

**STATE OF MAINE**  
**SUPREME JUDICIAL COURT**  
**SITTING AS THE LAW COURT**

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**LAW COURT DOCKET NO. CUM-25-421**

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**PETER L. MURRAY, ET AL.**

Plaintiffs/Appellants

v.

**CITY OF PORTLAND, ET AL.**

Defendants/Appellees

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**ON APPEAL FROM THE**  
**CUMBERLAND COUNTY SUPERIOR COURT**

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**REPLY BRIEF OF PLAINTIFFS/APPELLANTS**

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## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	3
ARGUMENT .....	4
I.    THE BOARD MEMBERS DID NOT EXERCISE THEIR OWN JUDGMENT AS TO THE MEANING OF THE WORD “GRADE” AND “STRUCTURE” IN THE PORTLAND CODE. (In Response to Developer’s Brief, Argument I, City’s Brief, Argument I) .....	4
II.   APPROVALS OF OTHER PROJECTS ARE NOT APPROPRIATE PRECEDENT FOR THIS CASE. (In response to Developer’s Brief, Argument I, City’s Brief, Argument I) .....	7
III.  THE ZONING ADMINISTRATOR’S READING OF THE DEFINITION OF BUILDING HEIGHT DEPRIVES THE PROVISION OF REGULATORY SIGNIFICANCE. (In Response to Argument II(A) of Developer’s Brief) .....	8
IV.  THE WALLS AND PATIOS AROUND THE CORE BUILDING, HOWEVER TERMED, ARE “STRUCTURES” SUBJECT TO SIDE YARD AND SETBACK REQUIREMENTS. (In Response to of Developer’s Brief, Argument II(B) and City’s Brief, Argument III) .....	11
V.   DELIBERATE ACQUISITION OF OFF-THE-RECORD INFORMATION TO INFORM BOARD DELIBERATIONS VITIATES THE BOARD’S DECISION (In Response to Developer’s Brief, Argument III(E), City’s Brief Argument V).....	13
CONCLUSION .....	16

**TABLE OF AUTHORITIES**

Page(s)

**CASES**

*Banks v. Maine RSA, #1*, 1998 ME 272.....8, 9

*Brooking v. Maine Employment Sec. Comm'n*, 449 A.2d 1116 (Me. 1982).....15

*City of Biddeford v. Adams*, 1999 ME 49 .....15

*Friends of Congress Square Park v. City of Portland*, 2014 ME 63.....6

*Jordan v. City of Ellsworth*, 2003 ME 82 .....8

*Lippoth v. Zoning Bd. of Appeals, City of South Portland*, 311 A.2d 552 (Me. 1973).....15

*Pine Tree Tel. and Tel. Co. v. Gray*, 631 A.2d 55 (Me. 1993).....15

*Tominsky v. Ogunquit*, 2023 ME 30 .....7

**STATUTES**

5 M.R.S.A. § 9059(4) (1989).....15

## ARGUMENT

### **I. THE BOARD MEMBERS DID NOT EXERCISE THEIR OWN JUDGMENT AS TO THE MEANING OF THE WORD “GRADE” AND “STRUCTURE” IN THE PORTLAND CODE. (In Response to Developer’s Brief, Argument I, City’s Brief, Argument I)**

From the beginning of this case, the Planning Board has relied on and deferred to the Portland Zoning Administrator as the supreme authority on how the language of the Portland Land Use Code is to be interpreted and applied.

However, it is the Planning Board, not the Zoning Administrator, that is charged with the interpretation of the Portland Land Use Code and the application of the ordinance to project applications before it. Uncritical deference to the Zoning Administrator is an abdication of the Board’s core responsibility. Statements of the Board members themselves during the course of the hearings disclose the extent of this deference and abdication.

One Board member bowed to the Zoning Administrator’s interpretation of “grade” for height measurement purposes despite his own repeatedly-expressed conviction that it “fails the straight face test” (Supp. R. 69-70, 76-77, 81, App. 85-86, 92-93, 97) because it is “the law of the land”. 2<sup>nd</sup> Supp. R. 216, App. 122, T. 52.<sup>1</sup>

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<sup>1</sup> These statements are much clearer indications of the Board members’ actual reasoning processes than the January 15 Findings prepared for them by Corporation Counsel. The latter appear to be conscious efforts to improve on what the Board members actually said during the deliberations. At the hearings, the

As acknowledged by another Board Member,

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. R. 80, App. 96 (Emphasis added). Or as a third Board Member stated on the

Record:

*.... 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. R. 73, App. 88-89 (Emphasis added).

At the first hearing in December 2021, the following colloquy took place

between the Board Chair and a planning staff member:

[Board Chair] . . . . but can we just reiterate the determination that Anna [inaudible] came to and how she came to that on average grade? And I guess clarifying, again, whether that's within our purview or not. *I guess the Zoning Administrator made the determination so its-- it seems as though it's not...*

[Staff member] *Yeah, it's not so much a finding as it is a zoning regulation and that's how the City calculates height."*

AR 768 (Emphasis added).

Terminology in municipal ordinances is to be read “reasonably with regard to both the objectives sought to be obtained and the general structure of the

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the Board members repeatedly emphasized that they were relying not on their own readings of the Code, but on the determination of the Zoning Administrator as initially conveyed to them by Planning Staff and ultimately by the Zoning Administrator herself.

ordinance as a whole.” *Friends of Congress Square Park v. City of Portland*, 2014 ME 63, ¶ 9. There is nothing in the law of Maine or the Land Use Code of the City of Portland that gives the Zoning Administrator the authority to construe Code language in a manner that binds the Planning Board in its quasi-judicial function of deciding Site Plan applications.

Based on the statements of Board Members on the Record, had they felt free to construe the ordinance for themselves, they would likely have found that the Developer’s ploy did indeed “fail the straight face test’ and would have rejected the application. After all, to the uninitiated, the plain meaning of the term “grade” in a building height regulation is much more likely to mean the surface of the site at the time of the application rather than some artificial surface to be created by the Developer as a part of the structure of the building. By the same token, if the purpose of height limitations in zoning ordinances is to inform both the public and potential developers of the maximum height of a structure that may be lawfully built on a specific lot, that purpose is better served by measuring the maximum height from the site as it stands, not from an unknown elevated surface that the developer may create and then label “grade.”

**II. APPROVALS OF OTHER PROJECTS ARE NOT APPROPRIATE PRECEDENT FOR THIS CASE. (In response to Developer’s Brief, Argument I, City’s Brief, Argument I)**

Cherry-picked approvals of other projects of various configurations at various times and in various zones do not constitute any kind of valid precedent that would guide the decision of the present case. First of all, prior rulings by a municipal Planning Board are not the kind of precedent that will constrain this Court’s *de novo* reading of municipal ordinance language on a Rule 80B appeal. See *Tominsky v. Ogunquit*, 2023 ME 30. This Court examines the meaning of defined terms within the Code and gives “no deference to a board's interpretation of an ordinance because such interpretation is a question of law that [the court] review[s] *de novo*.” *Tominsky*, 2023 ME 30, ¶ 22.

Second, and in any event, the approvals presented to the Planning Board cannot be related to the present case. There was no showing that these approvals involved the same Code language that applies to the present case. They were from various time periods and involved various zones. They involved various sites and projects, each with its own configuration of site and structure. There is no showing that the decisions presented are in fact representative of a uniform practice of any kind. It is entirely possible that within the voluminous files of the Portland Planning Department one can find approvals or denials based on other and different readings of this or other Code language. There is no organized way in

which this body of material is easily accessible to the public or anyone other than the Planning Staff.<sup>2</sup>

Most important, there was no showing that any of the approvals were the result of a contested proceeding or that there was any objection to the projects proposed. An administrative approval without objection is meaningless.

### **III. THE ZONING ADMINISTRATOR’S READING OF THE DEFINITION OF BUILDING HEIGHT DEPRIVES THE PROVISION OF REGULATORY SIGNIFICANCE. (In Response to Argument II(A) of Developer’s Brief)**

The only interpretation of the term “grade” that resonates with both the plain meaning of the language and the purposes and objectives of the ordinance is as the surface of the site at the time of the application. The Developer’s interpretation both is strained as a matter of plain language and flies in the face of the purposes and objectives of the ordinance. It would produce “absurd, inconsistent ... illogical results”. *Jordan v. City of Ellsworth*, 2003 ME 82, ¶ 10.

This case is on all fours with *Banks v. Maine RSA #1*, 1998 ME 272, where the developer sought to argue that a tower attached to a building was not a “structure” subject to the height limit in the zoning ordinance.

This overly broad interpretation of the ordinance, however, would render the height restriction virtually meaningless. Following this construction, a

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<sup>2</sup> The Developer’s Brief (p. 10) suggests that “due process” is served by allowing members of the public to inform themselves of the Zoning Administrator’s reading of the terms at issue in this proceeding by rummaging around in the files of the Planning Department and deciphering approval files of the kind presented in this case. On the contrary, due process requires that the City’s ordinances be expressed in plain language understandable to the public and that City Boards adhere to such language in construction and application of those ordinances.

skyscraper built simultaneously with shorter buildings would constitute a "feature" of the overall construction project. Such an interpretation would create an illogical result.

1998 ME 272, ¶ 9.

The contention of the Developer's Brief, echoed by the City's Brief, that the term "grade" for measurement of building height refers to whatever artificial surface the Developer might establish around the perimeter of his building deprives the definition of building height of regulatory significance. In this case, the Developer proposes to measure from elevated patios up to 14 feet above the surface of the building site to be created by adding walls around the perimeter of the building and filling the slot between the interior and exterior walls with dirt and patio surfacing. This is not even a case of a developer putting fill on a lot and then building on top of the fill. The girdle of earth to be added around the building proper would have nothing to do with supporting the building.

This approach would leave the matter of building height entirely up to the Developer, who could choose his own starting point. No reading of the plain meaning of the language with regard to the objectives sought to be obtained would reach such a result.

The Code definition of "predevelopment grade" as the average grade of a building site on October 1, 2000 does not justify reading the unmodified term "grade" as "post-development grade" when such a reading makes no policy sense.

It is just as consistent with reading that term as the surface of the earth at the time of the application, which does implement the policy of informing the public and potential developers of the maximum height of structure that can be built on any lot in the City. By the same token, the fact that the Developer has to point to storm water runoff regulations as imposing a *de facto* height restriction (See Developer's Brief pp. 15-17) is an admission that its construction of the express height regulations in the zoning ordinance fails to implement this important public policy. The unclear notion that storm water runoff requirements would somehow limit building height in some fashion is no substitute for construction of the zoning ordinance itself that makes clear to the public how high a structure can be built on any existing plot in the city.

The assertion in Developer's Brief (p. 18) that measuring grade from the actual surface of the building site would mean that no building higher than two stories could be built on most of Munjoy Hill is patently wrong.<sup>3</sup> As noted on page 12 of Appellants' principal Brief, on the very site in question, measuring building height from the average elevations of the building site at the four corners of the proposed structure would comfortably allow a building of three stories plus a

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<sup>3</sup> The same is true of the assertion in the Developer's Brief (p. 18) that "[l]imiting the building height on lots with slopes ..... will preclude the development of housing units within any portion of the R-6 zoning district that may have slopes."

parking deck. It would not allow a developer to measure from the surface of porches, bridges, or artificial patios to be created as a part of the project itself.

**IV. THE WALLS AND PATIOS AROUND THE CORE BUILDING, HOWEVER TERMED, ARE “STRUCTURES” SUBJECT TO SIDE YARD AND SETBACK REQUIREMENTS. (In Response to of Developer’s Brief, Argument II(B) and City’s Brief, Argument III).**

The claims in the briefs of both the Developer and the City that, in the MHNCOD, “side yard” setbacks are not to be measured from “structures” as elsewhere in the City but only from “buildings” ignore the actual language of the ordinance as well as the policy behind setbacks, which applies equally in all parts of town.

As noted in Appellants’ principal Brief, the term “side yard” is defined in Code section 14-47 as “[a] yard adjoining a side lot line ... the width of which shall be the shortest horizontal distance between the side lot line and any structure.” AR 462, App. 49. “Setback” is “[t]he required distance and the land resulting therefrom between a street line and the closest possible line of conforming structure.” AR 456, App. 46. A “structure” is [a]nything 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.” AR 458, App. 47. There is no special definition of any of these in the MHNCOD.

The MHNCOB relates the size of the defined “side yard” to the height of the building to be placed on the lot. It does not say that the side yard is to be measured from the building. Here is the language:

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.
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AR 484, App. 52. On a lot with a building up to 35’ high, the defined “side yard” is as required by the underlying zoning. For a lot to be improved with a building more than 35’ high, the minimum “side yard” is 10 feet. There is no suggestion in this language of a new definition of “side yard” that is any different than the one in the “Definitions” section of the Land Use Code. Nor is there any reason as a matter of policy why side yards in the MHNCOB should be measured any differently than side yards in other parts of the City

In fact, the outer walls with “patio amenities” surrounding the building core of the Project are not really “retaining walls” designed to hold up earth on a sloping lot. They do not create a level surface on which to site a building. These are walls to be constructed as part of the building itself to contain new earth to be added (including above the garage door) to create an artificial elevated patio

surface in an effort to game the system under which building heights are computed. These walls have no function of leveling or preparing the site on which the building is to be constructed.

Construing the term “structure” to include the external walls of the Project also promotes the policy of required setbacks. These are walls up to 14 feet high. They would be constructed to create elevated patios as a part of the construction of a multi-story building. Allowing them to be built right on the property line will deprive the neighbor of air and light and make it impossible to service or repair the walls without trespassing on his property.

“Retaining walls” or not, the Project’s external walls and patios are clearly “structures” that are subject to side yard and street setback requirements of the MHNCOD.

**V. DELIBERATE ACQUISITION OF OFF-THE-RECORD INFORMATION TO INFORM BOARD DELIBERATIONS VITIATES THE BOARD’S DECISION. (In response to Developer’s Brief, Argument III(E), City’s Brief Argument V)**

The arguments in the Developer’s Brief as well as the City’s Brief that off-the-Record information about the site and environs deliberately obtained by one of the Board members was merely incidental familiarity with the area are directly negated by statements by the Board member on the Record of the proceedings.

At the first Board Hearing on December 14, 2021:

Yeah, thank you Brandon. So, the – *I went up to the site, I've been there about three different times, walking through the neighborhood*, and I'm mindful – you know . . . paying close attention to the—both sides of the street, and I've focused on that in the past, but I've been around , both around the block and around the two-block radius for the neighborhood and looked at the design and the tougher question for me was the design standard issue.

AR 774 (Emphasis added).

...and having gone there three times, literally, and walked around taking a look, and you know, looking at MacArthur Gardens or whatever it's called right down the street....

AR 775.

At the hearing on January 15, 2025:

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.

2<sup>nd</sup> Supp. R. 247, App. 137, T. 17-18 (Emphasis added).

The Board member's statements make clear that he went deliberately to the site (on more than one occasion) to acquire information relevant to his decision of the application then before the Board and that the visits and the information obtained were not on the Record. Moreover, the Board member used the information gained in this manner to support his position in deliberations and

convince others to follow his lead.<sup>4</sup> That is a direct violation of proper administrative procedure as condemned by this Court in *City of Biddeford v. Adams*, 1999 ME 49. As this Court there stated,

[o]nly information 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.

1999 ME 49, ¶ 10.

This is no pre-existing casual familiarity with the area as was the case in *Lippoth v. Zoning Bd. of Appeals, City of South Portland*, 311 A.2d 552 (Me. 1973) and *Pine Tree Tel. and Tel. Co. v. Gray*, 631 A.2d 55 (Me. 1993). Without knowing exactly where the Board member went and exactly what he saw, there is no opportunity for those opposing the application to explain this adverse information or even argue whether it should be considered at all.

This case is on all fours with *City of Biddeford v. Adams, supra* where the Board member in question did exactly the same thing, requiring remand of the Board decision for a new hearing without the participation of that Board member.

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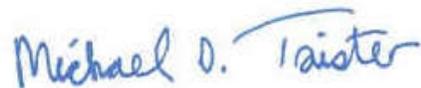
<sup>4</sup> The passages quoted are only a few of the several times this Board Member referred to the information he had acquired in his off-the-Record investigation of the Project environs. See also AR 774, 2<sup>nd</sup> Supp. AR 222, T. 74; 2<sup>nd</sup> Supp. AR 223, T. 79.

In this case as well, the proper course of action is to set aside the Board's tainted decision.

### CONCLUSION

For the reasons set forth in Appellants' principal Brief, this Court should rule as a matter of law that the constructions of "grade" and "structure" relied on by the Planning Board are legally erroneous and that the procedure and result of the Board's consideration of the effect of the Project on the adjacent historic district are likewise erroneous. This Court should thereupon vacate the decision of the Superior Court, set aside the decision of the Portland Planning Board, and order that the Developer's application be denied.

DATED: January 22, 2026



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