

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 et al., )  
 )  
 Defendants. )  
 )

**ORDER ON PENDING MOTIONS**

Before the court is Plaintiff Charles Sidman’s (“Sidman”) Motion for Trial of the Facts and to Specify Future Course of Proceedings, Defendants’ Motion to Dismiss, and Sidman’s Motion to Amend Complaint. The court held oral argument on these motions via Zoom on July 3, 2024. At oral argument the court granted Sidman’s Motion to Amend and the Amended Complaint is now the operative complaint in this matter.

I. Facts

The following facts are recited from the complaint and are taken as true for purposes of the motion to dismiss.

On March 17, 2022 Sidman led a Petitioning Committee to submit a citizen’s initiative ballot petitioning the Town Council to amend Bar Harbor Land Use Code Chapter 125, Article VII, § 125-77(H) (the “Initiative”). (Am. Compl. ¶ 22.) The Initiative was successfully passed on November 8, 2022, was incorporated into the Town’s Land Use Code, and took effect on December 8, 2022. (Am. Compl. ¶¶ 23-24.) The Ordinance limits the number of cruise ship passengers allowed to disembark in Bar Harbor to 1,000 per day in the aggregate. (Am. Compl.

¶ 25.) If more than 1,000 cruise ship passengers disembark in a day, the Harbor Master must report violations to the Town's Code Enforcement Officer ("CEO"), who is charged with enforcement. (Am. Compl. ¶ 29.) The Ordinance applies to any cruise ship reservation accepted after March 17, 2022. (Am. Compl. ¶ 31.)

On March 6, 2024, the Town Council held a special meeting whereby it decided to announce the following:

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.

(Am. Compl. ¶ 39.) In other words, the Town Council directed the Harbor Master not to apply the ordinance limits to reservations for the 2024 season that were made between March 17, 2022 and November 8, 2022. (Am. Compl. ¶ 40.) The Town Council publicized this decision by issuing a press release on the same day. (Am. Compl. ¶ 41.) The decision to exempt reservations made in the approximately eight-month span from March 17, 2022 to November 8, 2022 from the disembarkation limit 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. (Am. Compl. ¶ 44.)

Sidman owns a commercial retail property located at 6 Mount Desert Street in downtown Bar Harbor, where he has owned and operated a fine art gallery called the Argosy Gallery for the past twenty-eight years. (Am. Compl. ¶¶ 52, 55-56.) Sidman's clientele, fine art collectors, 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. (Am. Compl. ¶ 57.) Sidman alleges that he is harmed by the Town Council's decision because it 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. (Am. Compl. ¶ 58.) In his prayer for relief, Sidman requests the 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.

(Am. Compl. 15-16.)

## II. Motion to Dismiss

### A. Standard of Review

A motion to dismiss pursuant to M.R. Civ. P. 12(b)(6) tests the legal sufficiency of the complaint. *See Berounsky v. Oceanside Rubbish, Inc.*, 2022 ME 3, ¶ 7, 266 A.3d 284. The Court assumes all facts alleged in the complaint are true and examines the complaint “in the light most favorable to the plaintiff to determine whether it sets forth elements of a cause of action or alleges facts that would entitle the plaintiff to relief pursuant to some legal theory.” *Oakes v. Town of Richmond*, 2023 ME 65, ¶ 15, 303 A.3d 650 (quoting *Moody v. State Liquor & Lottery Comm’n*, 2004 ME 20, ¶ 7, 843 A.2d 43). “A dismissal should only occur when it appears beyond doubt that a plaintiff is entitled to no relief under any set of facts that [they]

might prove in support of [their] claim.” *Id.* (quoting *Moody*, 2004 ME 20, ¶ 7, 843 A.2d 43). Defendants move to dismiss all four counts of Sidman’s Amended Complaint.

## B. Discussion

### 1. Count IV “42 U.S.C. § 1983”

Sidman alleges in Count IV that the Town and the individual town councilors violated his constitutional right to vote by directing the Harbor Master to honor 2024 season cruise ship reservations made between March 17, 2022 and November 8, 2022. To state a claim under 42 U.S.C. § 1983, Sidman “must show a deprivation of a right secured by federal law, statutory or constitutional, and that the deprivation was achieved under color of state law.” *Fox Islands Winds Neighbors v. Dep’t of Env’t Prot.*, 2015 ME 53, ¶ 26, 116 A.3d 940 (quoting *Wyman v. Sec’y of State*, 625 A.2d 307, 310 (Me. 1993)).

Sidman attempts to resist dismissal on this claim by pointing to the Amended Complaint’s allegations that his vote on the Initiative was effectively nullified by the Town Council’s actions and this violated his right to vote, but he points to no case law supporting his novel theory of a violation of his right to vote. He makes no allegations that the Town, Town Council, or any councilors prevented him from casting a ballot. The authority Sidman cites simply establishes that states “may not value one person’s vote over that of another.” *See Bush v. Gore*, 531 U.S. 98, 104-05 (2000). Sidman does not allege that the Defendants have, for example, instituted discriminatory voting standards such as poll taxes or literacy tests. *See, e.g., Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 665-66 (1966). In fact, Sidman alleges that Defendants have disenfranchised the voters of Bar Harbor, generally. (Am. Compl. ¶ 112.)

On a motion to dismiss, the court is not bound to accept the complaint's legal conclusions. *Pacheco v. Libby O'Brien Kingsley & Champion, LLC*, 2022 ME 63, ¶ 6, 288 A.3d 398. Here, where Sidman has made no factual allegations of any defendant impeding him in casting a ballot or imposing discriminatory barriers to casting a ballot and has identified no case law to support his theory of disenfranchisement, the court DISMISSES Count IV for failure to state a claim upon which relief could be granted if his factual allegations are proven true. Count IV was Sidman's only claim against the individual town councilors and accordingly, the individual defendants are DISMISSED.

## 2. Count III "Injunctive Relief"

Defendants move to dismiss Sidman's Count III for "Injunctive Relief" on the basis that injunctive relief is a remedy, not a standalone claim. The elements a claimant must prove to obtain a permanent injunction include: (1) irreparable injury; (2) that would outweigh the harm the injunctive relief would inflict on the enjoined party; (3) the public interest is not adversely harmed; and (4) success *on the merits*. *Windham Land Trust v. Jeffords*, 2009 ME 29, ¶ 41, 967 A.2d 690 (emphasis added). The element of success on the merits necessarily requires merits to attach the injunction to. The court agrees with the Town that "injunctive relief" is not a standalone cause of action and therefore DISMISSES Count III. This does not preclude Sidman from obtaining injunctive relief as a remedy if he succeeds on the merits of a claim.

## 3. Count I "Rule 80B Relief"

The Town seeks to dismiss Sidman's Count I for "Rule 80B Relief" because the Sidman does not allege that the Town acted in a quasi-judicial manner and because this court is not permitted to intrude on a municipality's enforcement decisions. Maine Rule of Civil Procedure

80B applies when “review by the Superior Court . . . is provided by statute or is otherwise available by law.” M.R. Civ. P. 80B(a); *York Cnty. Bd. of Realtors v. York Cnty. Comm’rs*, 634 A.2d 958, 960 (Me. 1993). Sidman argues that Rule 80B review is available to him not under statute but by a common law action for a writ of mandamus. *See York Cnty. Bd. of Realtors*, 634 A.2d at 960. He argues a writ of mandamus is appropriate here because the Harbor Master and CEO’s duties are mandatory under the disembarkation ordinance. *See York Reg. of Prob. v. York Cnty. Prob. Ct.*, 2004 ME 58, ¶ 14, 847 A.2d 395.

While Sidman is correct the Rule 80B provides a procedural vehicle for bringing claims for a writ of mandamus, “the principle governing the right to review is nevertheless still based on whether the governmental agency acted in a quasi-judicial manner.” *Lyons v. Bd. of Dirs. of Sch. Admin. Dist. 43*, 503 A.2d 233, 236 (Me. 1986); *see also Dahlem v. City of Saco*, 2024 ME 32, ¶¶ 17-18, 314 A.3d 280. “Judicial action is an adjudication on the rights of the parties who, in general, appear or are brought before the tribunal by notice or process, and on whose claims some decision or judgment is rendered.” *Carter v. Wilkins*, 160 Me. 290, 294, 203 A.2d 682, 684 (1964). Here, Sidman has not alleged that he or any other party was brought before the Town Council by notice or process or that the Town Council rendered a decision on anyone’s claims. The action Sidman complains of is not quasi-judicial action, therefore Rule 80B does not supply Sidman with an avenue for relief. Further, Sidman is challenging the Town’s preemptive decision not to enforce the ordinance for a certain class of 2024 cruise ship reservations, but courts are prohibited from intruding “into municipal decision-making when a municipality decides whether *or not* to undertake an enforcement action.” *Salisbury v. Town of Bar Harbor*, 2002 ME 13, ¶ 11, 788 A.2d 598 (emphasis in original). For the foregoing reasons, Sidman’s Count I for “Rule 80B Relief” is DISMISSED.

#### 4. Count II “Declaratory Relief”

Defendants move to dismiss Sidman’s count for declaratory relief and argue that Sidman lacks standing to challenge the Town Council’s direction to the Harbor Master not to enforce the ordinance and that his claim is otherwise not justiciable for lack of ripeness. Sidman, as plaintiff, bears the burden to establish his standing, “which is determined based on the circumstances that existed when the complaint was filed.” *Black v. Bureau of Parks and Lands*, 2022 ME 58, ¶ 26, 288 A.3d 346. The showing required to establish standing depends on the type of claims alleged. *Id.* Generally, “a party must show they suffered an injury that is fairly traceable to the challenged action and that is likely to be redressed by the judicial relief sought.” *Collins v. State*, 2000 ME 85, ¶ 6, 750 A.2d 1257.

The parties disagree over whether Sidman is required to show a particularized injury and whether he seeks preventive, rather than remedial, relief. When the relief sought by challenging governmental action is preventive, the Law Court has held that particularized injury is not required. *McCorkle v. Town of Falmouth*, 529 A.2d 337, 338 (Me. 1987). In more recent cases the Law Court has cast doubt on the continuing validity of the preventive-remedial doctrine, *see Blanchard v. Town of Bar Harbor*, 2019 ME 168, ¶ 12 n.3, 221 A.3d 554, but the court need not wade into whether Sidman’s requested relief is preventive or remedial because the court finds that he has sufficiently alleged particularized injury here. Sidman alleges he is a business owner in downtown Bar Harbor and that non-enforcement of the disembarkation ordinance during the 2024 season will hurt his business interests because his clientele often complain and refuse to come to his business on days cruise ship passengers are in town. The particularized injury requirement is met because Sidman has alleged that his personal, pecuniary, or property rights will be directly and adversely affected. *See Collins*, 2000 ME 85, ¶ 6, 750 A.2d 1257.

Relatedly, Defendants argue that Sidman’s claim is not ripe for review nor is it justiciable under the Declaratory Judgments Act (DJA). “[T]he DJA ‘may be invoked only when there is a genuine controversy.’” *Blanchard*, 2019 ME 168, ¶ 20, 221 A.3d 554 (quoting *Patrons Oxford Mut. Ins. Co. v. Garcia*, 1998 ME 38, ¶ 4, 707 A.2d 384). The test for determining whether a genuine controversy exists is the same as the test for determining whether a claim is ripe. *Id.* “[T]he issues must be fit for judicial review, and . . . hardship to the parties will result if the court withholds review.” *Id.* A controversy that poses a concrete, certain, or immediate legal problem is fit for review. *Id.* ¶ 21. The hardship to the plaintiff cannot be speculative. *Id.* ¶ 22.

Defendants argue that, under *Blanchard v. Town of Bar Harbor*, Sidman’s claim is too speculative to be ripe. In *Blanchard*, the Law Court held that residents neighboring the town’s ferry terminal did not have standing and their claims were not ripe because they could not show the tangible impacts on their views that would result from ferry terminal improvements. *Id.* ¶¶ 1, 14-15, 22. The Law Court determined that the claims in *Blanchard* were too speculative because at the time of the complaint there were not yet any concrete construction proposals for the terminal’s expansion. *Id.* ¶ 14.

The court is not convinced that *Blanchard* requires it to find that Sidman’s claims are too speculative. In contrast to *Blanchard*, at the time Sidman filed his complaint cruise ship reservations were already on the books for the 2024 season that the disembarkation ordinance would otherwise apply to but for the Town’s decision not to enforce it. The arrival of the cruise ships is imminent. Members of Sidman’s clientele have already expressed that they will refuse to visit his business on cruise ship days because the passengers flood the town. Sidman has satisfied the first prong regarding fitness for judicial review.

Defendants also argue that Sidman's claim is not ripe because withholding review will not cause him hardship. This is because, they argue, he will be in the exact same position even if the court grants his requested relief because the Town cannot enforce the ordinance until the Harbor Master promulgates rules required under the ordinance, which it has not yet done. The fact that the rules have not yet been promulgated, however, does not appear in Sidman's Amended Complaint. Defendants argue that the court should consider the contents of the federal court's opinion upholding the law for this point because it is a public document and it is referenced in Sidman's Amended Complaint. Even assuming but not deciding that considering the opinion is appropriate under *Moody v. State Liquor and Lottery Commission*, the court would have to engage in factfinding to determine whether the rules must be promulgated before the Town could enforce the disembarkation ordinance, because the opinion does not state such a conclusion. See *Ass'n to Pres. and Protect Local Livelihoods v. Town of Bar Harbor*, --- F.Supp.3d ----, 2024 WL 952418, at \*6 (D. Me. 2024) (observing that implementation and rulemaking had been on hold pending the outcome of that litigation). This is not an appropriate consideration on a motion to dismiss. The court is limited to the contents of the Amended Complaint. Sidman has alleged that the Town Council's direction to the Harbor Master to exempt certain 2024 cruise ship reservations will cause him hardship by reducing his business clientele. The court finds that Sidman has adequately alleged standing and ripeness to allow his claim for declaratory relief to survive a motion to dismiss.

### III. Motion for Trial of the Facts

Because the court has dismissed Sidman's claim for M.R. Civ. P. 80B review, his motion for trial of the facts is **DENIED as moot**.

IV. Order

The entry is:

1. Sidman's Motion to Amend Complaint is GRANTED.
2. Sidman's Motion for Trial of the Facts and to Specify Future Course of Proceedings is DENIED.
3. Counts I, III, and IV of Sidman's Amended Complaint are DISMISSED.
4. Valerie Peacock, Gary Friedmann, Matthew Hochman, Maya Caines, Joe Minutolo, Earl Brechlin, and Kyle Shank are DISMISSED from the matter.
5. With respect to Count II, Defendants' Motion to Dismiss is DENIED. In all other respects, it is GRANTED.
6. The clerk will set up a case management conference to discuss a scheduling order.

The Clerk is requested to enter this Order on the docket for this case by incorporating it by reference. M.R. Civ. P. 79(a).

DATED: 7/10/24

  
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Thomas R. McKeon  
Justice, Maine Superior Court

Entered on the docket: 07/11/2024