

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

ASSOCIATION TO PRESERVE AND)
PROTECT LOCAL LIVELIHOODS, et al.,)
)
 Plaintiffs,)
)
 v.)
)
 TOWN OF BAR HARBOR, a municipal)
corporation of the State of Maine,)
)
 Defendant.)
)
_____)

Case No. 1:22-cv-416

PROPOSED PLAINTIFF-INTERVENOR PENOBSCOT BAY AND RIVER PILOTS ASSOCIATION’S MOTION TO INTERVENE AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION

Pursuant to Federal Rule of Civil Procedure 24, Proposed Plaintiff-Intervenor Penobscot Bay and River Pilots Association (the “Penobscot Pilots Association”) hereby moves to intervene in the above-captioned case on the side of Plaintiffs. The Penobscot Pilots Association’s proposed Complaint in Intervention is attached hereto as Exhibit 1.

In support of this Motion, the Penobscot Pilots Association states as follows:

Background

Plaintiffs have requested this Court declare invalid a citizens’ group initiative, now an ordinance effective December 8, 2022 (the “Challenged Ordinance”), prohibiting the disembarkation of more than 1,000 persons per day from cruise ships into the Town of Bar Harbor (the “Town”). The Challenged Ordinance purports to control cruise vessels that anchor in federally designated anchorages outside the municipal jurisdiction of the Town and private property owners who operate piers used for landing passengers from cruise ships anchored in Frenchman Bay. In effect, the Challenged Ordinance will prevent nearly all cruise ships from calling at the port of Bar Harbor.

The Penobscot Pilots Association has direct, concrete interests in the subject matter of the pending litigation. Resolution of the litigation may, as a practical matter, impair or impede the Penobscot Pilots Association's ability to protect its interests. The Penobscot Pilots Association requests that this Court grant intervention as of right under Federal Rule of Civil Procedure 24(a). Alternatively, if the Court finds the Penobscot Pilots Association does not meet the requirements of Rule 24(a), the Penobscot Pilots Association requests that this Court, in its discretion, permit the Penobscot Pilots Association to intervene under Rule 24(b).

I. The Penobscot Pilots Association Is Entitled to Intervene as of Right.

A party is entitled to intervene "as of right" when it, on timely request, demonstrates that it has a concrete interest in the pending action, there is a realistic threat that the resolution of the action will hinder its interest, and the existing parties do not adequately represent the potential intervenor's interest. *B. Fernandez & Hnos., Inc. v. Kellogg USA, Inc.*, 440 F.3d 541, 544-45 (1st Cir. 2006). While all four prongs of this test must be satisfied, courts "should utilize a holistic approach, read the requirements together, and weigh the factors with a commonsense view of the overall litigation." *Canadian Nat. Ry. Co. v. Montreal Maine & Atl. Ry., Inc.*, No. CV 10-452-B-W, 2010 WL 5168003, at *4 (D. Me. Dec. 14, 2010) (citing *Walgreen Co. v. Feliciano de Melecio*, 194 F.R.D. 23, 25 (D.P.R. 2000), *aff'd*, No. 00-2012, 2001 WL 355531 (1st Cir. March 28, 2001)); *see Travelers Indem. Co. v. Dingwell*, 884 F.2d 629, 637 (1st Cir. 1989) (all four prongs must be satisfied).

(a) This Motion is Timely.

A motion to intervene is timely if the potential intervenor acts “reasonably promptly” after obtaining knowledge of its interest in the case. *Banco Popular de P.R. v. Greenblatt*, 964 F.2d 1227, 1231 (1st Cir. 1992). Here, the Penobscot Pilots Association’s request to intervene comes just over two weeks after Plaintiffs filed their case. Because the litigation is in its infancy, there will be no prejudice to the other parties. *N. Am. Specialty Ins. Co. v. Seacoast Crane Co.*, 226 F.R.D. 27, 29-30 (D. Me. 2005) (finding motion to intervene timely when filed within two months of the main action and before the filing of an answer, but denying intervention on other grounds); *Canadian Nat. Ry.*, 2010 WL 5168003, at *5 (finding request for intervention filed right after the main suit timely). Thus, the Penobscot Pilots Association’s request is timely.

(b) The Penobscot Pilots Association Has a Concrete Interest in the Pending Action, and the Pending Action May, as a Practical Matter, Impair or Impede Its Ability to Protect Its Interest.

To intervene as of right, the proposed intervenor must demonstrate that it has a concrete interest in the property or transaction at issue in the pending action and that the pending action may, as a practical matter, impair or impede its ability to protect that interest. Often, courts consider these factors together because they are closely related. *Canadian Nat. Ry.*, 2010 WL 5168003, at *5; *see also Amoco Oil Co. v. Dingwell*, 690 F. Supp. 78, 81 (D. Me. 1988) (explaining that the “two requirements are closely related” because the extent of an intervenor’s interest could be determined by whether “the disposition of the action may . . . impede or impair” its ability to protect that interest) (quoting *Federal Deposit Ins. Corp. v. Jennings*, 816 F.2d 1488, 1492 (11th Cir. 1987)), *aff’d sub nom. Travelers Indem. Co. v. Dingwell*, 884 F.2d 629 (1st Cir. 1989).

A proposed intervenor has a “concrete interest” in the pending litigation when the intervenor’s interest is “direct, not contingent” and its “claims . . . bear a ‘sufficiently close relationship’ to the dispute between the original litigants.” *Conservation Law Found. of New England, Inc. v. Mosbacher*, 966 F.2d 39, 42 (1st Cir. 1992) (citing *Travelers*, 884 F.2d at 638). Potential economic harm weighs heavily in the interest inquiry. *Pub. Serv. Co. of N.H. v. Patch*, 136 F.3d 197, 205 (1st Cir. 1998). A “small, clearly defined group [that] holds a significant economic interest in the pending litigation” and has a “significant” “financial stake in the outcome” satisfies the second and third factors for intervention as of right. *Canadian Nat. Ry.*, 2010 WL 5168003, at *6.

Here, the Penobscot Pilots Association has a concrete interest in the outcome of the pending litigation. Specifically, the Penobscot Pilots Association has two intertwined interests: (1) if the Challenged Ordinance goes into effect, the Penobscot Pilots Association will suffer significant economic harm, endangering the viability of its essential pilotage services in all the areas it covers; and (2) implementation of the Challenged Ordinance will jeopardize the essential system of pilotage in Frenchman Bay to the detriment of all persons, property, and vessels that rely on pilotage for safe navigation.

The Challenged Ordinance directly harms the Penobscot Pilots Association. The Penobscot Pilots Association is the single designated pilotage group providing pilotage services on routes covering Penobscot and Frenchman Bays and the Penobscot River. The Penobscot Pilots Association provides pilotage services to all vessels requiring pilotage in its pilotage area. Nearly 50 percent of the Penobscot Pilots Association’s annual revenues are derived from pilotage services rendered to cruise vessels entering and exiting Frenchman Bay. The Challenged Ordinance at issue in this case will prohibit the majority of cruise vessels from calling at the port

of Bar Harbor. The Town had estimated that the Challenged Ordinance would eliminate 95 percent of current passenger counts. *Bar Harbor Cruise Management Plan v. Article 3*, <https://www.barharbormaine.gov/DocumentCenter/View/6398/Cruise-Management-Plan-v-Article-3?bidId=> (last visited Jan. 4, 2023). The loss of revenues from these cruise vessel calls will negatively impact the Penobscot Pilots Association’s ability to cover its fixed costs, to attract and retain well-qualified mariners to the profession and in service of the Penobscot Pilots Association’s pilotage area, and otherwise to maintain the system of pilotage in its designated area.

The Challenged Ordinance also threatens the Penobscot Pilots Association’s interest in maintaining safety, security, and protection of life, property, and the environment of its designated area. *See* 38 M.R.S. §§ 85, *et seq.* (outlining the statutory purpose “to provide for a system of state pilotage in order to provide maximum safety from the dangers of navigation for vessels entering or leaving . . . to maintain a state pilotage system devoted to the preservation and protection of lives, property, the environment and vessels entering or leaving these waters . . . and to insure the availability of pilots . . .”). The Penobscot Pilots Association is an integral element of Maine’s state pilotage system, and its services provide necessary support for safe and efficient operation of the pilotage system beyond Frenchman Bay. The Penobscot Pilots Association cannot provide its essential services to all traffic in Bar Harbor and Frenchman Bay without sufficient revenues to support its operations. Disruption of the Penobscot Pilots Association’s resources and the consequent inability of the Penobscot Pilots Association to perform its vital role will compromise the safety, environmental resources, and security of traffic in the Penobscot Pilot Association’s designated area and across Maine waters subject to state

pilotage requirements. Thus, the Penobscot Pilots Association has a protectable interest in the pending litigation that may be impaired or impeded as a result of resolution of this litigation.

(c) The Penobscot Pilots Association’s Interests May Not Be Adequately Represented by the Named Parties.

Finally, the proposed intervenor must demonstrate that the named parties may not adequately represent its interests. Typically, this requires only a “minimal showing” and can be satisfied if the intervenor’s interests are sufficiently different in kind or degree from those of the named parties. *B. Fernandez & Hnos., Inc.*, 440 F.3d at 545-46 (internal quotations omitted); *see also Canadian Nat. Ry.*, 2010 WL 5168003, at *7 (“A difference in kind or degree provides sufficient explanation.”). Where an intervenor has a “direct interest,” the burden to show inadequate representation “is lighter than if its interest was ‘thin and widely shared.’” *Id.* (quoting *Daggett v. Comm’n on Governmental Ethics & Election Pracs.*, 172 F.3d 104, 113-14 (1st Cir. 1999)). In any event, doubt about the adequacy of representation should be resolved in favor of intervention. *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972).

As discussed above, the Penobscot Pilots Association has a direct and concrete interest in the outcome of the litigation. The Penobscot Pilots Association’s interest is different, both in substance and degree, from the interests asserted by Plaintiffs. To be sure, both the Penobscot Pilots Association and Plaintiffs have an interest in avoiding the Challenged Ordinance’s immediate and substantial economic harms to their businesses. The Penobscot Pilots Association, however, also has an interest in preventing the Challenged Ordinance’s significant threat to the Penobscot Pilots Association’s ability to ensure that well-qualified, skilled pilots are available to preserve and protect lives, property, the environment, and vessels entering or leaving Maine’s coastal waters. In other words, the Penobscot Pilots Association has an interest in ensuring the continued viability of the State’s maritime pilotage system and in preventing

unauthorized and unconstitutional encumbrances on the ability of that system to protect life and property and ensure safety in Maine's coastal waters. This difference is sufficient to satisfy the fourth prong of the intervention test. *See B. Fernandez & Hnos., Inc.*, 440 F.3d at 547 (“The potential for this litigation to have a greater adverse impact on [the intervenor] is a sufficient basis for concluding that [plaintiff] may not serve as an adequate proxy.”).

Further, the Penobscot Pilots Association's interests are not adequately protected even though the Penobscot Pilots Association's ultimate objective – invalidation of the Challenged Ordinance – matches that of Plaintiffs. *United Nuclear Corp. v. Cannon*, 696 F.2d 141, 144 (1st Cir. 1982) (citing *Blake v. Pallan*, 554, F.2d 947, 954-55 (9th Cir. 1977)); *see Brook Vill. N. Assocs. v. Jackson*, Civ. No. 06-cv-046-JD, 2006 WL 3308328, at *3 (D.N.H. Nov. 13, 2006) (discussing rebuttable presumption of adequate representation) (citing *B. Fernandez & Hnos.*, 440 F.3d at 546).¹ The Penobscot Pilots Association opposes the Challenged Ordinance under the Maine Constitution. The Plaintiffs' complaint does not address claims under the Maine Constitution; therefore, Plaintiffs cannot be presumed to adequately represent the Penobscot Pilots Association's interest in invalidating the Challenged Ordinance on state constitutional grounds. *See Brook Village*, 2006 WL 3308328, at *3 (noting that counterclaim not raised by present party rebutted presumption of adequate representation).

Having satisfied all four factors for intervention as of right under Rule 24(a), the Penobscot Pilots Association requests that this Court grant its request for leave to intervene as of right in the pending action.

¹ Most of the cases addressing this rebuttable presumption arise in the context of parties seeking to intervene on the side of the government and so necessarily involve the consideration whether the government, which is charged with representing the interests of the public, adequately represents the interests of various segments of the public potentially affected by the litigation. Here, however, the Penobscot Pilots Association is seeking to intervene on the side of private parties opposing the Challenged Ordinance.

II. The Penobscot Pilots Association Should be Granted Permissive Intervention.

Permissive intervention is warranted, in the discretion of the court, “when an applicant’s claim or defense and the main action have a question of law or fact in common.” *Daggett*, 172 F.3d at 112-13 (quoting Fed. R. Civ. P. 26(b)). In considering a request for permissive intervention, the court may “consider almost any factor rationally relevant,” such as “whether a named party will adequately represent the intervenor’s interests;” “whether intervention will either ‘delay the lawsuit or prejudice the adjudication of the rights of the original parties;’” *Canadian Nat. Ry.*, 2010 WL 5168003, at *8 (quoting *Daggett*, 172 F.3d at 113); and whether the intervenor “may be helpful in fully developing the case[.]” *Daggett*, 172 F.3d at 113.

The Penobscot Pilots Association’s claims share common facts and questions of law with the Plaintiffs’ claims. Both the Penobscot Pilots Association and Plaintiffs bring similar claims against the Challenged Ordinance under the Supremacy and Commerce Clauses of the U.S. Constitution. Both also share the same goal – invalidation of the Challenged Ordinance on federal constitutional grounds. The Penobscot Pilots Association also brings claims against the Challenged Ordinance on state constitutional grounds and, as discussed above, this difference impacts any presumed ability of Plaintiffs to adequately represent the interests of the Penobscot Pilots Association. Further, participation of the Penobscot Pilots Association will not delay the pending case or prejudice the adjudication of the rights of the named parties. This case is in its infancy, so the Penobscot Pilots Association’s participation as a plaintiff cannot conceivably cause any delay. Finally, the Association’s involvement will be helpful in fully developing the case. As a participant in the state’s regulated pilotage system, the Penobscot Pilots Association brings a unique and necessary perspective to the federal constitutional issues raised in this case. Its proposed Complaint in Intervention enables the court to resolve the state constitutional issues

occasioned by the Challenged Ordinance's interference with the safe and efficient operation of Maine's state pilotage system and the State's economic growth and development goals.

Therefore, because the Penobscot Pilots Association has direct and important interests that may not be adequately represented by Plaintiffs, its intervention will not delay the case or prejudice the parties, and the Penobscot Pilots Association's involvement will be helpful in fully developing the case, the Court should exercise its discretion and grant the Penobscot Pilots Association permissive intervention pursuant to Rule 24(b), regardless of this Court's determination on the Penobscot Pilots Association's ability to intervene "as of right" pursuant to Rule 24(a).

Conclusion

The Penobscot Pilots Association respectfully requests that this Court grant the Penobscot Pilots Association's motion, find that the Association is entitled to intervene "as of right" under Rule 24(a), find that the Penobscot Pilots Association alternatively is permitted to intervene under Rule 24(b), and grant such other and further relief as is just and appropriate under the circumstances.

Respectfully submitted,

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Dated: January 14, 2023

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of January, 2023, I caused the foregoing document to be served upon all counsel of record via the Court's CM/ECF system.

/s/ Twain Braden
Twain Braden, Esq.