

STATE OF MAINE
HANCOCK, ss.

SUPERIOR COURT
CIVIL ACTION
Docket No. AP-2024-_____

CHARLES SIDMAN,)
)
 Petitioner,)
)
 v.)
)
 TOWN OF BAR HARBOR,)
)
 Respondent.)

**PETITION FOR REVIEW OF
GOVERNMENTAL ACTION
(M. R. Civ. P. 80B)**

Pursuant to Rule 80B of the Maine Rules of Civil Procedure and 30-A M.R.S. § 2691(3)(G), Petitioner Charles Sidman (the “Mr. Sidman” or “Petitioner”) hereby seeks review of the Town of Bar Harbor Board of Appeals’ (the “BOA”) May 14, 2024 vote denying Mr. Sidman’s appeal to the BOA for lack of jurisdiction. In support of his petition for review, Mr. Sidman 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”), organized pursuant to the laws of the State of Maine, with its principal office located at 93 Cottage Street, Town of Bar Harbor, County of Hancock, State of Maine.
3. The BOA is an administrative appellate board with authority pursuant to Chapter 125, Article XI, Section 125-103 of the Land Use Ordinance of the Town of Bar Harbor, Maine, that may hear appeals from any decision or enforcement action by a municipal body or official who or which interprets the Land Use Ordinance.

JURISDICTION AND VENUE

4. This Court has jurisdiction over these proceedings under Rule 80B of the Maine Rules of Civil Procedure, 4 M.R.S. § 105(3), and 30-A M.R.S. § 2691(3)(G).

5. 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.

FACTS

I. Background

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

7. 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 of the Town of Bar Harbor.

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

9. 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.

10. 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.

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

12. 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.

13. 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.

14. 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.”

15. 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.”

16. 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”).

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

This Council has already directed the Harbor Master to cancel, or reject, requests for reservations made after the day 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 “Decision and Order”).

18. 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.

19. The Town Council’s Decision and Order was memorialized by a press release issued by the Town Council on the same day.

20. The Town Council did not take a vote in issuing its Decision and Order.

21. Upon information and belief, the Harbor Master has heeded the Town Council’s Decision and Order.

II. The Town Council’s Decision and Order is without legal basis

22. 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.

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

24. Pursuant to the Charter, Article III, § C-10A(9)(d), the Town Council has the power to adopt land use ordinance amendments by supermajority vote (as defined in § C-14C(3) of the Charter) 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.

25. The Charter, Article III, § C-11(C) prohibits the Town Council from interfering with administration of the Town of Bar Harbor Code. Article III, § C-11(C) of 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.

26. The Charter, Article III, § C-14(C)(1) provides that the Town Council 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.”

27. The Charter, Article III, § C-14(C)(2) 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.”

28. The Charter provides that qualifying land use ordinance amendments as described in the Charter, Article III, § 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.

29. The Charter provides that for the purpose of the Charter, “supermajority” shall be defined as 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.

30. The CEO is tasked with mandatory enforcement of the Land Use Ordinance, Chapter 125, Article X, § 125-100, and specifically, the Ordinance, Article VII, § 125-77(H)(4).

31. The CEO does not have discretion in her duties to enforce the Land Use Ordinance. Land Use Ordinance, Chapter 125, Article X, § 125-100(B).

32. The Harbor Master similarly has no discretion to enforce the Land Use Ordinance or ordinances within his jurisdiction. Land Use Ordinance, Chapter 153, Article II, § 153-4(B).

33. In addition, the Ordinance requires the Harbor Master to establish “a mandatory procedure for reporting violations to the Code Enforcement Officer.” Land Use Ordinance, Chapter 125, Article VII, § 125-77(H)(3).

34. Investigating violations is one of the CEO’s mandatory duties. Land Use Ordinance, Chapter 125, Article X, § 125-100(B).

35. The corresponding fines and penalties for continued violations of the Ordinance are also mandatory. Land Use Ordinance, Chapter 125, Article X, § 125-101(B) & Article VII, § 125-77(H)(4).

36. There is no provision in the Land Use Ordinance suggesting that the Town Council itself has any independent enforcement authority or supervisory authority over the CEO or the Harbor Master. Indeed, under both State statute and the Charter, the Town Manager is “the chief executive and administrative official of the town,” and “[s]hall execute all laws and ordinances of the town.” 30-A M.R.S. § 2636(1), (3); Bar Harbor Town Charter, Article IV, § C-21(A), (C), (F).

37. Although the Town Council is responsible for appointing the Town Manager, it is the Town Manager who employs the CEO and Harbor Master. *See* 30-A M.R.S. § 2636(6).

38. The Town Council does not have any discretion as to whether the Harbor Master reports violations of the Ordinance to the CEO or whether violations and fines will be issued by the CEO.

39. The Town Council does not have any review authority over the CEO’s determinations.

40. Rather, enforcement decisions made by the CEO must be appealed to the Town’s Board of Appeals. Land Use Ordinance, Chapter 125, Article XI, § 125-103(A), (D)(1).

41. The Town Council’s only discretionary authority is to vote to accept the CEO’s report issued to the Town Council of a violation or nuisance condition that is not abated. Land Use Ordinance, Chapter 125, Article X, § 125-101(A)(1).

42. The Town Council’s Decision and Order did not involve either a vote by the Council or the CEO’s report of a violation.

43. Neither the Charter nor the Land Use Ordinance gives the Town Council the authority to determine whether, which, and how Town ordinances are to be enforced, to consider policy decisions of whether a violation should be issued, or to modify the enforcement measures identified by the CEO.

44. Neither the Charter nor the Land Use Ordinance gives the Town Council the authority to direct or instruct the CEO or Harbor Master with respect to enforcement of the Land Use Ordinance.

45. Although the Town Council is “authorized to enter into administrative consent agreements for the purpose of eliminating violations of this chapter and recovering fines without court action,” importantly, the Council is not allowed to enter into agreements for “illegal structure[s] or use[s] to continue in a shoreland district.” Land Use Ordinance, Chapter 125, Article XI, § 125-101(A)(2).

46. The Town Council’s Decision and Order usurps the CEO’s and Harbor Master’s statutory role of enforcement and goes well beyond any act of prosecutorial discretion.

47. The Town Council’s Decision and Order illegally amends the Ordinance in a substantive and critical manner by changing the cruise ship reservation cutoff from March 17, 2022 – as explicitly required by the Ordinance – to November 8, 2022.

III. Harm to Petitioner as a result of the Town Council’s Decision and Order

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

49. After the Decision and Order was issued, either 134 or 149 ships are scheduled to arrive in Bar Harbor for the 2024 cruise ship season.

50. The Decision and Order'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.

51. The Town Council's Decision and Order will result in an increase of cruise ship passengers disembarking to the Town beyond what the Ordinance permits.

52. The increase of passengers in the Town will result in more congestion in the Town.

53. The increase of passengers in the Town will result in more municipal services being used by the Town.

54. The increase of passengers in the Town will decrease safety in the Town.

55. The increase of passengers in the Town will decrease certain businesses' revenues in the Town.

56. The increase of passengers in the Town will interfere with Town residents' use and enjoyment of their properties.

57. 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.

58. Plaintiff pays property taxes to the Town.

59. 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.

60. Plaintiff owns and operates the Argosy Gallery, a fine art gallery, located at 6 Mount Desert Street in downtown Bar Harbor.

61. Plaintiff has owned and operated his business in Bar Harbor for the past twenty-eight years.

62. 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.

63. Plaintiff is harmed by the Town Council's Decision and Order, 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.

64. Plaintiff is harmed by the Town's Council's Decision and Order because the Town acting through the Town Council and its Decision and Order have unlawfully interfered with his substantive rights to petition and initiate a Land Use 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.

IV. The Board of Appeals

65. Title 30-A M.R.S. § 2691(4) provides, "Any municipality establishing a board of appeals may give the board the power to hear any appeal by any person, affected directly or indirectly, from any decision, order, regulation or failure to act of any officer, board, agency or other body when an appeal is necessary, proper or required." (Emphasis supplied).

66. Chapter 125, Article XI, Section 125-103(A) of Land Use Ordinance expressly provides, in relevant part:

The Board of Appeals may, upon written application of an aggrieved party received by the Planning Department within 30 days of **any decision** or enforcement action by a municipal body or official who or which interprets this chapter, hear appeals from such decision. For purposes of this section, the term "decision" is limited to an order, decision, ruling or enforcement action made in writing.

(Emphasis supplied).

67. The Town Council’s March 6, 2024 Decision and Order is or reflects a “decision” by “a municipal body or official” interpreting the Land Use Ordinance, Chapter 125, within the meaning of Article XI, Section 125-103(A), as the Decision and Order implicitly interprets, or rather re-interprets, the effective date of the Ordinance and implicitly interprets the Code as permitting the Town Council to direct the Harbor Master’s action with respect to enforcement of the Ordinance.

68. On April 2, 2024, Mr. Sidman submitted a written application to the BOA appealing the Decision and Order, No. AB-2024-01 – Administrative Appeal.

69. A hearing before the BOA on Mr. Sidman’s administrative appeal of the Town Council’s March 6, 2024 Decision and Order was held on May 14, 2024.

70. Mr. Sidman submitted a written argument prior to the BOA hearing, was represented by counsel at the BOA hearing, and also participated in the BOA hearing.

71. At the conclusion of the hearing, the BOA denied Mr. Sidman’s administrative appeal, concluding that the BOA lacked jurisdiction to consider Mr. Sidman’s appeal.

72. The BOA found that the Town Council does not have authority to enforce the Ordinance, that authority to enforce the Ordinance was vested with the Harbor Master and the CEO, that the Town Council’s Decision and Order has no force of law, and that the appeal is not of a concrete event or action about which an ordinance interpretation or enforcement decision has been made.

73. The BOA issued a written decision denying Mr. Sidman’s administrative appeal on May 23, 2024.

COUNT I

Administrative Appeal Pursuant to 30-A M.R.S. § 2691 and M.R. Civ. P. 80B

74. Petitioner repeats and realleges each of the allegations contained in Paragraphs 1 through 73 above as if more fully set forth herein.

75. Title 30-A M.R.S. § 2691(3)(H) provides that an aggrieved party may appeal a board of appeals decision to the Superior Court within 45 days of the date of the board of appeals' vote.

76. Chapter 125, Article XI, Section 125-107 of the Town's Land Use Ordinance provides, "Any party may, within 45 days of the date of the vote on the original decision made pursuant to this article, take an appeal to Superior Court in accordance with Rule 80B of the Maine Rules of Civil Procedure."

77. The Petitioner is an aggrieved party.

78. The Petitioner has exhausted his administrative remedies.

79. In reaching its decision to deny Mr. Sidman's appeal, the BOA abused its discretion, made errors of law, and made findings not supported by the substantial evidence in the record.

80. Contrary to BOA's findings of fact and conclusions of law, the Town Council's Decision and Order did have the force and effect of law because it effectively nullified the effective date of the Ordinance and usurped the authority of the CEO and Harbor Master.

81. Contrary to BOA's findings of fact and conclusions of law, the Town Council's March 6, 2024 Decision and Order was a concrete event.

82. Contrary to BOA's findings of fact and conclusions of law, the Town Council's Decision and Order is or reflects a "decision" by "a municipal body or official" interpreting the

Town of Bar Harbor Land Use Ordinance, Chapter 125, within the meaning of Article XI, Section 125-103(A).

83. Petitioner respectfully requests that this Court review the decision of the BOA, find the BOA's findings of fact were not adequately supported by substantial evidence in the record, hold that the BOA erred in its determination that it did not have jurisdiction, vacate the BOA's decision, and remand the matter to BOA with instruction that the BOA decide Mr. Sidman's administrative appeal on its merits.

WHEREFORE, Petitioner Charles Sidman respectfully requests this Court to vacate the BOA's decision and remand the matter to the BOA with instruction to decide Petitioner's administrative appeal on its merits, and to grant such other relief, including equitable relief, as is proper in the circumstances, and award Petitioner his costs and, to the extent available, his attorney's fees.

Dated: June 25, 2024



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