

**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,)

Plaintiff-Intervenor,)

Civil Action No. 1:22-cv-416

v.)

TOWN OF BAR HARBOR,)

Defendant,)

CHARLES SIDMAN,)

Defendant-Intervenor.)

**DEFENDANT TOWN OF BAR HARBOR’S OPPOSITION TO
AMENDED JOINT MOTION FOR INJUNCTION PENDING APPEAL**

Defendant Town of Bar Harbor (the “Town”), through its attorneys, Rudman Winchell, hereby opposes the Amended Joint Motion for Injunction Pending Appeal (ECF 228) (the “Amended Motion”) filed by Plaintiffs Association to Preserve and Protect Local Livelihoods, BH Piers, L.L.C., Golden Anchor, L.C., doing business as Harborside Hotel, B.H.W.W., L.L.C., Delray Explorer Hull 495, L.L.C., Delray Explorer Hull 493, L.L.C., and Acadia Explorer 492, L.L.C.’s (collectively, “Plaintiffs”) and the Penobscot Bay and River Pilots Association (“Pilots,” and collectively with Plaintiffs, “Appellants”). In support of its opposition, the Town states as follows.

BACKGROUND

*Factual Background and Procedural History*¹

This case concerns a citizen-initiated amendment to the Town’s Land Use Ordinance adopted by voters on November 8, 2022, and codified at section 125-77(H) of the Town Code, limiting disembarkations from cruise ships (the “Ordinance”). (ECF 206 at 13.) The Ordinance provides that the Harbor Master “shall develop rules and regulations” to establish, among other things, a mechanism for counting the number of persons disembarking each day, and a procedure for reporting violations to the Code Enforcement Officer. (ECF 228-1; PX 209.) Following the adoption of the Ordinance, Town staff tasked with developed the rulemaking, at the direction of the Council, stated in a written report delivered to the Council that it will not enforce the Ordinance to prohibit or cause a fine to issue for the disembarkation of persons that are recognized as “vessel personnel,” “vessel crew,” “seafarers assigned to a vessel,” “pilots,” and “representatives of seafarers’ welfare and labor organizations” under 33 C.F.R. § 105.200 and 33 C.F.R. § 105.237. (7/13/23 Tr. at 73-75; PX 204.) This will be codified as part of the regulations contemplated by the Ordinance and necessary before the Ordinance can be enforced. (7/13/23 Tr. at 160-64.)

In December 2022, Plaintiffs filed this lawsuit against the Town challenging the constitutionality of the Ordinance on various grounds, along with a motion for preliminary injunction seeking to block the implementation of the Ordinance. The Pilots intervened as plaintiffs, and Charles Sidman, one of seven members of the petitioning committee that initiated the Ordinance, intervened as a defendant. (ECF 206 at 3-4.) The Town agreed not to enforce the Ordinance during the pendency of the district court proceedings. (*Id.* at 2, 13.) Plaintiffs thereafter

¹ This Court will be familiar with the factual background of this matter, having presided over the trial and issued a decision. The Town therefore limits its discussion to only the most relevant facts and procedural history. To the extent that a more complete summation of the facts would be helpful to the Court, the Town incorporates by reference the factual background provided in its Post-Trial Brief. (ECF 196 at 1-7.)

withdrew their motion for preliminary injunction. (*Id.* at 2.) A three-day trial was held in July 2023. (*Id.*)

By an Amended Order and Decision dated March 1, 2024 (the “Decision”), this Court held in favor of the Town in all respects, except that it concluded that the Ordinance was “partially preempted in relation to seafarer shore access” but was otherwise valid as to cruise ship passengers. (*Id.* at 2, 60-61.) On April 9, 2024, Appellants appealed the Court’s Decision to the Court of Appeals for the First Circuit. On May 3, 2024—over 60 days after the Decision—Appellants filed in the First Circuit a Joint Motion for Injunction Pending Appeal. They argued that they should not be required to first move for relief in this Court as required by Fed. R. App. P. 8(a) because doing so would be futile in light of this Court’s decision on the merits, and because “time was of the essence.” On May 24, 2024, the First Circuit denied Appellants’ motion without prejudice for failure to comply with Fed. R. App. P. 8(a), noting that Appellants waited more than 60 days before filing their motion. Six days later, Appellants filed a Joint Motion for Injunction Pending Appeal, and a day after that filed the present Amended Motion.²

*Post-Order Events*³

On March 6, 2024, the Town Council issued a public statement directing the Town Manager to prepare draft rules implementing the Ordinance consistent with this Court’s decision for the Council’s consideration and approval after public hearing, after which enforcement would

² Although Appellants’ Amended Motion recites that it merely “corrects typographical errors, internal citations, and certain Exhibits,” it in fact completely replaces an exhibit—the affidavit of Sarah Flink—with a new affidavit that contains new and significantly different factual allegations. (*Compare* ECF 224-4, *with* ECF 228-4, in particular ¶¶ 25-35.)

³ Where the First Circuit’s review in this matter will necessarily be limited to the record developed at trial, *see, e.g., Cunningham v. Lyft, Inc.*, 17 F.4th 244, 251 (1st Cir. 2021), the Town does not concede that facts outside of that record are proper for this Court’s consideration on a motion for injunction pending appeal. It therefore presents these facts for additional context only to the extent that the Court considers extraneous facts presented by Appellants.

begin. (ECF 228-2.) With respect to the imminent 2024 cruise season, the Council indicated it would not enforce the Ordinance with respect to disembarkations from cruise ships with reservations made before voters approved the Ordinance, based on considerations of fairness, legal liability, and budgetary concerns. (*Id.*)

On May 7, 2024, the Council held a meeting at which it heard public comments on proposed draft rules and ordinances implementing the Ordinance. (Exhibit 1, Affidavit of James L. Smith ¶¶ 4, 6.) The Council considered earlier drafts at a public meeting on November 21, 2023. The proposed rules and ordinances exclude from application of the Ordinance “persons covered by 33 C.F.R. § 105.200 and 33 C.F.R. § 105.237.” (*Id.* ¶ 5 and Attachment A, Cruise Ship Disembarkation Ordinance Amendment 2024-06, § [###]-5 (defining “Persons”).) The Town is currently reviewing the comments it received—including comments from Appellants and Mr. Sidman. (*Id.* ¶ 7.) A public hearing before the Council on the proposed rules and ordinances will be held on June 18, 2024, after which the Council may vote to enact them under the Town Charter’s procedures. (*Id.* ¶¶ 8-9; Exhibit 2, Declaration of Christopher Wharff ¶ 12.)

As of May 31, 2024, the Harbor Master has confirmed all outstanding reservation requests for the 2024 and 2025 seasons. (Declaration of Christopher Wharff ¶¶ 6-7.) On May 21 and 31, 2024, Royal Caribbean Group canceled its reservations for 2024 and 2025, respectively. (*Id.* ¶¶ 8-9.) Most of Royal Caribbean’s 2024 reservations had been confirmed before July 2021. (*Id.* ¶ 8.) By making these 2024 reservations only to cancel them in May 2024, Royal Caribbean effectively prohibited other cruise lines from reserving those 2024 dates. (*Id.* ¶ 10.)

ARGUMENT

A “preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion.” *Dobson v.*

Dunlap, 576 F. Supp. 2d 181, 188 (D. Me. 2008) (quoting *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997)). When a party moves to stay a judgment pending appeal or for an injunction pending appeal, this Court considers four factors:

(1) whether the applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent relief; (3) whether issuance of relief will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Respect Me. PAC v. McKee, 622 F.3d 13, 15 (1st Cir. 2010); see also *Bos. Parent Coal.*, 996 F.3d at 44 (same). The first two factors are the “most critical.” *Bos. Parent Coal.*, 996 F.3d at 44; *Respect Me. PAC*, 622 F.3d at 15. Both require more than a mere possibility. “Plaintiffs must show a strong likelihood of success, and they must demonstrate that irreparable injury will be likely absent an injunction.” *Respect Me. PAC*, 622 F.3d at 15.

When considering a request for injunctive relief pending appeal, as opposed to a motion to stay, “the bar is harder to clear.” *Bos. Parent Coal.*, 996 F.3d at 44. This is because an injunction “does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by a lower court.” *Id.* (cleaned up) (quoting *Respect Me. PAC v. McKee*, 562 U.S. 996, 996 (2010)).

I. Appellants Have Not Shown a Substantial Likelihood of Success on the Merits.

To demonstrate likelihood of success on the merits, Appellants must show more than mere possibility of success—rather, they must establish a “strong likelihood” that they will ultimately prevail. *Respect Me. PAC*, 622 F.3d at 15. Appellants focus on two of the myriad arguments previously made to the Court. The Town addresses each in turn.

A. Preemption as to Seafarers

Appellants first argue that, because this Court concluded that the Ordinance was preempted insofar as it would apply to seafarers, it was bound to invalidate the Ordinance *in toto*, including as applied to cruise ship passengers. Not so.

First, an ordinance cannot be invalidated in full in a facial challenge to the law based upon a hypothetical constitutional problem with respect to one potential application of the ordinance. As this Court noted in its Decision, it is not enough for Appellants, in the context of a facial challenge, to show a single set of circumstances under which application of the Ordinance could be unconstitutional. Rather, it is Appellants' burden establish that "*no set of circumstances exists under which the [Ordinance] would be valid.*" *United States v. Hansen*, 599 U.S., 762, 769 (2023) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). Where the Ordinance is valid as applied to passengers, Appellants have failed to carry this burden.

This Court concluded that the Ordinance has the "*potential to conflict with the preemptive seafarer's access regulation and requires that Bar Harbor avoid any application of the Ordinance that would run afoul of 33 C.F.R. § 105.237.*" (ECF 206 at 31-32 (emphasis added).) But unless and until the Town attempts to enforce the Ordinance against a seafarer—which it has not done and repeatedly made clear it will not do—the Ordinance stands as facially valid, pending a hypothetical future as-applied challenge. *See Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 457-58 (2008) (noting conclusion that some applications of law would be constitutional is fatal to facial challenge).

Second, to the extent a severability analysis is required at all with respect to a facial challenge, Appellants are simply wrong on the law. A "statute may be invalid as applied to one state of facts and yet valid as applied to another." *Ayotte v. Planned Parenthood*, 546 U.S. 320,

329 (2006) (quoting *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282, 289 (1921)). The default rule is that “partial, rather than facial, invalidation is the required course, such that a statute may be declared invalid to the extent that it reaches too far, but otherwise left intact.” *Id.* (cleaned up) (quoting *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504 (1985)). The Supreme Court wrote in *Ayotte*:

[W]hen confronting a constitutional flaw in a statute, we try to limit the solution to the problem. We prefer, for example, to enjoin only the unconstitutional applications of a statute while leaving other applications in force, or to sever its problematic portions while leaving the remainder intact.

546 U.S. at 328-29. Ultimately, the question is one of legislative intent: “After finding an application or portion of a statute unconstitutional, we must next ask: Would the legislature have preferred what is left of its statute to no statute at all?” *Id.* at 330.

Appellants’ apparent suggestion that courts are limited to deleting certain words or provisions is not consistent with the law. It is true that courts must exercise restraint in fashioning a limited remedy. *Id.* at 329-30. The question is “how easily [the court] can articulate the remedy.” *Id.* at 329. If distinguishing constitutional and unconstitutional applications of a statute is a “relatively simple matter,” the court should proceed. *Id.* at 329-30 (quoting *United States v. Grace*, 461 U.S. 171, 180-183 (1983)). If the law is “murky” or “where line-drawing is inherently complex,” the court must take care not to invade the legislature’s domain. *Id.* at 330.

Here, this Court concluded that there was a potential preemption problem if the Ordinance were—contrary to all indications—ever applied to seafarers. However, that hypothetical conflict was clearly limited only to seafarers, as defined by federal regulation. Drawing a line between crew and passengers is not “inherently complex.”

If courts were limited to deleting text from a statute, as Appellants seem to suggest, *Ayotte* would have been decided differently. In that case, the abortion ban in question *lacked* a provision

necessary for its constitutionality under the law as it existed at the time—an exception to protect the health of the patient. *Id.* at 327-28. If all a court may do is strike particular words, the Court would have invalidated the law in full. But instead, the Court remanded for a determination as to whether the legislature would have preferred the statute *with a medical exception read into the statute*, or no statute at all. *Id.* at 331; *see also Brockett*, 472 U.S. at 504-05 (holding that even if word “lust” was not amenable to a limiting construction, statute prohibiting publication of obscene material could still be “invalidated only insofar as the word ‘lust’ is taken to include normal interest in sex”).

Appellants observe that severability is a matter of state law. But Maine law calls for the same analysis. “[I]f a statute is unconstitutional as applied, the state may continue to enforce that statute in different circumstances where it is not unconstitutional, and if a statute has unconstitutional applications, they are severable from the constitutional applications.” *NECEC Transmission LLC v. Bureau of Parks & Lands*, 2022 ME 48, ¶ 20 n.7, 281 A.3d 618, 627 n.7 (quoting 16A Am. Jur. 2d Constitutional Law § 211). Like the Supreme Court in *Ayotte*, Maine’s Law Court has likewise stated that the critical factor is legislative intent—that is, would the legislature prefer the ordinance as limited by the court, or no ordinance at all. *See, e.g., Kittery Retail Ventures, LLC v. Town of Kittery*, 2004 ME 65, ¶ 18, 856 A.2d 1183, 1190 (“An invalid portion of a statute or an ordinance will result in the entire statute or ordinance being void only when it is such an integral portion of the entire statute or ordinance that the enacting body would have only enacted the legislation as a whole.”); *Op. of the Justices*, 2004 ME 54, ¶ 23, 850 A.2d 1145, 1152 (“The Law Court considers the legislative purpose or purposes of the statute under consideration when examining questions of severability.”)

The key inquiry is whether the legislature (here, the voters of the Town) would have intended the Ordinance to apply as against passengers even if it could not be applied to crew. *See Wawenock, LLC v. DOT*, 2018 ME 83, ¶ 16, 187 A.3d 609, 618 (“Interpreting citizen-enacted legislation requires us to ‘ascertain the will of the people’ rather than the will of the Legislature.” (quoting *Op. of the Justices*, 2017 ME 100, ¶ 7, 162 A.3d 188, 198)). This Court properly found that “the voters of Bar Harbor intended and would prefer that the Ordinance remain operative as to passengers rather than be invalidated as to passengers.” (ECF 206 at 31.) The record amply supports that finding. Indeed, it is questionable whether voters understood “persons” as meaning anything *other* than “passengers.” The voters who testified at the trial framed their concerns about cruise ship visitation and the basis for their votes in favor of the Ordinance in terms of “passengers.” (7/13/23 Tr. at 214-15 (William Ray Horner); 7/13/23 Tr. at 234, 237 (Seth Libby).) At trial, and again in the First Circuit, Appellants pointed to private statements made by Mr. Sidman that “persons” was intended to cover both passengers and crew (PX 230), but Mr. Sidman is not “the legislature.” He is only one member of a seven-member petitioning committee, and only one of thousands of Bar Harbor voters who enacted the Ordinance. *See Wawenock*, 2018 ME 83, ¶ 16, 187 A.3d at 618. “[S]tatements by a law’s private-sector proponents sometimes can shed light on its purpose’ but the isolated correspondence of a single proponent ‘has little (if any) probative value in demonstrating the objective of the legislative body as a whole.’” *Portland Pipe Line Corp. v. City of S. Portland*, 332 F. Supp. 3d 264, 303 (D. Me. 2018) (quoting *All. of Auto. Mfrs. v. Gwadosky*, 430 F.3d 30, 39 (1st Cir. 2005)). It is unclear how Mr. Sidman’s private correspondence can be taken to reflect the will of thousands of voters not even privy to it.

In any event, regardless of whether voters understood “persons” as including crew, the suggestion that the voters would prefer to have *no limit on cruise ship disembarkations at all over*

limits “only” on passengers is preposterous on its face. The primary—if not exclusive—purpose of the Ordinance was to limit passenger disembarkation, consistent with the Town’s entire history of managing cruise ship visitation.

Finally, Appellants argue that “[u]ntil the Ordinance is validly amended or the Town issues purportedly curative rules, it is as applicable to seafarers as it is to all other disembarking persons.” (ECF 228 at 11.) This is true, but not in the way that Appellants suggest—by its terms, the Ordinance cannot be enforced against *anyone* until rules implementing it are adopted. (ECF 228-1; PX 204; PX 209; 7/13/23 Tr. at 73-75, 160-64.) The Town is proceeding with rulemaking that will both enable enforcement of the Ordinance and exclude seafarers, precisely as it indicated it would. (Affidavit of James L. Smith ¶¶ 4-9.) Appellants evidently take issue with the Town’s proposed means of excluding seafarers from enforcement of the Ordinance. But ultimately, the Town controls the circumstances in which it enforces the Ordinance. *See Salisbury v. Town of Bar Harbor*, 2002 ME 13, ¶ 11, 788 A.2d 598, 601 (noting Maine law “precludes the court’s intrusion into municipal decision-making when a municipality decides whether *or not* to undertake an enforcement action”); *see also* 30-A M.R.S. § 4452(1)(B) (stating that Code Enforcement Officer “may” issue a summons to an alleged violator). More importantly for purposes of the present motion, any theoretical future challenge to the implementation or enforcement of the Ordinance is not before this Court, and will not be before the First Circuit on appeal.

B. Dormant Commerce Clause

Appellants also argue that they are likely to prevail on the merits of their dormant Commerce Clause challenge. Appellants rehash arguments they previously (and unsuccessfully) made in this Court. (ECF 228 at 11-14.) These arguments fail for the same reasons they failed the

first time (ECF 206 at 42-60), and fall well short of the required showing of a strong likelihood of success on the merits required to warrant the extraordinary remedy of injunctive relief.

As before, Appellants' view of the dormant Commerce Clause is overbroad. "In the absence of conflicting federal legislation, the States retain authority under their general police powers to regulate matters of legitimate local concern, even though interstate commerce may be affected." *Lewis v. Bt Inv. Managers*, 447 U.S. 27, 36 (1980) (quotation marks omitted). Recently, the Supreme Court warned that the dormant Commerce Clause is only appropriately applied with "extreme caution" against "especially discriminatory" state laws. *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 143 S. Ct. 1142, 1165 (2023). "Preventing state officials from enforcing a democratically adopted state law in the name of the dormant Commerce Clause is a matter of extreme delicacy, something courts should do only where the infraction is clear." *Id.*

Modern Commerce Clause jurisprudence rests on two primary principles. "First, state regulations may not discriminate against interstate commerce; and second, States may not impose undue burdens on interstate commerce." *South Dakota v. Wayfair, Inc.*, 585 U.S. 162, 173 (2018). "Discrimination," in this context, means "economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Nat'l Pork Producers*, 143 S. Ct. at 1153 (quoting *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 337-338 (2008)). As this Court concluded, the Ordinance does not "discriminate" based on the origin of ships or their passengers, but on their unique contributions to congestion in Bar Harbor. (ECF 206 at 48.) In doing so, the Ordinance does not advance local interests at the expense of out-of-state competitors. (ECF 206 at 48-50.)

Nondiscriminatory state and local laws "will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Wayfair*, 585 U.S. at 173

(2018) (quoting *Pike v. Bruce Church, Inc.*, 397 U. S. 137, 142 (1970)). This Court correctly concluded that the any burden the Ordinance places on commerce is not “clearly excessive” in relation to the Ordinance’s benefit to the Town. (ECF 206 at 56-60.)

Contrary to Appellants’ contentions, a finding that a law in some way impedes the “flow” of commerce does not mean that the law is invalid. (ECF 206 at 51-52.) Rather, the burden on commerce must be weighed against the local benefits. *See, e.g., S. Pac. Co.*, 325 U.S. at 767 (“When the regulation of matters of local concern is local in character and effect, and its impact on the national commerce does not seriously interfere with its operation, and the consequent incentive to deal with them nationally is slight, such regulation has been generally held to be within state authority.”) The Court has “only rarely” held that the Commerce Clause preempts an entire field from state regulation, and only where there is a need for national uniformity. *National Pork Producers*. 143 S. Ct. at 1158 n.2.

This Court correctly applied these precedents. It did not uphold the Ordinance on the basis that “ships [are] more like hog breeders than trucks or trains,” as Appellants reductively suggested in the First Circuit, but on the basis that the Ordinance regulates a matter of local concern—the impacts of disembarking passengers on congestion and quality of life—and that cruise tourism is a “hyperlocal concern that is not well suited to a one-size-fits-all regulatory approach at the federal level.” (ECF 206 at 51-55.)

II. Appellants Have Not Shown They Will Suffer Irreparable Harm.

Parties seeking an injunction must do more than show a possibility of irreparable harm. Rather, they must show that “irreparable injury is *likely* in the absence of an injunction.” *Winter v. NRDC, Inc.*, 555 U.S. 7, 22 (2008). The mere fact that a party alleges a violation of constitutional rights does not show irreparable harm. *See, e.g., Respect Me. PAC*, 622 F.3d at 15; *Pub. Serv. Co.*

v. W. Newbury, 835 F.2d 380, 382 (1st Cir. 1987); *see also All. for Retired Ams. v. Sec’y of State*, 2020 ME 123, ¶ 11, 240 A.3d 45, 50.

Appellants warn of “ruinous and escalating per-person fines,” but also that “ships will no longer call at Bar Harbor.” (ECF 228 at. at 14-15.) Both propositions cannot be true, and it is not clear that either of them is. As to fines, the Ordinance has not yet been implemented; the harm Appellants forecast relates to the 2025 cruise ship season, which begins approximately one year from now. Appellants also appear to ignore that they have agency as to whether they comply with the Ordinance, once implemented, and can conduct themselves accordingly.

As to Appellants’ assurance that the ships simply will not come—which would appear to rule out “ruinous” fines—Appellants’ claims rest on speculation as to how nonparty cruise lines might choose to conduct their business in a changing regulatory environment. (ECF 206 at 58.) Appellants contend that one cruise line—Royal Caribbean—has canceled its calls at Bar Harbor for the 2024 and 2025 seasons due to “uncertainty of their ability to visit the port.” (ECF 228 at 17.) But that contention is based on rank hearsay that Appellants attempt to launder into the record via an affidavit from Sarah Flink, who has no personal knowledge of the business decisions of Royal Caribbean or any other cruise line. (ECF 228-4 ¶¶ 31-32 (averring to what unidentified representatives of Royal Caribbean allegedly told her)). A reservation is not a guarantee that a ship will visit—reservations can be and are regularly canceled, for any number of reasons. (Declaration of Christopher Wharff ¶ 11). Appellants fail to establish any connection between the Ordinance and these cancellations, or that the reservations in question would otherwise have been kept.⁴

⁴ Even if the hearsay statements contained within Appellants’ affidavits could be considered, those statements suggest that Royal Caribbean did not even attempt to market cruises including Bar Harbor to their customers, and has in fact been selling packages including other ports for two years. (*See* ECF 228-4 ¶ 31 (“Our current itineraries for 2024 were put on sale to the public in late 2022 *and did not feature Bar Harbor* [W]e will be continuing with our published itineraries that do not include the destination.” (emphasis added)). In other words, it was a foregone conclusion that Royal Caribbean would not visit Bar

Economic losses are not irreparable, unless they are so great as to “threaten the existence of the movant’s business.” *Vaqueria Tres Monjitas, Inc. v. Irizarry*, 587 F.3d 464, 485 (1st Cir. 2009). Appellants present only conclusory declarations as to the scale of their hypothetical losses, without explaining how they reached the relevant figures, and without providing any context for those figures, such that they can claim that their very “existence” is threatened. Moreover, the time to establish any such harm was at trial—not post-judgement affidavits based on facts outside the record and as to which there has been no discovery nor opportunity for cross-examination. There is absolutely no basis in the record for Appellants’ claim that the Ordinance “has already caused a near-total disappearance of 2025 vessel calls.”⁵ (ECF 228 at 15.) And it is simply wrong that the Town has “fail[ed] to confirm reservations for the 2025 cruise season.” (*Id.* at 16.) All such reservation requests have been confirmed. (Declaration of Christopher Wharff ¶¶ 6-7.)

Crucially, Appellants’ claim of irreparable harm must be viewed through the lens of their likelihood of success on the merits. As the First Circuit has stated, “[w]hat matters . . . is not the raw amount of irreparable harm the party might conceivably suffer, but rather the risk of such harm in light of the party’s chance of success on the merits.” *P.R. Hosp. Supply, Inc. v. Bos. Sci. Corp.*, 426 F.3d 503, 506 n.2 (1st Cir. 2005) (quoting *Siemens Bldg. Techs., Inc. v. Div. of Asset Capital Mgmt.*, 439 Mass. 759, 762, 791 N.E.2d 340, 343 (2003)). Where Appellants have, at best, a slim chance of success on the merits, no amount of speculative doomsaying establishes a likelihood of irreparable injury.

Harbor. If indeed Appellants lose revenue on the days that Royal Caribbean had booked for 2024, it will be because Royal Caribbean effectively prevented *other* cruise lines from booking those dates, despite knowing for “many months” that it would not be visiting Bar Harbor. (ECF 228-4 ¶ 31; Declaration of Christopher Wharff ¶¶ 8, 10.)

⁵ In support of this remarkable claim, Appellants cite this Court’s Decision. That may come as a surprise to the Court, given that it made no such finding.

III. The Balance of Equities Favors the Town, and the Injunction Sought Is Not in the Public Interest.

“A preliminary injunction is an extraordinary remedy never awarded as of right.” *Winter*, 555 U.S. at 24 (citations and quotation marks omitted). Rather, “courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief. In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.” *Id.* (cleaned up). Where the Town is a public entity, there is near-total overlap between the harm to the Town and to the public interest. The Town therefore addresses these factors together.

The harm to the Town and to the public from the requested injunction would be significant. As this Court recognized, the Town “has a year-round population of roughly 5,500 persons, a number comparable to the lower berth capacity (a rough measure of passenger capacity) of a solitary large cruise ship.” (ECF 206 at 4.) Cruise ship traffic has profound negative impacts on the Town and its residents. Those negative impacts have grown exponentially as the industry has constructed “ever larger vessels to achieve unprecedented economies of scale, principally for shareholder profit.” (ECF 206 at 54.) “Congestion in Bar Harbor is real and is experienced throughout the summer and fall months. When the [Appellants] disembark several thousand persons on a daily basis, they substantially burden Bar Harbor’s waterfront and intensify the experience of congestion more widely.” (ECF 206 at 40.)

The Town voluntarily paused implementation and enforcement of the Ordinance for more than a year, pending a decision by this Court as to the Ordinance’s constitutionality. (ECF 206 at 2, 13.) Appellants now attempt to weaponize the Town’s forbearance against it, suggesting that their requested injunction will simply “preserve the *status quo* in place since the Town agreed not to enforce the Ordinance during the pendency of the district court proceedings.” (ECF 228 at 18.)

The voters of the Town should not be compelled to subordinate their quality of life to the narrow economic interests of Appellants for yet another year (or more) based on dubious legal theories already properly rejected by this Court.

Appellants seek to downplay the harm to the public by assuring the Court that the “*status quo* will enable the Town and cruise lines to abide by the reduced daily passenger caps under the MOAs [Memoranda of Agreement] that the Town itself negotiated in 2022.” (ECF 228 at 18.) But it is not at all clear that the MOAs (to which Appellants are not parties) retain their vitality following the passage of the Ordinance and the Court’s Decision upholding it. It is by no means certain that cruise lines would abide by the MOAs if this Court enjoined implementation of the Ordinance.

Finally, Appellants argue that there is no public interest in the enforcement of an unconstitutional law. (ECF 228 at 19.) But, of course, this assumes the conclusion that the Ordinance is unconstitutional—a conclusion that Appellants fail to support and that this Court soundly rejected.

CONCLUSION

For all of the foregoing reasons, the Town respectfully requests that this Court deny Appellants’ Amended Joint Motion for Injunction Pending Appeal.

Dated at Bangor, Maine, this 7th day of June, 2024.

/s/ Jonathan P. Hunter, Esq.

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CERTIFICATE OF SERVICE

I hereby certify that on June 7, 2024, I electronically filed the foregoing *Defendant Town of Bar Harbor's Opposition to Amended Joint Motion for Injunction Pending Appeal* using the CM/ECF system, which will provide notice to all counsel of record in this case.

Dated: June 7, 2024

/s/ Jonathan P. Hunter, Esq.
Jonathan P. Hunter, Bar No. 4912

Case Nos. 24-1317, 24-1318
United States Court of Appeals for the First Circuit

**ASSOCIATION TO PRESERVE AND PROTECT
LOCAL LIVELIHOODS, et al.**

Plaintiffs/Appellants

PENOBSCOT BAY AND RIVER PILOTS ASSOCIATION

Plaintiff-Intervenor/Appellant

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TOWN OF BAR HARBOR

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CHARLES SIDMAN

Defendant-Intervenor/Appellee

On appeal from the United States District Court
for the District of Maine
Civil Action No. 1:22-cv-416-LEW

AFFIDAVIT OF JAMES L. SMITH

I, James L. Smith, of Bar Harbor, Maine, being first duly sworn,
depose and state as follows:

1. I am over the age of 18, have personal knowledge of the facts herein, and am competent to testify thereto.

2. I provide this affidavit in my capacity as the Town Manager of the Town of Bar Harbor (the “Town”).

3. As Town Manager, I have personal knowledge of the operations of the Town government, including the Town’s rulemaking process with respect to the ordinance at issue in this case, Town Code § 125-77(H) (the “Ordinance”), and the relevant Town records.

4. On November 17, 2023, and on May 3, 2024, the Town released proposed draft rules, ordinances, and procedures implementing the Ordinance and otherwise clarifying the authority of the Town’s Harbor Master (the “Proposed Rules”).

5. A true and accurate copy of the Proposed Rules is attached as **Attachment A**.

6. On May 7, 2024, the Town Council held a meeting at which it discussed and heard public comments on the Proposed Rules.

7. The Town is presently reviewing the comments it received on the Proposed Rules, including comments from the Appellants in this case and from Appellee Charles Sidman.

8. A public hearing on those portions of the Proposed Rules relating to amendments to the Town's Port and Harbor Ordinance is scheduled for June 18, 2024.

9. A public hearing on the remainder of the Proposed Rules has not yet been scheduled but could be scheduled for as early as June 18, 2024.

DATED: May13, 2024

/s/ James L. Smith
JAMES L. SMITH

STATE OF MAINE
HANCOCK, ss.

May 13, 2024

Personally appeared the above-named James L. Smith, who, first being duly sworn, made oath that the foregoing affidavit which he has signed and to which he subscribes is based on his own personal knowledge and that the facts set forth therein are true.

/s/ Elizabeth N. Graves
Notary Public
Printed Name: Elizabeth N. Graves
My Commission Expires: Dec. 2, 2027

AGENDA
Bar Harbor Town Council
May 7, 2024

The public can monitor by watching Spectrum channel 7 or 1303 or by live streaming on the town's website, www.barharbormaine.gov.

- I. CALL TO ORDER – 6:30 P.M.**
 - A. Excused Absence(s)**
- II. READING OF THE MEETING GROUND RULES**
- III. COMMITTEE APPOINTMENTS—None.**
- IV. PUBLIC COMMENT PERIOD—**The Town Council allows at this time up to fifteen minutes of public comment on any subject not on the agenda and not in litigation with a maximum of three minutes per person.
- V. APPROVAL OF MINUTES**
 - A. April 16, 2024 Regular Meeting**
- VI. ADOPTION OF AGENDA**
- VII. FINANCIAL REPORT—None.**
- VIII. COMMITTEE AND ISSUES UPDATE**
 - A. Financial Audit FY23**
 - B. LedgeLawn Traffic Calming**
 - C. Marine Resources Committee**
- IX. CONSENT AGENDA—**A single vote has been scheduled to approve the following routine items of business without discussion, unless individual agenda item action is requested by a Councilor:
 - A. Order, accept municipal officers' return on Notice of Public Hearing for May 21, 2024 on Articles 2-5 of Annual Town Meeting warrant.**
 - B. Order, approve renewal of taxi license for Point 2 Point Taxi.**
 - C. Order, approve renewal of taxi licenses for Sunrise 2 Sunset Taxi.**
 - D. Order, approve renewal of taxi license for MDI Tours.**
 - E. Order, approve new taxi license for Bernard Taxi Service.**
 - F. Order, approve renewal of taxi license for Cadillac Mountain Summit Shuttle.**
 - G. Order, approve renewal of taxi licenses for Acadia National Park Tours.**
- X. PUBLIC HEARINGS**
 - A. Shared Accommodations License for 294 Main Street**
 - B. Special Amusement Permit renewal for Bar Harbor Lobster Bakes, Class 3a**
 - C. Special Amusement Permit renewal for Bar Harbor Inn, Class 3ad**
 - D. New Special Amusement Permit for Langosta, Class 4**
 - E. Special Amusement Permit renewal for The Bluenose Inn, Class 3ad**

- F. Ordinance Amendment 2024-02, “An amendment to the Shellfish Conservation Ordinance to add American oysters, quahogs, razor clams and hen clams to the shellfish species under co-management.”
- G. Ordinance Amendment 2024-03, “An amendment to the Employee Living Quarters Licensing Ordinance to ensure consistency with a proposed Land Use Ordinance amendment.”

XI. UNFINISHED BUSINESS

- A. Order, approve Shared Accommodations License for 294 Main Street.
- B. Order, approve Special Amusement Permit renewal for Bar Harbor Lobster Bakes.
- C. Order, approve Special Amusement Permit renewal for the Bar Harbor Inn.
- D. Order, approve new Special Amusement Permit for Langosta.
- E. Order, approve Special Amusement Permit renewal for The Bluenose Inn.
- F. Order, adopt Ordinance Amendment 2024-02, “An amendment to the Shellfish Conservation Ordinance to add American oysters, quahogs, razor clams and hen clams to the shellfish species under co-management.”
- G. Order, adopt Ordinance Amendment 2024-03, “An amendment to the Employee Living Quarters Licensing Ordinance to ensure consistency with a proposed Land Use Ordinance amendment.”
- H. Resolve, Higgins Pit—Tabled from April 16, 2024 meeting.
- I. Treasurer’s Warrant—Request of Treasurer to authorize paid bills.

XII. NEW BUSINESS

- A. Order, enact shellfish conservation closure.
- B. Order, amend Permit and Paid Parking Policy to temporarily relocate RV parking.
- C. Order, schedule a public hearing on amendment to the Vehicles and Traffic Ordinance to adjust parking citation fee.
- D. Order, approve use of downtown streets for a March for Peace in Palestine.
- E. Order, authorize Town Manager to negotiate and sign an administrative consent agreement with Charles Loges to settle a code violation.
- F. Order, schedule a public hearing on amendment to the Port and Harbor Ordinance to clarify the Harbor Master’s authority for enforcement of codes and ordinances.
- G. Order, schedule a public hearing on proposed new ordinance, Cruise Ship Disembarkation.

XIII. TOWN MANAGER’S COMMENTS

XIV. COUNCIL COMMENTS

XV. EXECUTIVE SESSION

XVI. ADJOURNMENT

Anyone with a disability wishing to attend this meeting and who may have questions about how to do so should contact the Town Clerk’s office at clerk@barharbormaine.gov or 288-4098.

To: Bar Harbor Town Council
cc: Department Heads
From: James Smith, Town Manager
Date: Friday, May 3, 2024
Re: **Town Council Meeting of May 7**

- I. **Excused Absence(s)**—None requested at this time.
- II. **READING OF THE MEETING GROUND RULES**—Chair will read the meeting ground rules.
- III. **COMMITTEE APPOINTMENTS**—None.
- IV. **PUBLIC COMMENT PERIOD**—The Town Council allows at this time up to fifteen minutes of public comment on any subject not on the agenda and not in litigation with a maximum of three minutes per person.
- V. **APPROVAL OF MINUTES**
 - **Motion:** Move that the minutes be accepted and placed on file.
- VI. **ADOPTION OF AGENDA**
 - **Motion:** Move that the agenda be adopted as printed.
- VII. **FINANCIAL REPORTS**—None.
- VIII. **COMMITTEE AND ISSUES UPDATE**
 - A. Financial Audit FY23—Auditors Wanese Lynch, CPA and James Wadman, CPA will present the report. Councilors have print copies and the full report is [posted on the website](#).
 - **Motion:** Move to accept and file the FY23 audit by James Wadman, CPA and thank Ms. Lynch and Mr. Wadman for their presentation.
 - B. Ledgelawn Traffic Calming—Captain Chris Wharff will give an update.
 - C. Marine Resources Committee—Chair Chris Petersen will attend to give an update.
- IX. **CONSENT AGENDA**
 - A. Order, accept municipal officers’ return on Notice of Public Hearing for May 21, 2024 on Articles 2-5 of Annual Town Meeting warrant. Accepts the Municipal Officers’ Return as required by state law.
 - B. Order, approve renewal of taxi license for Point 2 Point Taxi. Approves renewal of a taxi license for one 6-passenger vehicle.

- C. Order, approve renewal of taxi licenses for Sunrise 2 Sunset Taxi. Approves renewal of taxi licenses for two 6-passenger vehicles.
- D. Order, approve renewal of taxi license for MDI Tours. Approves renewal of a taxi license for one 6-passenger vehicle.
- E. Order, approve new taxi license for Bernard Taxi Service. Approves new taxi license for one 6-passenger vehicle.
- F. Order, approve renewal of taxi license for Cadillac Mountain Summit Shuttle. Approves renewal of a taxi license for one 14-passenger vehicle.
- G. Order, approve renewal of taxi licenses for Acadia National Park Tours. Approves renewal of taxi licenses for four vehicles.
 - **Motion on Consent Agenda**—Move the consent agenda have passage.

X. PUBLIC HEARINGS

- A. Shared Accommodations License for 294 Main Street.
- B. Special Amusement Permit renewal for Bar Harbor Lobster Bakes, Class 3a
- C. Special Amusement Permit renewal for Bar Harbor Inn, Class 3ad
- D. New Special Amusement Permit for Langosta, Class 4
- E. Special Amusement Permit renewal for The Bluenose Inn, Class 3ad
- F. Ordinance Amendment 2024-02, “An amendment to the Shellfish Conservation Ordinance to add American oysters, quahogs, razor clams and hen clams to the shellfish species under co-management.”
- G. Ordinance Amendment 2024-03, “An amendment to the Employee Living Quarters Licensing Ordinance to ensure consistency with a proposed Land Use Ordinance amendment.”

XI. UNFINISHED BUSINESS

- A. Order, approve Shared Accommodations License for 294 Main Street. Approves a new Shared Accommodations License for MDI Hospital for accommodations for up to eight people in a new two-story building as submitted by Doug Springer.
 - **Motion:** Move to waive the reading and the order have passage.
- B. Order, approve Special Amusement Permit renewal for Bar Harbor Lobster Bakes. Approves the renewal of a Class 3a Special Amusement Permit as submitted by Brewer Brothers and HT, LLC.
 - **Motion:** Move to waive the reading and the order have passage.
- C. Order, approve Special Amusement Permit renewal for the Bar Harbor Inn. Approves the renewal of a Class 3ad Special Amusement Permit as submitted by David Witham.

- **Motion:** Move to waive the reading and the order have passage.
- D.** Order, approve new Special Amusement Permit for Langosta. Approves a new Class 4 Special Amusement Permit as submitted by Olivia Geandreau. Application and notice to abutters enclosed.
 - **Motion:** Move to waive the reading and the order have passage.
- E.** Order, approve Special Amusement Permit renewal for The Bluenose Inn. Approves the renewal of a Class 3ad Special Amusement Permit as submitted by John Lafayette.
 - **Motion:** Move to waive the reading and the order have passage.
- F.** Order, adopt Ordinance Amendment 2024-02, “An amendment to the Shellfish Conservation Ordinance to add American oysters, quahogs, razor clams and hen clams to the shellfish species under co-management.”
 - **Motion:** Move to waive the reading and the order have passage.
- G.** Order, adopt Ordinance Amendment 2024-03, “An amendment to the Employee Living Quarters Licensing Ordinance to ensure consistency with a proposed Land Use Ordinance amendment.”
 - **Motion:** Move to waive the reading and the order have passage.
- H.** Resolve, Higgins Pit—Tabled from April 16, 2024 meeting. The consultant and contractor will present an update and answer questions, then the Chair will entertain suggestions for language to complete the resolve.
 - **Motion:** Move to remove this item from the table.
 - **Motion:** Move the resolve have passage.
- I. Treasurer’s Warrant**—Request of Treasurer to authorize paid bills.
 - **Motion:** Move to sign the Treasurer’s warrants for paid bills.

XII. NEW BUSINESS

- A.** Order, enact shellfish conservation closure. Enacts conservation closure to limit commercial harvest of quahogs in Northwest Cove, Clark Cove, and the shoreline between them.
 - **Motion:** Move to waive the reading and the order have passage.
- B.** Order, amend Permit and Paid Parking Policy to temporarily relocate RV parking.

- **Motion:** Move to waive the reading and the order have passage.

C. Order, schedule a public hearing on amendment to the Vehicles and Traffic Ordinance to adjust parking citation fee.

- **Motion:** Move to waive the reading and the order have passage.

CI. Order, approve use of downtown streets for a March for Peace in Palestine. Authorizes the use of West, Holland, Cottage, and Rodick Streets for the May 15, 2024 march.

- **Motion:** Move to waive the reading and the order have passage.

CII. Order, authorize Town Manager to negotiate and sign an administrative consent agreement with Charles Loges to settle a code violation. Authorizes a Consent Agreement to resolve a setback violation at 16 Winding Brook Road.

- **Motion:** Move to waive the reading and the order have passage.

CIII. Order, schedule a public hearing on amendment to the Port and Harbor Ordinance to clarify the Harbor Master's authority for enforcement of codes and ordinances. Cruise Ship Standard Operating Procedures are enclosed as supplemental material.

- **Motion:** Move to waive the reading and the order have passage.

CIV. Order, schedule a public hearing on proposed new ordinance, Cruise Ship Disembarkation.

- **Motion:** Move to waive the reading and the order have passage.

XIII. **TOWN MANAGER'S COMMENTS**—Update from Town Manager.

XIV. **COUNCIL COMMENTS**—Individual Councilor comments.

XV. **EXECUTIVE SESSION**—None expected.

XVI. **ADJOURNMENT**

- **Motion:** Move to adjourn.

TITLE: ORDER, SCHEDULE A PUBLIC HEARING ON AMENDMENT TO THE PORT AND HARBOR ORDINANCE TO CLARIFY THE HARBOR MASTER'S AUTHORITY FOR ENFORCEMENT OF CODES AND ORDINANCES

Filed May 3, 2024

WHEREAS, under Federal, State, and Local laws, the Town of Bar Harbor has regulatory authority over anchorage and disembarkation of cruise ship passengers into the Town; and

WHEREAS, 38 M.R.S. §§ 1-13 (the "Harbor Master Statute") authorizes the Town, acting through the Town Council, to regulate the assignment or placement of moorings and other activities in its harbors; and

WHEREAS, 38 M.R.S. § 12 provides that a violation of the Harbor Master Statute or any harbor ordinance may be prosecuted and relief, fees, fines and penalties granted and assessed pursuant to the provisions of 30-A M.R.S. § 4452; and

WHEREAS, Chapter 153 of the Bar Harbor Town Code is enacted pursuant to the Town's home rule authority and the Harbor Master Statute; and

WHEREAS, an advanced planning and reservation process is necessary to ensure the Town's capacity for the anchoring of cruise ships and cruise ship passenger disembarkations is not exceeded and to ensure the Town has provided all necessary and available resources to accommodate cruise ship passenger disembarkation into Town; and

WHEREAS, this advanced planning and reservation process is accomplished pursuant to agreements with the cruise lines and promulgation of standard operating procedures for cruise ships; and

WHEREAS, an amendment to Chapter 153 is necessary to remove any doubt that such agreements and procedures are enforceable as regulations and orders of Harbor Master, and to clarify the enforcement procedures for violations of Chapter 153 and orders of the Harbor Master; and

NOW THEREFORE, BE IT ORDERED, that a public hearing is now scheduled for June 18, 2024 at 6:30 p.m. for public comment on the below Ordinance Amendment 2024-05, "An amendment to the Port and Harbor Ordinance to clarify the Harbor Master's authority for enforcement of codes and ordinances."

Port and Harbor Ordinance Amendment

Town of Bar Harbor
2024-05

An Amendment to the Port and Harbor Ordinance clarify the Harbor Master's authority for enforcement of codes and ordinances.

Statement of Fact: Schedules a public hearing for amendment to the Port and Harbor Ordinance.

The Town of Bar Harbor hereby ordains that Chapter 153, Port and Harbor, of the Town Code is amended as follows:

[Please Note: Old Language is ~~stricken~~. New language is underlined.]

Chapter 153 Port and Harbor

§ 153-4 Harbor Master.

The Harbor Master may appoint deputies who, under his/her direction, shall be authorized to enforce and carry out the rules and regulations of this chapter.

- A. Compensation. The compensation to be paid to the Harbor Master and deputies shall be determined by the Town Council and the compensation of deputies set as provided by the personnel rules.
- B. Duties. It shall be the duty of the Harbor Master to:
- (1) Enforce the provisions of all rules, regulations, ordinances and other laws which are lawfully promulgated and which are within his/her jurisdiction pursuant to law.
 - (2) Provide copies of all rules, regulations, ordinances and other laws which pertain to the harbor, waterfront and watercraft within the Town of Bar Harbor and to make said copies available to those persons using said harbor.
 - (3) Promote order in the harbor and ensure safety and use of the harbor for the general public.
- C. The Harbor Master is hereby authorized and it shall be his/her duty to remove or cause to be removed any watercraft from any wharf or dock in Bar Harbor when so requested by the owner of said wharf or dock. Whenever he/she shall deem it necessary, he/she shall remove or cause to be removed any watercraft lying in tier or rafted from any dock, wharf or mooring within his/her jurisdiction. If any vessel, boat, or raft or any watercraft shall anchor or lie contrary to any ordinance, rule or regulation of the Town of Bar Harbor, said Harbor Master shall forthwith serve notice to the owner or master or the person in care of said watercraft to remove the same and, if the person given a notice does not comply with said notice of the Harbor Master without delay, the Harbor Master shall cause the removal of said watercraft at the expense of said owner, and the Harbor Master may recover the cost of any such removal from the watercraft owner upon complaint filed in the Maine District Court. For all purposes of this section, "rules and regulations of the Town of Bar Harbor" include all applicable sections of this Code, and the Town of Bar Harbor, Maine Cruise Ship Standard Operating Procedures, as may be amended.

§ 153-30 Enforcement.

In addition to being subject to authority of the Harbor Master as already set forth in this Chapter and Town Code, the owner or master or the person in care of the watercraft that has anchored or that lies contrary to any such ordinance, rule or regulation of the Town of Bar Harbor, or has otherwise violated any provision of this Chapter, shall be subject to legal proceedings initiated by the Town of Bar Harbor for the recovery of the monetary penalties set forth in 30-A M.R.S. § 4452, as amended, and that violator shall further be subject in legal proceedings initiated by the Town of Bar Harbor, in a court of competent jurisdiction, to injunctive relief in order to prevent or abate such violations now or in the future. In any such proceedings in which the Town of Bar Harbor substantially prevails, it shall be awarded attorney's fees, court costs and any other relief to which it may be entitled. The scope of the Harbor Master's authority and the reach of the rules and regulations set forth in § 153 extend to the fullest extent permitted by law in Subchapter 1 ("Harbor Masters"), of Chapter 1, of Title 38 of M.R.S., as amended, up to the boundaries of the territorial waters defined in 38 M.R.S. § 1 directly affecting the area described in § 153-1(A).

[End of ordinance]



**MOUNT DESERT POLICE DEPARTMENT
BAR HARBOR POLICE DEPARTMENT**
James K. Willis, Chief of Police



BHPD
37 Firefly Lane
Bar Harbor, Maine 04609
Tel: 207-288-3391
jwillis@barharbormaine.gov

Lt. Christopher K. Wharff
Bar Harbor Harbor Master
1 Town Pier
Bar Harbor, Maine 04609
cwharff@barharbormaine.gov

MDPD
21 Sea Street, PO Box 248
NE Harbor, ME 04662
Tel: 207-276-5111
jwillis@mdpolic.org

Town of Bar Harbor, Maine

2024 Cruise Ship Standard Operating Procedures

PORT CALL RESERVATIONS AND PROCEDURES

Under Federal, State and Local laws, the Town of Bar Harbor has regulatory authority over anchorage and disembarkation of people into the Town. All anchorage reservations for the Port of Bar Harbor must be made using the web based PortCall platform. All reservations will be accepted on a first-come-first-served basis with a limit of three cruise ships in port per day. Reservations will only be accepted at a maximum of two years in advance of the reservation date. When a reservation is requested, the Harbor Master will review the reservation to ensure compliance. If there is an available anchorage for the requested date, the Harbor Master will change the booking status from REQUESTED to BOOKED. If there are already three cruise ships booked for that day, the reservation will be changed from REQUESTED to CANCELLED.

Once the booking status of the reservation has been changed to BOOKED, the reservation has been confirmed. Upon making reservations, the Cruise Line agrees to abide by all Federal and State laws and local regulations, as well as those of the Town of Bar Harbor as outlined in this document.

ANCHORAGE:

Bar Harbor has two General Anchorages capable of accommodating a maximum of three ships per day. One ship in anchorage "A" approximately one-half mile east of the tender landing and two ships in anchorage B1 and B2, north of Bar Island, approximately one mile from the tender landing. The preferred Anchorage is Anchorage B. On days when one or two ships are in port, ships will only be anchored in Anchorage B. On days when three ships are in port, the smallest of the three ships will be anchored in Anchorage A. Anchorage assignments will be given on a first-come-first-served basis according to reservation date. The final determination of anchorage assignment will be made by the Harbor Master and will be in the best interest of safety and expediency of operations. In times of inclement weather or other unplanned incidents, the Harbor Pilot may anchor the vessel in Anchorage A, and will communicate this change to the Harbor Master as soon as practicable.

PORT FEES:

There is a per person Port Fee for all cruise ships disembarking persons in the Town Bar Harbor. Port Fees are set by Town Council and are listed in the Fee Schedule. A copy of the fee schedule may be found online or is available through the Town Clerk.

Payment of all fees is expected the day of the ship visit unless other arrangements are made in advance.

POLLUTION CONTROL MEASURES:

The Town of Bar Harbor has the expectation and requirement that visiting ships will do everything possible to prevent oceanic, atmospheric, light and noise pollution. All cruise ships calling in Bar Harbor, whether in anchorage A or B, are required to hold all waste water including gray water while in port. Ships must minimize exterior lighting and public announcements to official or safety related levels. Music and large projection screens are prohibited.

SECURE FACILITIES:

Bar Harbor presently has two approved 33 C.F.R. § 105 Secure Facilities for embarkation and disembarkation of people from foreign flagged cruise ships. The facilities used at present are located immediately to the west of the Town Pier. The tender floats are located at Harbor Place and the Harborside Marina. The tender landings are in close proximity to Bar Harbor's downtown area and the main tour bus queuing areas are located on West Street.

In the event of a medical emergency aboard a cruise ship at anchorage contact the Harbor Master or EMS Dispatch. The patient will be met by ambulance at the tender landing point on the Bar Harbor waterfront. EMS personnel are not available to transport to cruise ships at anchor.

RECOMMENDED ROUTE:

Cruise Ship operators should be aware that the waters on the approach to Bar Harbor are heavily fished by the use of fixed fishing gear. Lobster fishing gear is set throughout the area, near shore as well as off shore. The presence of colored floats will indicate fixed fishing gear and should be avoided. Loss of fishing gear due to transits by large vessels is of concern to both the fisherman and the Town of Bar Harbor.

Please schedule arrival at the pilot station carefully to avoid unnecessary maneuvering. There are charted **RECOMMENDED ROUTES** on NOAA Chart #13318 and 13312 which should be strictly followed in order to avoid damaging fixed fishing gear. If gear is present within the Recommended Route the fisherman risks losing his gear. In general, local fishermen are aware of the amount of Cruise Ship traffic and avoid placing their gear within the charted route. All Frenchman Bay Pilots are familiar with the recommended route into Bar Harbor.

Your cooperation will be greatly appreciated. If further assistance is needed, please contact the Harbor Master.

TENDER OPERATORS:

Ships which use their own tenders to transport passengers to and from landing facilities in Bar Harbor must ensure that all tender operators abide by all applicable navigational rules.

Navigation lights and sound signals should be used during periods of reduced visibility and during periods of darkness.

ANCHORAGE B:

Ships assigned Anchorage B and tendering passengers should be aware of the presence of two private aids to navigation which will be in the channel normally used to transit from and to Anchorage B. The aids will be set between western Sheep Porcupine Island and the small islet east of Bar Island from May through October annually. The channel will be marked with a lighted nun on the east side and an unlighted can on the west side. Transit through the narrow channel is generally north/south. A point of reference south of this channel is the USCG Anchorage nun (white with blue stripe) located in the northwest corner of Anchorage A. Tenders should pass this buoy on the eastern side and continue south to the inner harbor entrance which is marked by an unlighted nun and a lighted white no wake buoy.

TENDER OFFICER REQUIRED:

Ships intending to tender people shall assign an officer to supervise the operation of the tenders for the duration of the port call. This officer must have direct communications with the tender operators and shall correct non-compliant operations immediately.

NO WAKE ZONE:

Bar Harbor inner harbor is a NO WAKE ZONE and is clearly marked as such with private aids to navigation. Tenders are responsible for the effects of their operation within the confines of the inner harbor including prop wash. Tenders should be made fast to the landing float and shut down to reduce negative effects on other vessels operating in the vicinity and minimize exhaust emissions.

Bar Harbor Points of Contact

Harbor Master	Lt. Christopher Wharff	(207)288-5571
Town Manager	James Smith	(207)288-4098
Police/Fire/EMS	Bar Harbor Dispatch	(207)288-3391
Chamber of Commerce	C of C Welcome Ctr.	(207)288-5103
Frenchman Bay Pilot	Dave Gelinis	(207)548-1077
Harbor Place and Harborside Pier FSO	Mike Siemion	(207)288-2386

TITLE: ORDER, SCHEDULE A PUBLIC HEARING ON PROPOSED NEW
ORDINANCE, CRUISE SHIP DISEMBARKATION

Filed May 3, 2024

WHEREAS, on March 17, 2022 a petitioning committee submitted a citizens' initiative petitioning for amendment of the Bar Harbor Land Use Code; and

WHEREAS, the voters of Bar Harbor voted to approve this amendment of the Bar Harbor Land Use Code on November 8, 2022; and

WHEREAS, this amendment required the Harbor Master to develop rules and regulations for the effective enforcement of this Ordinance; and

WHEREAS, it was necessary to delay the development and implementation of these rules pending the outcome of the decision of the United States District Court for the District of Maine; and

WHEREAS, on March 1, 2024 the Court upheld the constitutionality of the Ordinance by an Amended Decision and Order; and

WHEREAS, the Court in its decision noted that the development and promulgation of the rules were required before the Ordinance could be enforced; and

WHEREAS, on March 6, 2024 the Town Council held a public meeting and issued a public statement directing the Town Manager to prepare draft rules for the effective enforcement of the Ordinance;

NOW THEREFORE, BE IT ORDERED, that a public hearing is now scheduled for June 18, 2024 at 6:30 p.m. for public comment on the below Ordinance Amendment 2024-06, "An amendment to enact Chapter [####], Cruise Ship Disembarkation."

Cruise Ship Disembarkation Ordinance Amendment

Town of Bar Harbor

2024-06

An amendment to enact Chapter [####]: Cruise Ship Disembarkation

The Town of Bar Harbor hereby ordains that Chapter [####]: Cruise Ship Disembarkation, is enacted as follows:

Statement of Fact: Schedules a public hearing for proposed new Cruise Ship Disembarkation ordinance.

[Please Note: Old Language is ~~stricken~~. New language is underlined.]

Chapter [###]. Cruise Ship Disembarkation

§ [###]-1. Purpose:

The purpose of this Chapter is to govern the disembarkation of Persons to docks or land within the Town from cruise ships and implement the purpose and intent of § 125-77(H) of the Town Code, as well as the promotion of the health, safety, and general welfare of the present and future inhabitants of the Town in a manner that serves to balance the interests of the general public and those of individual property owners.

§ [###]-2. Authority:

Under federal, state and local law, the Town has regulatory authority over anchorage and disembarkation of Persons into the Town. This Chapter is adopted pursuant to the Town's home rule powers as provided for in Article VIII, Part Second, of the Maine Constitution, 30-A M.R.S. §§ 2101 et seq., and 38 M.R.S. §§ 1-13.

§ [###]-3. Validity and Severability:

If any section, subsection, clause, or phrase of this Chapter shall be found to be invalid or unconstitutional, such invalidity shall not affect the remaining provisions of this Chapter, and to that end the provisions of this Chapter are hereby declared severable.

§ [###]-4. Administration:

The provisions of this Chapter shall be administered jointly by the Code Enforcement Officer and Harbor Master or their respective designee(s).

§ [###]-5. Definitions:

Except as otherwise provided by this Chapter, language used herein shall be construed as set forth in § 125-108 of the Town Code and specific words and phrases shall have the meanings set forth in § 125-109 of the Town Code.

As used in this Chapter, the following terms shall have the following meanings:

Cruise Ship - "cruise ship" has the same meaning as set forth in § 153-22(B) of the Town of Bar Harbor Code.

Cruise Ship Disembarkation Facility ("CSDF") - a public or private property, or a public or private structure, used for disembarkation of persons arriving on land from cruise ships.

CSDF Owner – an individual, corporation, governmental agency, municipality, trust, estate, partnership, association, two or more individuals having a joint or common interest, or other legal entity that owns, operates, or otherwise is authorized to represent the CDSF.

Disembarkation - The arrival of persons to docks and/or land within the Town from cruise ships by tender vessels, or otherwise.

Persons - For purposes of this Chapter and the enforcement of § 125-77(H), "Persons" means passengers of cruise ships and not those persons covered by 33 C.F.R. § 105.200 and 33 C.F.R. § 105.237 (titled "System for seafarers' access"), namely, "vessel personnel," "vessel crew," "seafarers assigned to a vessel," "pilots," and "representatives of seafarers' welfare and labor organizations" (collectively, "Crew"). The word "person" (i.e. not capitalized) shall have the meaning provided by § 125-108 of the Town Code.

§ [###]-6. Requirements to Operate or Disembark at a CSDF

A. Permit Required:

No person may allow or facilitate the disembarkation of Persons from a cruise ship over land or operate a CSDF without having first obtained a permit to operate a CSDF ("CSDF Permit").

B. Cruise Ship Reservation Required:

No CSDF or person shall receive disembarking Persons from a cruise ship that has not first received confirmation from the Harbor Master for a booked reservation for anchorage pursuant to the Town of Bar Harbor Cruise Ship Standard Operating Procedures, as they may be amended.

C. Disembarkation Application and Permit Required:

(1) Application Required. A CSDF Owner shall submit an application to the Code Enforcement Officer, or designee, for a Disembarkation Permit to allow on a specified calendar day a specified number of Persons not exceeding 1,000 to disembark from one or more cruise ship(s) with a confirmed reservation for anchorage.

(2) Application Review. Applications shall be reviewed and approved or denied on a first-come-first-served basis and within 30 days of receipt. The application must identify the specific site of disembarkation, the calendar day of disembarkation, and the requested number of Persons to be disembarked to the identified CSDF and site of disembarkation on that calendar day.

(3) Issuance of Permit. Upon confirming the applicant has satisfied all other application criteria and requirements of this Chapter, the Code Enforcement Officer, or designee, shall grant the application and issue a Disembarkation Permit for the maximum number of Persons that does not cause the Daily Disembarkation Limit established by § 5(C)(4) of this Chapter to be exceeded.

(4) Daily Disembarkation Limit. The Code Enforcement Officer, or designee, shall not issue a Disembarkation Permit that would authorize the disembarkation of more than 1,000 Persons, in the aggregate, on a single calendar day, regardless of the total number of Disembarkation Permits requested or issued for a specific calendar day.

§ [###]-7. Disembarkation Procedures.

A. Counting Method.

CSDF Owners shall employ a means to electronically count each individual person that disembarks at a given CSDF (“Counting Method”). The Counting Method must include a means for discounting from the total count of individuals all crew. The Counting Method shall be approved by the Harbor Master, or their respective designee, and subject to annual review.

B. Daily Certification.

For each Disembarkation Permit, the CSDF Owner shall submit a certification to the Code Enforcement Officer specifying how many Persons were in fact disembarked on the calendar day specified on the Disembarkation Permit and from what cruise ship said Persons disembarked.

C. Code Enforcement Officer Access.

The Code Enforcement Officer, or designee, shall be permitted to access the site(s) of the CSDF at which Persons disembark, at any time during normal business hours, or at any time Persons are disembarking or embarking, for the purposes of ensuring and verifying that Persons are being counted properly. The CSDF shall not obstruct or otherwise interfere with said access. Whether access is necessary is within the sole discretion of the Code Enforcement Officer and Harbor Master.

D. Code Enforcement Officer Audit.

Upon request to the CSDF Owner, the Code Enforcement Officer, and their respective designee(s), shall have unobstructed and immediate access to the records and instruments used to implement the CSDF Counting Method for the purposes of auditing the CSDF Counting Method for accuracy and functionality and implementing and enforcing this Chapter and § 125-77(H) of the Town Code. Whether an audit is necessary is within the sole discretion of the Code Enforcement Officer. The CSDF Owner shall retain all records generated by the CSDF Counting Method for 3 years.

§ [###]-8. Enforcement.

A. Violation Report.

If the Code Enforcement Officer, or designee, determines that the terms of this Chapter have been violated, including without limitation if a CSDF has disembarked Persons without a Disembarkation Permit or disembarked more Persons than authorized per this Chapter and any applicable Disembarkation Permit, the Code Enforcement Officer within a reasonable time of the alleged violation, shall create a Violation Report. The violation report should include the date and time of the incident giving rise to the violation, the tender dock where the violation occurred, who witnessed the violation, the number of Persons who disembarked over the Disembarkation

Permit limit, and any other pertinent information as determined relevant by the Code Enforcement Officer.

B. Penalties and Enforcement.

This Chapter shall be enforced by the Code Enforcement Officer in accordance with § 125-11 of the Town Code. CSDF Owners, individuals, firms, associations, corporations, partnerships, trusts or other legal entities found to be in violation of this Chapter may be subject to such fines, penalties, actions, and orders as are authorized by 30-A M.R.S. § 4452, as the same may be amended, provided that each disembarking Person exceeding the Disembarkation Permit is a distinct and separate violation under 30-A M.R.S. § 4452(3)(B), resulting in a minimum \$100 penalty per excess unauthorized Person.

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,)

Plaintiff-Intervenor,)

Civil Action No. 1:22-cv-416

v.)

TOWN OF BAR HARBOR,)

Defendant,)

CHARLES SIDMAN,)

Defendant-Intervenor.)

DECLARATION OF CHRISTOPHER WHARFF

I, Christopher Wharff, of Bar Harbor, Maine, pursuant to 28 U.S.C. § 1746, declare as follows:

1. I am over the age of 18, have personal knowledge of the facts herein, and am competent to testify thereto.

2. I provide this affidavit in my capacity as the Harbor Master of the Town of Bar Harbor (the "Town").

3. As Harbor Master, I have personal knowledge of the operations of the Town relating to cruise ship visitation.

4. Among my duties as Harbor Master is management of the Town's reservation system for cruise ship visitation.

5. Agents of cruise lines make reservation requests through PortCall.com. I confirm those requests on a first-come, first-served basis according to the Town's policies and local laws.

6. On May 10, 2024, I confirmed all outstanding reservation requests for the 2024 season.

7. On May 31, 2024, I confirmed all outstanding reservation requests for the 2025 season, with a note that disembarkations would be subject to local laws in effect on those dates.

8. On May 21, 2024, Royal Caribbean Group canceled its reservations for 2024. Most of Royal Caribbean's 2024 reservations had been confirmed before July 2021.

9. On May 31, 2024, Royal Caribbean Group canceled its reservation requests for 2025.

10. Because reservation requests are confirmed on a first-come, first-served basis, the 2024 dates as to which Royal Caribbean Group had confirmed reservations were unavailable to other cruise lines until canceled by Royal Caribbean on May 21, 2024.

11. Cruise lines regularly cancel reservations for any number of reasons.

12. On June 18, 2024, the Town Council is scheduled to hold a public hearing on the previously released proposed rules, ordinances, and procedures implementing the ordinance at issue in this case, Town Code § 125-77(H).

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed in Bar Harbor, Maine, on June 7, 2024.

/s/ Christopher Wharff
CHRISTOPHER WHARFF