

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

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

*Plaintiffs/Appellants*

**PENOBSCOT BAY AND RIVER PILOTS ASSOCIATION**

*Plaintiff-Intervenor/Appellant*

v.

**TOWN OF BAR HARBOR**

*Defendant/Appellee*

**CHARLES SIDMAN**

*Defendant-Intervenor/Appellee*

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

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**TOWN OF BAR HARBOR'S RESPONSE TO  
JOINT MOTION FOR INJUNCTION PENDING APPEAL**

Appellee Town of Bar Harbor (the "Town"), through its attorneys,  
Rudman Winchell, hereby opposes the Joint Motion for Injunction  
Pending Appeal (the "Motion") filed by Plaintiffs Association to Preserve

and Protect Local Livelihoods, et al. (collectively, “Plaintiffs”) and the Penobscot Bay and River Pilots Association (the “Pilots,” and collectively with the Plaintiffs, the “Appellants”). In support of its opposition, the Town states as follows.

## **BACKGROUND**

### *Cruise Ship Visitation in Bar Harbor*

Cruise ship visitation to Bar Harbor began in the late 1980s. The Town has, for many years, regulated cruise ship visitation through the imposition of daily passenger caps based upon lower berth capacity of visiting ships, in conjunction with a first-come, first-served reservation system managed by the Harbor Master. (Decision at 7-8.)

Over the years, as the frequency and magnitude of cruise ship visits increased, and the ships got ever larger, the cruise industry began to have increasingly negative impacts on Bar Harbor. (*Id.* at 8-9, 14-16.) This included worsening congestion, particularly at and near the waterfront, and overall degradation of the quality of life of the Town’s residents. (*Id.*)

As a result of the COVID-19 pandemic, no foreign-flagged cruise ships were operating in 2020 or 2021. (*Id.* at 9.) For many of the Town’s residents, the absence of cruise ships highlighted the negative effects

their presence had on the Town. (*Id.*) In 2022, the Town Council formed a working group, which, in turn, negotiated Memoranda of Agreement (“MOAs”) with individual cruise lines setting lower daily passenger caps and creating new monthly caps. (*Id.* at 10-11.)

### *The Ordinance*

In parallel with the Council’s efforts to better manage cruise ship visitation through the MOAs—and based on the belief that the Council’s efforts to negotiate voluntary measures did not go far enough—a group of citizens formed a petitioning committee seeking to initiate an amendment to the Town’s Land Use Ordinance. (*Id.* at 11.) That citizen-initiated amendment was adopted by voters on November 8, 2022, and codified at section 125-77(H) of the Town Code (the “Ordinance”). (*Id.* at 13.) The Ordinance provides that “no more than 1,000 persons, in the aggregate, may disembark on a single calendar day from any cruise ship(s) and come to shore on, over, or across any property located within the Town of Bar Harbor.” (Mot. Exhibit B.) It further 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. (*Id.*)

Following the adoption of the Ordinance, the 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. (Exhibit 1, 7/13/23 Tr. Excerpt at 73-75; Exhibit 2, PX 204.) This will be codified as part of the regulations contemplated by the Ordinance and necessary before the Ordinance can be enforced. (Exhibit 1 at 160-64.)

### *District Court Proceedings*

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. (Decision 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 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 district 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. (Decision at 2, 60-61.)

#### *Subsequent Developments*<sup>1</sup>

On March 6, 2024, the Town Council issued a public statement directing the Town Manager to prepare draft rules implementing the Ordinance consistent with the district court’s decision for the Council’s consideration and approval after public hearing, after which enforcement would begin. (Mot. Exhibit C.) With respect to the imminent 2024 cruise

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<sup>1</sup> The Town does not concede that facts outside of that record are proper for this Court’s consideration, but presents these facts for additional context to the extent that the Court considers the post-judgment facts presented by Appellants.

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. (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.) It is anticipated that a public hearing before the Council on some or all of 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.)

## ARGUMENT

### **I. Appellants Failed to First Move in the District Court, as Required by Rule 8(a)(1).**

As a threshold matter, Appellants have failed to satisfy the requirements of Fed. R. App. P. 8(a). Pursuant to Fed. R. App. P. 8(a)(1)(C), “[a] party must ordinarily move first in the district court for . . . an order . . . granting an injunction while an appeal is pending.” As such, when a party files such a motion in the Court of Appeals, the motion must either state that a motion was made and denied in the district court, or “that moving first in the district court would be impracticable.” Fed. R. App. P. 8(a)(2)(A). “Impracticable” means “practically impossible.” *See Gerber v. Herskovitz*, No. 22-1075, 2022 U.S. App. LEXIS 14890, at \*2-3 (6th Cir. May 31, 2022) (quoting *Oxford English Dictionary* (3d ed. 2000)).

Appellants did not move first in the district court. They argue that doing so would have been impracticable because (1) “the district court already rejected Appellants’ requests for permanent injunctive relief,” and (2) “time is of the essence” because “the risk to the 2025 season (as well as future seasons) grows each day that the Town is permitted to enforce the Ordinance.” (Mot. at 21-22.) Neither argument holds water.

How the district court ruled on Appellants’ request for permanent injunctive relief does not at all reflect how the district court might rule on a request for *temporary* injunctive relief pending appeal. This Court has made clear that a district court’s rejection of claims on the merits does not show that moving first in the district court as required by Rule 8(a)(1) would have been impracticable. *Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. of Bos.*, 996 F.3d 37, 43 (1st Cir. 2021). Were the rule otherwise, a motion in the district court would always be “impracticable,” and the rule would be a nullity. *See id.*; *see also Washington Metro. Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841, 844-45 (D.C. Cir. 1977) (“Prior recourse to the initial decisionmaker would hardly be required as a general matter if it could properly grant interim relief only on a prediction that it has rendered an erroneous decision.”); *Bayless v. Martine*, 430 F.2d 873, 879 n.4 (5th Cir. 1970) (“It does not follow from the refusal to grant a preliminary injunction pending a trial in the court below that the district court would refuse injunctive relief pending an appeal.”); *Gerber*, 2022 U.S. App. LEXIS 14890, at \*3 (rejecting argument that likely inability to persuade district court made motion in district court “impracticable,” as “under [appellant’s] preferred

definition no party seeking a stay of a district court ruling pending appeal would need to move in the district court first”).

As to the claim that “time is of the essence,” Appellants have failed to show the kind of specific, imminent, prejudicial event sufficient to overcome the Rule 8(a)(1)’s requirements. For example, in *Boston Parents Coalition*, the Court concluded that moving first in the district court was impracticable where the appellant sought to enjoin implementation of an allegedly unconstitutional school admissions plan, and invitations were to be sent to successful applicants within two days of Court’s order. 996 F.3d at 41-44; *see also Ky. ex rel. Danville Christian Acad., Inc. v. Beshear*, 981 F.3d 505, 508 (6th Cir. 2020) (concluding moving first in district court to stay injunction of COVID-19 in-person instruction ban impracticable where school started following day).

Appellants fail to identify any specific imminent event that makes moving first in the district court “practically impossible.” The Ordinance cannot be implemented, let alone enforced, until rules are promulgated.<sup>2</sup> Appellants make no claim that the 2024 cruise ship season is under any

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<sup>2</sup> That Mr. Sidman has attempted to pressure the Town into premature enforcement via litigation in the state courts is irrelevant. The Ordinance expressly requires rulemaking that has not yet been completed.

threat. They argue that the 2025 season is under threat because of cruise lines' typical practice of booking their itineraries months or years in advance. But Appellants fail to present any evidence that the district court ruling on their motion first will make any appreciable difference, other than their generalized anxiety that "the risk to the 2025 season . . . grows each day." (Mot. at 22.) This falls well short of showing of "practical impossibility."

## **II. Appellants Have Failed to Carry Their Burden.**

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)).

**A. Appellants Have Not Shown a Strong Likelihood of Success on the Merits.**

**1. Preemption as to Seafarers**

Appellants first argue that, because the district 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 the district court pointed out, 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.

The district court noted 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.” (Decision at 31-32 (emphasis added).) But unless and until the Town attempts to enforce the Ordinance against a seafarer—which it has repeatedly made clear it will not do<sup>3</sup>—the

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<sup>3</sup> Appellants 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)

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 in 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.

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(stating that Code Enforcement Officer “may” issue a summons to an alleged violator).

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’ 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, the district 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 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)). The district 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.” (Decision at 31.) The record amply supports that finding. The purpose statement submitted with the petition initiating the Ordinance refers only to “passengers,” and speaks solely to the negative effects of “passengers” disembarking in Bar Harbor. (Decision at 12.) Plainly, the primary purpose of the Ordinance was to limit *passenger* disembarkation, consistent with the Town’s history of managing cruise ship visitation.

Indeed, it is questionable whether voters understood “persons” as meaning anything *other* than “passengers.” Appellants point to private statements made by Mr. Sidman that “persons” was intended to cover both passengers and crew, 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.

## 2. 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 unsuccessfully made in the district court. (Mot. at 13-16.) These arguments fail for the same reasons they failed in the district court (Decision 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.

Appellants contend that the court’s view of the Commerce Clause was “far too restrictive.” (Mot. at 16.) To the contrary, Appellants’ view 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 the district 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. (Decision at 48.) In doing so, the Ordinance does not advance

local interests at the expense of out-of-state competitors. (Decision 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)). The district 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. (Decision at 56-60.)

Appellants complain that the district court “treated ships more like hog breeders than trucks or trains” (Mot. at 16), in apparent reference to the Supreme Court’s recent decision in *National Pork Producers*, as well as a line of cases regarding “instrumentalities of interstate commerce,” such as trucks and trains. *See, e.g., Bibb v. Navajo Freight Lines*, 359 U.S. 520 (1959) (style of mud flaps for trucks); *S. Pacific Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761 (1945) (length of trains). 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. (Decision 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.

The district 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 suggest, 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.” (Decision at 51-55.)

**B. 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.” (Mot. at 16-17.) 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 how nonparty cruise lines might choose to conduct their business in a changing regulatory environment. (Decision at 58.) Moreover, 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.

Crucially, Appellants’ claim of irreparable harm must be viewed through the lens of their likelihood of success on the merits. As this Court 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.

**C. The Balance of Harms 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 the district 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.” (Decision 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.” (Decision 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.” (Decision at 40.)

The Town voluntarily paused implementation and enforcement of the Ordinance for more than a year, pending a decision by the district court as to the Ordinance’s constitutionality. (Decision at 2, 13.) Appellants now attempt to weaponize the Town’s good faith 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.” (Mot. at 19.) 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 rejected by the district court.

Finally, Appellants argue that there is no public interest in the enforcement of an unconstitutional law. (Mot. at 20-21.) But, of course, this assumes the conclusion that the Ordinance is unconstitutional—a conclusion that Appellants fail to support and that the district court soundly rejected.

## **CONCLUSION**

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

Dated at Bangor, Maine, this 13<sup>th</sup> day of May, 2024.

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### **CERTIFICATE OF COMPLIANCE**

I hereby certify that the foregoing document complies with Fed. R. App. P. 27(d), in that it is presented in Century Schoolbook 14-point font, and contains 5199 words.

Dated: May 13, 2024 /s/ Jonathan P. Hunter, Esq.  
Jonathan P. Hunter, Bar No. 1210939

### **CERTIFICATE OF SERVICE**

I hereby certify that on May 13, 2024, I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit using the CM/ECF system, which will electronically serve and provide notice to all counsel of record in this case.

Dated: May 13, 2024 /s/ Jonathan P. Hunter, Esq.  
Jonathan P. Hunter, Bar No. 1210939

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UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

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

Plaintiffs,

PENOBSCOT BAY AND RIVER PILOTS  
ASSOCIATION,

Plaintiff-Intervenor,

-vs-

TOWN OF BAR HARBOR,

Defendant,

CHARLES SIDMAN,

Defendant-Intervenor.

CIVIL ACTION NUMBER:

1:22-cv-00416-LEW

BENCH TRIAL

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Margaret Chase Smith United States Courthouse  
202 Harlow Street  
Bangor, Maine 04401  
July 13, 2023

B E F O R E:                    **THE HONORABLE LANCE E. WALKER**  
   **UNITED STATES DISTRICT JUDGE**

A P P E A R A N C E S:

EATON PEABODY

BY: TIMOTHY C. WOODCOCK, ESQUIRE

P. ANDREW HAMILTON, ESQUIRE

JANNA L. GAU, ESQUIRE

and

PATRICK W. LYONS, ESQUIRE

On behalf of the Plaintiffs, Association To Preserve and  
Protect Livelihoods, et al.,

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RUDMAN WINCHELL

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STEPHEN WAGNER, ESQUIRE

8 and

JONATHAN HUNTER, ESQUIRE

9 On behalf of the Defendant, Town of Bar Harbor.

10 CURTIS THAXTER LLC

BY: ROBERT PAPA ZIAN, ESQUIRE

11 RICHARD OLSON, ESQUIRE

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On behalf of the Defendant-Intervenor, Charles Sidman.

13

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16

17 Proceedings recorded by manual stenography; transcript  
produced by computer-aided transcription.

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GILBERT - DIRECT - ECONOMY

1 A. Not that I'm aware of.

2 Q. It's a line item as a donation?

3 A. Yup.

4 Q. Okay.

5 MS. ECONOMY: Sherry, could up bring up 204, please.

6 Q. Ms. Gilbert, I just brought up an exhibit marked as  
7 Exhibit 204. This has already been admitted into evidence.

8 Ms. Gilbert, is this a document that you've seen before?

9 A. Yes.

10 Q. And what is this document?

11 A. This is a note to the Town council discussing rulemaking  
12 for the land use ordinance.

13 Q. Okay. And what is conveyed to the Town of Bar Harbor  
14 council by virtue of this memo?

15 A. Sure. I would say the summary would be the definition of  
16 the -- excluding crew from the 1,000 passenger cap.

17 Q. Okay. So what is the intended effect then of this memo?

18 A. Could you say that one more time?

19 Q. What is the intended effect of this memo as you've  
20 provided this information to the Town council?

21 A. I guess just so that -- that they were all in  
22 agreement that the crew is excluded from the 1,000 passenger  
23 cap and how we're going to enforce the cap -- enforce the land  
24 use ordinance.

25 Q. Okay. So to be clear this, this memo is intended to

GILBERT - CROSS - PAPAZIAN

1 convey to the Town council that the 1,000 person cap set forth  
2 in the ordinance won't be applied to the crew of the ship?

3 A. That's correct.

4 MS. ECONOMY: Thank you, Ms. Gilbert. I don't have  
5 any other questions for you.

6 THE COURT: Thank you, Ms. Economy.

7 Mr. Papazian.

8 CROSS-EXAMINATION BY MR. PAPAZIAN:

9 Q. Hi, Ms. Gilbert. How are you?

10 A. Good, thanks. Nervous.

11 Q. Don't be. I'm friendly.

12 So sticking with this memo, who do you recognize as being  
13 exempt specifically from the counts under the ordinance?

14 MR. KINGSTON: I'm going to object to the extent the  
15 question calls for a legal conclusion as to the legal import  
16 of the ordinance.

17 THE COURT: Overruled. Go ahead. You can answer, if  
18 you know.

19 THE WITNESS: Okay. I would say the crew could be.  
20 The chef, the deckhand.

21 Q. Okay. And I'm going to read from this ordinance right  
22 here. Sorry, from the enforcement memo right here.

23 In the bottom paragraph, second sentence, I believe, you  
24 write, "Specifically, to avoid potential conflict with federal  
25 law in the implementation of the ordinance, the proposed rules

GILBERT - CROSS - PAPAIZIAN

1 will provide that 'persons' refers to passengers and not those  
2 who are covered by 33 C.F.R. section 105.200 and 33 C.F.R.  
3 section 105.237 (titled System for seafarers' access), namely,  
4 'vessel personnel,' 'vessel crew,' 'seafarers assigned to a  
5 vessel,' 'pilots,' and representatives of seafarers' welfare  
6 and labor organizations' (collectively, Crew)."

7 Did I read that correctly?

8 A. Yes.

9 Q. And is that your intention when you say "crew"?

10 A. It is.

11 Q. Okay. Let's go back to cruise ship fees for a second.

12 Do you know if cruise ship fees cover all of the expenses  
13 of the Town associated with cruise ship visitation?

14 A. It should.

15 Q. Have you looked at other towns -- town's port fees that  
16 they impose on cruise ships?

17 A. I have, but I can't think of any at this moment.

18 Q. Okay. Do you know if they vary from port to port?

19 A. Meaning Portland versus Eastport?

20 Q. Portland or Eastport or Bar Harbor, do they all vary?

21 A. Yes.

22 Q. And do you know how they decide how many -- how much fees  
23 they're going to impose?

24 A. I don't.

25 Q. Okay. And are cruise ship fees typical in other ports?

—PEACOCK - DIRECT - ECONOMY—

1 the next day. But he didn't send it to us first, and we  
2 didn't approve it.

3 Q. Okay. I'm going to talk a little bit, briefly, about the  
4 rulemaking process that the Town council goes through with  
5 regard to land ordinances?

6 A. Sure.

7 Q. Can you give us an overview of that process, please.

8 A. All right. So I think someone asked a question about  
9 whether the council can change or do anything with land use  
10 ordinances. Our Town charter actually has -- separates the  
11 Town council from the land use ordinance process so that's a  
12 Town meeting, direct-government approach.

13 So the Town council's role in land use is to essentially  
14 move land use ordinances through a process to get to voters.  
15 A land use ordinance can be proposed by the Town council, but  
16 we actually direct the planning -- the planning department to  
17 create the land use and to bring it back to us. Land use can  
18 get proposed from citizens and the planning department can  
19 also propose land use. They all have similar paths in that  
20 they have to -- the council moves them through and puts them  
21 on a warrant. We don't have the ability to change a language  
22 of things that comes on land use ordinances.

23 Typically, when a planning department gives us a land use  
24 ordinance to consider, it comes also with a set of rules that  
25 are in place.

PEACOCK - DIRECT - ECONOMY

1           And recently, a pretty big initiative that we -- a land  
2 use ordinance that we put through a few years ago was a  
3 short-term vacation rental program, where part of the program  
4 was -- in land use ordinance, which set a sort of, not a cap,  
5 but a percentage of short-term vacation rentals that were  
6 allowed in the Town of Bar Harbor. And then alongside of  
7 that, there's also an ordinance that was entered into a code,  
8 which has sort of all the rulemaking. But the planning  
9 department gave all of that to us. We were to review that in  
10 consultation with planning and code, and then it goes through  
11 a public hearing. So any -- any ordinance in the code  
12 requires a public hearing through our charter process and then  
13 the Town council can vote in a change into the ordinance.

14           Some of the rulemaking actually exists in policy or like  
15 the SOPs that you saw from the harbormaster actually are not  
16 in our code. Those are just a set of SOPs that exist in the  
17 harbormaster's office. They're not endorsed or voted on by  
18 the harbor -- by the Town, so. It's kind of a mixed bag of  
19 where rules end up.

20 Q.   The ordinance at issue here today, is it different  
21 because it didn't come with the actual rulemaking --

22 A.   Yeah. Yeah. So yeah, this is my first time as a  
23 councilor understanding what that -- that we got an ordinance  
24 that says -- directs the harbormaster to make the rules but  
25 didn't have the rules with it.

—PEACOCK - DIRECT - ECONOMY—

1 Q. And so I understand there's a task force that's been  
2 assigned to propose the rules as part of this process?

3 A. Yup. So we -- an understanding what we needed to do with  
4 the ordinance once it was enacted. I learned that the  
5 ordinance actually can't be enforced until it has ruled. I  
6 was a -- you know, pretty quick thing that we started to do.

7 So you saw Kevin Sutherland, the Town manager at the  
8 time, reaching out to the department heads or the appropriate  
9 staff asking for input about how we would start to think about  
10 the issues for -- what issues were coming up from the  
11 ordinance that would have to be addressed. They were  
12 rulemaking. And so that we can start to get ready to make the  
13 rules. So he initiated that with Jeff, that conversation, and  
14 that he basically identified the people who would be involved  
15 in, both the enforcement and the -- the -- implementation of  
16 the ordinance, which included -- which included the  
17 harbormaster, police chief, and the code enforcement officer.

18 And then when -- Kevin Sutherland was no longer with us,  
19 so, Sarah, who is the interim Town manager, took over his  
20 position there helping, but she's just basically then guiding  
21 the process -- guiding the team through.

22 Q. And so once they come up with proposed rules, do they  
23 bring them to the Town council?

24 A. Yeah. So that's something we've been talking about with  
25 our legal team about what -- where do these rules need to

—PEACOCK - DIRECT - ECONOMY—

1 live?

2           You know, we definitely don't -- we want rules to be in a  
3 place that are a little bit easier to get to, if we need to  
4 change them or adjust them as they live out over time, but we  
5 also want -- you know, thinking about, you know, if we wanted  
6 to put the rules into the land use ordinance itself. That's a  
7 little tricky because we have to do that through a town vote,  
8 and you have to, you know, get a town meeting to make those  
9 changes and it can be complicated and take a long time. And,  
10 you know, so we don't want to put rules in that spot  
11 necessarily, but we -- do we want rules to be in a council  
12 policy? Do we want them to exist in the SOP? And also those  
13 are public and political nature, so do we want the rules to be  
14 in a place where people can have input or say or, you know, a  
15 public hearing process where people can look at that? So  
16 we've been talking about that and thinking -- heading towards,  
17 I think, that sort of same model of -- the -- that the  
18 short-term vacation rentals, where some of it will be in the  
19 land use ordinance, and some of it will be in code so that  
20 there will be that public hearing process but still -- still  
21 fairly easy to change if we need to.

22 Q. So to summarize, the Town council has the right to do  
23 rulemaking with regard to an ordinance but not to amend an  
24 ordinance; is that fair to say?

25 A. Yes, that's fair to say, yeah. I think our charter

—PEACOCK - DIRECT - ECONOMY—

1 actually allows us to, like, make insubstantial changes, but  
2 we changed that in our last charter commission. But we can't  
3 change anything of any substance within the language of the  
4 land use ordinance as a council.

5 Q. I want to turn now to some other measures that the Town  
6 has taken with regard to, I'd say, overall quality of life in  
7 Bar Harbor.

8 We've already heard about the parking fee program.  
9 You've just been mentioning affordable housing. And, I'm  
10 sorry, limiting Airbnbs via a land use ordinance.

11 What was the purpose of limiting Airbnbs in Bar Harbor?

12 A. Yeah. So this was already happening when I came on to  
13 council, but Bar Harbor -- the state of Maine, actually, has  
14 particularly high vacation rental, weekly and daily vacation  
15 rental rates, in, like, through platforms like Airbnb and  
16 Vrbo. And Bar Harbor has some of the highest rates of that in  
17 the state, which I think probably puts us in pretty highest  
18 rates in the country.

19 We are starting to see pretty high percentages, like up  
20 into the 20 -- you know, 20 percent of the housing stock in  
21 Bar Harbor is being used for vacation rentals. There's  
22 pressure on the council from -- coming from the planning  
23 department to look at how we might start to reduce vacation  
24 rentals, the use of residential housing in the Town of Bar  
25 Harbor, reduce the percentage of that housing to be used for

**Manager's Office**  
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93 Cottage Street  
Bar Harbor, ME 04069



**Sarah Gilbert**  
**Interim Town Manager**  
[sgilbert@barharbormaine.gov](mailto:sgilbert@barharbormaine.gov)

**To:** Town Council

**From:** Sarah Gilbert, Interim Town Manager  
Angela Chamberlain, Code Enforcement Officer  
Christopher Wharff, Special Services Lieutenant / Harbormaster  
James Willis, Chief of Police

**CC:** Rudman Winchell (Stephen Wagner), Town Attorney

**Date:** May 31, 2023

**Re:** Update on Land Use Ordinance § 125-77(H) Rulemaking

Councillors:

As requested by the Council, the purpose of this memorandum is to provide an update on the development of rules to implement and enforce the initiated ordinance entitled, "An amendment to the Town of Bar Harbor Code to Impose Daily Limits on Cruise Ship Disembarkations" and codified in the Bar Harbor Town Code as Section 125-77 (the "Ordinance").

As you know, the Ordinance anticipates that the Harbormaster will promulgate rules and regulations to implement and enforce the Ordinance. Since the Ordinance passed in November 2022, acting under the direction of the Council and Former Town Manager Kevin Sutherland and Interim Town Manager Sarah Gilbert, the following members of staff have met as a working group four times to develop these rules: Sarah Gilbert, Angie Chamberlain, Chris Wharff, and James Willis (the "Working Group"). The Working Group has also consulted with the Town Attorney and Town Council Chair Val Peacock.

The Working Group anticipates presenting to the Council proposed rules and updates to the Town of Bar Harbor, Maine Cruise Ship Standard Operation Procedures at the Council's July 18<sup>th</sup> Regular Meeting. As directed by the Council, and following discussion with the Town Attorney, the proposed rules will also clarify the meaning of the term "persons," as that term (or the singular of that term) is used in Sections 125-77(H)(2), (3) and (4). Specifically, to avoid potential conflict with federal law in the implementation of the Ordinance, the proposed rules will provide that "persons" refers to passengers and not those who are covered by 33 C.F.R. section 105.200 and 33 C.F.R. section 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"). To the extent necessary, the proposed rules will specify measures to ensure the Harbormaster and/or his designee distinguishes between passengers and Crew. The Working Group, through the Town Attorney, discussed this point of clarification with counsel for Charles Sidman, the Defendant-Intervenor

**Manager's Office**

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93 Cottage Street

Bar Harbor, ME 04069



**Sarah Gilbert**

**Interim Town Manager**

[sgilbert@barharbormaine.gov](mailto:sgilbert@barharbormaine.gov)

in the pending litigation concerning the Ordinance and a member of the committee that initiated the Citizen's Initiative. Through his counsel, Mr. Sidman represented that he "supports exempting identified crew members from the 1,000 person disembarkation allowance."

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*

v.

**TOWN OF BAR HARBOR**

*Defendant/Appellee*

**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: May 13, 2024

  
\_\_\_\_\_  
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.

  
\_\_\_\_\_  
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](http://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](mailto: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**

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- 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**

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### § 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.

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### § 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](mailto:jwillis@barharbormaine.gov)

Lt. Christopher K. Wharff  
Bar Harbor Harbor Master  
1 Town Pier  
Bar Harbor, Maine 04609  
[cwharff@barharbormaine.gov](mailto:cwharff@barharbormaine.gov)

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

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## **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.