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MEMORANDUM

To: Warrant Committee, General Government Sub-committee

From: Kevin L. Sutherland, Town Manager

Date: August 29, 2022

Re: Questions received and Responses to the Citizen's Petition-Cruise ship disembarkations

This memo was put together in response to questions received from members of the Warrant Committee for their upcoming General Government Sub-committee meeting. While I requested assistance from staff in drafting some answers, the language developed for this memo is from the Town Manager's point of view.

1. Do we have any info on how the number of disembarkations affect the health of Frenchman's Bay waters? i.e., more passengers arriving may mean more tender boats going to and from, both tenders and cruise ships may be an additional burden on the bay. (Louise Lopez)

The waters are currently tested annually for bacteria in and around cruise ships (part of the cruise ship fee is earmarked for this work). As for impact specifically from tenders/ disembarkations, I do not believe we have metrics.

2. The petitioner's presentation and LUO Amendment mention that the loss of revenue expected by restricting disembarkations to a smaller number would not cause a loss of revenue to the town of Bar Harbor's resident taxpayers. I did not think the cruise ship revenue came right to town taxpayers and I believe we are limited to where and how we use cruise ship revenue to improvements that cruise ship passengers would benefit from. Am I correct in my thinking? (Louise Lopez)

Currently, revenue from cruise ships is directly related to its lower berth capacity when anchoring in Bar Harbor. i.e – a ship with 2,376 lower berth capacity x FY23 cruise ship fee \$5.21 = \$12,378.96 for one visit to Bar Harbor.

That revenue remains in an enterprise fund and is used to pay for cruise related expenditures. Some of those additional revenues are transferred to the general fund (which is municipally back by the tax payers) to offset some expenses related to staffing and debt service projects in and around the pier and the downtown where tourists typically visit. The FY23 budget has about \$485,000 of expenses that offset this. Without this revenue, we would need to look to other funding sources to offset this; greater utilization of the parking fund (where allowed by law), raise property taxes, cut services / programs, or a combination of all three.

3. This MDI Islander article begins with this info: “For the fiscal year of 2023, revenue from cruise ships anchoring in Bar Harbor is expected to be almost a million dollars. Without this revenue stream, the town would have to raise an additional \$485,000 or look to cut costs from municipal services.” Are these figures from a complete ban on all cruise ships? If so, what would the amount be for the town plan’s current restrictions? What about the citizens’ petition’s proposed restrictions? (Ezra Sassaman)

The figure quoted in the article assumes that there is a complete ban, however if the citizen’s petition passes (and it stands in court), there will likely be a strong reduction in cruise fees to cover disembarkation related activities only (essentially the same as a ban). This amount, \$180k, is separately budgeted from the 485k above. To better understand this, I’d suggest researching what happened in Juneau, Alaska.

As part of the FY23 budget process, the Council already made a 30% reduction to the cruise ship fund. The Council supported Cruise Management Plan will see no further reduction in projected revenue (unless the calls to port are significantly below the caps).

4. Has Bar Harbor residents’ opinion on cruise ship restrictions ever been gauged? If so, is this information available anywhere? (Ezra Sassaman)

A survey was conducted in 2021 and [the report](#) was presented in June of that year by Pan Atlantic Research.

Other Cruise ship related presentations, reports, and surveys can be found [HERE](#).

5. When are reservations made for the 2023 season and what would be the legality the town has to follow to change a reservation after it’s been confirmed? (Kathy St Germain)

Many, if not most, of the reservations for the 2023 season were in place since August of 2021. With the Council’s approval earlier this month, we’ve moved forward with accepting reservations that meet the new requirements.

There are bookings in 2023 for April and November and the lower berth capacity for approved ships in September and October are just slightly over the new daily and monthly caps (as they were approved prior to any of the Council’s actions). Those bookings will be honored. However, any other requests that were received but not previously approved or are received going forward will follow the new parameters.

This approach has been agreed to by both parties. The approval of the Citizen’s petition would undo any of the recently approved bookings and create greater legal risk for the town.

6. Can we get the results from the polco poll that was asking about the lack of cruise ships during covid on business? (Kathy St Germain)

Assuming this is in reference to Slides 52 – 57 in the report from Pan Atlantic Research. Link above in Question 4.

7. Some say the town cannot determine what ships can come to our harbor based on environmental records, yet Key West gives preference to ships with strong environmental records. How do they do it? (Ezra Sassaman)

The cruise ships in Key West dock directly at the pier, and at the pier locations which the municipality owns, they theoretically have a little more leverage (it's legally questionable and is still being debated in court).

In Bar Harbor, the cruise ships anchor in “navigable” waters which are within the federal government’s jurisdiction. The United States Coast Guard (USCG) issues regulations and actively enforces them here, including regulations specific to cruise ships.

All cruise ships that call on Bar Harbor have a USCG issued license: a Certificate of Compliance and/or a coastwise license. In such cases, federal law preempts state law (our anchorage is outside the municipal jurisdiction and the Harbormaster is acting as a steward of the state in this capacity).

8. Has the Town spoken to our counterparts in Key West or Portland to glean any insight into what our legal consequences may be from limitations that we may place on cruise ships? Are our circumstances similar or different; and, if so, in what ways? (Ezra Sassaman)

The Working Group here in Bar Harbor has done a significant amount of work connecting with representatives in Key West FL, Portland ME, Monterey CA, and Juneau AK to try and get a better handle on the differences and similarities each community is facing.

All four communities have run into contradictions with state law and/or federal law as they’ve tried to address their concerns – specifically maritime law and commerce clauses.

Key West, Portland, and Juneau have municipal owned docks which gives the community slightly more control over calls for cruise.

Juneau sees well over a million visitor each year. They recently lost a court case over use of cruise funds and have had to scale back the broad use of them.

In Key West it was not a clean process at all and it took years. In the end, the citizen referendum was not upheld by the state legislature as it was passed and the city spent a lot of money on outside council to ultimately negotiate an agreement with the industry and the private pier owner.

Monterey, like Bar Harbor have cruise ships anchored in the bay, but the docks where tenders disembark are owned by the City. Monterey is also less apt to benefit at all from cruise, as there are very few ships that visit per year and those that do, bus the passengers to other parts of the state, such as out to wine country.

The closest comparison for us might be Portland, because they follow Maine law and have state statute around the role of Harbormaster and ports of call. However, Portland does not have a cruise ship committee, and they do not have existing caps. Historically, the Council in

Portland does not regularly discuss cruise ships at all, so this referendum is much more of a surprise than it is for Bar Harbor. The Portland Council has done exactly what Bar Harbor has done: voted to put it on the ballot this fall. At its Aug 8 meeting, the Portland Council did briefly consider passing it and directly sending it to committee to be amended, but that effort failed, so instead they voted to put it on the ballot as is. And there are many organizations mobilizing against it and suggesting legal action.

9. Aside from the opinion prepared by the town attorney and presented to TC this February (I think) and the comments by OP's counsel at the recent TC meeting, are there other memos or opinions on this topic relied on by the TC/you that the WC needs to consider? (Seth Libby)

The Council initially received legal advice from its attorney in January of 2021. That document is public and can be found starting on page 92 of the [Council packet](#) from the January 19, 2021 meeting.

Secondly, prior to my arrival, the former Town Manager had arranged a meeting with a maritime attorney for the Council to ask questions in January 2022. The meeting was held in executive session under attorney/client privilege. The effort was made to address Councilor suggestions to consider reducing (effectively cancelling) some cruise ships for 2022. The information from that meeting remains confidential at this time as it contains relevant information to today's predicament and may be beneficial to the town if the petition passes and the town has to defend the Land Use amendment in court.

Third, information was shared with the Council the night before the Citizen Petition's Public Hearing of July 17th 2022 which we added to the end of the [Council packet](#) as a meeting handout. My email to the Council, which was a forward from the third-party attorney can be found starting on page 153.

10. What are the legal implications of the cruise initiative passing? (Meagan Kelly)

I am not an attorney, but have reviewed everything in question 9 above and listened to many viewpoints on the matter from attorneys, industry reps, elected and appointed officials, and residents of Bar Harbor. As your Town Manager, we should all to be aware of the legal risk.

The two biggest takeaways from everything I've learned in the last eight months and is buried in the information / links in question 9:

A. Commerce Clause

And more specifically, the Balance Test of the Commerce Clause, which means the benefits of a ban (or a severe limitation as proposed by the petitioner) to the Town of Bar Harbor would have to be greater than the loss from the industry and the other ports that the industry visits.

The [8/2 presentation](#) given to Council by the working group showed a map of the 38 ports in the Canada New England region. Since the cruise industry sells many of its 'rooms' based on their anchorage and visit to Acadia National Park, we therefore

have an outsized role and would have a scale tipping impact (not in our favor) by banning or limiting.

B. Supremacy Clause

Any conflict between federal and state (or local) law, federal law will prevail. There is significant risk that a measure banning or limiting cruise ships could be deemed unconstitutional, but will require a lot of time and money to address. These resources could be better spent on addressing other capacity challenges in our town.

11. Has the town attorney made any comments on this initiative? Even if they haven't made any public statements, do you know what their general opinion is on this? (Meagan Kelly)

Here are a few statements pulled from conclusions from attorney's hired by the Town of Bar Harbor:

"... there is some risk that [restricting or banning cruise ships from anchoring or discharging passengers within the Town] would be deemed impliedly preempted as interfering with the uniformity of maritime commerce"

- Jonathan P. Hunter, Rudman Winchell

"... we do believe that there is significant risk that a measure banning or limiting cruise ships could be deemed unconstitutional."

- William H. Welte, Welte & Welte, P.A.

12. Do you know when a 2,000 person ship comes in how many passengers generally disembark? (Meagan Kelly)

I assume the individual cruise lines can answer this question, but we do not track the specific number of passengers that actually disembark. Depending on the size of the ship they may tender themselves, hire a private firm, or a combination of the two, so even asking the private tenders for their data would not necessarily be helpful.

I do know that not all ships have been at capacity this year and that not all passengers choose to disembark when anchoring.