

STATE OF MAINE
CUMBERLAND, ss.

BUSINESS AND CONSUMER COURT
Location: Portland
Docket No. BCD-APP-2024-0007

CHARLES SIDMAN,)
)
 Plaintiff,)
)
 v.)
)
 TOWN OF BAR HARBOR and VALERIE)
 PEACOCK, GARY FRIEDMANN,)
 MATTHEW HOCHMAN, MAYA CAINES,)
 JOE MINUTOLO, EARL BRECHLIN and)
 KYLE SHANK, in their capacities as elected)
 members of the Bar Harbor Town Council,)
)
 Defendants.)

**AMENDED COMPLAINT FOR
REVIEW OF GOVERNMENTAL
ACTION (M. R. Civ. P. 80B)
WITH INDEPENDENT CLAIMS**

Plaintiff Charles Sidman for his complaint against the Town of Bar Harbor and Valerie Peacock, Gary Friedmann, Matthew Hochman, Maya Caines, Joe Minutolo, Earl Brechlin and Kyle Shank, in their capacities as elected members of the Bar Harbor Town Council, alleges and states as follows:

PARTIES

1. Charles Sidman is a resident of the Town of Bar Harbor, County of Hancock, State of Maine.
2. The Town of Bar Harbor is a municipal corporation in the State of Maine (the “Town”).
3. Valerie Peacock is a resident of the Town of Bar Harbor and is an elected member of the Bar Harbor Town Council.
4. Gary Friedmann is a resident of the Town of Bar Harbor and is an elected member of the Bar Harbor Town Council.

5. Matthew Hochman is a resident of the Town of Bar Harbor and is an elected member of the Bar Harbor Town Council.

6. Maya Caines is a resident of the Town of Bar Harbor and is an elected member of the Bar Harbor Town Council.

7. Joe Minutolo is a resident of the Town of Bar Harbor and is an elected member of the Bar Harbor Town Council.

8. Earl Brechlin is a resident of the Town of Bar Harbor and is an elected member of the Bar Harbor Town Council.

9. Kyle Shank is a resident of the Town of Bar Harbor and is an elected member of the Bar Harbor Town Council.

JURISDICTION AND VENUE

10. This Court has jurisdiction over these proceedings under Rule 80B of the Maine Rules of Civil Procedure, 4 M.R.S. § 105, Maine's Declaratory Judgments Acts statutes (14 M.R.S. §§ 5951-5963), 42 U.S.C. § 1983, 42 U.S.C. § 1988, common law, as well as under the Court's equitable authority regarding statutory violations and violations of both the United States and Maine constitutions.

11. Venue is proper in Hancock County, Maine pursuant to 14 M.R.S. §§ 501, 505, because the Town is a municipality located in Hancock County, Maine, the cause of action took place in Hancock County, Maine, and the tender ports, lands, and ordinances that govern cruise ships relating to said tender ports and lands in controversy is located in the shoreland zoning in the Town of Bar Harbor, Hancock County, Maine.

FACTS COMMON TO ALL COUNTS

12. The Charter of the Town of Bar Harbor (the "Charter") provides that the Town

shall have all the powers possible for a municipality to have under the Constitution and laws of the State of Maine.

13. The Charter provides that the Town Council consists of seven members elected by the qualified voters of the Town of Bar Harbor.

14. At all relevant times herein, the Town Council consisted of elected members Valerie Peacock, Gary Friedmann, Matthew Hochman, Maya Cains, Joe Minutolo, Earl Brechlin, and Kyle Shank (collectively the “Town Council”).

15. The Town Council by resolution may assign additional functions or duties to officers, departments, or agencies established by the Town Charter but may not discontinue or assign to any other office, department, or agency any function or duty assigned by the Town Charter to a particular office, department, or agency.

16. Pursuant to the Charter, the Town Council has the power to “adopt land use ordinance amendments by supermajority vote as defined in the Town Charter § C-14C(3) when: (i) The land use ordinance change is procedural or minor in that it seeks to correct, modify, or reconcile inconsistencies, contradictions, and errors or to bring the land use ordinance into compliance with state statutes pertaining to municipal zoning; and (ii) the land use ordinance change is first recommended to the Planning Board by the Planning Director and upon review and after a public hearing, the Planning Board recommends it to the Town Council by a supermajority vote as defined in the Town Charter § C-14C(3).”

17. The Charter provides that neither the Town Council nor its individual members have authority over Town employees, except through the Town Manager, and prohibits the Town Council and its individual members from giving orders to any such employee, either publicly or privately.

18. The Charter provides that the Town Council's voting, "except on procedural motions, shall be by roll call, and the ayes and nays and abstentions shall be identified and recorded in the journal. A majority of the Town Council shall constitute a quorum for purposes of conducting an official meeting and transacting municipal business, but a smaller number may adjourn from time to time and may compel the attendance of absent members in the manner and subject to the penalties prescribed by the rules of the Town Council. Except as otherwise provided in the Town Charter, the required majority to effectuate the passage, adoption or enactment of an item shall be a simple majority of a quorum."

19. The Charter provides that each member of the Town Council "in attendance shall vote on all issues and questions presented for vote except when a valid conflict of interest is stated and recognized by a majority vote of the Town Council. If any Town Councilor does abstain from a vote other than because of a recognized conflict of interest, he/she shall be considered to have cast a vote with the majority and the record shall so show."

20. The Charter provides that qualifying land use ordinance amendments as described in the Charter § C-10(A)(9)(d) must be recommended to the Town Council by a supermajority of the full membership of the Planning Board and must be approved by a supermajority of the full membership of the Town Council.

21. The Charter provides that for the purpose of the Charter, "supermajority" shall be defined as $\frac{2}{3}$ of the full membership of the body rounded up to the nearest whole number. (e.g., four in a five-member body and five in a seven-member body). In the case of a body of three members or less, a supermajority shall be defined as a unanimous vote.

22. On March 17, 2022, Mr. Sidman led a Petitioning Committee to submit a citizens' initiative ballot petitioning the Town Council to amend Bar Harbor Land Use Code Chapter 125, Article VII, § 125-77(H) (the "Initiative").

23. The Initiative passed on November 8, 2022, by a vote of 1,780 to 1,273 (58.3%) and amended the Town's Land Use Ordinance pursuant to the Charter.

24. The Ordinance took effect on December 8, 2022, and has been incorporated into the Town's Land Use Ordinance, Chapter 125, Article VII, § 125-77(H) (the "Ordinance").

25. The Ordinance limits the number of passengers from cruise ships allowed to disembark in Bar Harbor without imposing a fee on the landowners to a maximum, in the aggregate, of 1,000 per day.

26. The Ordinance also seeks to broaden participation in the tendering and landing of cruise ship passengers beyond the current monopoly controlled by Ocean Properties at a single localized portion of Town.

27. Under the Ordinance and pursuant to the rules and regulations developed by the Harbor Master, property owners are required to secure a written permit from the Code Enforcement Officer ("CEO") for any passenger disembarking from a cruise ship on, over, or across their land.

28. Once permitted, the property owner must abide by the reservation system developed by the Harbor Master.

29. But rather than prevent passengers from disembarking after the passenger limit has been met, the Harbor Master must report violations to the CEO, who is charged with enforcement.

30. Each disembarking passenger exceeding the location-specific permitted daily limit is a violation levied against the property owner and subject to a minimum \$100 penalty per excess unauthorized passenger disembarking at a property owner's site.

31. The Ordinance strictly applies to any cruise ship whose reservation was accepted after March 17, 2022, with the Ordinance stating "regardless of the date on which it is approved by the voters, this subsection will be applicable as of March 17, 2022, and shall govern any and all applications for permits or approvals required under this subsection that were or have been pending before any officer, board, or agency of the Town of Bar Harbor on or at any time after March 17, 2022."

32. The Ordinance states that it "shall not apply with regard to any cruise ship reservations that have been accepted by the Harbor Master prior to March 17, 2022."

33. By its plain terms, the Ordinance limits the number of disembarkations on or over land in the Town of Bar Harbor; it does not limit cruise ships by their capacities.

34. By its plain terms, the Ordinance does not call for or require the cancellations or rejections of cruise ship applications to visit or reservations.

35. In an Amended Decision and Order dated March 1, 2024, the Ordinance was upheld as lawful by Judge Lance Walker of the United States District Court for the District of Maine in *Assoc. to Preserve and Protect Local Livelihoods, et al. v. Town of Bar Harbor*, No. 1:22-cv-00416-LEW (the "Federal Lawsuit").

36. Before the November 8, 2022 vote, the Town Council publicly opposed the Initiative.

37. The Town Council opposed Charles Sidman's motion to intervene in the Federal Lawsuit.

38. Judge Walker commented in his decision allowing Mr. Sidman to intervene in the Federal Lawsuit that the Town Council harbored “a decidedly pro cruise ship sentiment” while “actively encourag[ing] the electorate to vote down the initiative.”

39. On March 6, 2024, the Town Council held a special meeting whereby it issued a resolution proclaiming:

This Council has already directed the Harbor Master to cancel, or reject, requests for reservations made after the date of the vote for all ships with lower berth capacities greater than 1,000 passengers. The disembarkation of passengers of cruise ships with reservations for the 2024 season that are made and accepted after this date are subject to the current Ordinance. However, the Council will honor reservations made before the town voted. Passengers from these 2024 ships will not be subject to the disembarkation limits of the Ordinance.

(the “Resolution”).

40. In other words, the Town Council decided and ordered the Harbor Master that the Ordinance would not apply to cruise ships that made reservations for the 2024 cruise ship season prior to the November 8, 2022 vote, effectively amending the application date of the Ordinance.

41. The Town Council’s Resolution was memorialized by a press release issued by the Town Council on the same day.

42. As of April 1, 2022, 56 ships were scheduled to arrive in Bar Harbor for the 2024 cruise ship season.

43. After the Resolution was issued, either 134 or 149 ships are scheduled to arrive in Bar Harbor for the 2024 cruise ship season.

44. The Resolution’s change to the Ordinance results in a difference of up to 93 additional ships being allowed to come to Bar Harbor in 2024, with at least 193,277 passengers coming ashore, with no regard to the permitting requirements, fines, and restrictions placed on land owners by the Ordinance.

45. The Town Council did not take a vote in issuing its Resolution.
46. The Town Council's Resolution will result in an increase of cruise ship passengers disembarking to the Town beyond what the Ordinance permits.
47. The increase of passengers in Town will result in more congestion in the Town.
48. The increase of passengers in Town will result in more municipal services being used by the Town.
49. The increase of passengers in Town will decrease safety in the Town.
50. The increase of passengers in Town will decrease certain businesses' revenues in the Town.
51. The increase of passengers in Town will interfere with Town residents' use and enjoyment of their properties.
52. Plaintiff owns two properties in the Town of Bar Harbor, including a commercial/retail property located at 6 Mount Desert Street in downtown Bar Harbor.
53. Plaintiff pays property taxes to the Town.
54. Plaintiff faces the potential for decreased property values if the Ordinance is not enforced as enacted because of the unending flow of cruise ship passengers into Bar Harbor.
55. Plaintiff owns and operates the Argosy Gallery, a fine art gallery, located at 6 Mount Desert Street in downtown Bar Harbor.
56. Plaintiff has owned and operated his business in Bar Harbor for the past twenty-eight years.
57. Plaintiff's clientele—collectors of fine art—frequently complain and refuse to come to his business in downtown Bar Harbor on days cruise ships are disembarking passengers into the Town because the Town is overrun with cruise ship passengers.

58. Plaintiff is harmed by the Town Council's Resolution, which will result in his inability to use and enjoy his property, have an adverse impact on his business, and serve to nullify his efforts to petition the government and pass the Ordinance.

59. Plaintiff is harmed by the Town's Council's Resolution because the Town acting through the Town Council and its Resolution have unlawfully interfered with his substantive rights to petition and initiate a Land Use Code ordinance amendment, to petition to have that initiative voted on, and when approved by the voters, to have the initiative become and be implemented as law.

COUNT I (RULE 80B RELIEF)

60. Plaintiff repeats and realleges each of the allegations contained in Paragraphs 1 through 59 above as if more fully set forth herein.

61. The Town Council's Resolution unlawfully interferes with the administration of the Land Use Code.

62. The Charter § C-11(C) states that "Neither the Council nor its members have authority over Town employees, except through the Manager. Neither the Council nor its members shall give orders to any such employee, either publicly or privately."

63. The Code § 125-100 tasks the CEO with mandatory enforcement of the Land Use Code.

64. The Ordinance tasks the CEO with mandatory enforcement of the Ordinance.

65. The CEO does not have discretion in her duties to enforce the Code.

66. The Code § 153-4(B) tasks the Harbor Master to enforce the Code provisions that are within his jurisdiction.

67. The Harbor Master does not have discretion in his duties to enforce the Code provisions that are within his jurisdiction.

68. The Ordinance requires the Harbor Master to establish “a mandatory procedure for reporting violations to the Code Enforcement Officer.”

69. Investigating violations is one of the CEO’s mandatory duties.

70. The Ordinance imposes mandatory fines and penalties to issue for any continued violations of the Ordinance.

71. The Town Council does not have any discretion as to whether the Harbor Master reports violations of the Ordinance to the CEO

72. The Town Council’s Resolution unlawfully interferes with the Harbor Master’s obligation to report violations of the Ordinance to the CEO.

73. The Town Council does not have any discretion as to whether the CEO issues violations or fines.

74. The Town Council’s Resolution unlawfully interferes with the CEO’s obligations to investigate and enforce the Ordinance.

75. The Town Council does not have any supervisory authority over the CEO or the Harbor Master.

76. Enforcement decisions made by the CEO must be appealed to the Town’s Board of Appeals pursuant to the Code § 125-103.

77. The Town Council’s only authority over the CEO is to vote to accept the CEO’s report issued to the Town Council of a violation or nuisance condition that is not abated pursuant to the Code § 125-101.

78. The Town Council's Resolution did not involve either a vote by the Town Council or the CEO's report of a violation.

79. The Town Council does not have any authority to substantively modify, suspend, or nullify provisions of the Code.

80. The Town Council does not have any authority to determine whether, which, and how Town ordinances are to be enforced.

81. The Town Council does not have any authority to consider policy decisions of whether a violation of the Code should issue.

82. The Town Council does not have any authority to modify the enforcement measures identified by the CEO.

83. Although the Town Council is "authorized to enter into administrative consent agreements for the purpose of eliminating violations of [the Code] and recovering fines without court action," the Town Council is not allowed to enter into agreements for "illegal structure[s] or use[s] to continue in a shoreland district" pursuant to the Code § 125-101(A)(2).

84. The shoreland district is defined to "include those areas within 250 feet of the normal high-water line of any great pond, river or saltwater body, within 250 feet of the upland edge of a coastal wetland." 38 M.R.S. § 435.

85. The landowners' violation of the Ordinance by disembarking excessive passengers is in the shoreland district.

86. The Town Council cannot enter into administrative consent agreements to eliminate violations of the Ordinance.

87. The Town Council's Resolution usurps the CEO's statutory role of enforcement and goes well beyond any act of prosecutorial discretion.

88. The Town Council's Resolution was a pretext to clothe the Town Council's unlawful attempt to render void, amend, or veto the Ordinance.

89. The Town Council lacks any authority to substantively amend or veto the Ordinance.

90. The Town Council's Resolution was based on errors of law, unlawful procedures, and abuses of discretion.

COUNT II (DECLARATORY RELIEF)

91. Plaintiff repeats and realleges each of the allegations contained in Paragraphs 1 through 90 above as if more fully set forth herein.

92. A controversy exists whether the Town through its Town Council has authority to amend or veto a lawfully passed land use ordinance by directing Town employees to disregard the provisions of a lawfully enacted land use ordinance.

93. Plaintiff requests that this Court declare that the Town and its Town Council has no authority to substantively amend or veto a lawfully passed land use ordinance by directing Town employees to disregard the provisions of a lawfully enacted land use ordinance.

94. A controversy also exists whether the Town through its Town Council can interfere with the mandatory duties of the CEO, Harbor Master, and other Town officials.

95. Plaintiff requests that this Court declare that the Town and Town Council are prohibited from interfering with the duties of the CEO, Harbor Master, and other Town officials, which includes enforcement of the Ordinance.

96. A controversy also exists whether the Town through its Town Council has authority to veto, suspend, or substantively amend the Ordinance to change the date that the Ordinance applies to cruise ship reservations, as explicitly provided for in the Ordinance.

97. Plaintiff requests that this Court declare that the Town Council has no authority to veto, suspend or amend substantive provisions of the Ordinance, which includes the application date of the Ordinance will begin to apply to cruise ship reservations.

98. Pursuant to the Uniform Declaratory Judgment Act, Title 14 M.R.S. §§ 5951, et seq., this Court has jurisdiction to address and decide these disputes and issues.

COUNT III (INJUNCTIVE RELIEF)

99. Plaintiff repeats and realleges each of the allegations contained in Paragraphs 1 through 98 above as if more fully set forth herein.

100. The Town Council's Resolution acts as an illegal legislative veto, suspension and/or amendment of the lawfully enacted Ordinance.

101. Plaintiff requests that this Court grant him injunctive relief and order the Town Council to revoke its Resolution, and further Order the Town, its agents, servants, employees, attorneys or anyone acting under its control, or any person in active concert or participation with the Town to not direct Town employees to disregard the application date of Ordinance as lawfully passed by the voters or their mandatory duties, and such grant such other equitable relief as is necessary to prevent the Town Council from nullifying the will of the voters.

102. Plaintiff will suffer irreparable harm if an injunction is not granted, because the Town Council's Resolution will result in his inability to use and enjoy his property, have an adverse impact on his business, and serve to nullify his efforts to petition the government and pass the Ordinance.

103. The irreparable harm to Plaintiff outweighs any harm to any defendants because the Town Council's Resolution will result in an increase of cruise ship passengers disembarking

to the Town beyond what the Ordinance permits and will result in result in more congestion in the Town, more municipal services being used, and decrease safety in the Town.

104. The public interest will not be adversely affected by granting injunctive relief because the Town Council's Resolution will decrease safety in the Town, decrease certain businesses' revenues in the Town, and interfere with Town residents' use and enjoyment of their properties.

COUNT IV (42 U.S.C. § 1983)

105. Plaintiff repeats and realleges each of the allegations contained in Paragraphs 1 through 104 above as if more fully set forth herein.

106. Defendants at all times relevant to this action were acting under color of state law.

107. The First and Fourteenth Amendments of the United States Constitution protect the right to vote as a fundamental right. The First Amendment's guarantees of freedom of speech and association protect the right to vote and to participate in the political process.

108. The right to vote is a fundamental constitutional right also protected by both the due process and equal protection clauses of the Fourteenth Amendment. See, e.g., *Bush v. Gore*, 531 U.S. 98, 104-05 (2000); *Anderson v. Celebrezze*, 460 U.S. 780, 786-87 (1983); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966).

109. Plaintiff was the leader of the Initiative and one of the 58.3% of voters that voted in favor of the Initiative.

110. The Town Council's Resolution unlawfully nullifies Plaintiff's vote for the Initiative.

111. The Town Council unlawfully deprived Plaintiff of his right to vote without due process of law in violation of the First and Fourteenth Amendments to the Constitution of the United States.

112. The Town Council's Resolution unlawfully disenfranchises the voters of Bar Harbor, including Plaintiff.

113. The Town Council's *ultra vires* actions deprive Plaintiff of his substantive right to petition the Town for amendments to the Land Use Code.

114. No legitimate state interest justifies these significant burdens on voting rights.

115. The Town Council's purported reason that enforcing the Ordinance for the 2024 cruise ship season is "fundamentally unfair, would potentially expose the Town to additional legal liabilities, and would have a drastic fiscal impact on an already strained and nearly complete municipal budget" are pretextual at best.

116. The Town Council's Resolution, in fact, have caused the harms that the Town Council relies on to defend its decision not to nullify the application date of the Ordinance – namely, fundamental unfairness to the voters in Bar Harbor, additional legal liabilities, and adverse fiscal impact to the Town.

117. The Town Council's Resolution has caused irreparable harm to Plaintiff and other voters of Bar Harbor.

WHEREFORE, Plaintiff Charles Sidman respectfully requests this Court to declare that the Town and its Town Council acted unlawfully in issuing its Resolution, declare that the Town Council lacked any lawful authority to order or direct the Harbor Master and CEO to disregard the lawful provisions of the Ordinance or to their mandatory obligations under the Code, grant injunctive relief barring the Town Council from ordering or directing the Harbor Master and

CEO from enforcing the Ordinance pursuant to their mandatory obligations, and to grant such other relief, including equitable relief, in order to ensure that the Town Council does not attempt through *ultra vires* and pretextual acts to nullify the will of the voters, find that the Town has unlawfully deprived Plaintiff of his substantive rights to petition the government by initiative and through a Town vote to amend the Land Use Code, and award Plaintiff his costs, and to the extent permitted by law, his attorneys' fees.

Dated: June 6, 2024

/s/ Jason J. Theobald

Jason J. Theobald (Bar No. 5605)

David P. Silk (Bar No. 3136)

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