construction of a four-story condominium block (one deck of parking plus three residential stories above) on the subject site.

Instead of measuring from the grade of the site around the structure, the Developer proposes to measure the height of the future building from the elevated patios that would be created by filling the space between the foundation and external walls to be built on the property lines surrounding the building rising to 138' above datum. See "Average Grade Calculation," AR 116; App. 157. This stratagem would raise the claimed allowable height of the building from 176.125' above datum to 183.0' above datum, just enough to fit in a fourth story of residences above the parking deck.

At the corner of Willis and Montreal Streets, the top of the proposed edifice would be 44.5 feet above the proposed surrounding "terrace," but 46.5 feet above the grade of that corner of the site at the time of application. At the northeasterly

corner of the building, the structure would rise some 58 feet above the grade of the site itself and the surrounding natural surfaces. The 2- to 14-foot-high outer walls supporting the artificial patio terraces would be located right on the property and street lines without any kind of setback.

The scale of the Project and the Developer's evident "creativity" with respect to building height and setbacks aroused controversy and opposition within the neighborhood from the beginning. Some 15 interested parties, mainly neighbors, along with the Munjoy Hill Neighborhood Organization filed written statements in opposition to the Project. *See* AR 335-382. Five of the opponents testified via Zoom at the December 14, 2021 public hearing. AR 753-758, 760-762, 764-765.

The grounds for the opposition were the Project's extreme lack of compatibility with the buildings in the adjacent historic neighborhood and its failure to observe the height and setback restrictions in the MHNCOD. Several parties also pointed out that the Project could not be approved until and unless the Planning Board first received and considered a legally required "written analysis" from the staff of the Portland Historic Preservation Commission on the Project's effect on the neighboring Historic District. AR 357, 375, 760-761. The Director of Greater Portland Landmarks expressed concern "that the Planning Board and the

public might not yet have a complete analysis that would warrant approval this evening....” AR 763.

At the December 14, 2021 hearing, the Planning Board was told that the Zoning Administrator was of the view that the maximum building height could be measured from the raised patios to be constructed for the Project and that the walls supporting the patios should not be considered “structures” for purposes of side yard and side street setback requirements. Several Planning Board members stated that they were relying on the Zoning Administrator’s construction of the relevant Code provisions in approving the project. *E.g.*, AR 767-768, 774.

The Board also accepted the staff’s statement that the Board had received the required historic preservation input through participation of historic preservation staff at a staff planning meeting several months before the Project came before the Planning Board. AR 773-774. The Project was initially approved as submitted on the day of the hearing (the “Approval”). *See* AR 267-271 for the Planning Board’s written decision dated December 17, 2021.

B. Procedural History

Plaintiffs timely appealed the Planning Board approval under Rule 80B in Docket AP-22-03. On this first appeal, the Superior Court agreed with the Developer and the Planning Board. *See* Order dated August 1, 2022 in Docket No. AP-22-03.

On appeal of the Superior Court decision, this Court did not reach the substantive issues raised by the appeal but ruled that the Planning Board had not adopted appropriate findings on which its decision could be reviewed. It remanded the case to the Planning Board for further consideration and an opportunity to make the necessary findings. *Murray, et al. v. City of Portland et al.*, 2023 ME 57 (August 22, 2023), ¶ 15.

On initial remand, the sole additional information the Planning Board considered was a planning staff report. *See* Supp. AR 1-17. At a meeting on November 28, 2023, the Board members were told once again that the Zoning Administrator had construed the relevant Code sections to allow the Project as presented and several members stated that they felt bound by the Zoning Administrator’s construction. Supp. AR 72-80, App. 88-96. A majority of the Board members voted to reapprove the Project as originally presented.¹

On Plaintiffs’ appeal from the December 12, 2023 approval, the Superior Court concluded that the “findings” adopted by the Board by reference to a staff report were “insufficient for meaningful judicial review” and remanded the case to the Planning Board to “make sufficient findings of fact regarding the height, setback and design-review requirements.” Cumberland County Superior Court

¹ One Board member (who had not participated in the prior approval) voted to disapprove the Project on the ground that it failed to comply with the MHNCO maximum height limits. *See* Supp. AR 69-70, 76-77, 81, App. 85-86, 92-93, 97.

Docket No. AP-24-03, Remand Order dated Sept. 30, 2024. The court retained jurisdiction of the matter to obviate the need for another Rule 80B appeal.

On this second remand, the Board held a public hearing on December 10, 2024 at which the Developer and planning staff members made additional presentations and the Board heard public testimony from six members of the public.²

At this meeting, Portland’s Zoning Administrator appeared and stated her views on building heights and setbacks (2nd Supp. AR 205-207, App. 111-113, T. 5-15). The Board also received a handful of Planning Board decisions on other projects in which apparently height had been measured from artificial grades created by the projects and “retaining walls” had been permitted on or near property lines. 2nd Supp. AR 24-183.

During the December 10, 2024 meeting, the Board members once again stressed that they felt bound by the Zoning Administrator’s construction of the relevant Code sections. *E.g.*, 2nd Supp. AR 217, App. 123, T. 55. The Board member who had earlier found the Developer’s height measurement scheme “failed the straight face test” reversed himself because he understood the Zoning

² The public witnesses included architectural historian Julie Ann Larry, who testified to the Project’s incompatibility with the neighboring Historic District. 2nd Supp. AR 196-197, App. 153-154.

Administrator’s interpretation to be the “law of the land.” 2nd Supp. AR 216, App. 122, T. 52.

At the December 10 hearing, some members of the Board expressed some doubt about whether the May 18, 2021 staff memo satisfied the requirement for a “written analysis” from the historic preservation staff set forth in Portland City Code, §14-526(d)(5)(b). 2nd Supp. AR 223-225, App. 129-131, T. 79-88. It was decided to table final action on the remand to allow the staff to produce a “written analysis” that complied with the Code requirements. 2nd Supp. AR 225-226, App. 131-132, T. 88-91).

The Board reconvened on January 14, 2025 to receive a new document jointly authored by the Historic Preservation Program Manager and the Planning and Development Director in purported compliance with the Code §14-526(d)(5)(b) requirement (the “Joint Memo”). 2nd Supp. AR 184-194, App. 142-152. After brief discussion, the Board again voted to adopt “findings and conclusions” that had been prepared by Corporation Counsel and submitted at the previous meeting and to approve the Project. 2nd Supp. AR 247-250, App. 137-140, T. 20-32.

Following transmittal of the Board’s new findings to the Superior Court and briefing by the parties, the same Justice who affirmed the Board’s 2021 approval

affirmed the Planning Board Approval once again. Cumberland County Superior Court, Decision dated 8/1/25 (App. 14-21). This appeal followed.

STANDARD OF REVIEW

Where the Superior Court acts in an intermediate appellate capacity, as in the decision under appeal, the Law Court directly reviews the operative administrative decision for errors of law or procedure, abuse of discretion or findings not supported by substantial evidence in the record. See *Tomasino v. Town of Casco*, 2020 ME 96, ¶ 5 (decisions of municipal boards); *Carryl v. Department of Corrections*, 2019 ME 114, ¶ 115 (decisions of state agencies). The Law Court's review is “without deference to the Superior Court's intermediate review.” *Francis Small Heritage Trust, Inc. v. Town of Limington*, 2014 ME 102, ¶ 11, 98 A.3d 1012.

This appeal raises the issue of whether the Portland Planning Board may properly defer to the Zoning Administrator in the construction of the terms, “Building, height of,” “Side Yard,” and “Structure” in §14-47 of the Code, whether the resulting construction of those terms is correct, and the correct meaning of the term “written analysis” in Code §14-526(d)(5)(b). On these issues, review by this Court is *de novo* and the Planning Board’s (or Zoning Administrator’s) interpretation of the relevant language is not entitled to any deference. See *Odiorne Lane Solar, LLC v. Town of Eliot*, 2023 ME 67, ¶ 10, 304 A.3d 253; *Tominsky v.*

Ogunquit, 2023 ME 30, ¶ 22, 294 A.3d 142; *Lane Const. Corp. v. Town of Washington*, 2007 ME 31, ¶ 7, 916 A.2d 973. The Court need not delve deeper than the plain meaning of the ordinance if its language is clear on its face. *Portland Reg'l Chamber of Com. v. City of Portland*, 2021 ME 34, ¶ 23, 253 A.3d 586; *21 Seabran, LLC v. Town of Naples*, 2017 ME 3, ¶ 12, 153 A.3d 113.

This is not one of those cases in which “local characterizations or fact-findings as to what meets ordinance standards” should be accorded “substantial deference.” *Town of Vassalboro v. Barnett*, 2011 ME 21, ¶ 6, 13 A.3d 784. In *Tominsky v. Ogunquit*, 2023 ME 30, ¶ 22, 294 A.3d 142, this Court recently made it clear that judicial review of a local board’s application of relevant ordinance provisions is *de novo* as a matter of law unless that “legal determination is greatly informed by the board’s factual findings.” *Tominsky*, 2023 ME 30, ¶ 22, 294 A.3d 142 (quotation marks omitted). That is certainly not the case here. There are no factual findings of any consequence. As the arguments set forth below illustrate, this Court’s review of the Board’s application of the relevant sections of the Code, is *de novo* as a matter of law.³

ISSUES PRESENTED FOR REVIEW

This appeal presents the following issues for review:

³ It should not be forgotten that the Portland Planning Board is not a small-town part-time volunteer effort. Portland is Maine’s largest city. The Planning Board reviews multi-million-dollar projects. Portland has a large full-time planning staff, which is advised by the City’s Corporation Counsel. There is every reason to hold this organization and its activities to a reasonable standard of procedural regularity and fidelity to the law.

1. Did the Portland Planning Board err when it deferred to the Zoning Administrator's construction of "Grade" and "Setbacks" under the Portland City Code rather than reach its own construction of these terms?
2. Did the Portland Planning Board err when it read the term "Building, height of" in Portland City Code §14-47 to permit the allowable height of a proposed building to be measured from an elevated artificial patio surface to be created by constructing external walls around the perimeter of the building to be constructed?
3. Did the Portland Planning Board err when it construed the term "Structure" in Portland City Code §14-47 as not to include exterior concrete, stone and wood walls supporting patios around the building up to 14 feet above ground level as part and parcel of the construction of the building itself?
4. Did the Portland Planning Board err as a matter of law and procedure
 - a. when it failed to receive and consider a legally required "written analysis" by the Portland Historic Preservation staff before it deliberated and approved the site plan application,
 - b. when it permitted a member of the Board to make off-the-record visits to the site to gather information relevant to his decision and then use his impressions in the Board's deliberations,
 - c. when the Board accepted an *ex post facto* memorandum jointly authored by the Planning Director as compliance with Code §14-526(d)(5)(b),
 - d. when the Board found the Project to be compatible not with the structures in the Historic District in the immediate vicinity of the

Project but with other buildings in and out of the District further away?

It is submitted that the answer to all four of these questions is “Yes.” The judgment below should be vacated, and the matter remanded to the Portland Planning Board with directions that Application be denied.

ARGUMENT

I. THE BOARD ERRONEOUSLY DEFERRED TO THE ZONING ADMINISTRATOR IN CONSTRUING CODE TERMS RELATING TO THE MEASUREMENT OF HEIGHT AND SIDE YARD SETBACKS.

The record in this case discloses that the Planning Board’s construction of the Portland Land Use Code terms “grade” and “structure” was based entirely on the Portland Zoning Administrator’s construction of these terms as passed on by the planning staff at the December 14, 2021 and November 28, 2023 hearings and by the Zoning Administrator herself on December 10, 2024. This was not a case of the Board merely receiving advice from the Zoning Administrator; here the Board members followed the Zoning Administrator’s directions because they thought they had to. There was a complete substitution of the judgment of the Zoning Administrator for that of the Board.

For instance, on November 28, 2023, before being instructed in the Zoning Administrator’s practices, one Board Member found the Applicant’s height measurement to “fail the straight face test” and voted against approving the Project. Supp. R. 69-70, 76-77, 81, App. 85-86, 92-93, 97. However, after hearing

from the Zoning Administrator on December 10, 2024, he bowed to her interpretation as “the law of the land.” 2nd Supp. AR 216, App.122, T. 52.

Another Board Member also acknowledged that in determining the meaning of “Height, of Buildings’ in Code §14-37:

we deferred to the staff or the City’s long term interpretation of the ordinance to mean X, we deferred to the staff’s interpretation and then – and we’re deferring again, I think, because that’s what we did before – *right or wrong, it’s what we did*

Supp. AR 66-77, App. 82-83 (Emphasis added).

. . . and so, from my perspective, *I don’t go much deeper than saying has the zoning administrator said that these things are being met, and that’s how – right or wrong, whatever - that’s how I’ve always treated these determinations. . . .*

Supp. AR 80, App. 96 (Emphasis added). The same appears to be true of a third Board Member, who stated:

Yeah, and I think maybe to put in another way, *you know, if I had voted at the time, like, I would’ve voted against it*, but I can agree that the approving decision was based on this [practice of the Zoning Administrator] even though I would have been against it. . .

Supp. AR 73, App. 89 (Emphasis added).

As was the case with the definition of “grade” for height measurement purposes, the Board improperly accepted the Zoning Administrator’s construction of the term “structure” to exempt “retaining walls” from zoning setback

requirements. AR 761; Supp. AR 66, App. 82; 2nd Supp. AR 218-219, App. 124-125, T. 60-64.⁴

The Board members did not attempt to construe the relevant Code sections on their own. It was all about directions from the Zoning Administrator. *See, e.g.* AR 767, 768, 771, 2nd Supp. AR 216-219, App. 122-125, T. 50-64. Seven of the numbered paragraphs of the “findings” adopted by the Board at the January 15, 2025 meeting parrot the Zoning Administrator’s statements. 2nd Supp. AR 2-6. App. 33-37.

The members of the Planning Board are responsible to make their own constructions of the Code and their own findings of fact in the application of the Code to the case at hand. The citizens are entitled to have the decisions on site plan applications made by the officials appointed to make those decisions, not delegated to a City employee who is not a member of the Board.

Reliance on the Zoning Administrator’s determinations might perhaps be harmless in an uncontested case in which no-one was raising any question about compliance with Code requirements. Here, the Board members were on notice from the earliest hearing that numerous neighbors were asserting that the Project did not comply with the Code’s height and setback requirements.

⁴ When asked why she considered that a retaining wall is not “structure”, the Zoning Administrator’s only response was, “I can’t imagine what our city would look like if retaining walls were subject to setbacks.” 2nd Supp. AR 219, App. 125, T. 64.

The vice in allowing the Zoning Administrator to decide the case based only on her own reading of the Zoning Code is that it favors parties “on the inside” who know the Zoning Administrator and her proclivities. Members of the general public who assume that the Code means what it says would not even approach the Zoning Administrator to find out about her special readings.

Moreover, there is no way to hold the Zoning Administrator accountable to decide the same way in every case. The only way the public can be protected against potentially arbitrary decisions of public boards is to require them to decide according to the written law, subject to oversight and review by courts of law.

Here, there is nothing that puts the public on notice that, regardless of the language of the Code, the Portland Planning Department will allow developers to create artificial “grades” to gain additional stories on their projects and that it considers massive “retaining walls” supporting patio amenities as non-structures for setback purposes.

At the December 10, 2024 hearing, the planning staff presented a handful of prior Board approvals of projects in various parts of the city. However, these orders can scarcely be regarded as evidence of a policy adopted by the Board. Nowhere in any of the approval orders tendered is there indication that either issue was either raised or discussed during the Planning Board proceedings or considered by the Board in the grant of the approval. These approvals cannot be

fairly cited as notice to the public of some kind of administrative precedent in the construction of these Code sections.

It is also well established that prior rulings by municipal boards cannot generate an “administrative interpretation” of ordinance language that is entitled to any deference by this Court. The principle of *stare decisis* does not apply to municipal officials’ interpretation of a zoning ordinance. *See Portland Regional Chamber of Commerce v. City of Portland*, 2021 ME 34, ¶ 23.

II. THE PLANNING BOARD ERRED IN CONSTRUING THE TERM ‘GRADE’ IN PORTLAND CITY CODE §14-47 TO INCLUDE AN ELEVATED ARTIFICIAL PATIO SURFACE TO BE CREATED BY WALLS AROUND THE BUILDING.

A. *The Term “Grade”, Fairly Read, Means the Existing Elevation of the Project Site at Time of Application.*

The definition of “Building, height of” in § 14-47 of the Code reads as follows:

The vertical measurement from grade, or the predevelopment grade on the islands, to the highest point of the roof beams in flat roofs

AR 439, App. 43. The term “grade” is not specially defined in the Code.

Ordinance language is to be construed “reasonably in light of the purposes and objectives of the ordinance and its general structure.” *Town of Vassalboro v. Barnett*, 2011 ME 21, ¶ 6. The most logical and reasonable reading of “grade,” in light of the purpose of the Code to control and regulate building height, is that it

denotes *the existing ground surface of the project site at the time the application is submitted.*

When interpreting the language of a municipal ordinance, the Court must first evaluate the plain meaning of the ordinance. *Winter v. Town of Mt. Desert*, 2009 ME 66, ¶ 17, 974 A.2d 903. Terms should be given “their common and generally accepted meaning, unless indicated otherwise by their context in the ordinance.” *DeSomma v. Town of Casco*, 2000 ME 113, ¶ 9, 755 A.2d 485, 488. The common and generally accepted meaning of “grade” is as the actual existing ground surface of the site at the time the project is proposed to be built, on which its foundation sits, and that naturally surrounds the site at the time of project construction. *See Webster’s New World College Dictionary* (4th ed. 2002) (“the ground level around a building”).

The purpose of regulating building height in the various zones within the City is to maintain a degree of compatibility of the structures that are built there. This policy is frustrated if developers can circumvent the regulation by establishing their own “grades” for measuring purposes far above the surface of the existing terrain.

B. The Special Definition of “Predevelopment Grade” in Code §14-47 Does Not Mean that “Grade” Should Be Construed as an Artificial Surface to be Created by Construction of the Project.

The term “predevelopment grade” has a special definition in Portland Code §14-47,

Pre-development grade is defined as average grade, existing on October 1, 2000, at the corners of the foundation of the proposed structure.

AR 454, App. 45.

“Pre-development grade” for height measurements on Portland’s islands is a special definition that refers to a surface elevation as of a particular date, specifically October 1, 2000. This definition was evidently intended to preclude filling of island land and then, perhaps years later, building to a height measured from the level of the fill. However, the special definition of “pre-development grade” applicable to the islands does not imply that on the mainland, the term “grade” should be construed as whatever artificial surface the developer chooses to create by the project under consideration.

To construe the unmodified term “grade” as the surface of the site at the time of application is in no way inconsistent with the definition of “pre-development grade” as the surface at a specific point in time more than 25 years ago. The term “grade,” as it appears in the definition of building height means what it says.

C. The Board’s Construction of the Term “Grade” Creates an Illogical Result Contrary to the Regulatory Purpose of the Ordinance.

An ordinance is to be construed reasonably considering its purposes and structures and to avoid absurd or illogical results. *Dickau v. Vt. Mutual Insurance Co.*, 2014 ME 158, ¶ 21, 107 A. 3d 621; *Banks v. Maine RSA No. 1*, 1998 ME 272. To say that the “grade” from which the maximum height of a building is to be measured can be whatever a Developer says it will be is illogical and verges on the absurd. In this case, allowing the Developer to create an artificial “grade” would allow the Project structure to rise some 7 feet above the maximum height that would be permitted by measuring from the actual grade of the land under the foundation and the land surrounding the Project.

As one Planning Board Member stated at the public hearing on November 28, 2023, “It just doesn’t pass the straight face test for me... It’s not grade,” Supp. AR 69-70. App. 85-86. Later that evening, in casting his vote against approval, that Member repeated,

it’s quite clever, but, you know, it really does not for me pass the straight face test, you know, especially on the water side where a planter goes over the entry to the garage and that’s considered grade.

Supp. AR 76-77, App. 92-93.

The Developer’s definition of “grade” deprives the term of any significant regulatory meaning in terms of limiting height regulation. This case is similar to *Banks v. Maine RSA No. 1*, 1998 ME 272 in which the Denmark Planning Board accepted a developer’s proposal to call a 190’ utility tower a “feature” of its

service building and hence exempt from the 35’ maximum height for “structures” in the zoning ordinance. There, as here,

“[t]his overly broad interpretation of the ordinance, however, would render the height restriction virtually meaningless.....Such an interpretation would create an illogical result.”

1998 ME 272, ¶ 9.

The notion that the consequences of an extreme and illogical reading of the definition of “Building, height of” might coincidentally be mitigated by other extraneous building requirements such as the storm water regulations, is no justification for giving the primary measure regulating building height an illogical construction. One cannot expect that persons seeking to ascertain how high a building can be constructed on a given site will look to the storm water regulations rather than the height limits in the Zoning Ordinance as measured from the surface of the building site at the time.

In short, site plan review standards should be applied to the site as it exists, not to elevated surfaces to be artificially created by the Project itself. The Planning Board was wrong as a matter of law to accept “building, height of” to be measured from the artificial grade established post construction.

III. THE BOARD ERRED IN EXEMPTING CONSTRUCTED OUTER WALLS UP TO 14 FEET IN HEIGHT CAPPED BY PATIOS FROM THE DEFINITION OF ‘STRUCTURE’ FOR SETBACK PURPOSES.

The Planning Board erred in construing the term “structure” as used in the MHNCOD as excepting proposed exterior walls measuring up to 14 feet in height and supporting “patio amenities” for purposes of side lot and side street setback measurements. These walls and patios, however denominated, are “structures” subject to those setback requirements.

The terms of the MHNCOD with respect to required setbacks of buildings and other structures from side and street boundaries are clear:

“Minimum Side Yard Setback. Buildings more than 35’, 10’ for all side yards....”

“Minimum Side Yard Setback on a Side Street. 5’....”

Portland City Code, §14-140.5(c). AR 484-485, App. 52-53. ⁵

The terms “side yard,” “yard” and “setback” are defined in Portland City Code §14-47 as:

Yard, side: A yard adjoining a side lot line extending from the front yard to the rear yard, the width of which shall be the shortest horizontal distance between the side lot line and any structure.

AR 462, App. 49.

Yard: A space on a lot which is required by this article to be maintained open, unoccupied and unobstructed between lot lines and any structure, except as permitted in this article. ...

AR 461, App. 48.

⁵ The Code provisions setting forth the required setbacks in the Munjoy Hill Neighborhood Conservation District is accompanied by a graphic depiction of how the setbacks affect the location of structures on lots. See AR 485, App. 53.

Setback: The required distance and the land resulting therefrom between a street line and the closest possible line of conforming structure. ...”

AR 456, App. 46.

Since the Developer proposed a building greater than 35 feet in height, a “side yard setback” of 10 feet between the boundary of the next-door lot and “any structure” and a side street setback of 5 feet between the boundary of Montreal Street and any “conforming structure,” are mandatory requirements. This is the plain language of the Code and it applies to the Project.⁶

Section 14-347 of Portland City Code defines a “structure” as

Anything constructed or erected of more than one (1) member which requires a fixed location on the ground or attached to something having a fixed location on the ground.

(Emphasis added). AR 458, App. 47.

By the plain terms of the definition, the Project’s exterior walls are “structures” subject to the setback requirements of the MHNCOD. They would have “more than one member.” They would have four sides that completely surround the interior building walls. They would include poured concrete cores, with stone and wood surface panels and trim. They would be 4 feet to 14 feet high

⁶ Both before the Board and in the Superior Court, the Developer has made the argument that in the MHNCOD, setbacks are measured from “buildings” to side lines rather than from “any structure” as required by the Code as a whole. This argument is specious. The reference to “building” in Code §14-140.5(c) specifies the conditions under which a particular “side yard setback” is to be required. For example, if the planned building will be more than 35’ in height, the “side yard setback” as defined by the Code is to be 10 feet. There is nothing to suggest that the setback is to be only from the building.

along the boundary between the site and the neighboring lot on Willis Street. They would run from 2 feet to 11 feet high above the sidewalk along Montreal Street. They would be capped with artificial “patio amenities” for use of the residents of the building. They would have a “fixed location on the ground.”

The reasoning of this Court in *Inhabitants of Boothbay v. Russell*, 410 A.2d 554 (Me. 1980) applies here. In *Boothbay*, this Court ruled that a wood deck, anchored to the ground by concrete, was a “structure” subject to the town’s Shoreland Zoning ordinance.

To hold that a substantial deck, permanently affixed to the land and costing about \$2,500 to construct, is not a “structure” would fly in the face of the common everyday meaning of the term. Everything that can be gleaned from the declared purposes of shoreland zoning... overwhelmingly confirms that the ordinance draftsmen intended the term “structure” to carry its customary meaning.

Inhabitants of Boothbay v. Russell, 410 A.2d at 557. In this case, the everyday meaning of the term as well as the declared purposes of the Code confirm that the exterior walls and patios to be constructed at 19 Willis are comprehended by the term “structure” as defined in Code §14-47.

The plain language in the definition of “structure” in §14-47 includes no exemption for “retaining walls.” Were there a legislative intent to exempt a “retaining wall” from the definition of structure, the definition could easily have made mention of it. *Banks v. RSA #1*, 1998 ME 272, ¶ 9 (“If the town wishes to

allow the construction of utility towers in excess of thirty-five feet in height, it can change the language of its ordinance.”)

Moreover, other sections of the Code refer to “retaining walls” as “structures.” For instance, in the Shoreland Zoning portion of the Code one finds, “The plan shall...include, where applicable, provisions for permanent stabilization *structures such as retaining walls ...*.” (Portland City Code § 14-449(d)(1)(c) (Emphasis added). AR 503, App. 63. Another example is, “No setback shall be required for piers, docks, *retaining walls or any other structure* which requires direct access to the water as an operational necessity.” Portland City Code § 14-449(a)(1) (Emphasis added). AR 497, App. 61.

It was very clear before the Planning Board that the proposed exterior walls met the literal definition of “structure” in the Code. However, the Planning Board approved the Project based on blanket assertions by staff and the Zoning Administrator that “retaining walls are not considered a structure for setback purposes in the City.” AR 767. See also 2nd Supp. AR 219, App. 125, T. 62-64.

This is not a matter of substantial evidence to support a fact finding, but rather clear misconstruction of the terms of the Code. In that sense, this case is very like *Banks v. Maine RSA #1*, 1998 ME 272, where this Court rejected the attempt of a local planning board to characterize a radio tower as a building

‘feature’ and construed the local zoning ordinance to make it as “structure” subject to zoning height limitations.

To the extent that the meaning of a municipal ordinance may not be clear on its face, this Court construes its terms “reasonably in light of the purposes and objectives of the ordinance and its general structure.” *Gerald v. Town of York*, 589 A.2d 1272; 1274. Reasonable setback requirements are designed to insure that new structures will not unreasonably deprive their neighbors of light and air and that the structures can be accessed for purposes of maintenance and service without having to trespass on the neighboring property. Setbacks also hinder the spread of fire.

Walls up to 14 feet in height right on the property line certainly deprive the neighbor of light and air. They are also not accessible for purposes of maintenance and repair without trespassing on the next-door lot or impeding the sidewalk. They bring the whole edifice right to the edge of the property line rather than allowing side yards that are “open, unoccupied and unobstructed” as required by the terms of the ordinance.

This is not a case where the ordinance language appears to cover something that clearly does not implicate the policy behind that language. Both as a matter of Code language and supporting policy, the exterior walls of the 19 Willis Street project are “structures” subject to the 5-foot and 10-foot setback requirements of

the MHNCO. The Zoning Administrator was wrong. This Court owes no deference to such a misconstruction of the plain language in the Code.

IV. THE BOARD FAILED TO COMPLY WITH CODE §14-526(d)(5)(b) IN CONSIDERING THE COMPATIBILITY OF THE PROJECT WITH THE ADJACENT HISTORIC DISTRICT.

A. *The Board Was Not Furnished with the Required “Written Analysis” by Historic Preservation Staff Prior to Deliberating the Historic Compatibility of the Project.*

Because the Project is located within 100 feet of the Munjoy Hill Historic District, the Planning Board was required by the Portland City Code to give special consideration to the effect of the Project on the historic district. Section 14-526(d)(5)(b) of the Code specifically requires:

Development adjacent to designated landmarks, historic districts or historic landscape districts: when any part of a proposed development is within one hundred (100) feet of any designated . . . historic district . . . *character-defining elements of such development shall be generally compatible with the major character-defining elements of the landmark or portion of the district in the immediate vicinity of the proposed development....* For the purposes of this provision, ‘compatible’ design shall be defined as design which respects the established building patterns and visual characteristics that exist in a given setting and, at the same time, is a distinct product of its own time. *To aid the planning board in its deliberations, historic preservation staff shall provide a written analysis of the proposed development’s immediate context, identifying the major character-defining elements and any established building patterns that characterize the context.*

AR 571–572, App. 67-68 (Emphasis added).

The language and evident purpose of Code §14-526(d)(5)(b) make it clear that the Planning Board must consider architectural character when reviewing a site plan for any project within 100 feet of an existing Historic District. In the first sentence of §14-526(d)(5)(b) the use of the mandatory “shall” makes it clear that the Planning Board can grant site plan approval only if it positively finds that the proposed development is in fact “generally compatible with the major character-defining elements of the portion of the district in the immediate vicinity of the proposed development,” in this case right across Willis Street.

The Code then goes further than just establishing the criteria. The Code also mandates that “[T]o aid the planning board in its deliberations, [the] historic preservation staff shall provide” to the Planning Board a

written analysis of the proposed development’s immediate context, identifying the major character-defining elements and any established building patterns that characterize the context.

Portland City Code, §14-526(d)(5)(b) (Emphasis added). AR 572, App. 68. The use of the term “shall” makes the provision mandatory. *Portland Sand & Gravel, Inc. v. Town of Gray*, 663 A.2d 41, 43 (Me. 1995).

The Code §14-526(d)(5)(b) requirement of a written analysis by the HP staff is not just a technical box to check. Vital to the continued integrity of a historic district is the compatibility of new construction in its immediate vicinity. The

historic character of a structure or neighborhood can be spoiled by incongruous new construction next door or across the street.

That is precisely what so many public comments focused on: whether the proposed 4-5 story 12-unit condominium block was “generally compatible” with the “character defining elements” of the row of modest gable-ended 1½-story frame dwellings in the historic district across the street. To make that determination, the Planning Board needed something more specific by way of written analysis than a brief mention of the issue in a 7-months-old “Multi-Family Standards” design review. They did not receive anything remotely resembling the “written analysis” required by the Code either at the original public hearing or at the public hearing on remand. It was not until December 10, 2024, after they had already approved the Project multiple times that the Board requested the required written analysis. 2nd Supp. AR 225-226, App. 131-132, T. 86-91.

B. The Board’s Decision Was Improperly Influenced by a Board Member’s Intentional Off-the-Record Views of the Neighborhood.

During the Board deliberations in December 2021, and again on December 10, 2024, one of the Board members disclosed that he had made deliberate off-the-record visits to the neighborhood in order to reach his own judgment as to the compatibility of the Project with other structures in the general neighborhood. AR 773; 2nd Supp. AR 222, 223, App. 128-129, T. 74,79. There is no way of telling what this Board member looked at or compared with the Project.

It is well established in Maine that agencies cannot base their decisions on information that is not a part of the record before them.

Furthermore, only evidence that is made a part of the record can be considered by the Board in making its decision. *See* 5 M.R.S.A. § 9059(4) (1989). An agency cannot use information that is not of record. “The purpose of this rule is to give a party the opportunity to explain adverse evidence.” *Brooking v. Maine Employment Sec. Comm'n*, 449 A.2d 1116, 1119 n. 4 (Me. 1982). To the extent that an agency relies on information obtained outside of the record and the proceedings, it has acted improperly.

City of Biddeford v. Adams, 1999 ME 49, ¶ 10 (improper site visit by member of appellate tax board). When made aware of this improper input, the Portland Planning Board should have disqualified the member from taking any further part in the decision. *See City of Biddeford v. Adams*, ¶ 12.

At the final hearing on January 15, 2025, this Member stated,

And I remember when we first looked at this site plan, I went up and walked the neighborhood. I walked the district within three blocks of it. And I mean, I – I understood the concern about the mass and the scale of the building. So I was looking at that, and I was looking at – also looking at some of the character defining traits of the building that have been added to it to reflect some of the triple decker characteristics and some of the sloping elements that are characteristic of the hill – and in making that walk and looking at the historic district in the map that I had, I felt overall it clearly was compatible with the historic district.

2nd Supp. AR 247, App. 137, T. 17-18. The Board member is not referring to the standard of §14-526(d)(5)(b), but to other standards of his own such as “triple decker characteristics” that are characteristic of the “hill.” He talked about “the district within three blocks of it.” His inspection of the area led him to form

conclusions based on information and impressions that were obtained outside the record before him in this case and were actually wrong.

C. The Joint Memo Given the Board After It Had Already Decided Does Not Satisfy the Code Requirement of a Written Analysis by Historic Preservation Staff to “Aid the Planning Board in Its Deliberations.”

After the Board had already repeatedly decided that the Project satisfied the requirements of Section 526(d)(5)(b), on December 10, 2024 the Board requested that the Planning Staff procure for it the kind of written analysis that it should have received at the outset of its decisional process. See 2nd Supp AR. 224-226, App. 130-132 (T. 81-89). On January 15, 2025, the Planning Staff produced the Joint Memo in purported compliance with the request. See 2nd Supp. AR 184, App. 142. This document, prepared after the Board had already decided the issue, is not what Section 526(d)(5)(b) required.

First of all, the document was too late. The language of Section 526(d)(5)(b) makes it clear that the written analysis is supposed to “aid the Planning Board in its deliberations.” However, if the deliberations have already taken place, it has clearly not “aided” them. The Board had already repeatedly found the Project to be compatible with the Historic District.

Second, the Code requires that the analysis be provided by the “historic preservation staff.” This suggests that this analysis should reflect not only a degree of expertise, but also some independence. The Joint Memo provided the Board on

January 15, 2025 was co-authored by the Planning and Urban Development Director. The Planning Director has been a vociferous supporter of this project from the beginning. *See, e.g.* AR 743, 745, 746; 2nd Supp. AR 220-223, App. 126-129, T. 65-78. There is no way of assessing what influence the Planning Director had on the recommendations or telling what portions of the memo were authored by him rather than the historic preservation staff member. Ultimately, the Board was not provided what the ordinance required either before or even after it decided the case

D. *The Board Did Not Properly Apply the Criteria in the Ordinance.*

Code §14-526(d)(5)(b) is designed to protect the integrity of Portland’s historic structures and districts by insuring that the architecture of new development in the immediate vicinity of historic assets does not undermine their historic character but is “generally compatible” with it.

First, it applies only to a project located within 100 feet of a historic structure or district. Second, the Board must identify the “major character defining elements of the ... portion of the district in the *immediate vicinity* of the proposed development.” Third, the Board must determine whether the development “is generally compatible” with such character defining elements.⁷

⁷ An example of how this process is carried out can be found in the testimony of architectural historian Julie Larry. *See* 2nd Supp. AR 196-197, App.153-154. She carefully delineated the structures in the

Neither the Board discussion nor the Joint Memo from the Planning Director and the Historic Preservation Officer follow this logical pattern. Instead, the discussion betrays the confusion and lack of focus on the part of the Board. For example:

Board member: . . . And I understand this, the context of the Promenade Towers, the MacArthur Gardens, all that kind of stuff. And that's kind of what I – when I walked the site I did that.⁸ But what I don't have is someone telling me the - the. you know what the ordinance says which is what's in the inventory – what's in the inventory from – the resource inventory when this was designated. What are the character defining elements of the district? I don't think it's the MacArthur or the Promenade Towers because they, wouldn't be character defining of the historic district. They're clearly in the neighborhood.

2nd Supp. AR 223, App. 129, T. 79.

One Board member stated that he believed that “the building is compatible with buildings in the historic district that have triple decks.” 2nd Supp. AR 245-246, App. 135-136, T. 12-13. There are no triple decks in the “immediate vicinity” of the Project that would be most impacted by its lack of compatibility – the

Munjoy Hill Historic District within 100 feet of the Project site. See Figure 2 above, 2nd Supp. AR 197, App. 154. She analyzed their character defining elements as:

The historically designated buildings within the proposed development's immediate context follow a similar development pattern and are primarily small in scale and massing. The homes share similar character defining elements. On Willis and Montreal Streets dwellings are one-and-a-half or two-story dwellings, most with gable roofs. City Assessor records indicated the dwellings range from 19-22 feet in width.

⁸ Another reference to the Board member's private extra-record investigation.

nearest is at least a block down Montreal Street to the west and would be unaffected by the Project.

The aerial view in the staff presentation at the December 10, 2024, hearing (2nd Supp. AR 23, App. 180) affords a good perspective of the portion of the historic district in the immediate vicinity of the Project:



Figure 4 –Aerial view of the Project site and nearby structures. 2nd Supp. AR 23 (App. 180).

The largely vacant square in the middle is the Project site. All of the buildings in the immediate vicinity of the site (including the two houses on the site to be demolished) exhibit the same “character defining elements” as small 19th

century single family wood frame dwellings. Note that there are no “3-deckers” in this area.

As noted above, one Board member made it clear that his opinion on compatibility was not based on the Record, but on his own private inspection of the neighborhood:

But as a whole, when I took that map and I walked the three blocks in the immediate area in the district, I felt that it was ... it was compatible based on the characteristics that were in charged (sic) and looking at.

2nd Supp. AR 247, App. 137, T. 18. Another Board Member opined,

But I have always all along agreed that this has been compatible as not in the historic district but near the historic district matching those three-story, the scale – the height more in the – the – you know, the flats, the three-story flats and such. Much more like the apartment building than some of the single-family homes. It wouldn’t match a single family home vernacular. It would be much more the multi-family type.

2nd Supp. AR 246, App. 136, T. 13-14.

The Board members’ confusion was scarcely alleviated by the Joint Memo. That document identifies “the west side of Willis Street and Montreal Street east of Willis” as being the portion of the district “adjacent to the proposed development” and states that this area contains “larger multifamily buildings”. This statement is incorrect. The only multifamily buildings on Montreal Street are *west* of Willis Street, and not in the portion of the district either “adjacent to” or “in the immediate vicinity of” the Project. See 2nd Supp. AR 23, App. 180, Fig. 4 above.

Code §14-526(d)(5)(b) refers to “[c]haracter defining elements of landmarks and historic districts ... identified in the historic resource inventory and respective historic district designation reports.” The Joint Memo reproduces the official Munjoy Hill Historic District designation report listings for the immediate vicinity of the Project (Willis Street between Montreal and Walnut and Montreal Street east of Willis). 2nd Supp. AR 189-190, App. 147-148. These official listings contain absolutely no reference to “triple-deckers” or similar structures as among those character-defining elements.⁹

Indeed, some Board members’ comments suggest that they did not apply the §14-526(d)(5)(b) standard at all.

Board Member: Well, I would say Evan’s report seems to conclude that the components of the building are compatible with the neighborhood. I know in public comments it said that the scale is inappropriate, but if it fits within the guidelines and we sort of – we rehashed and rehashed that and acceptable where we are. *And you know, that’s just the reality in Portland. We’re going to have more and more density and more height. And the first building is always objectionable. But we will adapt.*”

2nd Supp. AR 246, App. 136, T. 15 (Emphasis added).

⁹ The Joint Memo attempts to drag in three 3-story buildings that are further away on Montreal Street that are not mentioned as “character defining elements” in the designation reports and are not located in the immediate vicinity of the Project. This finds resonance in references to “triple-deckers” by Board Members (*See, e. g.*, 2nd Supp. AR 245-247, App. 135-137, T. 12-17). By laying such great emphasis on these more distant tenements, the Board members implicitly concede that the Project is not compatible with the group of smaller homes that surround it.

Ultimately, the Board was not properly aided by the required written analysis by historic preservation before it deliberated. When it did deliberate, it ignored the specific requirements of the Ordinance.

CONCLUSION

For the reasons set forth above, the Portland Planning Board erred in its deference to the Zoning Administrator's reading of the Portland City Code with respect to the measurement of maximum building heights and setbacks. The Project fails to comply with both legal height restrictions and setback requirements properly construed. The Planning Board erred in considering and approving the Project without receiving the mandatory compatibility analysis by the historic preservation staff required by Code §14-526. The Board failed properly to apply the specific requirements of §526(d)(5)(b) to protect the integrity of the adjacent historic district. The judgment of the Superior Court should be reversed and the Board should be directed to deny the application.

DATED: December 3, 2025

/s/ Michael D. Traister
Michael D. Traister, Esq. Bar No. 8138
mtraister@mpmlaw.com
Attorney for Appellants

MURRAY, PLUMB & MURRAY
75 Pearl Street, P.O. Box 9785
Portland, ME 04104-5085
(207) 773-5651