UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

ASSOCIATION TO PRESERVE AND PROTECT LOCAL LIVELIHOODS, et al.,	)	
Plaintiffs,	)	No. 1:22-cv-416-LEW
PENOBSCOT BAY & RIVER PILOTS ASSOCIATION, a Maine corporation,	)	
Plaintiff-Intervenor,	)	
v.	)	
TOWN OF BAR HARBOR, a municipal corporation of the State of Maine,	)	
Defendant.	)	

PLAINTIFFS' OPPOSITION TO PROPOSED DEFENDANT-INTERVENOR CHARLES SIDMAN'S VERIFIED MOTION TO INTERVENE AND ALTERNATIVE VERIFIED MOTION TO PARTICIPATE AS AMICUS CURIAE

Plaintiffs, the Association to Preserve and Protect Local Livelihoods ("APPLL"), B.H. Piers, L.L.C. ("BH Piers"), Golden Anchor, L.C., doing business as Harborside Hotel ("Harborside"), B.H.W.W., L.L.C. ("BHWW"), Delray Explorer Hull 495 LLC ("495"), Delray Explorer Hull 493 LLC ("493"), and Acadia Explorer 492, LLC ("492") (and together with APPLL, BH Piers, Harborside, BHWW, 495, and 493, "Plaintiffs"), through their attorneys, file this Opposition to Proposed Defendant-Intervenor Charles Sidman's Verified Motion to Intervene and Alternative Verified Motion to Participate as Amicus Curiae.

On November 8, 2022, the Town of Bar Harbor ("Defendant" or "the Town") passed a Citizen Petition for Land Use Ordinance Amendment that is at issue in this litigation ("the Initiated

Ordinance" or "Ordinance"). Mr. Sidman seeks to intervene as a party because he is the "genesis of the voter initiative that passed and became the challenged Ordinance."

The Civil Rules establish two modes of intervention: intervention as of right, *see* Fed. R. Civ. P. 24(a), and permissive intervention, *see* Fed. R. Civ. P. 24(b). Mr. Sidman claims an entitlement to both modes. However, he fails to meet his burden. As discussed below, Mr. Sidman's has only an undifferentiated, generalized interest in defending the Ordinance and not only would his participation as a party be unhelpful in fully developing the case, it would unduly delay and prejudice the adjudication of the original parties. Moreover, the Town is more than capable of and fully intends to vigorously defend the Ordinance.[1]

I. Mr. Sidman is not entitled to intervene as of right.

A party is entitled to intervene "as of right" only 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); *R&G Mortgage Corp. v. Fed. Home Loan Mortgage Corp.,* 584 F.3d 1, 7 (1st Cir. 2009); Fed. R. Civ. P. 24(a)(2). An applicant who fails to meet any one of these requirements is denied intervention as of right. *Travelers Indem. Co. v. Dingwell*, 884 F.2d 629, 637 (1st Cir. 1989); *T-Mobile Ne. LLC v. Town of Barnstable*, 969 F.3d 33, 39 (1st Cir. 2020) ("It is black letter law that a failure to satisfy any one of these four requirements sounds the death knell for a motion to intervene as of right.").

[1] Plaintiffs note that Defendant, Town of Bar Harbor, has filed its Opposition to Mr. Sidman's Motion to Intervene and, in addition to opposing it as failing to meet Rule 24(a) and (b) has also opposed it as failing to meet Article III standing requirements. Plaintiffs agree with the Town's Article III standing arguments and incorporate them herein by reference.

Mr. Sidman fails to satisfy three of the requirements to intervene as of right.

a. Mr. Sidman has no concrete interest in the pending action and the pending action will not impair or impede his ability to protect any interest.

Courts often consider the "interest" and "potential prejudicial effect on the interest" factors together because they are closely related. *Canadian Nat. Ry. Co. v. Montreal Maine & Atl. Ry., Inc*., No. CV 10-452-B-W, 2010 WL 5168003, at *5 (D. Me. Dec. 14, 2010); *see also Amoco Oil Co. v. Dingwell*, 690 F. Supp. 78, 81 (D. Me. 1988) (explaining a court "considers the second and third factors together, 'since the magnitude or extent of an intervenor's interest will be in part a function of how much the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest.'") (quoting *Federal Deposit Ins. Corp. v. Jennings*, 816 F.2d 1488, 1492 (11th Cir. 1987)).

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). Accordingly, "[a]n undifferentiated, generalized interest in the outcome of the case at hand is not . . . sufficient to meet the standards of Rule 24(a)(2)." *Canadian Nat. Ry Co.,* No. CV 10-452-B-W, 2010 WL 5168003, at *5 (internal citations omitted).

Citing *Yniguez v. State of Ariz.*, 939 F.2d 727 (9th Cir. 1991), Mr. Sidman asserts a "concrete" interest in the outcome of the pending litigation as he is the "genesis of the voter initiative that passed and became the challenged Ordinance." *Sidman Mot. to Intervene* at 5. Mr. Sidman's reliance on *Yniguez* is misplaced.

In *Yniguez*, intervention was granted for sponsors of a ballot initiative in part because the Governor of Arizona elected not to appeal the decision of the district court, showing inadequate

representation of the intervenor's interests. 939 F.2d at 737. Moreover, the Supreme Court vacated that decision as moot and, in the process, cast doubt on the Ninth Circuit's reasoning. *See Arizonans for Off. Eng. v. Arizona,* 520 U.S. 43, 65, 117 S. Ct. 1055, 1068, 137 L. Ed. 2d 170 (1997) (stating that ballot initiative sponsors are not "agents of the people . . . to defend . . . the constitutionality of initiatives made law of the State.").

Although Mr. Sidman exercised a right accorded to him to commence and advance the initiative process, upon approval, the Initiated Ordinance became a Town ordinance in which all Bar Harbor residents have an equal stake. Mr. Sidman has pointed to nothing in the Town's charter or ordinances that vests him with some special status in vindicating the Ordinance just because he helped set in motion the process by which it became law. Nor has he cited to anything that supports the inference that the Town voters, in approving the Initiated Ordinance, understood that they would be vesting him with some special authority, above and beyond his shared status as a resident and voter in Bar Harbor, to defend it from legal challenge.

Once the Initiated Ordinance was adopted, thereby joining the rest of the laws of the Town of Bar Harbor, the obligation to defend the Initiated Ordinance vested in the Town—not in individual citizens. The precedents of this Court are in accord with this point.

Specifically, this Court has denied intervenor status to drafters and sponsors of ballot initiatives. *Nat'l Right to Life Pol. Action Comm. State Fund v. Devine*, No. CIV. 96-359-P-H, 1997 WL 33163631 (D. Me. Mar. 19, 1997). In *Devine*, the National Right to Life Political Action Committee State Fund sued the Maine Commission on Governmental Ethics and Election Practices, requesting a declaration and injunction that the recent citizen campaign financing initiative violated the First Amendment. Maine Citizens for Clean Elections – an incorporated association of several Maine organizations that worked together to draft and sponsor the Clean

Election Act, gathered the necessary signatures to put it on the ballot, and then campaigned for its adoption by the voters – moved to intervene as a defendant in order to support the constitutionality of the statute.

The Court denied the motion to intervene, finding the proposed defendant-intervenor failed to show both a concrete interest and a lack of adequate representation. As to the alleged interest, the Court found "that the intervenors here have only the interest that all citizens possess who support particular legislation," concluding:

> Yes, the intervenor here has gone to great lengths to bring this legislation into effect through the initiative process and has spent vast quantities of time and money in the process. The same can be said of many lobbyists, however, and the cases are clear that they do not thereby gain intervention status as of right.

Id. at *1 (citing *Keith v. Daley*, 764 F.2d 1265, 1269 (7th Cir.) (stating that an "interest as chief lobbyist . . . is not a direct and substantial interest sufficient to support intervention"), *cert. denied,* 474 U.S. 980 (1985)).

Devine makes clear, therefore, that, even though Mr. Sidman may be, as he asserts, the "genesis of the voter initiative" and its chief lobbyist in Bar Harbor, upon the Ordinance's adoption, Mr. Sidman's interest, such as it was, merged with and became indistinguishable from the undifferentiated, generalized interest shared with the Bar Harbor citizenry at large. Moreover, Mr. Sidman's reliance on his "legislative standing" runs counter to the vast body of case law on this concept – including the cases relied on in his motion. Federal courts generally only grant

intervention by right to a legislator when the executive branch has failed to defend the law at issue[2] or when state statute affirmatively grants legislators the right to intervene.[3]

Mr. Sidman also alleges he faces "concrete harm" based on decreased property values if the Ordinance is not enforced "because of the unending flow of cruise ship passengers into Bar Harbor," and that his business will suffer because clients "refuse to come to his business on cruise ship days . . . ," noting that "[t]his harm is common among a large portion of businesses in [Bar Harbor] that support the Ordinance." *Sidman Mot. to Intervene* at 6. This argument falls of its own weight. Mr. Sidman readily admits his alleged interest in protection of property values and operation of his business is shared by "a large portion" of business and residents in Bar Harbor, further illustrating he holds only an undifferentiated, generalized interest shared with all citizens who support the Ordinance.

Moreover, Mr. Sidman's reliance on *Portland Cellular P'ship v. Inhabitants of the Town of Cape Elizabeth*, No. 2:14-CV-00274-JDL, 2015 WL 12990147 (D. Me. Feb. 3, 2015), is not

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[2] On this point, *Devine,* again, is instructive. There, the Court followed its ruling that involvement in generating the initiative did not meet the "concrete interest" test, it went on to observe, "[m]ore importantly, the Attorney General, representing the defendants who compose the Commission on Governmental Ethics and Election Practices, can adequately defend this new statute, one of the critical tests under Rule 24(a) and First Circuit precedent." *Devine*, 1997 WL 33163631 at *2.

[3] *See, e.g., Berger v. N. Carolina State Conf. of the NAACP*, 213 L. Ed. 2d 517, 142 S. Ct. 2191 (2022) (on motion of North Carolina legislative leaders to intervene as of right federal litigation challenging constitutionality of state voter-identification law, State Board of Elections, an existing defendant, did not "adequately represent" interests of leaders, who were expressly authorized by state statute to intervene on behalf of General Assembly as party in any judicial proceeding challenging state statute); *Windsor v. United States*, 797 F. Supp. 2d 320 (S.D.N.Y. 2011) (members of the United States House of Representatives granted intervention after Department of Justice stated that it would not defend constitutionality of Section 3 of the Defense of Marriage Act); *Miracle v. Hobbs*, 333 F.R.D. 151 (D. Ariz. 2019) (state legislators denied intervention as they did not have a significantly protectable interest in upholding the constitutionality of Arizona's law when declaratory-judgment statute did not grant proposed intervenors blanket authority to defend the state law, especially when the attorney general was already was defending the State).

apt. There, the Court granted intervention to two direct abutters and one nearby resident to property that was approved for installation of a wireless facility (the property already housed a sixty-year-old Portland Water District tank). *Id.* at *1. In finding the neighbors had an interest in the litigation, the Court focused on well-established case law granting abutters standing in litigation while also noting the potential for decreases in property values caused by the installation of the wireless facility.[4] *Id.* at *2. Mr. Sidman has not alleged, nor could he, that his property or business abuts cruise ship facilities. Therefore, *Portland Cellular P'ship* has no application to his interest as he, himself, presents it.

Mr. Sidman also claims that a lack of enforcement of the Ordinance could cause a decrease to his property values. He also argues that there will be a negative impact to his business (when he asserts "[a]s a local business owner for the past twenty-eight years, he also would suffer concrete harm from the non-enforcement of the Ordinance because his clientele—collectors of fine art—refuse to come to his business on cruise ship days."). ECF# 45 at p.6. But he provides no support whatsoever for these claims. This argument is both a red herring and not supported by *Portland Cellular P'ship*. As set out in the Plaintiff's Verified Complaint, *see* ¶¶ 22-30, Bar Harbor has been a popular cruise ship destination for over twenty years. Against this background, there is simply no support for Mr. Sidman's conclusory contention that there is a decrease in property values over that time and that there has been any demonstrable impact to his business while cruise ships have come to Bar Harbor; rather, if this Court were to issue the injunctive relief Plaintiffs request, it would simply maintain the long established status quo in Bar Harbor.

[4] However, there is recent First Circuit case law denying both intervention as of right and permissive intervention to direct abutters of a proposed wireless facility. *See T-Mobile Ne. LLC v. Town of Barnstable*, 969 F.3d 33, 37 (1st Cir. 2020).

b. Mr. Sidman's interests will be adequately represented by the Town of Bar Harbor.

The rare case in which a member of the public is allowed to intervene in an action in which a governmental agency represents the public interest requires a very strong showing of inadequate representation. To demonstrate inadequate representation, a putative intervenor must show that no existing party fairly represents their interests and such a showing requires more than empty conjecture. *T-Mobile Ne. LLC v. Town of Barnstable*, 969 F.3d 33, 39 (1st Cir. 2020) (citing *Pub. Serv. Co. of New Hampshire v. Patch*, 136 F.3d 197, 207 (1st Cir. 1998)) (cautioning that this requirement "is more than a paper tiger", as a party pursuing intervention as of right "must produce some tangible basis to support a claim of purported inadequacy" of representation).

Additionally, the burden of persuasion is "ratcheted upward" on the proposed intervenor when a governmental body is defending the matter, as there is a rebuttable presumption that the governmental body adequately represents their interests. *See Patch*, 136 F.3d at 207 (citing *Mausolf v. Babbitt,* 85 F.3d 1295, 1303 (8th Cir. 1996)); *see also B. Fernández & Hnos., Inc. v. Kellogg USA, Inc.,* 440 F.3d 541, 546 (1st Cir. 2006) (where the ultimate objectives of a party seeking to intervene and a named party are identical, there exists a "rebuttable presumption of adequate representation"); *Devine*, 1997 WL 33163631 at *2 (Attorney General "can adequately defend this new statute.").

Mr. Sidman asserts that there is "a real threat that the Town will refuse to defend the Ordinance." *Sidman Mot. to Intervene* at 8. This is based on the Town Manager's intimations at a January 5, 2023 meeting where he discussed the Town was considering its options as to how it should respond to Plaintiff's then recently-filed request for the issuance of a preliminary injunction. *Id.* at *Exhibit A.*

Here, however, Mr. Sidman has conflated the possibility of an intermediate and necessarily temporary agreement among the parties with an adjudication on the merits. Plaintiffs, Plaintiff-Intervenors, and the Town have discussed terms under which they might jointly stipulate to the entry of an injunction—subject, of course, to final approval by this Court.[5] In pursuing these discussions, Plaintiffs, Plaintiff-Intervenors, and the Town share two broad objectives.

First, the Plaintiffs and Plaintiff-Intervenors have a strong incentive to minimize the potentially significant damages that immediate enforcement of the Ordinance would otherwise inflict. For its part, the Town has an incentive to avoid exposure to possible liability for damage claims arising from its enforcement of an Ordinance which could be found unconstitutional. Second, if Plaintiffs, Plaintiff-Intervenors, and the Town could reach agreement on the terms of a preliminary injunction, they would obviate the need for a hearing on that question and would open the way for the parties to agree to an expedited schedule for a trial on the merits—a trial at which, as the Town has repeatedly indicated, it will vigorously defend the Ordinance against the full spectrum of Plaintiffs' and Plaintiff-Intervenor's claims.

That the Town's interest in limiting its exposure to damage claims is legitimate is beyond peradventure. It is fully consistent with the Town's obligation to preserve and protect itself and its citizens from avoidable loss. Moreover, this particular interest is uniquely a municipal interest that the Town alone can represent, fully assess, and vindicate. And, by contrast, it is an interest which Mr. Sidman, who is entirely unaccountable to the residents of Bar Harbor for the management of this risk, cannot represent.

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[5] The Town, in its opposition to Mr. Sidman's motion to intervene, summarizes the terms of the framework for a stipulated preliminary injunction as discussed by the Parties' counsel at a January 26, 2023 judicial settlement conference. *See Town's Opp'n* at 2 n.2.

In sum, whether the Town might come to some agreement regarding a requested preliminary injunction is not evidence that it will not defend the constitutionally of the Ordinance and does not form a basis for a claim that the Town it inadequately representing Mr. Sidman's interests. A mere difference of opinion concerning the tactics with which the litigation should be handled does not make inadequate the representation of those whose interests are identical with that of an existing party. *See Verizon New England v. Maine Pub. Utilities Comm'n*, 229 F.R.D. 335, 338 (D. Me. 2005) ("failure of a party to raise a particular legal argument favored by the prospective intervenor does not establish inadequate representation per se.") (internal citation omitted).

The Town has given every indication that it intends to defend the Ordinance and seek its ultimate enforcement. This is evidenced by the Town's Answer to the Plaintiff's Complaint, the Town's memorandum opposing Mr. Sidman's intervention, and in the parties' recent efforts to reach agreement on a proposed stipulated preliminary injunction. Taken together, these filings make clear the Town has every intention to vigorously defend the Ordinance.[6] There is no daylight between the Town's commitment to defend the Ordinance and Mr. Sidman's claim to do the same. In sum, the record before the Court is clear, the Town "can adequately defend this new [ordinance]." *Devine*, 1997 WL 33163631 at *2.

For these reasons, Mr. Sidman has failed to satisfy the requirements to intervene as of right.

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[6] *See also Daggett,* 172 F.3d at 113–14 ("The reality is that, as courts have moved from formalistic restrictions to a practical "interest" requirement for intervention as of right, so tests of "inadequacy" tend to vary depending on the strength of the interest. Courts might require very little "inadequacy" if the would-be intervenor's home were at stake and a great deal if the interest were thin and widely shared.").

As Mr. Sidman's interest here is "thin and widely shared," he has failed his burden to show a "great deal" of inadequacy regarding the Town's defense of the Ordinance.

II. Mr. Sidman should not be granted permissive intervention.

When considering a request for permissive intervention, the Court should "give weight to whether the original parties to the action adequately represent the interests of the putative intervenors." *Town of Barnstable*, 969 F.3d at 41 (citing *Kowal v. Malkemus (In re Thompson),* 965 F.2d 1136, 1142 n.10 (1st Cir. 1992); *see also, Devine*, 1997 WL 33163631 at *2. The Town has given every indication that it intends to defend this Ordinance. Mr. Sidman has failed to show otherwise.

Relatedly, with a request for permissive intervention, the Court can consider whether the putative intervenor "may be helpful in fully developing the case." *Daggett v. Comm'n on Governmental Ethics & Election Pracs*., 172 F.3d 104, 113 (1st Cir. 1999). Here, Mr. Sidman's motion does not articulate what, if anything, he would contribute to the Town's defense, beyond the statement that "[a]s the lead petitioner in the voter initiative, Mr. Sidman brings a unique and necessary perspective to the issues raised in this case." *Sidman Mot. to Intervene* at 9.

This case hinges on the plain language of the Ordinance, as enacted by the voters of Bar Harbor, and whether it is constitutional. The Town is defending the constitutionality of the Ordinance with full vigor. There is no reason to believe that the Town's defense will be inadequate.[7] Moreover, Mr. Sidman does not have to participate as a party to contribute his alleged "unique and necessary perspective" – he could provide testimony as a witness for the Town if it were to find value from his perspective. *See Daggett,* 172 F.3d at 113.

What is more, the sine qua non for permissive intervention is "whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). Multiplying the number of parties in a case will often lead to delay. *See Daggett,* 172

[7] If the Town were ever to change its position and not defend the Ordinance, then the question of intervention on this ground could be revisited. *See Daggett*, 172 F.3d at 112.

F.3d at 113 (noting that district court's "thought that the addition of still more parties would complicate a case" was "plainly a permissible consideration."). Permitting intervention to Mr. Sidman, who is not poised to add meaningful value to the litigation as a party, would unduly hinder the efficient resolution of this matter. *See id.* (finding it within district court's discretion to consider that case "badly need[s] to be expedited" and that "more parties would complicate" matters unnecessarily).

To this point, as noted above, the Parties have been discussing a possible agreed-upon preliminary injunction. In pursuing these discussions, Plaintiffs, for their reasons, and the Town, for its reasons, have been concerned about limiting possible damages and damage claims pending an adjudication on the merits of the Ordinance's constitutionality. In seeking agreement on this point, they are also seeking agreement on an accelerated timetable towards a trial on the merits.

From his Motion to Intervene, it appears that Mr. Sidman vigorously objects to any stipulation by the parties to injunctive relief. It follows that, therefore, if he were to join this litigation as a full party, he would press his objection with the Court and seek a hearing on Plaintiffs' motion for a preliminary injunction first, following which, at some point further down the road, there would be a trial on the merits.

In short, he would be imperiling the possibility of an agreement on the entry of interim protective relief accompanied by an expedited schedule towards a trial on the merits in favor of risk of great damage to Plaintiffs with its attendant risks of significant liability to the Town. And, when the trial on the merits arrived, it would become clear, as it now is apparent, that Mr. Sidman would add nothing to the defense that the Town already plans to mount to the Ordinance's constitutionality.

From the foregoing, it is apparent that, where preliminary injunctive relief is concerned, although adversaries on the merits, coming from their very different perspectives, the Parties share a strong interest in avoiding the infliction of significant damage on the Plaintiffs arising from immediate enforcement of the Ordinance and in avoiding potential liability for the Town the infliction of such damage could impose. They also share an interest expediting the point at which a full trial on the merits may be held and this Court can determine, one way or the other, the Ordinance's constitutionality.

For the foregoing reasons, Plaintiffs believe that, for different but nonetheless compelling reasons, Plaintiffs, Plaintiff-Intervenors, and the Town may be willing to enter into a stipulated preliminary injunction. That the Town may be willing to do so, says everything about its commitment to protecting the residents of Bar Harbor from unnecessary risk and says exactly nothing about the Town's commitment to defend the Ordinance on the merits. All it shows is that the Town has a significant incentive to seek a prompt and cost-effective adjudication of this matter while minimizing its risk in in the interim. Mr. Sidman's intervention would add nothing to the Town's defense of the Ordinance on the merits, but it would create an undue risk of delay and contention on preliminary issues and, thereby, prejudice the adjudication of the original parties' rights.

Mr. Sidman should not be granted permissive intervention.

III. Mr. Sidman should not be granted leave to participate as amicus curiae.

The filing of amicus briefs can be beneficial to raise additional arguments or theories that a particular party has not raised. *Daggett v. Webster,* 34 F. Supp. 2d 73, 75-76 (D. Me.), *vacated sub nom. Daggett v. Comm'n on Governmental Ethics & Election Pracs.,* 172 F.3d 104 (1st Cir. 1999). However, Mr. Sidman has made no showing that he would raise additional arguments or

theories that the Town would not. Mr. Sidman's participation as amicus curiae would provide no benefit to the Town or this litigation.

Moreover, as this litigation is in its infancy and it not yet clear what arguments or theories the Town will raise in its defense, granting Mr. Sidman leave to participate as amicus curiae would be premature and unwarranted.

CONCLUSION

WHEREFORE, the Plaintiffs request the Court DENY Proposed Defendant-Intervenor Charles Sidman's Verified Motion to Intervene and Alternative Verified Motion to Participate as Amicus Curiae.

By their attorneys,

DATED: February 6, 2023

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CERTIFICATE OF SERVICE

I hereby certify that on February 6, 2023, the foregoing was electronically filed with the Clerk of this Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

Dated: February 6, 2023 /s/Timothy C. Woodcock