

STATE OF MAINE  
SUPREME JUDICIAL COURT  
SITTING AS THE LAW COURT

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LAW DOCKET NO. CUM-25-241

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PETER L. MURRAY, ET AL.,

Plaintiffs/Appellants

v.

CITY OF PORTLAND,

Defendant/Appellee

AND

37 MONTREAL LLC

Party-in-Interest/Appellee

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ON APPEAL FROM THE (CUMBERLAND COUNTY) SUPERIOR COURT

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**BRIEF OF PARTY-IN-INTEREST/APPELLEE 37 MONTREAL LLC**

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Natalie L. Burns, Bar No. 3687  
JENSEN BAIRD  
Ten Free Street  
P.O. Box 4510  
Portland, ME 04112  
(207) 775-7271  
*Attorney for Party-in-Interest, 37 Montreal LLC*

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## **FACTUAL AND PROCEDURAL BACKGROUND**

This case is the second appeal from decisions of the City of Portland Planning Board (the Board) approving Appellee/Party-in-Interest 37 Montreal LLC's (37 Montreal) to construct a twelve-unit residential building in the City's densest residential zoning district. 37 Montreal submitted its site plan application to the City on or about August 26, 2019. Plaintiffs-Appellants (Appellants) appealed the initial approval, which ultimately resulted in this Court's decision in *Murray v. City of Portland*, 2023 ME 57, 301 A.3d 777. The Superior Court remanded the matter to the Board in accordance with this Court's decision. (A. 7.) Appellants then filed the pending appeal from the Board's decision on remand. (A. 9.) The Superior Court again remanded the matter to the Board for additional action (the Second Remand Order), specifically to make clear findings to support its reasoning and conclusions. (A. 11); *Murray v. City of Portland*, No. AP-24-03, 2024 Me. Super. LEXIS 25.

The Board held an initial meeting to address the Second Remand Order on November 12, 2024. (A. 108.) At that time, the Board voted to reopen the evidentiary record to allow "the presentation of additional evidence from the applicant, the City and from members of the public" on the three issues that were the subject of the Remand Order. (A. 109.)

On December 10, 2024, the Board conducted a public hearing, where it heard presentations from City staff members, including the Zoning Administrator. (A. 110-113, 132, 166-180.) In addition, the agent for 37 Montreal made a presentation. (A.

113-116, 181-204.) Finally, counsel for Appellants, two Appellants, Julie Ann Larry and two other citizens presented arguments and testimony.<sup>1</sup> (A. 116-119.) After receiving this supplemental information as provided for by the Board at its initial meeting on the Remand Order, the Board voted to postpone its consideration of the application until its meeting on January 14, 2025. The purpose of the postponement was to allow the City to submit a report from the City’s Historic Preservation Program Manager. (A. 129: 80:8-81:11.) One of the Board members indicated that he wanted the report submitted in part because “if we’re supposed to do it, we also have to have in our minds what the inventory is.” (A. 121: 80:8-10). The Board discussed that the original memo composed by different members of the staff, including the Historic Preservation Program Manager, might be determined by the Court not to satisfy fully the requirements of Section 14-526 (d)(5)(b) of the Portland Code of Ordinances. (A. 129-131.) The Board then voted to postpone the matter in order to allow the staff to prepare the supplemental report. (A. 132.)

On January 14, 2025, the Board heard comments from Appellant Murray and discussed the report from the current Historic Preservation Program Manager, Evan Schueckler. (A. 133-141.) The report from Mr. Schueckler set forth the context of historic properties in the area of the proposed project, showing a variety of housing sizes and types of structures, generally with smaller buildings on a portion of Willis

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<sup>1</sup> Ms. Larry, a consultant in historic preservation, also submitted written testimony, relied upon by Appellants in their Supplemental Brief. (A. 153.)

Street and much larger buildings on Montreal Street. (A. 148-150.) The report further indicated whether those structures were considered contributing or non-contributing structures within the Munjoy Hill Historic District.

All of the Board members discussed the historic compatibility standard. (A. 134-136.) After that discussion, the Board reviewed the draft findings prepared by the staff and voted:

to adopt the above factual findings which shall serve to supplement the Planning Board's existing findings and conclusions contained in its December 14, 2021 and December 12, 2023 approval letters and conclude that the Planning [Board] has been provided with a written analysis that meets Land Use Code Section 14-526 (d)(5)(b), and that memorandum aided the Planning Board in its deliberations and based on the information in the record, the Board finds that the proposed project is compatible with the major character-defining features of the surrounding neighborhood.

(A. 37.) The Board also entered supplemental findings concerning the measurement of height and the applicability of setback requirements to the project after hearing testimony and presentations on each subject. (A. 33-37.)

## **ARGUMENT**<sup>2</sup>

### **I. THE PLANNING BOARD DID NOT DEFER TO THE ZONING ADMINISTRATOR IN CONSTRUING THE HEIGHT AND SETBACK PROVISIONS OF THE CODE.**

The Second Remand Order found that the Planning Board's prior discussions about the Board's historic measurement of height did not constitute an adequate

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<sup>2</sup> 37 Montreal joins in and adopts by reference the arguments contained in Defendant-Appellee City of Portland's Brief.

finding of fact on the issue because the “Board’s conclusion the City has a ‘longstanding practice’ to calculate height...is not tied to a sufficient factual basis in the record.” *Murray*, 2024 Me. Super. LEXIS 25 at \*8. In addition, the Superior Court found that the Board’s references to use of its own precedent in two specific prior projects and as a matter of general practice “lack specificity and are not clear findings” concerning the City’s longstanding practice. *Id.* The Superior Court concluded “that the record lacks sufficient factual support to apprise the Court of the rational basis for the decision regarding the height requirement.” *Id.* On the issue of setbacks, the Superior Court remanded the case to the Planning Board “to establish a clear factual and analytical basis regarding why a retaining wall does not fit within the definition of structure.” *Id.*

In response to the issues raised in the Second Remand Order, the City’s Zoning Administrator provided an explanation of the measurement of height, including specific examples of projects approved by the Planning Board that calculated the average grade based upon the post development grade at the principal corners of the building. (A. 111-112.) Copies of Planning Board approvals of other projects involving height and retaining walls were included. (Second Supplemental Record [SSR] 29-159.)<sup>3</sup>

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<sup>3</sup> Due to the volume of the Record in this appeal, which incorporated the Record from the original appeal, some citations will be to the original Administrative Record (AR) and the two Supplemental Records developed in the second appeal.

This review of the record demonstrates that the Planning Board did not defer to the Zoning Administrator in this case. While she presented testimony about the longstanding practice of the City's current and prior zoning administrators concerning these issues, she also submitted evidence of Planning Board approvals of projects that included the measurement of height on properties with slopes and others that had retaining walls that were not set back from property lines. The Board was familiar with its prior approvals and had referred to them at various times during this case. However, in response to the Remand Order, the staff presented written documentation about the Board's prior approvals.

In addition to the Zoning Administrator's presentation, 37 Montreal provided evidence of retaining walls located on or in close proximity to property lines, retaining walls that were installed to level building sites, and a listing of ten projects approved by the Planning Board that utilized the same post-development grade height measurement. (A. 113-118.) 37 Montreal's presentation included building elevations for three projects: (1) 246 Eastern Promenade, approved by the City in 2024 (A. 198-199); (2) 218 Washington Avenue, also discussed in the Zoning Administrator's presentation (A. 200); and (3) 210 Valley Street (A. 201). These projects included sites with slopes, some substantially greater than the ones on the subject property.

Appellants additionally argue that the Planning Board could not rely upon the Zoning Administrator's practice in interpreting the height and setback provisions of the Code because there "is no way to hold [her] accountable to decide the same way

in every case.” (Blue Br. 24.) Appellants further argue that the “only way the public can be protected against potentially arbitrary decisions of public boards is to require them to decide according to written law, subject to oversight and review by courts of law.” *Id.* This argument first assumes that the only correct reading of the disputed provisions of the Code are those argued by Appellants. That is an issue to be decided by this Court and not by Appellants. The assumption that the Board did not make its own decision about height is not supported by the record. In its findings, the Board referred to its own prior decisions. (A. 34, 36.)

In the Second Remand Order, the Superior Court expressed a concern that there was a potential due process concern about the lack of a memorialization of historical interpretations in that “an individual dealing with the agency will not know how to conduct themselves in a way that conforms to that practice.” *Murray*, 2024 Me. Super. LEXIS 25 at \*7, n. 4. The Board addressed the Superior Court’s concern in finding 11 under the Maximum Height Requirements (A. 34) and finding 14 under setback requirements. (A. 36.) Those findings discuss that Planning Board meetings are open to the public, that notice is given to the public and applicants of meetings, and all materials presented at Board meetings are available on the City’s website. (A. 34, 36.) It also must be noted that every single building permit issued in the City is a matter of public record and interested parties may consult with the Zoning Administrator about interpretations of the Code.

## II. THE PLANNING BOARD PROPERLY DETERMINED THAT THE PROJECT MEETS ALL APPLICABLE DIMENSIONAL REQUIREMENTS.

Appellants challenge the Planning Board's finding that the Project meets all applicable dimensional requirements; specifically, they contend that the Board improperly determined that the application (1) did not meet the height limits in the ordinance and (2) did not meet the side yard setback and side street setback because they should have been applied to the proposed retaining walls rather than to the building. In order to prevail on these arguments, however, Appellants must demonstrate that there is no competent evidence to support the factual finding, or that the Planning Board committed a reversible error of law in its decision. For the reasons below, the Court should reject these arguments.

### A. The Planning Board properly applied the applicable building height limitations the definition of building height.

Appellants first argue that the Planning Board improperly applied the Code's height provisions in approving the project. Section 14-47 of the Code defines the term "building, height of" and establishes the governing principles for the determination of building height:

The vertical measurement from grade, or the pre-development grade on the islands, to the highest point of a structure. For buildings, height shall be measured to the roof beams in flat roofs, to the highest point of the roof beams or the highest point on the deck of mansard roofs, to a level midway between the level of the eaves and highest point of pitched roofs or hip roofs, or to a level two-thirds of the distance from the level of the eaves to the highest point of gambrel roofs. For this purpose, the level of the eaves shall be taken to mean the highest level where the

plane of the roof intersects the plane of the outside wall on a side containing the eaves.

Portland, Me., Code of Ordinances § 14-47. (A. 43-443.)

The term “grade” is not defined in the version of the Code at issue in this case.<sup>4</sup> There is a definition of “Pre-development grade” that establishes a specific date for the determination of grade, but as noted in the definition of building height, that provision only applies to Portland’s islands. (A. 45.)

Appellants argue that grade should be determined prior to the commencement of the development of a site. However, there is no language in the applicable Code provisions that supports this argument. *See Estate of Robbins v. Town of Cumberland*, 2017 ME 16, ¶ 7, 154 A.3d 1183 (the Court “looks first to the plain meaning of the terms of the ordinance to give effect to the legislative intent”) (citations omitted). If the meaning of the ordinance is clear, the Court does not look beyond the words themselves. *Wister v. Town of Mt. Desert*, 2009 ME 66, ¶ 17, 974 A.2d 903. Further, the Court should not add language to an ordinance when the language is plain. *See Estate of Robbins*, 2017 ME 16, ¶ 9, 154 A.3d 1183 (rejecting argument that would require the Court to read additional language into a provision).

The City could have drafted the Code to require that the height of all development be measured from pre-development grade or it could have established a

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<sup>4</sup> The City has adopted an entirely new version of its Land Use Code, frequently referred to as ReCode, which includes a rule of measurement for “grade, average” that incorporates the City’s historic interpretation of height, including that measurements are to be taken at the foundation of the structure where it meets the grade after construction.

date at which grade would be determined, as it did for the islands. The City chose not to do those things for mainland properties, and so the claim that a height calculation should be based on pre-development grade has no textual support. *See Aydelott v. City of Portland*, 2010 ME 25, ¶ 12, 990 A.2d 1024 (the lack of a land area per dwelling unit requirement for an island residential zoning district when such a requirement was established for all of the non-island residential districts “suggests an intentional distinction” and so no such requirement applied to the island zoning district at issue). Furthermore, while the interpretation of an ordinance is a question of law to be determined by this Court, substantial deference is given to “local characterizations or fact-findings as to what meets ordinance standards.” *Balano v. Town of Kittery*, 2017 ME 110, ¶ 2, 163 A.3d 144 (citations omitted).

Appellants’ proposed limitation on height measurement, which would result in the loss of a story of the building, is inconsistent with the stated purposes of the R-6 zoning district: “To set aside areas on the peninsula for housing characterized primarily by multifamily dwellings at a high density providing a wide range of housing for differing types of households.” Portland, Me., Code of Ordinances § 14-135. (AR. 454.) The dimensional requirements of the R-6 zone reflect this purpose statement: the minimum lot size for residential uses is 2,000 square feet, with a minimum lot area per dwelling unit of 725 square feet. Portland, Me., Code of Ordinances § 14-139 (a). (AR. 477.) These provisions demonstrate that Appellants’ proposed restrictive reading of the definition of building height is inconsistent with the stated goals of the City to

create more housing in a densely developed section of the peninsula. It also could result in the creation of uniformly smaller dwelling units, rather than providing for the “wide range of housing of housing for differing types of households” set forth in the R-6 zone’s purpose statement. Portland, Me., Code of Ordinances § 14-135. (AR. 454.)

The Munjoy Hill Neighborhood Conservation Overlay District (MHNCOD) was a temporary provision, now repealed. While it modified height limits for some types of development, it did not do so for the Project since it included a unit that met the requirements set forth in § 14-140.5(c) of the Code of Ordinances (development of three units or more on a lot over 2,000 square feet that includes at least one workforce housing unit). (A. 52.) Nowhere in the MHNCOD does it state that a development in that overlay district was required to have less density than the underlying R-6 zone or to use a different height measurement. There is no question that the effect, and intent, of Appellants’ argument is to reduce the otherwise allowed density.<sup>5</sup> By way of example, the development proposed by 37 Montreal is to contain twelve dwelling units. (A. 27.) The lot size of the 19 Willis Street parcel is 10,800 square feet, with an area per dwelling unit of 900 square feet for the twelve units, compared to the 725 square feet per unit that the Code allows. (AR 17.) This means that the proposal is already less dense than the maximum allowed by the Code. If

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<sup>5</sup> This effect and intent apply equally to Appellants’ setback arguments.

Appellants' proposed interpretation were adopted, it would further reduce the number and size of dwelling units. This result is not only inconsistent with the stated purpose of the R-6 zoning district, it is also inconsistent with the recently adopted statutory provisions intended to foster the creation of additional dwelling units in order to address the ongoing shortage of homes in the State. *See* 30-A M.R.S. §§ 4364-4364-C.

Appellants further argue that the failure to interpret the term "grade" to include the additional language "pre-development" would be an "absurd result." Appellants' reference to *Banks v. Maine RSA No. 1*, 1998 ME 272, 721 A.2d 655 is inapposite. That case involved the question of whether a 190-foot telecommunications tower was exempt from the applicable 35-foot height requirements; it did not address the question of how the height was to be measured. Further, Appellants incorrectly assume that the pre-development grade is always lower than the post-development grade. Under their argument, a developer with a site with significant ledge, not an uncommon situation in Portland, could claim the ledge area as the point from which the height measurement would occur, even though the ledge would be blasted and result in a lower site grade during and after the development (and a much taller building than otherwise allowed). This is far more illogical than allowing the grade calculation to occur from the established development grade. The idea that a developer would have an incentive to add significant fill to a site ignores that the project must also meet site plan review standards. As part of the preliminary site plan submission requirements, an applicant must show proposed grading and contours and

the “[p]reliminary design of a proposed stormwater management system in accordance with Section 5 of the Technical Manual.” Portland, Me., Code of Ordinances § 14-527(d)(1), (4). (AR 587.) The final site plan submission must include “[a] stormwater management and drainage plan, in accordance with Section 5 of the Technical Manual” in addition to a grading plan. Portland, Me., Code of Ordinances § 14-527 (f)(17), (18). (A. 70.) As part of the required final written materials, an applicant must include a “narrative describing the site layout, on and off-site watershed hydrology, new and existing buildings and facilities, total impervious area, disturbed area and developed area created by the project” and “[s]tormwater runoff calculations as described in Section 5 of the Technical Manual.” Portland, Me., Code of Ordinances § 14-527(g)(4), (5). (A. 72.)

In its review of a site plan, the Planning Board must find that the development meets the requirements of Section 14-526 of the Code. (AR. 553.) Among these standards are several requirements related to stormwater management and erosion control. (AR. 565-567.) Because the Project required Level III site plan review,<sup>6</sup> it was required to demonstrate compliance with the following requirements:

- (1) minimizing the volume and rate of stormwater runoff from the lot;

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<sup>6</sup> All residential projects, including single-family and two-family developments, require some level of site plan review and so must meet applicable erosion and sedimentation requirements. The thresholds for the various levels of site plan review are set forth in Section 14-523(d), (e) and (f) of the Code. (AR. 530-534.)

(2) not creating any ponding, flooding or other drainage problems on adjoining properties; and

(3) reducing adverse impacts associated with increases or changes in flow, soil erosion and sedimentation.

Portland, Me., Code of Ordinances § 14-526(b)(3)(a), (b). (AR 565-566.)

A site with a large amount of fill would require substantial engineering to meet these stormwater requirements. In addition, the provision of accessible parking, safe access to abutting streets, provision and maintenance of landscaping and day-to-day use of the lot would be difficult, if not impossible. Because of the City's various review standards, it is clear that using a post-development grade for the purpose of determining the allowed height does not support Appellants' claim that developers will add significant and unnecessary fill for a height advantage because such a development would almost certainly result in significant, detrimental erosion, as well as negative stormwater impacts on abutting properties, that would prevent approval by the Planning Board or other reviewing authority.

Even if the Court disagrees that the definition of building height is clear, then the Court must "construe its terms reasonably in light of the purposes and objectives of the ordinance and its general structure." *Stewart v. Town of Sedgwick*, 2002 ME 79, ¶ 6, 797 A.2d 27 (citation omitted). Here, the MHNCOD provides for an additional 10 feet of height, up to 45 feet, for any structure of 3 units or more located on a lot that is over 2,000 square feet in area that includes a "workforce housing unit for rent."

(AR. 484.) The MHNCOD is, by its express terms, a district that is only located on Munjoy Hill, and many of the lots in the District are on a slope.<sup>7</sup> If height has to be measured from a pre-development grade, then development cannot occur as envisioned by the City in enacting the overlay district. Except for a lot at the very crest of the hill, buildings most likely could not exceed two stories, with some even shorter than that. This directly contradicts the express language of the MHNCOD, which was to “address the negative impacts of these pressures (development pressures related to the District’s location and the nature of the existing building stock) and create a positive framework for investment in the area.” Portland, Me., Code of Ordinances § 14-140.5. (AR. 482.) Limiting the building height on lots with slopes will result in inconsistent development from lot to lot and street to street, which is also inconsistent with the provisions of the Code.<sup>8</sup> It also will preclude the development of housing units within any portion of the R-6 zoning district that may have slopes.

Appellants’ proposed interpretation of the measurement of the height of the building from pre-development grade is inconsistent with the City’s historic interpretation of its Code, including with interpretations made by the Planning Board

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<sup>7</sup> A map showing the MHNCOD boundaries is included as Diagram 14-140.5.a of the Code. (A. 51.)

<sup>8</sup> Because the City’s design standards for the R-6 zoning district require the finished floor elevation of a residence to be a minimum of 24 inches above the sidewalk elevation (AR. 621), Appellants’ interpretation would make this requirement difficult—if not impossible—to meet on any lots with pre-development grades below street level.

itself. (A. 111-112, 170-176.) Appellants seek to have this Court adopt their own definition of building height rather than applying the Code’s specific definition, which this Court may not do. *See Rudolph v. Golick*, 2010 ME 106, ¶ 9, 8 A.3d 684 (“if an ordinance defines a term specifically, we will not redefine that term”). The Court should affirm the decision of the Planning Board that the Project complies with the height requirements of the Code

**B. The Project Meets All MHNCOD Setback Provisions.**

On the first remand, the Planning Board adopted findings in support of the above analysis and earlier discussion by the Board. Specifically, the Planning Board found:

According to the applicant’s submitted plans, including drawings C1.0, C2.1 and A-1.1 (Attachment 7), the proposed building and its foundation meet the minimum setback requirements. Plans also show landscaped terraces and planters encircling the building that are supported by a retaining wall which facilitates the provision of underground parking and establishes a level development site on a sloped parcel. Because these features on the plan are all components of the landscaping or site preparation, and not part of the foundational support for the building, they are not conforming structures that are otherwise required to meet applicable setback requirements. Therefore, the applicant’s proposed development meets the applicable setback requirements.

(Supp. AR. 14.) The Board incorporated its prior findings into its decision made in response to the Second Remand. (A. 33.)

The Board’s finding of fact is entitled to substantial deference by this Court. *See Balano v. Town of Kittery*, 2017 ME 110, ¶ 2, 163 A.3d 144 (courts are to “accord substantial deference to local characterizations or fact-findings as to what meets ordinance standards”). Moreover, this finding is supported by substantial evidence in the record.

The best depiction of the building’s compliance with setbacks is the full-sized copy of the document titled “Proposed Site Plan,” dated December 3, 2021, and which is included in the record at AR. 726.<sup>9</sup> That plan shows the proposed building in white in the center of the page, with the limits of the applicable building setbacks shown as a dashed line. (*Id.*) In addition, note 10 on the plan shows the dimensional requirements for R-6 and for MHNCOD, and the proposed dimensions for the Project meeting each of those requirements. (*Id.*)

As set forth in the Code, the dimensional standards provided in the MHNCOD “supersede those dimensional standards outlined elsewhere in Chapter 14.” Portland, Me., Code of Ordinances § 14-140.5(c). (AR. 483.) Therefore, for the two setbacks that Appellants raise in their argument (side setback; side street setback), the applicable requirements are from § 14-140.5(c):

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<sup>9</sup> The plans included in the Appendix at 14-16 do not include this plan, possibly due to its larger size; in any event, the notes on those reduced-size plans are difficult to read.

Minimum Side Yard Setback	Buildings of height up to 35': As per the underlying zoning. Buildings more than 35': 10' for all side yards, except that a side yard no less than 5' is permitted when used to continue a documented built pattern of the surrounding streetscape, in which case a proportional increase in another side yard must be provided.
Minimum Side Yard Setback on a side street	5'; or the minimum depth of the immediately abutting street-facing yard (see Diagram 14-140.5.b.) <sup>10</sup> , whichever is less. 0' when demonstrated that reduced setbacks are necessary to facilitate the provision of underground parking.

(A. 52-53.) The site plan shows that the building complies with a 10' side setback and a 5' side street setback (the “side street” being Montreal Street, as the front door of the proposed building will be located on Willis Street).

Importantly, Appellants do not contend that the proposed building violates those two setbacks; the site plan plainly demonstrates otherwise. Instead, Appellants make the novel argument that the proposed retaining walls must also meet the building setback requirements—despite the fact that they are not “buildings.”<sup>11</sup>

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<sup>10</sup> The diagram is omitted here, but it is available in the Administrative Record. (AR. 485.)

<sup>11</sup> 37 Montreal also does not concede that the proposed retaining walls are “structures” as defined by the Code: “Anything constructed or erected of more than one (1) member which requires a fixed location on the ground.” Portland, Me., Code of Ordinances § 14-47. (AR 458.) A retaining wall does not meet that definition, as it does not contain more than one structural member, which is generally defined as a load supporting member of a facility, such as beams and load supporting walls, or any non-load-supporting member, such as ceilings and non-load-supporting walls. *See, e.g.*, 40 C.F.R. § 61.141. At most, the proposed retaining walls consist of just one structural member.

Although the term “building” is not defined in the Code, courts typically look to dictionary definitions to determine the generally accepted meaning of a term. *See, e.g., Halco v. Davey*, 2007 ME 48, ¶¶ 10-12, 919 A.2d 626. The common dictionary definitions of the word “building” are: “a usually roofed and walled structure built for permanent use (as for a dwelling),” Merriam Webster, <https://www.merriam-webster.com/dictionary/building>; and “a structure with walls and a roof, such as a house or factory,” Cambridge Dictionary, <https://dictionary.cambridge.org/us/dictionary/english/building>.

The side yard setback in MHNCOD is 10 feet for buildings greater than 35 feet in height, and for buildings up to 35 feet, the underlying zoning applies (here, that would be 5 feet). (A. 52.) Unlike the side yard setback language for R-6 under § 14-139 (AR. 478), which is superseded, the MHNCOD side yard setback refers to “buildings,” not “structures.” (A. 52.) The retaining wall is neither a building nor is it greater than 35 feet in height; therefore, the side yard setback in MHNCOD plainly does not apply to the retaining wall. As is clearly shown on the site plan, the proposed building is set back 10 feet from the side yard and 5 feet from the side street. (AR. 726.)

For the MHNCOD side street setback, it does not refer to either “buildings” or “structures”; it simply says “5 feet.” (A. 53.) However, all of the other setback provisions in the table refer to “buildings,” including minimum side yard setback and minimum rear yard setback. (A. 52-53.) Moreover, Diagram 14-140.5.b depicts a

building set back 5 feet from the street. (A. 53.) For the rear yard setback, the table specifies other setbacks for rear decks, porches or similar unenclosed space, as well as for accessory structures with a ground coverage of 144 square feet or less. Those other setbacks are not specified for the side yard setback or side street setback, which supports a conclusion that they only apply to buildings. In summary, it was reasonable for the Planning Board to find that the side street setback in MHNCOD, like the side yard setback, only applies to the proposed building. (A. 35.) Its finding that the Project, as proposed, meets all dimensional requirements is supported by evidence in the record, and the finding is entitled to substantial deference. *See Balano*, 2017 ME 110, ¶ 2, 163 A.3d 144.

**C. There Is No Precedent in the City for Applying Setback Provisions to Retaining Walls.**

Further bolstering the Planning Board’s findings on setbacks is the evidence of the City’s past practice in this regard. The record supports the fact that the City- including the Board itself- has never applied setback provisions to retaining walls that are designed to hold back the earth from neighboring properties, such as the ones that are proposed for the Project. Specific examples were reviewed by the Board. (A. 178-179, 193.) The Board found that “the purpose of a retaining wall is to hold back soil on a steep slope and to stabilize the soil in order to build a structure.” (A. 36.) It further found that a retaining wall was neither a building nor a structure. (A. 35.)

**D. Appellants' Interpretation of the Code Leads to an Absurd Result.**

Appellants interpret the MHNCOD setback provisions to apply to retaining walls in addition to buildings.<sup>12</sup> However, the words in an ordinance “must not be construed to create absurd, inconsistent, unreasonable or illogical results.” *Duffy v. Town of Berwick*, 2013 ME 105, ¶ 23, 82 A.3d 148 (internal citation omitted); *Peregrine Developers, LLC v. Town of Orono*, 2004 ME 95, ¶ 15, 854 A.2d 216 (rejecting an ordinance interpretation that would have rendered every multifamily dwelling in the town that is occupied by three or more unrelated students a “dormitory”); *see also Melanson v. Belyea*, 1997 ME 150, ¶ 4, 698 A.2d 492 (interpreting statutory language to avoid “absurd, inconsistent, unreasonable or illogical results”).

Similar to the case for fences (which *are* structures), retaining walls are quite often created to define the property boundary – that is, to hold back the earth from a neighboring property so that one’s property may be developed. This is especially true in areas of the City defined by significant slopes, such as the Munjoy Hill Neighborhood. If a retaining wall is required to be set back 10 feet from property boundaries, it would eliminate significant square footage of usable space on those parcels and could even render some parcels completely unusable.

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<sup>12</sup> Throughout their brief, Appellants refer to “outer walls capped by patios.” They do not explain whether a different rule would apply to a retaining wall holding up an area improved with a lawn or a driveway. In any event, if setbacks apply to a retaining wall, there is nothing in the Ordinance to support this distinction.

The Planning Board’s interpretation is consistent with the purpose statements for the R-6 zoning district to allow for greater density, which could not occur with the restrictive interpretation urged by Appellants. It is also consistent with the setback requirements of the MHNCOD, which apply to buildings and not to structures. Portland, Me. Code § 14-140.5(c). (A. 52-53).

Finally, although the City’s “ReCode” (its complete rewrite of the prior land use code) is not applicable to this Project and this appeal, as it was adopted after this application was filed and approved, it is instructive to note that the ReCode specifically confirms the City’s past practice regarding setbacks. In Section 7.2 of the ReCode rule of measurement for “setback” states that setbacks “shall not apply to fences, retaining walls, raised garden beds and other similar structures.” Portland, Me., Land Use Code § 7.2 (2025).

**III. APPELLANTS HAVE FAILED TO MEET THEIR BURDEN TO DEMONSTRATE THAT THE BOARD’S FINDING THAT THE PROJECT IS GENERALLY COMPATIBLE WITH THE MAJOR CHARACTER-DEFINING ELEMENTS OF THE PORTION OF THE MUNJOY HILL HISTORIC DISTRICT LACKS RECORD SUPPORT.**

For their final argument, Appellants address the Planning Board’s finding that the project “is generally compatible with the major character-defining elements of the portion of Munjoy Hill Historic District in the immediate vicinity of the proposed development and therefore meets Section 14-526(d)(5)(b).” (A. 38.)<sup>13</sup> In essence,

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<sup>13</sup> The full language of the Board’s finding that Appellants challenge is as follows:

Appellants' argument is that the Planning Board's finding is unsupported by substantial evidence in the record. (Blue Br. 40-44.) Appellants bear the burden of persuasion on appeal because it seeks to overturn the Planning Board's decision. *See Bizier v. Town of Turner*, 2011 ME 116, ¶ 8, 32 A.3d 1048.

**A. Substantial Evidence Standard.**

“Substantial evidence exists if there is any competent evidence in the record to support a decision,” *Fitanides v. City of Saco*, 2004 ME 32, ¶ 23, 843 A.2d 8, and it is “evidence that a reasonable mind would accept as sufficient to support a conclusion.” *Sproul v. Town of Boothbay Harbor*, 2000 ME 30, ¶ 8, 746 A.2d 368. The Law Court has stated that a planning board's finding “is not unsupported by substantial evidence merely because two inconsistent conclusions can be drawn from the evidence.” *Friends of Lamoine v. Town of Lamoine*, 2020 ME 70, ¶ 21, 234 A.3d 214 (quoting *Veilleux v. City of Augusta*, 684 A.2d 413, 415 (Me. 1996)); *see also Town of Vienna v. Kokernak*, 612 A.2d 870, 872 (Me. 1992) (“That the record contains evidence inconsistent with the result, or that inconsistent conclusions could be drawn from the evidence, does

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Barker motioned, and Smith seconded a motion to adopt the above factual findings which shall serve to supplement the Planning Board's existing findings and conclusions contained in its December 14, 2021 and December 12, 2023 approval letters and conclude that the Planning [Board] has been provided with a written analysis that meets Land Use Code Section 14-526(d)(5)(b), and that memorandum aided the Planning Board in its deliberations and based on the information in the record, the Board finds that the proposed project is compatible with the major character-defining features of the surrounding neighborhood.

(A. 38.)

not render the commissioners' findings invalid if a reasonable mind might accept the relevant evidence as adequate to support the commissioners' conclusion.”).

Regarding the Planning Board's ability to determine credibility and to weigh evidence, the Law Court has stated that a reviewing court “will not substitute [its] judgment for that of the Planning Board.” *Friends of Lamoine*, 2020 ME 70, ¶ 21, 234 A.3d 214; *see also Driscoll v. Gbeewalla*, 441 A.2d 1023, 1026 (Me. 1982) (an appellate court “may not substitute its judgment for that of the municipal body, but is limited to determining whether from the evidence of record facts could reasonably have been found by the [municipal] body to justify its decision”). The identification of a locality or neighborhood for the purpose of determining compatibility is necessarily fact sensitive. *Hill v. Town of Wells*, 2021 ME 38, ¶ 23.

Finally, this Court will “accord substantial deference to the [tribunal of original jurisdiction's] characterizations and fact-findings as to what meets ordinance standards.” *Day v. Town of Hiram*, 2025 ME 8, ¶ 9, 331 A.3d 365 (citation omitted). Here, of course, the tribunal of original jurisdiction was the Planning Board. The Court cannot vacate the findings of the Planning Board unless Appellants are able to demonstrate that “no competent evidence supports the [Planning Board's] conclusions.” *Adelman v. Town of Baldwin*, 2000 ME 91, ¶ 12, 750 A.2d 577. Appellants have failed to make that required showing.

**B. The Planning Board’s findings are supported by substantial evidence.**

To begin with, it is useful to restate here the ordinance standard that is at issue:

When any proposed development is within one hundred feet of any designated historic district . . . 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 . . . . 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.

Code § 14-526(d)(5)(b) (emphasis added) (A. 67-68.) The key ordinance language is:

“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.” § 14-526(c)(5)(b) (emphasis added) (A. 68.)

The administrative record contains a Historic Preservation Advisory Review (“Advisory Review”), dated January 14, 2025, which was drafted by Evan Schueckler, the City’s Historic Preservation Program Manager, and appears on his letterhead. (A. 142-152.) The Advisory Review contains a very detailed discussion of the project and its compatibility with the major character-defining elements of the immediate vicinity, applying the meaning of the term “compatible” from the above-quoted ordinance language.

The portion of the Munjoy Hill Historic District adjacent to the proposed development, the west side of Willis Street and Montreal

Street east of Willis Street, reflects the same eclecticism and architectural diversity found throughout the whole district. Buildings vary from one-and-a-half stories in height up to three stories, ranging from modest single-family homes to larger multifamily buildings. Architectural styles and ornaments reflect the full span of the district's historical development.

(A. 147.) The photos included within the Advisory Review support the eclecticism that is described in the passage quoted above. (A. 148.) As examples, Mr. Schueckler included detailed descriptions of the flat-roofed, triple-decker buildings at 52, 63 and 64 Montreal Street, which are all inside of the Munjoy Hill Historic District and very close to the project site. (A. 149.) These buildings are primary examples of compatibility with the portion of the District in the immediate vicinity of the Project, as those buildings are just steps away from the proposed project site. The Advisory Review includes architectural descriptions from the designation materials for the Munjoy Hill Historic District for Willis Street, which references two and-a-half story Greek Revivals with gable ends to the street. (A. 147.) The architectural description for Montreal Street discusses “a variety of scales and styles of homes...Dwellings range from one story to three stories.” (A. 148.) The Advisory Review concludes with a five-paragraph analysis of the proposed development, describing the various features of the building: overall form – “flat roof articulated by a projecting cornice”; articulation and fenestration; stacked balconies/porches; and material palette. (A. 151-152.) Mr. Schueckler also pointed out that certain features of the building “help to differentiate the construction as a product of its own time,” which is part of the

review standard. (A. 152.) In summary, the Advisory Review constitutes substantial evidence in the record to support the Planning Board’s finding of compatibility.

**C. The Board Acted Within Its Authority in Allowing the Record to Be Supplemented.**

Appellants argue that the Board impermissibly allowed the record to be augmented. The Board accepted the following during its December 10, 2024 hearing on the remand order:

- a. A presentation by 37 Montreal’s agent. (A. 113-115, 181-204.)
- b. Testimony by the City’s zoning administrator about the general historic interpretation of the Code’s height and setbacks, as well as specific examples of the Board’s own approvals of projects that included one or both of these issues. (A. 111-113, 174-179.)
- c. A written submission and oral presentation by Julie Larry, an architectural historian. (A. 118-119. 153.)
- d. Statements by Appellants and their attorney. (A. 116-118.)

The presentations by Ms. Larry and 37 Montreal’s agent addressed the historic preservation review issues. While the Board previously determined that the application met the historic preservation standard set forth in the site plan review provisions in its prior decisions, both this Court and the Law Court remanded the matter for additional findings. (A. 7, 11.)

Throughout this case, the Courts have focused upon the due process claims raised by Appellants, sometimes seemingly without consideration of the due process rights of 37 Montreal. This Court has repeatedly stated that “[b]oth an applicant and

members of the public who oppose a project are entitled under the [D]ue [P]rocess [C]lause of the United States and Maine [C]onstitutions to a fair and unbiased hearing.” *Duffy v. Town of Berwick*, 2013 ME 105, ¶ 15, 82 A.3d 148 (citations omitted) (emphasis added). A fair and unbiased hearing is one where there is a full and fair opportunity to comment on an application. *Id.*, ¶ 17. The Court will vacate an agency’s actions “if it results in procedural unfairness.” *Lane Constr. Corp. v. Town of Washington*, 2008 ME 45, ¶ 32, 942 A.2d 1202. However, the reopening of a hearing process to accept new evidence is not an arbitrary and capricious action resulting in a due process violation. *Id.* ¶ 34.<sup>14</sup> In reviewing Appellants’ arguments, this Court must weigh the due process rights of both Appellants and 37 Montreal.

Both Appellants and 37 Montreal submitted additional materials and testimony concerning the issues raised by Appellants in this appeal, without objection by either side. However, Appellants now complain that the City could not supplement the record through the submission of a report that Appellants have repeatedly argued was required by § 14-526(d)(5)(b).<sup>15</sup> Given that only the City could generate the report required by § 14-526(d)(5)(b), it is puzzling to see how allowing the City to further

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<sup>14</sup> In *Lane*, the planning board allowed an applicant to provide information clarifying a technical issue without allowing the public to speak on this issue. The Law Court found that this was not a due process violation because the planning board properly struck “a fair and reasonable balance between its interest in efficiency and the public’s right to speak” “in view of the extensive hearings and deliberations” conducted in the board’s review of the application. Here, the public was invited to, and did, comment, both at the December 10 and the January 14 hearings.

<sup>15</sup> The Planning Board had previously determined that the May 18, 2021 staff report met the requirements of the Code.

supplement the record constitutes a due process violation when Appellants have argued consistently in this case that the City should have provided such a report in the first instance. The overall conclusions in the January 14, 2025 memorandum are no different from those set forth in the May 18, 2021 staff report prepared by several City Planning staff members, including the Historic Preservation Program Manager. The May 18, 2021 report discusses “compatibility with surrounding buildings and general character of the established neighborhood” and identifies the “predominant character-defining elements of residential architecture in the area.” (A. 162.) The January 14, 2025 report addresses these issues, while providing additional evidence of the actual inventory considered in the review, including photographs of nearby buildings in the Munjoy Hill Historic District. (A. 142-154.) The issues addressed in the January report addressed the same issues discussed by Ms. Larry in her evidence and testimony. Appellants had notice of the additional report and were able to contest it during the January 14, 2025 meeting, in addition to having provided Ms. Larry’s report at the December 10, 2024 meeting. (A. 134.) This satisfies Appellants’ due process rights. *See Bryant v. Town of Wiscasset*, 2017 ME 234, ¶ 16, 176 A.3d 176 (determining that failure to give personal notice of a planning board public hearing did not result in a due process violation when the board held an additional hearing and the plaintiffs were afforded the opportunity to be heard).

Appellants’ arguments that the Board did not have the authority to augment the record further ignore 37 Montreal’s due process rights. While submitting their

own additional testimony and evidence through Julie Larry, they seek to preclude any response by the City on the issues of how the City reviews the “immediate neighborhood” as discussed in § 14-526(d)(5)(b). Since Ms. Larry’s submission conflicted with 37 Montreal’s submission on this issue, it was appropriate for the Planning Board to request that the Historic Preservation Program Manager provide a report addressing the ordinance standard, including this disputed issue. The Board discussed the need for a staff review of what it was to consider as the inventory for purposes of the historic preservation compatibility standard. (A. 129.) In addition, members of the Board were concerned that the Court would find that the December 10, 2021 report did not meet the requirements of § 14-526(d)(5)(b), even though Board members felt that the report did in fact meet the requirements. (A. 130-131.)

In addition to the inconsistency of Appellants’ arguments that the record could be supplemented in some respects, but not in others, it is important to focus on the issues raised in this case. Throughout this appeal, Appellants have argued that the May 18, 2021 memorandum did not meet the requirements of § 14-526(d)(5)(b). Appellants have repeatedly urged that the appeal should be granted simply because the specific form of report that they argued was required was not prepared. However, as previously discussed, 37 Montreal has never had the ability to compel the City to provide any type of report. Granting the appeal under such circumstances would result in procedural unfairness to 37 Montreal, in violation of its due process rights.

*See Lane Constr. Corp*, 2008 ME 45, ¶ 32, 942 A.2d 1202. The Planning Board's procedures afforded Appellants-and 37 Montreal-the due process protections to which they are entitled. *Bryant*, 2017 ME 234, ¶ 16.

Appellants' argument that the historic preservation staff report was improperly presented at the January 14, 2025 meeting because it was done to support the approval is contradicted by the Board's deliberations. Board Member Silk, who was acting as chair at that meeting, stated that the Board accepted additional information from the staff about the interpretation of the height and setback issues, "heard comments from the public regarding that" and then the Board determined that it was important to have "an actual memo from HP where there wasn't any doubt whether it was a memo or not." (A. 135.) He went on to state: "I don't think it means anyone has prejudged this or won't pay attention and read that memo and make a decision in terms of compatibility." (A. 135.) Four members stated that they did not find the historic preservation report to contain new information not already known to the Board at the time of its prior votes. (A. 136.)

In the Second Remand Order, the Superior Court concluded: "there is a defect in the record because there are insufficient facts to permit meaningful judicial review." *Murray*, 2024 Me. Super. LEXIS 25 at \*12.<sup>16</sup> The addition of facts falls within the ambit of the Second Remand Order. Because both parties were allowed to participate

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<sup>16</sup> The Remand Order calls for the filing of a supplemental record and did not limit that record to a supplemental decision. *Id.*

fully in the proceedings, including submitting their own presentations, the Planning Board properly considered the due process rights of both parties.

The Superior Court rejected Appellants' argument concerning the reopening of the evidentiary record, finding that "[t]here is no evidence in the record that the Planning Board failed to comply with any rule or order (including this Court's remand order, which contained no language restricting the Planning Board's ability to hear new evidence, violated Plaintiffs' due process rights, or otherwise exceeded its discretion." (A. 17.)

**D. The Planning Board did not err in its determination of the area that could be utilized in the determination of compatibility.**

Appellants argue that the portion of the Historic District in the immediate vicinity is shown in a photograph included in their brief and also found at A. 180, which they say was included in the staff presentation. (Blue Br. 42.) They fail to note that it was not included as part of the Advisory Report, which is found at A. 142-152. Instead, this exhibit was included as part of the submission of Julie Larry, who included it as an exhibit with the caption "Area approximately 100' feet from the subject property." (A. 154). Appellants' citation to A. 180 is found after the presentation of the Zoning Administrator. (A. 166-179.) The Advisory Report included a different map that showed the "immediate context of the Munjoy Hill Historic District, in the vicinity of the proposed development at 19 Willis Street." (A. 147.) It is important to note that Ms. Larry's map appears to be based on a

misreading of the applicable provision of the Code. The review is not limited to buildings within the Historic District and within a hundred feet of the proposed development. The 100-foot requirement instead determines what areas of development outside of the Historic District are subject to the general compatibility standard. Code § 14-526(d)(5)(b). (A. 67.) Because Appellants' argument is not supported by the plain language of the Code, they have failed to show that the Board's findings on this issue were in error, either as a matter of fact or law.

The Planning Board has the discretion to evaluate the evidence and make credibility determinations and find facts based on its assessment of the evidence. *See Petrin v. Town of Scarborough*, 2016 ME 136, ¶ 42, 47 A.3d 842 (noting that, “[a]lthough the Taxpayers presented testimony from an appraiser who offered a contrary opinion regarding the effect of the 2008 recession, the Board [of Assessment Review] was not compelled to accept that view”). In its decision, the Planning Board specifically referenced the Advisory Review as aiding the Board in its deliberations and conclusion that the project is “compatible with the major character-defining features of the surrounding neighborhood.” (A. 38.) One may infer by the fact that the Planning Board did not incorporate any of Ms. Larry's findings into its decision that it did not find her testimony to be persuasive. Instead, the Board adopted the analysis set forth in the Advisory Review, and in doing so, did not commit any reversible error.

**E. The Board's consideration of their own competent personal knowledge was not reversible error.**

Appellants further argue that the Board's decision should be reversed due to the fact that one of the Board members discussed his own personal observations of the vicinity of the project site. Although it is impermissible for a Board member to rely on extrinsic evidence when adjudicating issues before the Board, a Board member may rely on competent personal knowledge of the subject matter of the application. *Compare City of Biddeford v. Adams*, 1999 ME 49, ¶ 10, 727 A.2d 346 (stating that an administrative board acts improperly if it considers evidence that is not part of the record in reaching its decision) *with Pine Tree Telephone & Telegraph Co. v. Town of Gray*, 631 A.2d 55, 57 (Me. 1993) (recognizing well-established law that planning board members may employ their competent personal knowledge when rendering decisions)<sup>17</sup> (citing *Lippoth v. Zoning Bd. of App., City of So. Portland*, 311 A.2d 552, 557 (Me. 1973) (board members' knowledge of street, surroundings, and Maine weather "would encompass the traffic problems readily foreseeable" and could make an informed judgment as to whether approval would generate unusual traffic conditions affecting the general neighborhood) and *Forest Construction Co. v. Planning & Zoning Comm'n*, 155 Conn. 669, 236 A.2d 917, 921 (Ct. 1967) ("members of the commission

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<sup>17</sup> In that case, the Law Court held that the planning board "properly considered the detailed personal knowledge of its members that the portion of Route 26 adjacent to the lot at issue was often congested because of its proximity to a number of public and commercial buildings." *Pine Tree Tel. & Tel.*, 631A.2d at 57.

were entitled to consider any facts, concerning the area, traffic, intersection and surrounding circumstances, which they had learned by personal observation”).

Notably, the transcript passage that Appellants quote in their brief (Blue Br. 38) addresses the board member’s observations prior to the initial approval of this project, not the current approval that is under appeal. The board member’s reference must be considered in context, as his concluding statement was: “So I’m comfortable that we made the finding initially correctly. I’m comfortable that the second time we made the finding we made it correctly. And I think now that we have without doubt a memo that is from [Historic Preservation], I’m comfortable that the prior two findings that we made were correct.” (A. 137.) Therefore, it is apparent that, at least for this board member, the primary basis for finding that the project is compatible with the immediate vicinity is the Advisory Review that is included in the record (A. 142-152), which matches up with his own observations. *See Adelman v. Town of Baldwin*, 2000 ME 91, ¶ 11, 750 A.2d 577 (finding no error in planning board members’ statements that they applied their own personal experiences when discerning the credibility of evidence presented to the board). Board members live within the communities where the projects that they review are located. It is not improper for them to walk within their community and they are not required to avoid neighborhoods where pending projects are located.

**F. The Historic Preservation Advisory Review complies with § 14-526(d)(5)(b) and the Board Properly Determined that the Project met the Standard.**

Finally, Appellants assert that the “staff memo,” referred to herein as the Advisory Review, does not comply with the applicable ordinance standard, § 14-526(d)(5)(b), which is quoted above. Appellants have not set forth any reasonable basis for concluding that the Board’s decision should be reversed.

The ordinance says that, in situations where the project site is located within 100 feet of a historic district, “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.” Code § 14-524(d)(5)(b). (A. 67.) Although Appellants concede that the Advisory Review was drafted by the HP staff member, Mr. Schueckler (indeed, the memorandum is printed on his letterhead), they argue that because a member of the planning staff<sup>18</sup> is also listed on the document, it somehow disqualifies the Advisory Review as complying with the applicable ordinance standard. (Blue Br. 39-40.) They also argue that the Board could not consider the memorandum at all at this point in the review. However, they themselves presented new evidence and testimony in opposition to the application, including a letter from an architectural historian. (A. 153.)

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<sup>18</sup> It is important to note that the Historic Preservation Program manager is, in fact, a member of the City’s Department of Planning & Urban Development (*i.e.*, planning staff).

Appellants argue that the Advisory Review is flawed because it discusses “triple-deckers on a section of Montreal Street that is outside the immediate vicinity,” when in reality, those three buildings are right up the street from the project site. Appellants make repeated reference to an arbitrary 100-foot diameter requirement in their attempt to very narrowly define the phrase “immediate vicinity” to mean “directly across the street,” but there is no support in the ordinance for such a requirement. The Advisory Review appropriately included a discussion of the large, triple-decker buildings located just a few doors up Montreal Street from the project site and readily visible from it, and the Planning Board’s adoption of that analysis for its conclusion was not erroneous. (A. 38, 147.) To reiterate, simply because the record evidence could lead to inconsistent conclusions does not render the findings invalid “if a reasonable mind might accept the relevant evidence as adequate to support the [board’s] conclusion.” *Town of Vienna v. Kokernak*, 612 A.2d 870, 872 (Me. 1992). Further, the historic compatibility standard does not limit the size or use of structures. Instead, it requires that they be “generally compatible with the major character defining elements” of the neighboring district, while at the same time stating that a building is to be “a distinct product of its own time.” (A. 68.) There is substantial evidence in the record to support the Board’s finding that the proposed development met this standard.

## CONCLUSION

For the reasons set forth above, Appellee/Party-in-Interest 37 Montreal LLC respectfully requests that this Court deny Appellants' Rule 80B appeal, and affirm the Planning Board's initial December 14, 2021 approval of the 37 Montreal LLC's application for Level III Site Plan, Subdivision, and Conditional Use Approval, and supplemental decisions dated December 12, 2023 and January 10, 2025.

Dated: December 31, 2025

/s/ Natalie L. Burns  
Natalie L. Burns, Bar No. 3687

Attorney for Appellee/Party-in-Interest  
37 Montreal LLC

JENSEN BAIRD  
P.O. Box 4510  
Portland, Maine 04112  
(207) 775-7271  
[nburns@jensenbaird.com](mailto:nburns@jensenbaird.com)