

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MAINE**

ASSOCIATION TO PRESERVE AND )  
PROTECT LOCAL LIVELIHOODS, *et al.*, )  
) )  
*Plaintiffs,* )  
) )  
PENOBSCOT BAY AND RIVER PILOTS )  
ASSOCIATION, a Maine corporation, )  
) )  
*Plaintiff-Intervenor,* )  
) )  
) )  
v. )  
) )  
TOWN OF BAR HARBOR, a municipal )  
corporation of the State of Maine, )  
) )  
*Defendant.* )  
) )  
) )  
\_\_\_\_\_ )

**Civil Action No. 1:22-cv-416**

**ANSWER AND DEFENSES**

Defendant Town of Bar Harbor (“Defendant”), by and through its attorneys, Rudman Winchell, hereby answers the Verified Complaint (the “Complaint”) filed by 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”), as follows:

**DEFENSES**

1. Plaintiffs have failed to state a claim upon which relief may be granted.

2. Plaintiffs' claims are barred, in whole or in part, by the applicable statutes of limitations.

3. Plaintiffs lack standing to bring this action.

4. This action is not ripe for adjudication.

5. Plaintiffs have failed to present a justiciable controversy among or between the parties.

6. Plaintiffs have failed to demonstrate that they are entitled to injunctive relief.

7. Defendant has acted in good faith at all times relevant to this action.

8. Plaintiffs' claims are barred, in whole or in part, by the doctrines of waiver, estoppel, and/or unclean hands.

9. Defendant's home rule authority to enact the Initiated Ordinance is expressly recognized and affirmed by Maine's Coastal Conveyance Act, 38 M.R.S. § 7.

10. The Initiated Ordinance does not discriminate against interstate commerce or attempt to regulate beyond the boundaries of the Town of Bar Harbor.

11. To the extent there exists any discrimination against interstate commerce, the Initiated Ordinance advances a non-protectionist purpose.

12. To the extent there exists any discrimination against interstate commerce, the Initiated Ordinance sets forth the least discriminatory means for achieving that purpose.

13. Any burdens imposed on interstate commerce by the Initiated Ordinance are reasonable in relation to the Initiated Ordinance's putative local benefits.

14. The Initiated Ordinance advances general health, safety, welfare, and peace of the community.

15. The Initiated Ordinance does not interfere with the federal government's ability to speak with one voice when regulating commerce with foreign nations.

16. Plaintiffs have failed to mitigate their damages, if any.

17. Defendant has no duty, fiduciary or otherwise, to operate the Town of Bar Harbor in a manner that benefits Plaintiffs' business operations to the detriment of its residents.

18. Facts and law demonstrate that the Initiated Ordinance is not preempted, and the enforcement of the Initiated Ordinance would not violate any provision of the U.S. Constitution or laws of the United States, or violate any right of any Plaintiff under the U.S. Constitution or any of the laws of the United States.

### **SUMMARY**

1. Paragraph 1 of the Complaint is introductory in nature. To the extent a response is required, the Initiated Ordinance is a written document that speaks for itself. Defendant denies the allegations in Paragraph 1 to the extent they are inconsistent with the Initiated Ordinance. Defendant lacks sufficient information to admit or deny the remaining allegations in Paragraph 1 and therefore denies the same.

2. Paragraph 2 of the Complaint is introductory in nature. To the extent a response is required, Defendant denies the allegations contained in Paragraph 2.

3. Paragraph 3 of the Complaint is introductory in nature. To the extent a response is required, Defendant denies the allegations contained in Paragraph 3.

4. Paragraph 4 of the Complaint is introductory in nature. To the extent a response is required, Defendant denies the allegations contained in Paragraph 4.

5. Paragraph 5 of the Complaint is introductory in nature and purports to describe what is contained elsewhere in the Complaint. The Complaint speaks for itself. To the extent a response is required, Defendant denies the allegations contained in Paragraph 5.

**PARTIES**

6. Defendant lacks sufficient information to admit or deny the allegations in Paragraph 6 of the Complaint and therefore denies the same.

7. Upon information and belief, Defendant admits the allegations in Paragraph 7 of the Complaint.

8. The Approval is a written document that speaks for itself. Defendant denies the allegations in Paragraph 8 to the extent they are inconsistent with the Approval. Defendant lacks sufficient information to admit or deny the remaining allegations in Paragraph 8 of the Complaint and therefore denies the same.

9. Upon information and belief, Defendant admits the allegations in Paragraph 9 of the Complaint.

10. The Approval is a written document that speaks for itself. Defendant denies the allegations in Paragraph 10 to the extent they are inconsistent with the Approval. Defendant lacks sufficient information to admit or deny the remaining allegations in Paragraph 10 of the Complaint and therefore denies the same.

11. Upon information and belief, Defendant admits the allegations in Paragraph 11 of the Complaint.

12. Upon information and belief, Defendant admits the allegations in Paragraph 12 of the Complaint.

13. Upon information and belief, Defendant admits the allegations in Paragraph 13 of the Complaint.

14. Upon information and belief, Defendant admits the allegations in Paragraph 14 of the Complaint.

15. Upon information and belief, Defendant admits the allegations in Paragraph 15 of the Complaint.

16. Admitted.

### **JURISDICTION AND VENUE**

17. Paragraph 17 of the Complaint contains statements of law to which no response is required. To the extent a response is required, Defendant denies every allegation and legal conclusion in Paragraph 17.

18. Paragraph 18 of the Complaint contains statements of law to which no response is required. To the extent a response is required, Defendant denies every allegation and legal conclusion in Paragraph 18.

19. Paragraph 19 of the Complaint contains statements of law to which no response is required. To the extent a response is required, Defendant admits that venue is proper in the District of Maine.

20. Paragraph 20 of the Complaint contains statements of law to which no response is required. To the extent a response is required, Defendant denies every allegation and legal conclusion in Paragraph 20.

**FACTUAL BACKGROUND**

*The Cruise Industry in Bar Harbor*

21. Defendant lacks sufficient information to admit or deny the allegations in Paragraph 21 of the Complaint and therefore denies the same.

22. The Master Plan is a written document that speaks for itself. Defendant denies the allegations in Paragraph 22 to the extent they are inconsistent with the Initiated Ordinance. Defendant lacks sufficient information to admit or deny the remaining allegations in Paragraph 22 and therefore denies the same.

23. Defendant lacks sufficient information to admit or deny the allegations in Paragraph 23 of the Complaint and therefore denies the same.

24. Defendant lacks sufficient information to admit or deny the allegations in Paragraph 24 of the Complaint and therefore denies the same.

25. Defendant lacks sufficient information to admit or deny the allegations in Paragraph 25 of the Complaint and therefore denies the same.

26. Defendant lacks sufficient information to admit or deny the allegations in Paragraph 26 of the Complaint and therefore denies the same.

27. Defendant lacks sufficient information to admit or deny the allegations in Paragraph 27 of the Complaint and therefore denies the same.

28. Defendant lacks sufficient information to admit or deny the allegations in Paragraph 28 of the Complaint and therefore denies the same.

29. Defendant lacks sufficient information to admit or deny the allegations in Paragraph 29 of the Complaint and therefore denies the same.

30. Defendant lacks sufficient information to admit or deny the allegations in Paragraph 30 of the Complaint and therefore denies the same.

31. Defendant lacks sufficient information to admit or deny the allegations in Paragraph 31 of the Complaint and therefore denies the same.

32. Defendant lacks sufficient information to admit or deny the allegations in Paragraph 32 of the Complaint and therefore denies the same.

33. Defendant admits that it has managed cruise ship visitation by establishing seasonal limitations on cruise ship passengers. Defendant lacks sufficient information to admit or deny the remaining allegations in Paragraph 33 of the Complaint and therefore denies the same.

34. Defendant admits that it has managed cruise ship visitation by establishing seasonal limitations on cruise ship passengers. Defendant lacks sufficient information to admit or deny the remaining allegations in Paragraph 34 of the Complaint and therefore denies the same.

35. Admitted.

36. Defendant admits that on or about August 16, 2022, it adopted a Cruise Management Plan which established seasonal limitations on cruise ship passengers. Defendant denies the allegations in Paragraph 36 of the Complaint to the extent that they are inconsistent with the Cruise Management Plan.

37. The MOA are written documents that speak for themselves. Defendant denies the allegations in Paragraph 37 to the extent they are inconsistent with the MOA.

*The Citizens' Initiative*

38. Admitted.

39. The Town Code and the Initiative are written documents that speak for themselves. Defendant denies the allegations in Paragraph 39 to the extent they are inconsistent with the written documents.

40. The Town Code and the Initiative are written documents that speak for themselves. Defendant denies the allegations in Paragraph 40 to the extent they are inconsistent with the written documents.

41. The Town Code and the Initiative are written documents that speak for themselves. Defendant denies the allegations in Paragraph 41 to the extent they are inconsistent with the written documents.

42. The Town Code and the Initiative are written documents that speak for themselves. Defendant denies the allegations in Paragraph 42 to the extent they are inconsistent with the written documents.

43. The Town Code and the Initiative are written documents that speak for themselves. Defendant denies the allegations in Paragraph 43 to the extent they are inconsistent with the written documents.

44. The Town Code and the Initiative are written documents that speak for themselves. Defendant denies the allegations in Paragraph 44 to the extent they are inconsistent with the written documents.

45. The Town Code and the Initiative are written documents that speak for themselves. Defendant denies the allegations in Paragraph 45 to the extent they are inconsistent with the written documents.

46. The Town Code and the Initiative are written documents that speak for themselves. Defendant denies the allegations in Paragraph 46 to the extent they are inconsistent with the written documents.

47. The Town Code and the Initiative are written documents that speak for themselves. Defendant denies the allegations in Paragraph 47 to the extent they are inconsistent with the written documents.

48. The Town Code and the Initiative are written documents that speak for themselves. Defendant denies the allegations in Paragraph 48 to the extent they are inconsistent with the written documents.

49. Denied.

50. Defendant admits the Town Council voted to place the Initiative on the warrant for the November Special Town Meeting. The Order is a written document that speaks for itself. Defendant denies the allegations in Paragraph 50 to the extent they are inconsistent with the Order.

51. Defendant denies that the document attached as Exhibit D to the Complaint is a true and accurate copy of the Special Town Meeting Warrant. Exhibit D is a written document that speaks for itself and appears to be the Ordinance Amendment Notice prepared by the Town Clerk for eCode360.com, the online vendor that hosts the Town's Code. Defendant lacks sufficient information to admit or deny the contents of all staff memoranda to the Council submitted prior to November 8, 2022, which are not attached to the Complaint. Defendant denies any allegations in Paragraph 51 to the extent they are inconsistent with the written document attached as Exhibit D or all staff memoranda to the Council issued prior to November 8, 2022.

52. Defendant admits the Initiative passed by the Bar Harbor Special Town Meeting on November 8, 2022. The remaining allegation in Paragraph 52 of the Complaint states a legal

conclusion to which no response is required. To the extent a response is required, Defendant denies every allegation and legal conclusion in Paragraph 52. The Initiated Ordinance, Special Town Meeting Warrant, and the Town Charter are written documents that speak for themselves. Defendant denies the allegations in Paragraph 52 to the extent they are inconsistent with the written documents.

53. The Initiated Ordinance and Town Code are written documents that speak for themselves. Defendant denies the allegations in Paragraph 53 to the extent they are inconsistent with the written documents.

54. Defendant lacks sufficient information to admit or deny the allegations in Paragraph 54 of the Complaint and therefore denies the same.

55. Defendant lacks sufficient information to admit or deny the allegations in Paragraph 55 of the Complaint and therefore denies the same.

56. Defendant lacks sufficient information to admit or deny the allegations in Paragraph 56 of the Complaint and therefore denies the same.

57. The Initiated Ordinance is a written document that speaks for itself. Defendant denies the allegations in Paragraph 57 to the extent they are inconsistent with the Initiated Ordinance.

58. Defendant lacks sufficient information to admit or deny the allegations in Paragraph 58 of the Complaint and therefore denies the same.

59. Defendant lacks sufficient information to admit or deny the allegations in Paragraph 59 of the Complaint and therefore denies the same.

60. Defendant lacks sufficient information to admit or deny the allegations in Paragraph 60 of the Complaint and therefore denies the same.

61. Defendant lacks sufficient information to admit or deny the allegations in Paragraph 61 of the Complaint and therefore denies the same.

62. Defendant lacks sufficient information to admit or deny the allegations in Paragraph 62 of the Complaint and therefore denies the same.

63. Defendant lacks sufficient information to admit or deny the allegations in Paragraph 63 of the Complaint and therefore denies the same.

64. Defendant lacks sufficient information to admit or deny the allegations in Paragraph 64 of the Complaint and therefore denies the same.

65. Denied.

66. Defendant lacks sufficient information to admit or deny the allegations in Paragraph 66 of the Complaint and therefore denies the same.

**CLAIMS FOR RELIEF**  
**COUNT I**

*(Violation of the Supremacy Clause, Article VI, Clause 2, of the U.S. Constitution)*

67. Defendant repeats and incorporates by reference the responses contained above as if fully set forth herein.

68. Paragraph 68 of the Complaint contains a statement of law to which no response is required. To the extent a response is required, Defendant denies every allegation and legal conclusion in Paragraph 68.

69. Paragraph 69 of the Complaint contains statements of law to which no response is required. To the extent a response is required, Defendant denies every allegation and legal conclusion in Paragraph 69.

70. Paragraph 70 of the Complaint contains statements of law to which no response is required. To the extent a response is required, Defendant denies every allegation and legal conclusion in Paragraph 70.

71. Paragraph 71 of the Complaint contains statements of law to which no response is required. To the extent a response is required, Defendant denies every allegation and legal conclusion in Paragraph 71.

72. Defendant lacks sufficient information to admit or deny the allegations in Paragraph 72 of the Complaint and therefore denies the same.

73. Paragraph 73 of the Complaint contains statements of law to which no response is required. To the extent a response is required, Defendant denies every allegation and legal conclusion in Paragraph 73.

74. Paragraph 74 of the Complaint contains statements of law to which no response is required. To the extent a response is required, Defendant denies every allegation and legal conclusion in Paragraph 74.

75. Defendant lacks sufficient information to admit or deny the allegations in Paragraph 75 of the Complaint and therefore denies the same.

76. Denied.

77. Defendant lacks sufficient information to admit or deny the allegations in Paragraph 77 of the Complaint and therefore denies the same.

78. Paragraph 78 of the Complaint contains a statement of law to which no response is required. To the extent a response is required, Defendant denies every allegation and legal conclusion in Paragraph 78.

79. Paragraph 79 of the Complaint contains statements of law to which no response is required. To the extent a response is required, Defendant denies every allegation and legal conclusion in Paragraph 79.

80. Paragraph 80 of the Complaint contains statements of law to which no response is required. To the extent a response is required, Defendant denies every allegation and legal conclusion in Paragraph 80.

81. The Approvals are written documents that speak for themselves. Defendant denies the allegations in Paragraph 81 to the extent they are inconsistent with the Approval. Defendant lacks sufficient information to admit or deny the remaining allegations in Paragraph 81 of the Complaint and therefore denies the same.

82. The Initiated Ordinance is a written document that speaks for itself. Defendant denies any allegations in Paragraph 82 to the extent they are inconsistent with the Initiated Ordinance. Defendant denies re remaining allegations contained in Paragraph 82.

83. Denied.

84. Paragraph 84 of the Complaint contains a statement of law to which no response is required. To the extent a response is required, Defendant denies every allegation and legal conclusion in Paragraph 84.

85. Paragraph 85 of the Complaint contains a statement of law to which no response is required. To the extent a response is required, Defendant denies every allegation and legal conclusion in Paragraph 85.

86. Defendant lacks sufficient information to admit or deny the allegations in Paragraph 86 of the Complaint and therefore denies the same.

87. Defendant denies that it lacks the right to establish and enforce limitations on the number of cruise ship passengers entering on a daily basis. Defendant lacks sufficient information to admit or deny the remaining allegations in Paragraph 87 of the Complaint and therefore denies the same.

88. Denied.

89. Denied.

90. Denied.

## **COUNT II**

*(Violation of the Commerce Clause of the United States Constitution)*

91. Defendant repeats and incorporates by reference the responses contained above as if fully set forth herein.

92. Paragraph 92 of the Complaint contains statements of law to which no response is required. To the extent a response is required, Defendant denies every allegation and legal conclusion in Paragraph 92.

93. Paragraph 93 of the Complaint contains statements of law to which no response is required. To the extent a response is required, Defendant denies every allegation and legal conclusion in Paragraph 93.

94. Paragraph 94 of the Complaint contains statements of law to which no response is required. To the extent a response is required, Defendant denies every allegation and legal conclusion in Paragraph 94.

### **The Initiated Ordinance Discriminates Against Interstate Commerce**

95. Paragraph 95 of the Complaint contains statements of law to which no response is required. To the extent a response is required, Defendant denies every allegation and legal conclusion in Paragraph 95.

96. Defendant denies that the Initiated Ordinance discriminates against interstate commerce. The remaining allegations of Paragraph 96 of the Complaint contain statements of law to which no response is required. To the extent a response is required, Defendant denies every allegation and legal conclusion in Paragraph 96.

97. Defendant denies that transport of persons by water to Bar Harbor is an inherently “out-of-state” activity. Defendant lacks sufficient information to admit or deny the remaining allegations in Paragraph 97 of the Complaint and therefore denies the same.

98. Defendant lacks sufficient information to admit or deny the allegations in Paragraph 98 of the Complaint and therefore denies the same.

99. The Initiated Ordinance is a written document that speaks for itself. Defendant denies any allegations in Paragraph 99 to the extent they are inconsistent with the Initiated Ordinance.

100. The Initiated Ordinance is a written document that speaks for itself. Defendant denies any allegations in Paragraph 100 to the extent they are inconsistent with the Initiated Ordinance.

101. The Initiated Ordinance is a written document that speaks for itself. Defendant denies any allegations in Paragraph 101 to the extent they are inconsistent with the Initiated Ordinance.

102. Defendant denies that the stated “Purpose” for the Initiative is mere pretense and lacks any factual basis. The Initiated Ordinance and the Initiative are written documents that speak for themselves. Defendant denies any allegations in Paragraph 102 to the extent they are inconsistent with the written documents.

103. Defendant lacks sufficient information to admit or deny the allegations in Paragraph 103 of the Complaint and therefore denies the same.

104. Defendant denies that the Initiated Ordinance erects a wall around the port of Bar Harbor, halts commerce from a large percentage of cruise ships active in interstate and foreign commerce, and/or obstructs commerce. The remaining allegation of Paragraph 104 of the Complaint contains a statement of law to which no response is required. To the extent a response is required, Defendant denies every allegation and legal conclusion in Paragraph 104.

105. Denied.

**The Initiated Ordinance is an Excessive Burden on Interstate Commerce**

106. Paragraph 106 of the Complaint contains a statement of law to which no response is required. To the extent a response is required, Defendant denies every allegation and legal conclusion in Paragraph 106.

107. Denied.

108. Denied.

109. Denied.

110. Defendant lacks sufficient information to admit or deny the allegations in Paragraph 110 of the Complaint and therefore denies the same.

111. Denied.

**The Initiated Ordinance Unduly Restricts Foreign Commerce**

112. Paragraph 112 of the Complaint contains statements of law to which no response is required. To the extent a response is required, Defendant denies every allegation and legal conclusion in Paragraph 112.

113. Paragraph 113 of the Complaint contains statements of law to which no response is required. To the extent a response is required, Defendant denies every allegation and legal conclusion in Paragraph 113.

114. Defendant denies that the Initiated Ordinance discriminates against foreign commerce. Defendant lacks sufficient information to admit or deny the remaining allegations in Paragraph 114 of the Complaint and therefore denies the same.

115. Denied.

116. Denied.

117. The Initiated Ordinance is a written document that speaks for itself. Defendant denies any allegations in Paragraph 117 to the extent they are inconsistent with the Initiated Ordinance. Paragraph 117 of the Complaint contains statements of law to which no response is required. To the extent a response is required, Defendant denies every allegation and legal conclusion in Paragraph 117.

118. Defendant denies that the Initiated Ordinance impermissibly regulates in an area where national uniformity is essential. Defendant lacks sufficient information to admit or deny the allegations in Paragraph 118 of the Complaint and therefore denies the same.

119. Defendant denies that the Initiated Ordinance would impose a regime for landing passengers and crew in Bar Harbor that is different than those in other ports in the United States, in violation of the Foreign Commerce Clause. Paragraph 119 of the Complaint contains a statement of law to which no response is required. To the extent a response is required, Defendant denies every allegation and legal conclusion in Paragraph 119.

120. Defendant denies that the Initiated Ordinance threatens the nation's ability to maintain an integrated maritime transportation system. Paragraph 120 of the Complaint contains a

statement of law to which no response is required. To the extent a response is required, Defendant denies every allegation and legal conclusion in Paragraph 120.

121. Denied.

122. Denied.

123. Denied.

124. Denied.

### **COUNT III**

*(Initiated Ordinance Inconsistent with Substantive Due Process)*

125. Defendant repeats and incorporates by reference the responses contained above as if fully set forth herein.

126. Denied.

127. Defendant denies that the Initiated Ordinance is arbitrary, discriminatory and irrelevant to any legitimate legislative goal and that mandatory disembarkation caps unreasonably deprive Plaintiffs of their property interests. The Initiated Ordinance is a written document that speaks for itself. Defendant denies any allegations in Paragraph 127 to the extent they are inconsistent with the Initiated Ordinance. Defendant lacks sufficient information to admit or deny the remaining allegations in Paragraph 127 of the Complaint and therefore denies the same.

128. Denied.

WHEREFORE, Defendant respectfully requests that this Honorable Court dismiss Plaintiffs' Complaint in its entirety, enter judgment in favor of Defendant, award Defendant its costs, attorneys' fees, and expenses, and grant such other and further relief as this Court deems just and proper.

Dated at Bangor, Maine, this 6th day of February, 2023.

/s/ Allison A. Economy, Esq.  
Allison A. Economy, Bar No. 5336  
[aeconomy@rudmanwinchell.com](mailto:aeconomy@rudmanwinchell.com)

/s/ Jonathan P. Hunter, Esq.  
Jonathan P. Hunter, Bar No. 4912  
[jhunter@rudmanwinchell.com](mailto:jhunter@rudmanwinchell.com)

/s/ Stephen W. Wagner, Esq.  
Stephen W. Wagner, Bar No. 5621  
[swagner@rudmanwinchell.com](mailto:swagner@rudmanwinchell.com)

Attorneys for Defendant Town of Bar Harbor  
RUDMAN WINCHELL  
84 Harlow Street  
P.O. Box 1401  
Bangor, ME 04402  
207.947.4501

**CERTIFICATE OF SERVICE**

I hereby certify that on February 6, 2023, I electronically filed the foregoing *Answer and Defenses* using the CM/ECF system, which will provide notice to all counsel of record in this case.

Dated: February 6, 2023

/s/ Jonathan P. Hunter  
Jonathan P. Hunter, Bar No. 4912  
Attorney for Defendant  
RUDMAN WINCHELL  
84 Harlow Street  
P.O. Box 1401  
Bangor, ME 04402  
207.992.2413  
[jhunter@rudmanwinchell.com](mailto:jhunter@rudmanwinchell.com)