

III. VENUE

4. Venue lies in this Court pursuant to 14 M.R.S. § 501, *et seq.*

IV. FACTUAL BACKGROUND

Notice of Violation –Summary of Claims

5. On August 5, 2024, the Town of Bar Harbor (“the Town”) issued a Notice of Violation (“NOV”) to Plaintiff, Golden Anchor L.C., for allegedly violating an ordinance, termed the Disembarkation Ordinance, that the Town Council had approved on June 18, 2024 over written and in person objections by representatives of Plaintiff. The Disembarkation Ordinance purported to govern the Plaintiff’s operations at the Golden Anchor dba Harborside Pier (the “Pier”). A true copy of the NOV and all attachments thereto are attached herewith. **Exhibit A.1 and Exhibits A.2-7 inclusive.**

6. In this action, Plaintiff challenges the Disembarkation Ordinance on the following grounds;

- a) the Town Council’s adoption of the Disembarkation Ordinance violated the Town Charter and the Town’s implementing ordinance provision governing substantive amendment of the Town’s Land Use Ordinance at Section 125-9(E) (Count I);
- b) that, by employing an invalid process for adopting the Disembarkation Ordinance, the Town violated the United States Constitution and the Maine Constitution (Count II);
- c) that, by unilaterally rendering void the prior Town site plan approval of the Planning Board and the prior Wharves and Weirs Act permit issued by the Town Council to Plaintiff for its pier for marina and cruise ship disembarkation purposes, among other purposes, and to force Plaintiff to accede to the replacement of said prior Town permits with a new permit for the longstanding Pier, that the Disembarkation

Ordinance violates the Town's protection of longstanding uses under Sections 125-52 through 124-54 that are made lawfully nonconforming by virtue of any amendment of the Land Use Ordinance, and further violates Plaintiff's vested rights in said prior permits in violation of the United States Constitution and the Maine Constitution (Count III);

- d) that, in attempting to delegate to Plaintiff, a private party, duties, responsibilities and authorities that are inherently governmental and were assigned to the Harbor Master under 125-77(H) and which the government is wholly barred from delegating, the Disembarkation Ordinance violated the Maine Constitution and related statutes (Count IV);
- e) that, in seeking to delegate to Plaintiff inherently non-delegable governmental powers and duties and sanctioning Plaintiff for failing to accept and execute those non-delegable powers and duties, the Disembarkation Ordinance violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution and both the Law of the Land and Due Process Clauses of Article I, Sections 6 and 6-A of the Maine Constitution (Count V);
- f) that, in subjecting Plaintiff to fines for the actions of third parties without providing Plaintiff with the authority and powers to avoid or prohibit the conditions giving rise to such fines and without authorizing Town officials to exercise powers to enable Plaintiff to avoid the conditions giving rise to such fines, the Disembarkation Ordinance violates the United States Constitution and the Maine Constitution (Count VI);

- g) that, in requiring Plaintiff to commit to the terms of permits issued by the Town under the authority of the Disembarkation Ordinance, which terms are invalid and unconstitutional, the Town has violated Plaintiff's constitutional rights (Count VII);
- h) that, by categorizing and distinguishing "Persons" (with a capital "P") coming to the Town by cruise ship, as opposed to all other persons coming within the Town by all other means of conveyance and by imposing a rigid limitation of 1,000 on such "Persons", applicable every day of the year irrespective of the seasonal variations in visitation to the Town that the Town, itself, had recognized, permitted and allowed for decades and, through the voluntary caps and the MOAs, had applied as official Town policy, the Disembarkation Ordinance is discriminatory, arbitrary and capricious and lacks a rational nexus between its purpose and the means it employs in violation of the U.S. Constitution and Maine Constitution (Count VIII); and,
- i) that, in providing that each human being fitting the definition of "Persons" (with a capital "P") arriving at the Pier in numbers greater than 1,000 as a "nuisance" (within the meaning of Section 99 of Chapter 125 the Town's Land Use Ordinance and implicitly under 30-A M.R.S. Section 4302) and subjecting Plaintiff to fines and other sanctions, including revocation of the Town Permits, for "allow[ing]" such "Persons" to disembark at the Pier, the Town Council has tacitly acknowledged under 30-A MRS Section 4302 that Chapter 52 is a Land Use Ordinance that can only be adopted by the Voters, has exceeded its Charter authority, has exceeded its Home Rule Authority under Article VIII, Part Second, Section 1 of the Maine Constitution and 30-A M.R.A. Sections 3001 and 4302 as well as other provisions of the Maine Constitution and of the United States Constitution. (Count IX).

7. Since 2000, Plaintiff has owned and operated the Golden Anchor dba Harborside pier (“the Pier”) located at 55 West Street in the Town of Bar Harbor. At all times material, Plaintiff has held and continues to hold a property interest in the Pier.

8. The Pier is the principal disembarkation point for visitors arriving in Bar Harbor by cruise ship.

9. In 2001 to 2008, the Town issued permits (“Town Permits”) to operate the Pier as such, including for the purpose of facilitating the disembarkation of all persons arriving at Bar Harbor by cruise ship and their return from Bar Harbor to those cruise ships. In issuing recommendations from the Planning Staff prior to the Planning Board issuance of Site Plan Approval and in the Harbor Committee’s recommendation to the Town Council prior to issuance of the Wharves and Weirs Act Permit, the Town officials and officers recognized the use of the Pier for cruise ship disembarkation. Indeed in March 2008, the Harbor Committee unanimously agreed to recommend approval of the Wharf License for the expansion of the Golden Anchor Pier on the north side of the existing pier. In so doing, the Harbor Committee memo of March 14, 2008 cited “the primary reason for the recommendation is move the cruise ship tender landing and associated traffic to a more isolated part of the harbor.”

10. At no time from April 1, 2008, until June 18, 2024 did the Town change the terms of the Town Permits nor Plaintiff’s duties and responsibilities pursuant thereto, including but not limited to the Town Permit’s authorization to Plaintiff to use the Pier for the disembarkation of persons arriving at Bar Harbor by cruise and for the return of those persons from Bar Harbor to the cruise ships. And, at no time over the subsequent long use of the Pier was a notice of violation for disembarkation of cruise passengers issued for the Pier until August 5, 2024.

Cruise Ship Visits and Bar Harbor

11. In 1998, the Town adopted a master plan to encourage cruise ships to visit Bar Harbor to provide greater economic opportunity and to extend the more active tourist-based season from July and August into the “shoulder seasons” of April through June and from September into November.

12. After the cruise ships anchor, several tender vessels then bring passengers and crew to one of two privately-owned piers of which the Pier is one.

13. Plaintiff made significant investments to acquire the property on which the Pier was located and to make improvements to the Pier so that it could, among other purposes, accommodate the cruise ship visits and enable the Town to realize its goal of encouraging more cruise ship visits and expanding economic opportunities throughout the Town and the surrounding area.

14. The cooperative efforts of the Town, the State, and other essential participants, including Plaintiff, were successful. Cruise ship visits increased, particularly in September and October. In 2016 a peer-reviewed economic study prepared by University of Maine economic professor, Todd Gabe, Ph.D. estimated that cruise ship visits generated \$20.2 million in local spending, \$5.4 million in labor income, and helped support 379 local jobs.

15. Cruise ship visits have played and continue to play a crucial role in expanding the narrow tourist season, permitting many businesses, which had been unable to do so before, to operate in the April to June and September to November shoulder seasons beyond the late June to late August peak summer season when land-based tourism visitation occurs.

Voluntary Caps

16. Early on, Town leaders recognized that cruise ship visits to Bar Harbor required planning and management. Working cooperatively with cruise ship representatives, the Town developed a system of “voluntary caps” which were based on the Lower Berth Capacities of visiting cruise ships—that is, the capacity of cruise ships to accommodate passengers rather than on their actual disembarkation and occupancy on a given visit—and which placed a daily ceiling on cruise ship visitation. These daily limits were tailored to conform to the tourist season with higher daily limits applying in the months of April through June and September into November and with lower ceilings applying in the heavier tourist months of July and August.

17. The Town also established a committee to review cruise ship visits and, each year, to report its findings and recommendations, which were non-binding, to the Town Council. The Town Council was also required, each year, to review those reports and recommendations and to approve voluntary caps for the coming season. This process remained in effect from 2008 until 2022 when the Town Council replaced it with contractual agreements between the Town and individual cruise lines, which was also based on the cruise ships’ Lower Berth Capacities, setting daily, monthly and annual limits for cruise ship visits. These contractual agreements were termed “Memoranda of Agreement” (“MOAs”).

Ordinance Limiting Persons Disembarking from Cruise Ships

18. In March of 2022, a citizen-originated initiative (“the Initiative”) was circulated to Bar Harbor voters that would limit to 1,000 the number of “persons” who could disembark from a cruise ship and enter into the Town on each calendar day without the imposition of a penalty.

19. On November 8, 2022, meeting in Town Meeting, Bar Harbor voters approved the initiative in its entirety; thereafter, it was codified at Chapter 125-77(H) (“the Ordinance”)

Exhibit A.4.

20. As approved at the November 8, 2022 Town Meeting, the Ordinance provided as follows: a) that no more than 1,000 persons, in the aggregate, may disembark on a single calendar day from a any cruise ship(s) and come to shore on, over, or across a property located in the Town[.]; b) that the determination as to whether more than 1,000 persons had so disembarked was to made by the Harbor Master; *id.* at § 77(H)(2); c) that the Harbor Master was required to “develop rules and regulations” i) for cruise ship reservations, ii) a “mechanism for counting and tracking the number of persons disembarking each day”; iii) “a mandatory procedure for reporting violations to the Code Enforcement Officer” and, iv) that the Harbor Master was authorized to develop “any other provisions” pursuant to Subsection 77(H)(3). *Id.* at § 77(H)(3).

21. For each “excess unauthorized person” disembarking at the Pier—that is, each person over the Ordinance’s “1,000-persons-per-day limit,” the Ordinance authorized the Code Enforcement Officer to impose fines ranging from \$100 to \$5,000 for each such “excess unauthorized person.” *Id.* at § 77(H)(3), (4); see also, 30-A M.R.S. §§ 4452 and 4452(3)(B).

22. The Ordinance did not provide sanctions for any persons or entities other than owners and operators of the private piers. The Ordinance did not provide owners and operators of the two private piers with any authority to prevent the disembarkation of “excess unauthorized persons” from cruise ships into Bar Harbor. *Id.* at 77(H), *passim*.

23. The Ordinance did not provide any authority for the Town, itself, whether through the Harbor Master, the Code Enforcement Officer, the Town Police or any other Town official, to

prevent the disembarkation of “excess unauthorized persons” from cruise ships into Bar Harbor. *Id., passim.*

24. At all times material, including when Bar Harbor voters approved the Ordinance, the Town’s Land Use Ordinance has defined the word “person” as meaning “[a]n individual, corporation, governmental entity, agency, municipality, trust, estate, partnership, association, two or more individuals having a joint or common interest, or other legal entity.” Town Code at Chapter 125-109, “PERSON”. **Exhibit B.1.**

25. Under the Town Charter, except under limited conditions not applicable to the Town Council’s adoption of the Disembarkation Ordinance, the Town Council may not alter, amend, or add to the Town’s Land Use Ordinance. Town Charter, Section C-10A(9)(d)(1)-(2); see, also, Section C-14C(3). **Exhibits B.2** and **B.3.** At Section 125-9(E), the Land Use Ordinance provides an “amendment” provision that makes clear the distinction between the Town Council’s charter authority to adopt “minor technical and conformance” changes to the Land Use Ordinance and the Town Meeting’s charter authority to adopt all other amendments to the Land Use Ordinance when it declares, in 125-(9)(E) that the manner of amending the Land Use Ordinance is by action of the Town Meeting (i.e., the voters of the Town). **Exhibit B.4.**

Plaintiff’s Challenge to Ordinance/U.S. District Court Decision

26. Following the approval of the Ordinance at the November 8, 2022 Town Meeting, Plaintiff and others filed a complaint in the U.S. District Court for the District of Maine against the Town seeking a declaratory judgment that the Ordinance violated certain provisions of the U.S. Constitution and, further, seeking injunctive relief barring the Town from enforcing the Ordinance.

27. Among other claims, Plaintiff challenged the Ordinance on the grounds that its application to “persons” covered crew members who would seek to disembark from cruise ships and enter into the Town. Plaintiff alleged that the Ordinance’s application to crew members violated U.S. Coast Guard regulation 33 C.F.R. § 105.237, which protects the disembarkation rights of crew members (also referred to as “seafarers”).

28. On May 31, 2023, shortly before the July 11-13 bench trial in U.S. District Court on Plaintiff’s Complaint, a “Working Group” composed of Town officials, issued a memorandum to the Town Council advising that it would present “proposed rules that would 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) (“Town Memorandum”).” **Exhibit C**. The Town Memorandum explained that the “clarification” was necessary “to avoid potential conflict with...33 C.F.R. § 200 and 33 C.F.R. § 105.237.” *Id.*

29. The Working Group never issued any such proposed rules.

30. On March 1, 2024, the district court issued an Amended Decision and Order (“Order”) denying most of Plaintiff’s constitutional challenges to the Ordinance but finding that the Ordinance’s application to disembarking crew members conflicted with and was preempted by Section 105.237. **Exhibit D** (Order) at 28-32, 60.

31. In reaching its decision on this point, the District Court expressly found that, as originally proposed, the Ordinance had not used the word “persons” for purposes of calculating the numerical limit but, instead, had used the word “passengers.” *Id.* at 12.

32. The District Court found that, before its enactment, proponents of the Initiative had struck the word “passengers” wherever it appeared in the proposed legislation and replaced it

with “persons” for the purpose of expanding its reach to encompass all persons disembarking from cruise ships including crew members. *Id.*

Disembarkation Ordinance—June 18, 2024

33. On June 18, 2024, the Town, acting by and under the authority of the Town Council, enacted a new law governing disembarkation from cruise ships (“Disembarkation Ordinance”). **Exhibit A.5**.

34. Following approval by the Town Council, the Disembarkation Ordinance was codified at Chapter 52, Sections 1-8 of the Town Code.

35. The Disembarkation Ordinance provides that, “[t]he purpose of this Chapter is to govern disembarkation of Persons to docks or land within the Town from cruise ships and implement the purpose and intent of § 125-77(H) [the Ordinance] of the Town Code.” **Exhibit A.5**, § 52-1.

36. The Disembarkation Ordinance provides further its definition of the word “Persons” with a capital “P”, governs “the enforcement of § 125-77(H)”; that is, it changes and governs the meaning of the word “persons” with a small “p” as used in the Ordinance and as defined in the Land Use Ordinance. *Id.* at §5, “Persons.”; *cf.*, **Exhibit A.4**, §§ 77(H(2)-(4)); with **Exhibit B.1**, § 125-109, “PERSON”.

37. In particular, the Disembarkation Ordinance purports to change the meaning of “persons” in the Ordinance to exempt seafarers whose disembarkation rights are protected by 33 C.F.R. § 105.237.

38. The Chapter 52 Disembarkation Ordinance purports to accomplish this change in the meaning of “persons” in the Ordinance by providing its own definition of “Persons” with a capital “P”. As redefined in the Chapter 52 Disembarkation Ordinance, “‘Person’ means

passengers of cruise ships and **not** those covered by 33 C.F.R. § 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 § 125-109 of the Town Code.” Exhibit A.5 § 52-5, “Person”.

39. In addition, the Disembarkation Ordinance applies to any “Cruise Ship Disembarkation Facility” (“CSDF”). *Id.* at 52-6(A) It defines a Cruise Ship Disembarkation Facility as “a public or private property, or a public or private structure, used for disembarkation of persons arriving on land from cruise ships.” *Id.* at § 52-5, Cruise Ship Disembarkation Facility (“CSDF”). The Disembarkation Ordinance defines a “CSDF Owner” as “an individual, corporation, governmental agency, municipality, trust, estate, partnership, association, two or more individuals having a joint or common interest, other than a legal entity that owns, operates, or otherwise is authorized to represent the CSDF.” *Id.* at § 52-5, CSDF Owner.

40. The Disembarkation Ordinance requires CSDF owners to obtain a permit to operate the CSDF. *Id.* at § 52-6(A).

41. In addition to requiring a permit, the Chapter 52 Disembarkation Ordinance also provides that all “CSDF Owner[s] 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.” *Id.* at § 52-6(C)(1).

42. In effect, without expressly so providing, the Disembarkation Ordinance voids Plaintiff’s prior Town Permits for the Pier, rendering it without force and effect and seeks to require Plaintiff to apply for a new permit, in conformity with the Disembarkation Ordinance.

Id. at § 52-6(A), 52-6(C)(1)-(4); see, also, *id.* at A.6-7, contrary to the protections given to lawfully nonconforming uses under Sections 125-52 through 124-54 of the Town's Land Use Ordinance.

43. Under the Disembarkation Ordinance, the Pier is a CSDF and Plaintiff is a CSDF Owner. Therefore, the Disembarkation Ordinance applies to both the Pier and to Plaintiff as owner and operator of the Pier.

44. The Disembarkation Ordinance provides further that the Code Enforcement Officer "shall grant the [the CSDF Owner's] application and issue a Disembarkation Permit for the maximum number of Persons that does not cause the Daily Disembarkation Limit established by § 6(C)(4) of this Chapter to be exceeded."

45. As has been set forth above, the Chapter 52 Disembarkation Ordinance is intended to override, superseded, and effectively replace the underlying Ordinance's undifferentiated application to all "persons" including seafarers protected by 33 C.F.R. § 105.237 which the District Court found unconstitutional. **Exhibit D** (Order) at 28-32, 60. The Disembarkation Ordinance attempts to do so, not by directly amending and changing the meaning of "persons" as it appears in the Ordinance. To the contrary, the Disembarkation Ordinance leaves the Ordinance unchanged and ostensibly in full force and effect. Instead, it changes the meaning of "persons" in the Ordinance indirectly by declaring that, by force of the Disembarkation Ordinance, the word "persons" in the Ordinance (and as defined in the Land Use Ordinance) now means "Persons" (with a capital "P"), and that "Persons" excludes seafarers.

46. Although the Chapter 52 Disembarkation Ordinance purports to exclude seafarers from all other disembarking persons, it provides no standards and procedures by which CSDF owners may consistently and reliably make this distinction. *Id., passim.* Yet, the Disembarkation

Ordinance provides for the imposition of sanctions on CSDF owners—sanctions which mimic but effectively change and supersede comparable terms in the Ordinance—in the event, *inter alia*, that more 1,000 “Persons” disembarks in a single calendar day and provides further that each such “person” constitutes a separate offense triggering fines ranging from \$100 to \$5,000 per “excess unauthorized Person.” *Id.* at § 52-8(B).

47. The Chapter 52 Disembarkation Ordinance provides no standards and procedures by which Plaintiff or Town officials may consistently and reliably distinguish between the two distinct categories the Disembarkation Ordinance, itself, has created of “Persons” who **are** subject to its daily numerical limitations and those who are **not** covered by 33 C.F.R. §§ 2105.237 and 200); that is, disembarking seafarers. *Id.*

48. The Disembarkation Ordinance provides that the failure to make the required distinction between “Persons” and disembarking seafarers subjects Plaintiff to fines ranging from a “minimum” of \$100 to \$5,000 for each “excess unauthorized Person”. *Id.*

49. While subjecting Plaintiff to potentially devastating fines for failing to distinguish between “Persons” and seafarers, the Disembarkation Ordinance purports to delegate to Plaintiff the responsibility for developing the “Counting Method” by which Plaintiff and Town officials responsible for sanctioning Plaintiff can consistently, reliably and demonstrably make this distinction to Plaintiff. *Id.* at § 52-7(A).

50. The Counting Method requires that Plaintiff, as a CSDF Owner, “shall employ a means to electronically count each individual person that disembarks at a given CSDF (“Counting Method”).” *Id.* The Counting Method requirement provides further that, “[t]he Counting Method must include a means for discounting from the total count of individuals all

crew”; and provides further that “[t]he Counting Method shall be approved by the Harbor Master, or their respective designee, and subject to annual review.” *Id.*

51. In addition, the Disembarkation Ordinance requires Plaintiff as a CSFD Owner to “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.” *Id.* at § 52-7(B).

52. Consistent with the underlying Ordinance, the Chapter 52 Disembarkation Ordinance does not provide the CSDF owners and operators, including Plaintiff with any authority to prevent disembarkation of Persons in excess of the 1,000-Person limit. Exhibit A.5, *passim*. Nor does the Disembarkation Ordinance provide any Town officials with the authority to prevent the disembarkation of Persons in excess of the 1,000-Person limit.

Notice of Violation

53. On August 5, 2024, the Town’s Code Enforcement Officer issued a Notice of Violation (“NOV”) to Plaintiff asserting that Plaintiff was in violation of the Disembarkation Ordinance. In particular, the NOV asserted that Plaintiff had not obtained a “permit to operate a CSDF (“CSDF Permit”). on July 25, 2024, “passengers were being unloaded from the tenders onto the dock. Exhibit A.1.

54. Although the Disembarkation Ordinance was an **ordinance**, the NOV characterized it as “constitut[ing] the **rules** anticipated by and necessary to enforce the [Ordinance].” *Id.* (emphasis supplied).

55. The NOV was supported by a “Violation Report” which asserted that, on July 25, 2024, Code Enforcement Officer Angela Chamberlain and Harbor Master Christopher Wharff “witnessed passengers being unloaded from tenders onto the dock.” *Id.* The Violation Report

did not reveal how CEO Chamberlain and Harbor Master Wharff Enforcement Officer differentiated disembarking seafarers, protected by 33 C.F.R. § 105.237, from “passengers.”

Exhibit A.2.

56. The Violation Report asserted that Plaintiff had not only violated the Disembarkation Ordinance but had also violated the Ordinance. It asserted further that the alleged violations of the Chapter 52 Disembarkation Ordinance and the underlying Ordinance constituted “nuisances” under the Land Use Ordinance and that sanctions could be imposed on Plaintiff under any or all of these authorities. *Id.*

57. The Violation Report required Plaintiff to take “corrective action” which included “submit[ting] an application to allow for the disembarkation of individuals meeting the definition of Person under the [Disembarkation Ordinance].” *Id.*

58. The Violation Report provided further that Plaintiff’s failure to apply for “the applicable permits within 30 days will result in further enforcement action.”

59. By its terms, the Violation Report confirmed that, without expressly acknowledging it, the Disembarkation Ordinance purported to void and render a nullity the longstanding prior Town Permits that the Town had issued to Plaintiff for the operation of the Pier, which Town Permits, before the Town Council’s adoption of the Disembarkation Ordinance, the Town had never sought to withdraw, void, alter, or otherwise condition or limit.

Required Permit Applications

60. The NOV was also supplemented by a Cruise Ship Disembarkation Facility Permit form. **Exhibit A.6.**

61. Among other things, the CSDF facility permit application requires Plaintiff to attach “a written description approved by the Harbor Master describing the means to count each

individual person that disembarks at this [CSDF]”; providing further that “[t]his includes a means for discounting the crew from the total amount of individuals disembarking.” *Id.*

62. Section V of the CSDF facility permit—headed “Acceptance”—requires Plaintiff to make the additional representation that, “[b]y accepting this permit, I acknowledge that no more than the number of persons approved by the Disembarkation permit are entitled to disembark from any cruise ship on a single day at the permitted site” with the further representation that Plaintiff will “abide by the 1,000-person limit”, not in accordance with the Ordinance’s application to all “persons”, but in accordance with the Disembarkation Ordinance’s definition of “Persons” (with a capital “P”). *Id.*

63. The NOV was also supplemented by a Cruise Ship Disembarkation Permit Application governing daily disembarkation of persons from cruise ships. Exhibit A.7.

64. Among other things, the CSDF permit application required Plaintiff to represent that “no more than the number of persons approved by a Disembarkation permit are entitled to disembark from cruise ships on any single day at the permitted site” and required Plaintiff to make the further representation that “I agree to abide by the 1,000-person per day limit”, providing that, “‘Persons’ shall have the meaning provided by the Cruise Ship Disembarkation Ordinance.” *Id.*

V. CLAIMS AGAINST THE TOWN

COUNT I

(Ultra Vires—Violation of Town Charter)

65. Plaintiff repeats and realleges the allegations set forth in Paragraphs 1 through 64 as if fully set forth herein.

66. Under the Town’s Charter, the Town Council may not alter, amend or add to the Town’s Land Use Ordinance. All such changes to the Land Use Ordinance may only be adopted

by Bar Harbor voters at large in a Town Meeting. Exhibits B.2 and B.3. As provided in the Town Charter and as confirmed in Section 125-9(E) of the Land Use Ordinance, Bar Harbor voters, meeting in a Town Meeting, have the sole authority, in the first instance, to enact and to amend or otherwise alter the Land Use Ordinance. Exhibit B.4.

67. Because it proposed to amend the Land Use Ordinance, before its enactment, the underlying Ordinance now codified at Section 125-77(H) was presented to Bar Harbor voters at a Town Meeting held on November 8, 2022 where the voters passed it.

68. As alleged above, the Chapter 52 Disembarkation Ordinance was not approved by Bar Harbor voters at Town Meeting but, rather, was approved by and purportedly enacted into law under the sole authority of the Town Council.

69. Although not approved at a Town Meeting and although not openly and expressly amending (1) the underlying Ordinance at Section 125-77(H), as part of the Land Use Ordinance, and also (2) the definition of “persons” as defined by Section 125-109 of the Land Use Ordinance and as employed in the underlying Ordinance at Section 125-77(H), the Chapter 52 Disembarkation Ordinance nonetheless clearly changes the Ordinance’s central terms, supersedes all its materials terms, and, without repealing it, renders the Ordinance superfluous and without force and effect; that is, a nullity.

70. The Disembarkation Ordinance supersedes and nullifies the Ordinance in the following ways:

A. The Disembarkation Ordinance asserts that it “govern[s] the disembarkation of Persons...and implements the purpose and intent of § 125-77(H) and that “language” and “words” in the Land Use Ordinance shall control “[e]xcept as provided in this Chapter.” Exhibit A.5, §§ 52-1, 52-5. These provisions means that the meaning of terms as

defined in the Land Use Ordinance and as used in Section 125-77(H) are controlled by and subordinate to the Chapter 52 Disembarkation Ordinance.

B. Although the Ordinance employs the word “person” as its central and essential limitation on the numbers of individuals allowed to disembark from a cruise ship in a single calendar day and although in doing so, the Ordinance necessarily incorporated the existing definition of “person” in the Land Use Ordinance, the Chapter 52 Disembarkation Ordinance redefines “persons” with a small “p” to mean “Persons” with a capital “P”, thus exempting seafarers, and purports to make that new definition control the meaning of “persons” as used in Section 125-77(H) and as defined in Section 125-109. *Cf.*, Exhibit A.4, 125—77(H)(2)-(4), Exhibit B.1; Exhibit A.5, Section 52-5, “Persons”.

C. Although the Ordinance mandated that the Harbor Master “shall develop...a mechanism for counting and tracking the number of persons disembarking each day”—an ordinance-based assignment that the Working Group acknowledged in the Town Memorandum—the Disembarkation Ordinance strips the Harbor Master of this responsibility and reassigns it to the CSDF Owners. *Cf.*, Exhibit A.4, § 125—77(H)(3), Exhibit C (Town Memorandum); Exhibit A.5, § 52-7(A).

D. Although the Ordinance mandated that the Harbor Master was required to “develop the rules and regulations” for the implementation of the underlying Ordinance, the comprehensive regime set forth in the Chapter 52 Disembarkation Ordinance has usurped and rendered superfluous the rulemaking duties that the underlying Ordinance assigned to the Harbor Master. *Cf.*, Exhibit A.4, § 125-77(H)(3); Exhibit A.5, § 52, *passim*; *see also*, Exhibit A.1 (NOV) (“This CSD Ordinance...**constitutes the rules** anticipated and necessary **to enforce Section 125-77(H)** of the Town Code.” (emphases supplied)).

E. Although the Ordinance provides a particular regime for the imposition of sanctions on private pier owners (CSDF Owners under the Disembarkation Ordinance), the Disembarkation Ordinance expanded the breadth of mandates with which the CSDF owners must comply “in accordance with Sections 125-100 and 125-101 of the Land Use Ordinance without amending the Land Use Ordinance, in general, or the Ordinance, in particular, to accomplish this purpose. Cf. **Exhibit A.4**, § 125-77(H)(4); **Exhibit A.5**, §52-(8)(B).

F. In addition to the foregoing specific instances in which the Disembarkation Ordinance overrides, renders superfluous and effectively nullifies the Ordinance, in its full sweep and effect, the Disembarkation Ordinance also overrides, renders superfluous and effectively nullifies the underlying Ordinance approved by the voters.

71. In addition to overriding and supplanting the Ordinance, the Disembarkation Ordinance, itself, is the legal and functional equivalent of a land use ordinance and, as such, consistent with the Town Charter, could only become effective through the vote of Bar Harbor voters meeting in a Town Meeting.

72. The Disembarkation Ordinance is the legal and functional equivalent of a land use ordinance in several respects which include but are not limited to the following:

A. Although the Land Use Ordinance expressly provides that any violation of its terms constitutes a “nuisance” and although the Ordinance expressly invokes and requires the application of the Land Use Ordinance’s nuisance-based enforcement regime (**Exhibit A.4**, § 125-77(H)(4), the Chapter 52 Disembarkation Ordinance, though purporting not amend the Land Use Ordinance and purporting not, itself, to be a land use ordinance in its own right, expressly invokes and relies upon the Land Use Ordinance’s nuisance-based enforcement regime. **Exhibit A.5**, § 52-8((B).

B. The Violation Report confirms the Chapter 52 Disembarkation Ordinance's invocation of and reliance on the Land Use Ordinance's nuisance-based enforcement regime and its invocation of and reliance on Section 127-77(H) for its enforcement authority asserting that the "actions" charged against Plaintiff by the NOV "are in violation of Chapter [52] Section 52-6 of the [Cruise Ship Disembarkation] Ordinance and Section 125-77(H) of the Land Use Ordinance. Such violations are a nuisance in violation of Chapter 125-99. See, Section 125-77(H) and 125B for possible maximum fines." **Exhibit A.5.**

73. The Charter of the Town of Bar Harbor is the Town's fundamental law and is superior to any ordinance, whether approved by the Town Council or Bar Harbor voters at a Town Meeting.

74. Any ordinance approved by the Town Council alone which overtly or by implication purports to alter the meaning of any part of the Land Use Ordinance violates the Town Charter's requirement and the Land Use Ordinance amending provision at 125-9(E) that only Bar Harbor voters, meeting in a Town Meeting, may amend any provision of the Land Use Ordinance.

75. By attempting to change the meaning of the Land Use Ordinance by means of a Town Council-approved ordinance, the Disembarkation Ordinance exceeded the powers of the Town Council, violated the Town Charter, as well as Section 125-9(E) of the Land Use Ordinance, and is null and void.

76. Any ordinance approved by the Town Council which is, in purpose and effect, the functional equivalent of the Land Use Ordinance or any substantive part thereof but which does directly amend the Land Use Ordinance and is not approved by Bar Harbor voters in a Town

Meeting in accordance with the Town Charter violates the Town Charter and is void and without force or effect.

77. Chapter 52, the Disembarkation Ordinance, is, in purpose and effect, the functional equivalent of a land use ordinance within the meaning of the Town Charter and Section 125-9(E); the Disembarkation Ordinance was not approved by the voters of Bar Harbor at a Town Meeting as required by the Town Charter; and the Disembarkation Ordinance, therefore, is null and void and without force and effect.

WHEREFORE, Plaintiff prays this Court to declare that Chapter 52, the Disembarkation Ordinance constitutes an invalid exercise of the Town Council's authority inconsistent with and violative of the Town Charter as confirmed by Section 125-9(E) of the Land Use Ordinance and is null and void and, further, to declare that the Disembarkation Ordinance is, in purpose and effect, a land use ordinance and, as such, was required to have been approved by Bar Harbor voters at a Town Meeting in accordance with the Town Charter and, for failing to comply with the Town Charter, the Disembarkation Ordinance is void and of no force and effect, and, further, to enjoin the Town from enforcing the Disembarkation Ordinance in general and, in particular, to bar the Town from enforcing the NOV against Plaintiff and, further, to provide such additional relief as may be warranted, including Plaintiff's attorney fees and costs.

COUNT II

(Due Process—U.S. Constitution and Maine Constitution—Violation of Town Charter)

78. Plaintiff repeats and realleges the allegations set forth in Paragraphs 1 through 77 as if fully set forth herein.

79. Plaintiff has property interests in its ownership and operation of the Pier within the meaning of the Due Process Clause of the Fourteenth Amendment to the United States

Constitution and within the meaning of the Law of the Land Clause of Article I, Section 6 and the Due Process Clause of Article I, Section 6-A of the Maine Constitution.

80. Plaintiff has liberty, property and equality interests in its ownership and operation of the Pier within the meaning of Article I, Section 1 of the Maine Constitution.

81. The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution and the Law of the Land and Due Process Clauses of the Maine Constitution require that any Ordinance that the Town adopts that may affect or impair Plaintiff's property interests must fully comply with any requirements in the Town Charter or other Town provision having the force of law with the failure to do so constituting denials of Due Process.

82. The Disembarkation Ordinance effected substantive changes to both the underlying Ordinance at 125-77(H) and the Land Use Ordinance without complying with the procedures required by the Town Charter and 125-9(E) of Land Use Ordinance for amending or otherwise changing and limiting the meaning of "person" as it appears in the underlying Ordinance, which is incorporated into and made a part and of the Land Use Ordinance and by changing and limiting the meaning of "person" as defined by the Land Use Ordinance as used in the Ordinance.

WHEREFORE, Plaintiff prays that this Court declare that, by altering the meaning of the underlying Ordinance at 125-77(H) without having complied with the Town Charter's requirements and the Land Use Ordinance Section 125-9(E) requirement for amendments of and changes to the Land Use Ordinance, the Chapter 52 Disembarkation Ordinance violated Plaintiff's right to Due Process as protected by the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution and by the Law of the Land and Due Process Clauses of the Maine Constitution, and violated Plaintiff's liberty, property, and equality interests as protected

by Article I, Section 1 of the Maine Constitution, and to issue injunctive relief barring the Town from enforcing the Disembarkation Ordinance against Plaintiff and by issuing such other relief as may be warranted, including Plaintiff's attorney fees and costs.

COUNT III
(Due Process—Violation of Plaintiff's Vested Rights)

83. Plaintiff repeats and realleges the allegations set forth in Paragraphs 1 through 83 as if fully set forth herein.

84. In 2001-2008, the Town issued the Town Permits to Plaintiff.

85. The Plaintiff's interests and rights in the Town Permits are recognized and protected under Sections 125-52, *et seq.* in Chapter 125 of the Town Code that is the Bar Harbor Land Use Ordinance.

86. Plaintiff's interests and rights in the Town Permits have vested within the meaning of the Due Process Clause of the United States Constitution and within the meaning of the Law of the Land and Due Process Clauses of Article I, Section 6 and Article I, Section 6-A of the Maine Constitution.

87. Plaintiff's interests and rights in the Town Permits are also protected by the liberty, equality and property provisions of Article I, Section 1 of the Maine Constitution.

88. The Chapter 52 Disembarkation Ordinance effectively voids the Town Permits, rendering them legal nullities, and replaces them with an entirely new permit imposing preconditions and compliance obligations, including new and distinct sanctions for failure to comply therewith, that are materially different from those required by the prior Town Permits for the Pier.

89. The Chapter 52 Disembarkation Ordinance's purported voiding of the prior Town Permits that issued from 2001 until 2008 and replacement of same by the new and materially

different duties, obligations, and potential sanctions provided by the new permit violate Plaintiff's vested rights in the prior Town Permits in violation of Sections 125-52 and 125-54 and the Due Process Clause of the Fourteenth Amendment to the United States Constitution and the Law of the Land and Due Process Clauses of Article I, Sections 6 and 6-A of the Maine Constitution and the liberty, equality and property provisions of Article I, Section 1 of the Maine Constitution which protects individuals' rights to protect their property.

WHEREFORE, Plaintiff prays that this Court declare that, by altering the meaning of the Ordinance without having complied with the Town Charter's requirements for amendments of and changes to the Land Use Ordinance, the Disembarkation Ordinance violated Plaintiff's right to Due Process as protected by the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution and by the Law of the Land and Due Process Clauses of the Maine Constitution, that in the aforementioned respects, the Disembarkation Ordinance also violates Plaintiff's liberty, equality, and property interests as protected by Article I, Section 1 of the Maine Constitution, and to issue injunctive relief barring the Town from enforcing the Disembarkation Ordinance against Plaintiff and by issuing such other relief as may be warranted, including Plaintiff's attorney fees and costs.

COUNT IV
(Ultra Vires—Unlawful Delegation of Governmental Power)

90. Plaintiff repeats and realleges the allegations set forth in Paragraphs 1 through 89 as if fully set forth herein.

91. The Disembarkation Ordinance imposes fines on Plaintiff for every "excess unauthorized Person"—that is, above the 1,000-Person per day limit—who disembarks from a cruise and enters into the Town on a given calendar day. Exhibit A.5, § 52-8(B).

92. The Disembarkation Ordinance purports to exclude seafarers from the 1,000-Person per day limit. *Id.* at §5, “Persons”; see also, *id.* at § 7(A), §8(B).

93. The Disembarkation Ordinance provides no standards or procedures by which Plaintiff can consistently and reliably distinguish between disembarking seafarers and all others who disembark. *Id., passim.*

94. The Ordinance also provides no standards or procedures by which Plaintiff can consistently distinguish between disembarking seafarers and all others who disembark and, to the contrary, bars Plaintiff from making any such distinction. **Exhibit A.5**, §§ 52-1-8, *passim.*

95. In the provision captioned “Counting Method”, the Disembarkation Ordinance purports to delegate to Plaintiff the responsibility to develop the standards and procedures by which disembarking seafarers can consistently and reliably be distinguished from Disembarking Persons (capital “P”). *Id.*, at, § 52-7(A).

96. The authority to designate particular conduct or status which is unlawful and subject to criminal or civil sanction is an inherently governmental power residing in the legislative branch of government. Me. Const., art. IV, Pt. 3d, § 1.

97. The United States Constitution and the Maine Constitution both require that any laws or rules adopted by a governmental entity that prohibit particular conduct or status and provide penalties for engaging in such conduct or assuming such status meet Due Process standards to ensure that persons can understand the terms and conditions of such laws or rules and that such laws or rules will provide government officials charged with enforcing them with sufficient guidance so that they do not enforce them arbitrarily and disproportionately.

98. If governmental entities adopt laws or rules that fail to meet the foregoing Due Process requirements, persons potentially aggrieved or aggrieved by such law or rules may sue

the governmental entities under the authority of such laws at 42 U.S.C. § 1983 and, if successful, receive an award for attorney fees and costs under 42 U.S.C. § 1988.

99. These Due Process requirements further demonstrate that the authority to designate conduct or status that constitutes a civil wrong subject to penalties is an inherently governmental function and no governmental entity, including the Town, may delegate such authority and the responsibilities attendant to it to any private party, including Plaintiff.

100. The authority to set the standards and procedures by which conduct or status that the legislative authority has made unlawful may result in the lawful imposition of a particular criminal or civil sanction is also an inherently governmental power residing in the legislative branch of government. *Id.*

101. Under the Home Rule amendment to the Maine Constitution, Article VIII, Part Second, Section 1 and under 30-A .M.R.S. § 3001, Maine municipalities may have broad powers, including legislative powers, but are not empowered to delegate to private parties the power to set the standards and procedures by which civil fines may be imposed.

102. The Counting Method provision of the Disembarkation Ordinance purports to delegate to Plaintiff, as owner of the Pier (CSDF), the authority and the responsibility to develop and issue the standards and procedures by which Plaintiff must distinguish between seafarers and “Persons” (with a capital “P”).

103. The attempt to delegate such power to a private party—Plaintiff—as set forth in the Counting Method constitutes an unlawful and invalid delegation of inherently governmental power to a private party in violation of the Maine Constitution and Maine statutory law.

WHEREFORE, Plaintiff prays that this Court declare that The Counting Method in the Chapter 52 Disembarkation Ordinance constitutes an unlawful and invalid attempt to delegate to

a private party the power and obligation to develop standards and processes by which civil sanctions may be imposed and as such violates the Home Rule provisions of the Maine Constitution, Article VIII, Part 2, Section 1 and, 30-A M.R.S. § 3001, *et seq.*, and all other pertinent and applicable laws of the State of Maine, and further, prays this Court to issue injunctive relief barring the Town from enforcing the Disembarkation Ordinance against Plaintiff and by issuing such other relief as may be warranted, including Plaintiff's attorney fees and costs.

COUNT V
(Due Process—U.S. Constitution and Maine Constitution—Unlawful Delegation of Governmental Power)

104. Plaintiff repeats and realleges the allegations set forth in Paragraphs 1 through 103 as if fully set forth herein.

105. The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution and the Law of the Land and Due Process Clauses of the Maine Constitution require that any Ordinance that the Town adopts that may affect or impair Plaintiff's property interests fully comply with any requirements in the Home Rule provisions of the Maine Constitution and with Maine statutory law, including but not limited to 30-A M.R.S. § 3001.

106. For the reasons set forth above, The Counting Method provision of the Disembarkation Ordinance lies outside of the Town's lawful powers and the Town's attempt to impose such duties and responsibilities, therefore, violates Plaintiff's right to Due Process as protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution and by the Law of the Land and Due Process Clauses of Article I, Section 6 and Article I, Section 6-A of the Maine Constitution.

WHEREFORE, Plaintiff prays that this Court declare that, the Counting Measure provision of the Disembarkation Ordinance violates Plaintiff's right to Due Process as protected by the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution and by the Law of the Land and Due Process Clauses of the Maine Constitution and to issue injunctive relief barring the Town from enforcing the Disembarkation Ordinance against Plaintiff and by issuing such other relief as may be warranted, including Plaintiff's attorney fees and costs.

COUNT VI
(Unlawful Exposure to Civil Sanction)

107. Plaintiff repeats and realleges the allegations set forth in Paragraphs 1 through 106 as if fully set forth herein.

108. The Disembarkation Ordinance provides that, in general, its enforcement authority is derived from 30-A M.R.S. § 4452. Exhibit A.5, §52-(8)(B). The Ordinance also invoked 30-A M.R.S. § 4452 in general for its enforcement authority. Exhibit A.4, § 125-77(H)(3).

109. In particular, the Disembarkation Ordinance relies on 30-A M.R.S. § 4452 for the sanctions it imposes on Plaintiff, which sanctions range from a "minimum" of \$100 to as much as \$5,000 for each "excess authorized Person" (with a capital "P") who disembarks in a given calendar day over the number 1,000. Exhibit A, 5, at § 52-(8)(B); *cf.*, *Id.* at 4, at § 125-77(H)(3); see also, 30-A M.R.S. § 4452(3)(B).

110. Although exposing Plaintiff to the risk of the Town's imposition of these potentially catastrophic fines, the Disembarkation Ordinance does not provide Plaintiff with any authority to bar any such "excess unauthorized Persons" from disembarking at the Pier and entering the Town.

111. Nor does the Disembarkation Ordinance authorize any Town official to bar any such “excess unauthorized Person” from disembarking at the Pier and entering the Town.

112. No law can impose civil liability for actions of third parties upon a person unless that person has the capability to conform his conduct in order to avoid or prevent the circumstances by which the actions of third parties would otherwise precipitate such civil liability.

113. More particularly, 30-A M.R.S. § 4452 assumes that “violators” subject to sanction under its authority have the legal and practical authority to “abate” the conditions giving rise to the violation. 30-A M.R.S. § 4452(3)(C).

114. Plaintiff does not have the authority to bar Persons (with a capital “P”) who are otherwise entitled to disembark at the Pier from doing so solely on the ground that the 1,000st Person, and those Persons who may follow that Person, exceed the 1,000-person-per-day limit imposed by the Disembarkation Ordinance.

115. Neither in the Disembarkation Ordinance, nor in the Ordinance, nor in any other law adopted by the Town has the Town authorized Town officials to bar Persons (with a capital “P”) who are otherwise entitled to disembark at the Pier from doing so solely on the ground that the 1000th Person and those Persons who may follow that Person exceed the 1,000-person-per-day limit imposed by the Disembarkation Ordinance.

116. Neither does the Town possess the authority under the Maine Constitution, nor under any Maine laws, whether derived from statute, common law or other source, to bar Persons (with a capital “P”) who are otherwise entitled to disembark at the Pier from doing so solely on the ground that that Person and those Persons who may follow that Person exceed the 1,000-person-per-day limit imposed by the Disembarkation Ordinance.

117. The Disembarkation Ordinance exposes Plaintiff to civil liability based on the conduct of third parties which conduct the Disembarkation Ordinance does not authorize Plaintiff or any Town Official to bar.

118. Exposing Plaintiff to civil fines under the circumstances alleged above exceeds the Town's authority under the Article VIII, Part Second, Section 1 of the Maine Constitution and violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution and the Law of the Land and Due Process Clauses of Article I, Sections 6 and 6-A of the Maine Constitution and also violates the liberty, equality, and property provisions of Article I, Section 1 of the Maine Constitution.

WHEREFORE, Plaintiff prays this Court to declare that by exposing Plaintiff to civil sanctions under the circumstances and conditions set forth above, the Disembarkation Ordinance violates the Town's Home Rule authority and violates Plaintiff's rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution and under the Law of the Land and Due Process Clause of Article I, Sections 6 and 6-A of the Maine Constitution and also violates the liberty, equality, and property provisions of Article I, Section 1 of the Maine Constitution and prays this Court to issue injunctive relief barring the Town from enforcing the Disembarkation Ordinance against Plaintiff and by issuing such other relief as may be warranted, including Plaintiff's attorney fees and costs.

COUNT VII
(Permit Applications Invalid)

119. Plaintiff repeats and realleges the allegations set forth in Paragraphs 1 through 118 as if fully set forth herein.

120. The Disembarkation Ordinance requires Plaintiff, as a CSDF Owner, to apply for a permit to operate the Pier, as a CSDF, for the purpose of disembarking “Persons” and “persons” into Bar Harbor. Exhibit A.5, § 52-(6)(A).

121. To implement this new permit requirement, the Town has devised a form entitled Cruise Ship Disembarkation Facility Permit (“CSDF Permit”) which the Town attached to the NOV. Exhibit A.6 “Cruise Ship Disembarkation Facility Permit.”

122. The CSDF Permit requires Plaintiff to attach to the application “a written description approved by the Harbor Master describing the means to count each individual person that disembarks at this [CSDF]” and requires Plaintiff to ensure that the “means” so described “discount[] the crew from the total amount of individuals disembarking.”

123. The Disembarkation Ordinance also requires Plaintiff, as a CSDF Owner, to apply for and obtain a Disembarkation Permit to enable it to “allow a specified calendar day a specified number of Persons not exceeding 1,000 to disembark” from cruise ships. *Id.* at § 52-6(C)(1).

124. To implement this requirement, the Town has devised a form entitled Cruise Ship Disembarkation Permit Application Permit (“Disembarkation Application”) which the Town attached to the NOV. Exhibit A.7 “Cruise Ship Disembarkation Permit Application.”

125. The Disembarkation Permit requires Plaintiff to “acknowledge that no more than the number of persons [with a small “p”] approved by a Disembarkation permit may disembark” on a given day and to commit that Plaintiff “will abide by the 1-000 person [with a small “p”] daily limit.”

126. By its terms, the Disembarkation Permit is invalid because it is based on the Disembarkation Ordinance which, as alleged above, is an invalid exercise of the Town Council’s authority and violative of the Town Charter as confirmed by the Land Use Ordinance’s amending

provision at Section 125-9(E), and is also violative of the Due Process Clause of the Fourteenth Amendment to the United States Constitution and the Law of the Land and Due Process Clause of Article I, Sections 6 and 6-A of the Maine Constitution; violates Plaintiff's vested rights in the Town Permits as protected by Sections 125-52 through 125-54 of the Town's Land Use Ordinance, as well as the United States and Maine Constitutions; violates Plaintiff's constitutional rights by requiring Plaintiff to exercise non-delegable governmental powers in devising a "Counting Method"; and, further, the Disembarkation Permit uses the word "person" with a small "p" in a way that is materially inconsistent with the Disembarkation Ordinance's use of the word "Persons" with a capital "P", rendering the Disembarkation Permit materially ambiguous and further rendering compliance with its terms incapable of ascertainment and enforcement to the degree required by the Due Process Clause of the Fourteenth Amendment and the Law of the Land and Due Process Clauses of Article I, Sections 6 and 6-A of the Maine Constitution and also violates the liberty, equality, and property provisions of Article I, Section 1 of the Maine Constitution.

127. In addition, and as has been alleged above, the CSDF Permit is invalid because it is based on the Disembarkation Ordinance which, as alleged above, is an invalid exercise of the Town Council's authority and violative of the Town Charter and the Land Use Ordinance amending provision, the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and the Law of the Land and Due Process Clauses of Article I, Sections 6 and 6-A of the Maine Constitution, Plaintiff's vested rights as protected by the United States and Maine Constitutions, and Plaintiff's rights under the liberty, equality, and property provisions of Article I, Section 1 of the Maine Constitution.

WHEREFORE, Plaintiff prays this Court to declare that in each of the foregoing respects, the CSDF Permit application form and the Disembarkation Permit application form violate the Town Charter and violate the Due Process Clause of the Fourteenth Amendment and the Law of the Land and Due Process Clauses of Article I, Sections 6 and 6-A of the Maine Constitution and the liberty, equality, and property provisions of Article I, Section 1 of the Maine Constitution, and to issue injunctive relief barring the Town from enforcing the Disembarkation Ordinance against Plaintiff and by issuing such other relief as may be warranted, including Plaintiff's attorney fees and costs.

COUNT VIII

(Due Process and Equal Protection—U.S. Constitution, Due Process Equal Protection—Maine Constitution, Rational Nexus—Maine Constitution)

128. Plaintiff repeats and realleges the allegations set forth in Paragraphs 1 through 127 as if fully set forth herein.

129. The Disembarkation Ordinance discriminates between "Persons" (with a capital "P") arriving in the Town in numbers greater than 1,000 and all other persons arriving in the Town by all other means of conveyance who are subject to no Town-imposed limitation whatsoever.

130. The Disembarkation Ordinance sets an arbitrary limit of 1,000 as the disembarkation limit for "Persons" (with a capital "P") which applies every day of the year without exception when, in fact, the Town has actual knowledge spanning decades that the numbers of persons visiting Bar Harbor is highest in the months of July and August, is less in the months of April through June and September through November, and the Town has adopted and approved policies recognizing these seasonal variations in such visits through its adoption and

approval of voluntary caps from 2008 through 2022 and its adoption and approval by the Town Council in 2022.

131. The Disembarkation Ordinance's discrimination against "Persons" (with a capital "P") and all others arriving in Town by any other means of conveyance is arbitrary and capricious and lacks a rational nexus between the Disembarkation Ordinance's purpose and the means it employs to achieve that purpose, all in violation of the Due Process and Equal Protection Clauses of the United States Constitution, the Law of the Land and Due Process Clauses of Sections 6 and 6-A of the Maine Constitution, and the Equal Protection Clause of Article 6 of the Maine Constitution, and the liberty, equality and property provisions of Article I, Section 1 of the Maine Constitution, and, limitations on the legislative power set forth in Article IV, Part Third, Section 1 of the Maine Constitution.

132. The Disembarkation Ordinance's application of a rigid limit of 1,000 on the disembarkation of "Persons" (with a capital "P") applicable every day of the year without any means of adjustment for the seasonal variation in visits to the Town is arbitrary and capricious and lacks a rational nexus between the Disembarkation Ordinance's purpose and the means it employs to achieve that purpose, all in violation of the Due Process and Equal Protection Clauses of the United States Constitution, the Law of the Land and Due Process Clauses of Sections 6 and 6-A of the Maine Constitution, and the Equal Protection Clause of Article 6 of the Maine Constitution, and the liberty, equality and property provisions of Article I, Section 1 of the Maine Constitution, and, limitations on the legislative power set forth in Article IV, Part Third, Section 1 of the Maine Constitution.

WHEREFORE, Plaintiff prays this Court to declare that the Disembarkation Ordinance is discriminatory, arbitrary and capricious, and lacks the requisite rational nexus between its

purpose and the means its employes all in violation of the Due Process and Equal Protection Clauses of the United States Constitution, the Land of the Land Clause of the Maine Constitution, the Due Process and Equal Protection Clauses of the Maine Constitution, the liberty and property clauses in Article I, Section 1 of the Maine Constitution, and, the limitations imposed on the legislative power by Article IV, Part Third, Section 1, which limitations are made applicable to municipalities by Article VIII, Part Second, Section 1 of the Maine Constitution and 30-A M.R.S. § 3001 and prays this Court to issue injunctive relief barring the Town from enforcing the Disembarkation Ordinance against Plaintiff and by issuing such other relief as may be warranted, including Plaintiff's attorney fees and costs.

COUNT IX
(Ultra Vires—Unlawful Designation as a “Nuisance”)

133. Plaintiff repeats and realleges the allegations set forth in Paragraphs 1 through 132 as if fully set forth herein.

134. The Town interprets the Disembarkation Ordinance to provide that a violation of its terms constitutes a public nuisance. Exhibit A.2, Exhibit B.5. In so doing, and as has been alleged above, the Town is effectively acknowledging that the Chapter 52 Disembarkation Ordinance , itself, is a Land Use Ordinance. see, Exhibit B.5 (Section 125-99) and 30-A M.R.S. § 4302. And, as has also been alleged above, under the Town's Charter, as confirmed by the Land Use Ordinance, the Town Council lacks the authority to alter or amend the Land Use Ordinance or to adopt the functional equivalent of a land use ordinance. Exhibits B.2, B.3, and B.4.

135. The mere entry of a person within the limits of a municipality also cannot, without more, constitute a public nuisance.

136. The mere disembarkation of a “Person” (with a capital “P”) into Bar Harbor as the 1,001st such “Person” to disembark in single calendar cannot, by itself, constitute a public nuisance either under Maine common law, Maine statutory law, or the laws and rules of the Town. Nor can the mere disembarkation of other Persons above the Disembarkation Ordinance’s 1,000-Person-per-day limit constitute a public nuisance under Maine common law, Maine statutory law or the laws and rules of the Town.

137. A “Person” (with a capital “P”) and constituting an “excess unauthorized Person” under the Ordinance (see, Exhibit A.5, § 52-(8)(B); see also, *id.*, A.4, § 125-77(H)(3)) cannot, without more, constitute a public nuisance either under Maine common law, Maine statutory law, or the laws and rules of the Town.

138. In designating all violations of the Chapter 52 Disembarkation Ordinance a “nuisance”, the Town has exceeded its Home Rule authority under Article VIII, Part Second, Section 1 of the Maine Constitution.

WHEREFORE. Plaintiff prays this Court to declare that by treating Plaintiff’s ownership and operation of the Pier as a nuisance under Chapter 52 and by treating the disembarkation of “Persons” (with a capital “P”) in numbers greater than 1,000 on each calendar day, the Town Council has exceeded its authority to declare and set limits on a public nuisance under the laws of Maine and, in doing so, the Disembarkation Ordinance violates the Town’s Home Rule authority and violates Plaintiff’s rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution and under the Law of the Land and Due Process Clause of Article I, Sections 6 and 6-A of the Maine Constitution and, the liberty, equality, and property provisions of Article I, Section 1 of the Maine Constitution and prays this Court to issue injunctive relief barring the Town from enforcing the Disembarkation Ordinance against Plaintiff

and by issuing such other relief as may be warranted, including Plaintiff's attorney fees and costs.

PRAYER FOR RELIEF

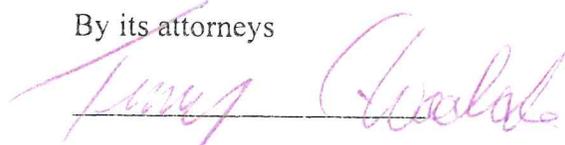
WHEREFORE, for the reasons set forth above and in accordance with and in addition to the requests for relief set forth above, Plaintiff respectfully for relief as follows:

1. that, pursuant to 14 M.R.S. § 5951, *et seq.*, this Court declare that the Disembarkation Ordinance violates the Constitution of Maine and the state laws of Maine on the grounds set forth above and enter judgment against the Town pursuant to and in accordance with such declaration;
2. that, pursuant to 14 M.R.S. § 5951, *et seq.*, this Court declare that the Disembarkation Ordinance violates the United States Constitution on the grounds set forth above and enter judgment against the Town pursuant to and in accordance with such declaration;
3. that, this Court issue an injunction against the Town barring the Town from each of the following: a) barring the Town enforcing the Disembarkation Ordinance in general, including any enforcement against Plaintiff and Plaintiff's Pier, b) barring the Town from enforcing the Notice of Violation against Plaintiff; c) barring the Town from directly to indirectly voiding Plaintiff's Town Permits to operate the Pier; and, d) barring the Town from requiring Plaintiff to complete any permits required and imposed upon Plaintiff by the Disembarkation Ordinance;
4. that, this Court award Plaintiff its attorney fees and costs pursuant to 42 U.S.C. § 1988; and,
5. that, this Court issue such other the further relief that this Court deems just and proper.

Dated at Bangor, Maine, this 10th day of September, 2024.

GOLDEN ANCHOR LC

By its attorneys



Timothy C. Woodcock, Bar No. 1663
twoodcock@eatonpeabody.com

P. Andrew Hamilton, Bar No. 2933
ahamilton@eatonpeabody.com

Eaton Peabody, P.A.

Bangor, ME 04401

Tel: (207) 947-0111

EXHIBITS

- A.1: Notice of Violation
- A.2: Violation Report
- A.3: Photographs
- A.4: Chapter 125-77(H) "The Ordinance"
- A.5: Disembarkation Ordinance – June 18, 2024
- A.6: Cruise Ship Disembarkation Facility Permit
- A.7: Cruise Ship Disembarkation Permit Application
- B.1: Town Code Chapter 125-109
- B.2: Town Charter, Section C-10A(9)(d)(1)-(2),
- B.3: Town Charter, Section C-14C(3)
- B.4: Town Meeting Vote Procedure
- C: Town Memorandum
- D: Order

**TOWN OF BAR HARBOR
Code Enforcement Division**

93 Cottage Street, Suite I
Bar Harbor, Maine 04609-1400
Tele. 207-288-3329 Fax 207-288-3032
E-Mail: ceo@barharbormaine.gov

AUG 09 2024



Angela M Chamberlain

Code Enforcement Officer
Building Inspector
Electrical Inspector
Plumbing Inspector

August 5, 2024

Golden Anchor LC
1000 Market Street
Building One, Suite 300
Portsmouth, NH 03801

NOTICE OF VIOLATION

DELIVERED BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED

**55 West Street – NOTICE OF VIOLATION AND ORDER TO TAKE CORRECTIVE ACTION–
FAILURE TO SECURE NECESSARY PERMITS**

To Whom It May Concern:

The Town of Bar Harbor has determined that your use of the property located at 55 West Street, Bar Harbor, Maine, also known as Tax Map 101, Lot 010-000, (hereinafter the "Property"), is in violation of the Town's Cruise Ship Disembarkation Ordinance, which went into effect on July 18, 2024.

The Town's Cruise Ship Disembarkation Ordinance (hereinafter the "CSD Ordinance" and to be codified at Chapter 52)¹, which constitutes the rules necessary to implement Section 125-77H of the Land Use Ordinance, requires that a permit must be obtained from the Code Enforcement Officer ("CEO") for a Cruise Ship Disembarkation Facility prior to receiving any disembarking Persons from a cruise ship. This CSD Ordinance, a copy of which is attached, constitutes the rules anticipated by and necessary to enforce Section 125-77H of the Town Code.

Section 52-6 of the CSD Ordinance states as follows: "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")."

¹ This Chapter was enacted effective July 18, 2024. However, it has not yet been codified. A copy of the enacted but uncoded draft is attached.

Section 52-5 of the CSD Ordinance defines person as follows: ""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."

Section 52-5 of the CSD Ordinance defines a Cruise Ship Disembarkation Facility ("CSDF") as follows: "a public or private property, or a public or private structure, used for disembarkation of persons arriving on land from cruise ships."

On or about July 25, 2024, it was observed that individuals meeting the definition of "Person" under the CSD Ordinance disembarked from a cruise ship on your Property without the property owner having first obtained a CSDF Permit as required by the Ordinance.

These actions are in violation of Chapter Section 52-6 of the CSD Ordinance and Section 125-77H of the Land Use Ordinance. Such violations are a nuisance in violation of Chapter 125-99. See Section 125-77H and 125-101B for possible maximum fines.

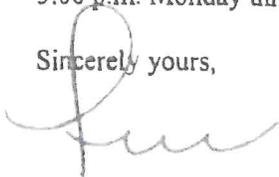
You are hereby ordered to take the following corrective action: within thirty (30) days from the date of this letter you must submit an application to allow for the disembarkation of individuals meeting the definition of Person under the CSD Ordinance. Failure to apply for the applicable permits within 30 days will result in further enforcement action.

In addition to the CSD Ordinance, I have included copies of Section 125-77H, the Cruise Ship Disembarkation Facility permit application, and the Cruise Ship Disembarkation permit application for your use.

Pursuant to Section 125-103, "the Board of Appeals may, upon written application of an aggrieved party received by the Planning Department within 30 days of any decision or enforcement action by a municipal body or official who or which interprets this chapter, hear appeals from such decision."

If you have any questions about this letter, please contact me at 207-288-3329 between the hours of 8:30 a.m. - 5:00 p.m. Monday through Friday.

Sincerely yours,



Angela M. Chamberlain
Code Enforcement Officer

Cc: Building Permit File
Eben Salvatore
P. Andrew Hamilton, Esq. ✓
Stephen Wagner, Esq.
Town Council Members
James Smith, Town Manager



TOWN OF BAR HARBOR
Code Enforcement Division

93 Cottage Street, Suite I
Bar Harbor, Maine 04609-1400
Tele. 207-288-3329 Fax 207-288-3032

VIOLATION REPORT

Tender Dock where the violation occurred:

55 West Street (Tax Map 101, Lot 010-000)

Property Owner:

Golden Anchor, LC

Property Owner Mailing Address:

1000 Market Street
Building One, Suite 300
Portsmouth, NH 03801

Date of Violation: July 25, 2024

Time: 10:30 am

Witnesses to the violation:

1. Angela Chamberlain, Code Enforcement Officer
2. Chris Wharff, Harbor Master
3. _____

Number of Persons who disembarked over the limit: _____

Other pertinent information:

Tenders were arriving at the dock and we witnessed passengers being unloaded from the tenders onto the dock. Norwegian tents were set up on the site for the Norwegian GEM.

The Code Enforcement Department does not have any pending Cruise Ship Disembarkation Facility Permit or Cruise Ship Disembarkation Permit applications on file for this property.

Report prepared by Angela Chamberlain, Code Enforcement Officer.

EXHIBIT
A.3

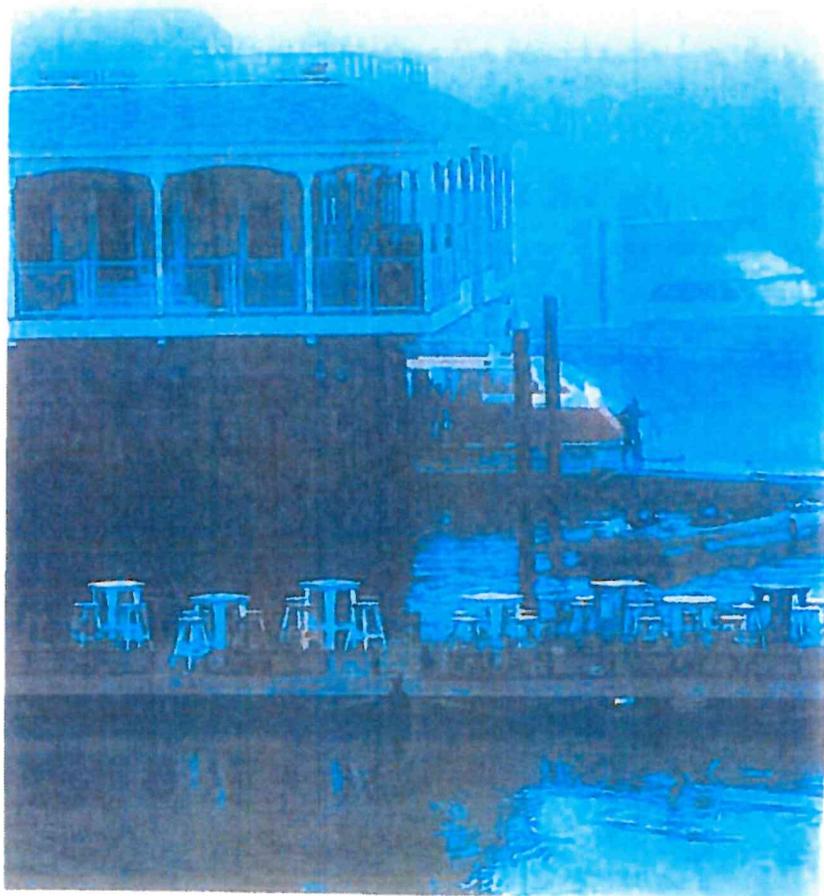














Town of Bar Harbor, ME
Monday, August 5, 2024

Chapter 125. Land Use

Article VII. Permits

§ 125-77. Permit required for certain activities.

[Amended 5-7-1991; 11-2-1999]

After the effective date of this chapter, a written permit from the Code Enforcement Officer shall be required for the following activities, regardless of whether such activities have received site plan or subdivision approval or whether they also require review by the Design Review Board pursuant to Article XIII, Design Review:

- A. Flood hazard areas. All construction or earthmoving activities or other improvements within the one-hundred-year floodplain designated on the Flood Insurance Rate Maps published by the Federal Emergency Management Agency.
- B. New construction. New construction of buildings and structures.
- C. Alteration. Alteration of a building, structure, or land, or parts thereof, including but not limited to:
[Amended 5-3-2004]
 - (1) Change in size of windows or doors;
 - (2) Repair of foundations, whether concrete, cinder block, granite and posts, or piles;
 - (3) Interior renovations for change in use;
 - (4) Remodeling interior walls to create new rooms;
 - (5) Enclosing open frame porch;
 - (6) Installing skylights;
 - (7) Erection of fences;
 - (8) Construction of new steps;
 - (9) Creation of roads or driveways;
 - (10) Erection of panels for winter closure or the erection of winter storm vestibules in the Downtown Village or Waterfront Development Districts; provided, however, that a permit need only be obtained in the first year of the useful life of the structure to be erected.
[Amended 6-8-2010]
- D. Placement of signs. Placement of signs except temporary signs.
[Amended 5-3-2004]
- E. Moving or demolition. All buildings or structures which are removed from or moved onto, or moved around within, a lot or demolished.
- F. Change of use. The change of any premises from one category of land use to any other land

use

G. Activities. Any other activities described in Article III as requiring a permit from the Code Enforcement Officer.

H. Disembarking persons from cruise ships on, over, or across any property located within the Town of Bar Harbor.
[Added 11-8-2022]

- (1) For the purposes of this section, "cruise ship" has the same meaning as set forth in § 153-22B of the Town of Bar Harbor Code.
- (2) As determined by the Harbor Master, 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; provided, however, that this subsection shall not apply with regard to any cruise ship reservations that have been accepted by the Harbor Master prior to March 17, 2022.
- (3) The Harbor Master shall develop rules and regulations in order to establish (a) a reservation system for cruise ships that transport persons by watercraft for disembarkation in the Town of Bar Harbor; (b) a mechanism for counting and tracking the number of persons disembarking each day; (c) a mandatory procedure for reporting violations to the Code Enforcement Officer; and (d) any other provisions that the Harbor Master deems necessary under this subsection. Any property owner issued a permit under this § 125-77H shall comply with all rules and regulations promulgated by the Harbor Master under this subsection.
- (4) This subsection shall be enforced by the Code Enforcement Officer in accordance with § 125-100 of this chapter, based on information as to violations provided by the Harbor Master, and property owners in violation of this subsection shall 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 permitted daily limit in § 125-77H(2) is a specific violation under 30-A M.R.S. § 4452(3)(B), resulting in a minimum \$100 penalty per excess unauthorized person.
- (5) Notwithstanding 1 M.R.S. § 302, and regardless of the date on which it is approved by the voters, this subsection will be applicable as of March 17, 2022, and shall govern any and all applications for permits or approvals required under this subsection that were or have been pending before any officer, board, or agency of the Town of Bar Harbor on or at any time after March 17, 2022; provided, however, that the Town will not take any enforcement action under this subsection with regard to any cruise ship visits occurring prior to the date of adoption by voters at Town Meeting.



On Tuesday, June 18, 2024, the Bar Harbor Town Council adopted the following amendment to the Municipal Code. The amendment takes effect July 18, 2024. A copy has been filed with the Town Clerk

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:

[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 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.

§ [###]-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 CSDF.

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.

§ 1-6. 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 acted upon in the order in which they were received 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 § 6(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.

§ 1-7. 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.

Consistent with 30-A M.R.S. § 4452(1)(A), 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. If access is denied, the Code Enforcement Officer may apply for an administrative search warrant pursuant to Maine Rule of Civil Procedure 80E.

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 §§ 125-100 and 125-101 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.



 Town of Bar Harbor
Planning & Code Enforcement

Cruise Ship Disembarkation Facility Permit Application

SECTION I. PROPERTY INFORMATION

Property Address: _____ Map _____ Lot _____

SECTION II. PROPERTY OWNER/APPLICANT INFORMATION

Owner: _____

Address: _____ City: _____ Zip: _____

Phone number: _____ Email: _____

Applicant: _____

Address: _____ City: _____ Zip: _____

Phone number: _____ Email: _____

NOTE: If not owner, please attach written authorization to apply for permits and/or approvals.

SECTION III. APPLICATION INFORMATION

I have attached a written description approved by the Harbor Master describing the means to count each individual person that disembarks at this Cruise Ship Disembarkation Facility. This includes a means for discounting the crew from the total amount of individuals disembarking.

"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".

SECTION IV. INSTRUCTIONS

Fill out this Cruise Ship Disembarkation Facility Permit Application to the Code Enforcement Officer.

SECTION V.

ACCEPTANCE

The undersigned applicant acknowledges that the applicant and the person on whose behalf a permit is sought are responsible to ensure that the proposed activity complies with all applicable standards of the Municipal Code and Council policies, including but not limited to, Chapter 125 Land Use Ordinance, Chapter 153 Port and Harbor, and Chapter ____ Cruise Ship Disembarkation.

1. By accepting this permit, I agree to allow the Code Enforcement Officer, the Harbor Master or their respective designees to be present on the permitted site during disembarkation of cruise ships for the purpose of ensuring compliance with this permit and all applicable standards of the Municipal Code.
2. By accepting this permit, I acknowledge that no more than the number of persons approved by a Disembarkation permit are entitled to disembark from any cruise ships on any single day at the permitted site, and I agree to abide by the 1,000-person daily limit. "Persons" shall have the meaning provided by the Cruise Ship Disembarkation Ordinance.
3. This permit shall expire one (1) year after the date of issuance.

By accepting this permit, I agree to comply with all applicable standards of the Municipal Code.

Name _____ Date _____

Signature _____

----- For Office Use Only -----

Disembarkation Facility Permit # _____ Fee: _____

Code Enforcement Officer Date

Harbor Master Date



Town of Bar Harbor
Planning & Code Enforcement

Cruise Ship Disembarkation Permit Application

SECTION I. PROPERTY INFORMATION

Property Address: _____ Map _____ Lot _____

SECTION II. PROPERTY OWNER/APPLICANT INFORMATION

Owner:
Address: _____ City: _____ Zip: _____
Phone number: _____ Email: _____

Applicant: _____
Address: _____ City: _____ Zip: _____
Phone number: _____ Email: _____

NOTE: If not owner, please attach written authorization to apply for permits and/or approvals.

SECTION III. APPLICATION INFORMATION

Cruise Ship Disembarkation Facility Permit #: _____

Date of Disembarkation: _____

I have attached proof that a reservation for anchorage on this date has been approved by the Harbor Master.

Number of Persons to Disembark (<1,000): _____ Number of Cruise Ships _____

"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".

SECTION IV. INSTRUCTIONS

Fill out this Cruise Ship Disembarkation Permit Application along with proof of accepted anchorage reservation to the Code Enforcement Officer.

SECTION V. ACCEPTANCE

The undersigned applicant acknowledges that the applicant and the person on whose behalf a permit is sought are responsible to ensure that the proposed activity complies with all applicable standards of the Municipal Code and Council policies, including but not limited to, Chapter 125 Land Use Ordinance, Chapter 153 Port and Harbor, and Chapter ____ Cruise Ship Disembarkation.

- 1. By accepting this permit, I agree to allow the Code Enforcement Officer, the Harbor Master or their respective designees to be present on the permitted site during disembarkation of cruise ships for the purpose of ensuring compliance with this permit and all applicable standards of the Municipal Code.
- 2. By accepting this permit, I acknowledge that no more than the number of persons approved by a Disembarkation permit are entitled to disembark from any cruise ships on any single day at the permitted site, and I agree to abide by the 1,000-person daily limit. "Persons" shall have the meaning provided by the Cruise Ship Disembarkation Ordinance.
- 3. This permit is only valid for the date of disembarkation listed.

By accepting this permit, I agree to comply with all applicable standards of the Municipal Code.

Name _____ Date _____

Signature _____

----- For Office Use Only -----

Disembarkation Permit # _____ Fee: _____

Date of Disembarkation _____ Persons permitted to disembark _____

Code Enforcement Officer _____

Date _____



Town of Bar Harbor, ME
Tuesday, September 10, 2024

Chapter 125. Land Use

Article XII. Construction and Definitions

§ 125-109. Definitions.

The following terms shall have the following meanings:

ABUTTING

Having a common border with, or being separated from such common border by an alley, easement, street, road, public way or private way.

ACCESS

A means of approach or entry to or exit from property.

ACCESSORY PROJECT

A change to an appendage of a structure that includes signage, awnings, canopies, umbrellas, outdoor displays, lighting, or landscaping.
[Added 11-2-1999]

ACCESSORY STRUCTURE

See "structure."

ACCESSORY USE

See "use."

ACRE

A measure of land containing 43,560 square feet.

ACTIVE RECREATION

See "recreation."

AFFORDABLE HOUSING

Lots/units which may be purchased or rented for occupancy by people with up to 120% of moderate income as established by the State Planning Office or the Hancock County Planning Commission.
[Added 5-2-2005; amended 11-4-2008]

AGGRIEVED PERSON

An owner of land whose property is directly or indirectly affected by the granting or denial of a permit or variance under this chapter; a person whose land abuts land for which a permit or variance has been granted; or any other person or group of persons who have suffered particularized injury as a result of the granting or denial of such permit or variance.
[Amended 11-3-2009]

AGRICULTURAL ACTIVITY

Land clearing, tilling, fertilizing, including spreading and disposal of manure and manure sludge, liming, planting, pesticide application, harvesting of cultivated crops, pasturing of livestock, poultry and other similar or related activities, but not including construction, creation or maintenance of

A transportation facility where passengers embark on or disembark from carriers such as ferries and buses that provide transportation to passengers for hire by land or sea. Passenger terminals typically include some or all of the following: ticket counters, waiting areas, management offices, baggage handling facilities, restroom facilities, visitor center, cruise ship operations. A passenger terminal use on the waterfront may include moorage for cruise ships and/or vessels engaged in transporting passengers for hire. Activities commonly found aboard such vessels, whether moored, docked or under way, that are incidental to the transport of passengers shall be considered part of the passenger terminal use and shall not be treated as separate uses.
 [Added 6-13-2017]

PATIO

A level area adjacent to a dwelling unit constructed of stone, cement or other material, located at ground level, with no railing or other structure above the level of the ground. In all shoreland districts a patio shall be considered a structure.
 [Amended 6-8-2010]

PERFORMANCE GUARANTEE

A financial guarantee to ensure that all improvements, facilities or work required by this chapter, regulations and the approved plans and specifications of a development.

PERFORMANCE STANDARD

A criterion established to control the use of land and structures. The purpose of performance standards is to provide detailed regulations and restrictions by means of minimum criteria which must be met by uses in order to protect neighbors from adverse impacts of adjoining land uses and to protect the general health, safety and welfare of citizens of Bar Harbor.

→ **PERSON**

An individual, corporation, governmental agency, municipality, trust, estate, partnership, association, two or more individuals having a joint or common interest, or other legal entity.
 [Added 11-5-1991]

PERSONAL PROPERTY

Property which is owned, utilized and maintained by an individual or members of his or her residence and acquired in the normal course of living in or maintaining a residence and is not attached to or affixed to the ground or a structure. It does not include merchandise which was purchased for resale or obtained on consignment.

PERSONAL SERVICES

A business which provides services but not goods, such as hairdressers, shoe repair, and the like.

PHOTO SIMULATION

A computer representation of the appearance of a building or scene showing how it currently looks or how it will look after specified activities (i.e., the construction of a building, renovations, landscaping, etc.) have occurred.
 [Added 11-2-1999]

PHOTOVOLTAIC (PV)

A semiconductor-based device that converts light directly into electricity.
 [Added 11-2-2021]

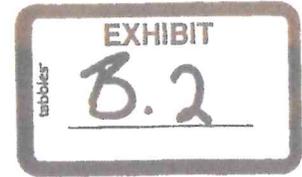
PIER

See "structure, water-related."

PLACE OF WORSHIP

[Added 5-2-2005]

A. A church, synagogue, temple, mosque, or other facility that is used for prayer by persons of similar beliefs;



Town of Bar Harbor, ME
Tuesday, September 10, 2024

Chapter C. Charter

Article III. The Town Council

§ C-10. General powers and duties.

A. The Council shall have the power to:

(1) Appoint:

- (a) The Town Manager for a term not to exceed three years;
- (b) The Town Attorney and an Auditor who shall serve at the will of the Council;
- (c) The members of the Planning Board, Board of Appeals, and such other boards and committees for such terms of office with such powers and duties as are provided for by this Charter, Town ordinances and state statutes.

(2) Remove for cause during the term of office after hearing any person appointed pursuant to the provisions of this Charter except those persons who serve at the will of the Council.

(3) By ordinance create, change and abolish offices, departments and agencies, other than offices, departments and agencies established by this Charter. The Council by resolution may assign additional functions or duties to officers, departments or agencies established by this Charter but may not discontinue or assign to any other office, department or agency any function or duty assigned by this Charter to a particular office, department or agency. The Council may, however, vest in the Town Manager all or part of the duties of any office under this Charter, with the exception of that of the Town Clerk, Town Assessor or Town Attorney.

(4) Convey or authorize the conveyance of real estate acquired by mature tax mortgage liens and the lease or authorization for lease of Town-owned property for a term of not longer than 15 years including any renewal options.

(5) Adopt an annual budget which shall be presented to the Warrant Committee as provided by this Charter, and cause the detailed budget to be printed in the Town Report; provided, however, that the recommendations and comments of the Warrant Committee shall be printed and made available as required by provisions in § C-36 for distribution prior to Town Meeting. At a minimum the detailed budget shall include:

- (a) A budget message from the Town Manager explaining in narrative fashion the revenues, expenditures and fund balances;
- (b) Calculation of the estimated tax rate;
- (c) Budget summary by cost center;
- (d) A narrative description of the Capital Improvement Program; and
- (e) A spreadsheet showing five years of appropriations for the Capital Improvement Program.

- (6) Borrow funds and provide for the execution of notes thereof in anticipation of taxes, said notes to be repaid within the fiscal year in which issued.
 - (7) Provide for an annual audit.
 - (8) Dispose of, by sale or otherwise, surplus Town personal property.
 - (9) Make, adopt, amend and repeal ordinances for any purpose permitted by statute with the exception of those pertaining to zoning except as provided below. In addition to such ordinances, the Council shall have the power to adopt ordinances which:
[Amended 11-3-2020]
 - (a) Adopt or amend an administrative code.
 - (b) Provide for a fine or other penalty or establish a rule or regulation for violation of which a fine or other penalty is imposed.
 - (c) (Reserved)
 - (d) Adopt land use ordinance amendments by supermajority vote as defined in §C-14C(3) when:
 - [1] The land use ordinance change is procedural or minor in that it seeks to correct, modify, or reconcile inconsistencies, contradictions, and errors or to bring the land use ordinance into compliance with state statutes pertaining to municipal zoning; and
 - [2] The land use ordinance change is first recommended to the Planning Board by the Planning Director and upon review and after a public hearing, the Planning Board recommends it to the Town Council by a supermajority vote [as defined in §C-14C(3)].
 - (e) Provide for the compulsory attendance of witnesses, the administering of oaths and the compulsory production of evidence in connection with investigations into the affairs of the Town and the conduct of any Town department (including the School Department), office or agency or in connection with any hearing provided for by this Charter involving the forfeiture of office of any Councilor, Superintending School Committee member or Warrant Committee member, or the dismissal of any Town employee or member of any Town board.
 - (f) Adopt or amend a Code of Ethics, governing all elected and appointed Town officials, including without exception the members of the Town Council, Superintending School Committee and Warrant Committee and their appointees. Any Code of Ethics adopted under this section shall be based on the following principles: that elected officials and their appointees be fair, impartial and responsive to the needs of the people and each other in the performance of their respective functions and duties; that decisions and policy be made in proper channels of the Town's governmental structure; that public office not be used for personal gain; and that members of the Town Council, Superintending School Committee, Warrant Committee and their appointees maintain a standard of conduct that will inspire public confidence in the integrity of the Town's government. Any Code of Ethics adopted under this section shall take precedence over §§ C-53 and C-54 of the Charter, in the event that an interpretational conflict arises in regard to these sections.
 - (10) Apply for grants and accept such grants, provided that no monetary or other obligation not authorized by Town Meeting is entailed or required.
 - (11) Approve proprietary budgets for revenue producing facilities as defined by M.R.S.A. Title 30-A, Chapter 213, the Revenue Producing Municipal Facilities Act.
 - (12) Exercise all other powers of the Town of Bar Harbor not otherwise specifically reserved to the Town Meeting.
- B. Notwithstanding the foregoing, nothing contained herein shall diminish the right of the citizens of the Town of Bar Harbor at a Town Meeting to approve or disapprove acts of the Town Council,

whether such acts be by ordinance or otherwise.

whether such acts be by ordinance or otherwise.



§ C-14. Procedure.

- A. Meetings. The Town Council shall convene within two days following the annual election for purposes of organizing as provided by statute and this Charter.
- B. Rules and journal. The Council shall annually determine its own rules and order of business and shall provide for keeping a record of its proceedings, which shall be kept for public record.

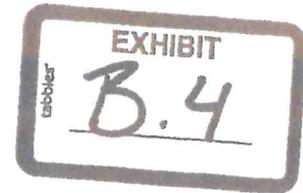
→ C. Voting.

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

(2) Each Councilor in attendance shall vote on all issues and questions presented for vote except when a valid conflict of interest is stated and recognized by a majority vote of the Council. If any Councilor does abstain from a vote other than because of a recognized conflict of interest, he/she shall be considered to have cast a vote with the majority and the record shall so show. [Amended 11-3-2020]

→ (3) Qualifying land use ordinance amendments as described in § C-10A(9)(d) must be recommended to the Town Council by a supermajority of the full membership of the Planning Board and must be approved by a supermajority of the full membership of the Town Council. [Added 11-3-2020]

(a) For the purpose of this Charter, "supermajority" shall be defined as 2/3 of the full membership of the body rounded up to the nearest whole number. (e.g., four in a five-member body and five in a seven-member body). In the case of a body of three members or less a supermajority shall be defined as a unanimous vote.



Town of Bar Harbor, ME
Tuesday, September 10, 2024

Chapter 125. Land Use

Article I. General Provisions

§ 125-9. Amendment.

[Amended 11-5-1991; 5-4-1992; 5-4-1998; 11-2-2010; 11-8-2011]

There shall be four methods for proposing amendments to Bar Harbor's Land Use Ordinance, as follows:

A. Amendments.

- (1) Citizen petition. Upon the written petition of a number of registered voters equal to at least 10% of the number of votes cast in the Town at the last gubernatorial election, but in no case fewer than 10 registered voters, the Town Council shall automatically insert in the warrant for a regular or special Town Meeting an article to amend this chapter.
- (2) Property owner. A property owner may submit a written request to the Planning Board to consider an amendment and the Planning Board shall consider this request at a public hearing. Notice of the public hearing shall be provided as set forth in § 125-9C below.
 - (a) The Planning Board, may, upon a written request from a property owner, submit a written request to the Town Council to insert in the warrant for a regular Town Meeting an article to amend this chapter.
 - (b) Such request shall contain at a minimum the following materials:
 - [1] An application form from the Planning Department;
 - [2] A map showing the existing neighborhood districts for the subject property and for properties within 600 feet;
 - [3] A map showing the existing land uses at the time of application for the above-mentioned subject property and area;
 - [4] A narrative and evidence of how the requested change meets the policies and strategies in the most recently adopted Comprehensive Plan (including the Land Use Plan);
 - [5] Other information necessary to illustrate the need for a change in the district or other standards in this chapter.
 - (c) Within 30 days of submission of the written request, together with fees and materials, the Planning Board shall meet to determine if the application is complete for their review. A public hearing will be held within 45 days of the Planning Board finding the application complete.
 - (d) Notification to abutters within 600 feet of the subject property and a notice to a newspaper of general circulation in the Town of Bar Harbor shall occur at least 10 days prior to the hearing.

- (e) At the public hearing, the Planning Board shall hear the request, accept public comment on the request and deliberate to determine which of the following courses of action they will perform:
 - [1] Recommend to the Town Council the written request as submitted as per § 125-9A.
 - [2] Recommend with amendments or conditions that would bring the proposal into conformance with the most recently adopted Comprehensive Plan.
 - [3] Take no action.
 - (f) If the Planning Board takes no action on the written request, the subject property owner may seek other alternatives outlined in § 125-9A. Planning Board action under § 125-9 is not the subject of appeal under § 125-103.
 - (g) The Planning Board shall submit its decision to the Town Council within 30 days of the close of the public hearing.
- (3) Planning Board. The Planning Board may propose an amendment and the Planning Board shall consider this amendment at a public hearing. Notice of the public hearing shall be provided as set forth in § 125-9C below.
- (4) Town Council. The Town Council may submit a written request to the Planning Board to consider an amendment, and the Planning Board shall consider this request at a public hearing. Notice of the public hearing shall be provided as set forth in § 125-9C below.
- B. Final public hearing. Following the conclusion of the Planning Board's public hearings, the Town Council shall hold a public hearing to accept or reject final amendments for the warrant. Notice of the public hearing shall be provided as set forth in § 125-9C below.
- C. Notice requirements.
- (1) Notice of the hearing shall be posted in the municipal office at least 13 days prior to such hearing.
 - (2) Notice of the hearing shall be published at least two times in a newspaper that complies with 1 M.R.S.A. § 601 and that has a general circulation in the municipality. The date of the first publication must be at least 12 days before the hearing, and the date of the second publication must be at least seven days before the hearing.
 - (3) In addition to the notice required by the preceding two subsections, when an amendment is proposed to the existing Land Use Ordinance or the Neighborhood Districts Map of Bar Harbor that, within a geographically specific portion of the Town, will have the effect of either prohibiting all industrial, commercial or retail uses where any of such uses is permitted, or permitting such uses where any of such uses is prohibited, the following is required:
 - (a) The notice must contain a copy of the map indicating the portion of the Town affected by the proposed amendment.
 - (b) For each parcel within the Town that is in or abutting the portion of the Town affected by the proposed amendment, the notice must be mailed by first-class mail at least 13 days prior to the public hearing to the last-known address of the person to whom property tax on each parcel is assessed. The municipal officers shall prepare and file with the Town Clerk a written certificate indicating those persons to whom the notice was mailed and at what addresses, when it was mailed, by whom it was mailed and from what location it was mailed. This certificate shall constitute prima facie evidence that notice was sent to those persons named in the certificate. Notice is not required under this subsection for any type of zoning ordinance adopted under the laws governing growth management contained in Chapter 187, Subchapter II of 30-A M.R.S.A., as amended, or the laws governing shoreland zoning contained in Title 38, Chapter 3, Subchapter I, Article 2-B, as amended.

[1]

[1] *Editor's Note: See 30-A M.R.S.A. § 4312 et seq. and 38 M.R.S.A. § 435 et seq., respectively.*

- D. Following a hearing conducted pursuant to the preceding subsection, the Planning Board shall, by majority vote, make a recommendation as to whether the proposed amendment ought to be adopted or ought not to be adopted. Such recommendation shall be printed on the warrant.
- E. Such amendment may be adopted by a majority vote at a duly constituted Town Meeting.
[Amended 11-8-2022]
- F. Copies of amendments to this chapter related to shoreland regulation, attested and signed by the Town Clerk, shall be submitted to the Commissioner of the Department of Environmental Protection following adoption by the Town Meeting and shall not be effective unless approved by the Commissioner. If the Commissioner fails to act on any amendment within 45 days of his/her receipt of the amendment, the amendment is automatically approved. Any application for a permit submitted to the Town within the forty-five-day period shall be governed by the terms of the amendment, if such amendment is approved by the Commissioner.

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



Sarah Gilbert
Interim Town Manager
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

Councilors:

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 18th 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
Municipal Building
93 Cottage Street
Bar Harbor, ME 04069



Sarah Gilbert
Interim Town Manager
sgilbert@barharbormaine.com

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."



UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

ASSOCIATION TO PRESERVE)
AND PROTECT LOCAL)
LIVELIHOODS, B.H. PIERS, L.L.C.,)
GOLDEN ANCHOR L.C.,)
B.H.W.W., L.L.C., DELRAY)
EXPLORER HULL 495 LLC,)
DELRAY EXPLORER HULL 493)
LLC, and ACADIA EXPLORER 492)
LLC,)

Plaintiffs,)

No. 1:22-cv-00416-LEW

PENOBSCOT BAY AND RIVER)
PILOTS ASSOCIATION,)

Plaintiff-Intervenor,)

v.)

TOWN OF BAR HARBOR,)

Defendant,)

CHARLES SIDMAN,)

Defendant-Intervenor)

AMENDED¹ DECISION AND ORDER

In this action, a group of Bar Harbor businesses and business owners who seek to preserve commercial relationships with cruise lines and their passengers challenge a local exercise of popular sovereignty by the people of Bar Harbor who seek to curtail cruise ship

¹ This Amended Decision and Order exclusively corrects typographical errors.

visitation to maintain a certain quality of local life. The resulting controversy is of constitutional dimension and tenders a host of questions, but chiefly asks whether a municipality with privately owned port facilities can restrain interstate cruise ship commerce for local welfare ends or must make way and permit whatever level of commerce the local market can support.

The matter proceeded to a bench trial following the Court's issuance of an expedited schedule and Plaintiffs' withdrawal of a motion for preliminary injunction. The Town of Bar Harbor has agreed not to enforce the challenged land use ordinance pending the outcome of litigation. Following a three-day trial in July 2023, the parties submitted closing arguments in writing. Based on my consideration of the evidentiary record, the arguments of counsel, and the law, judgment will enter in favor of the Defendant Town of Bar Harbor on every count but one, and even as to that one count, judgment will enter partially for the Town, as only limited declaratory relief is awarded in recognition of a partial preemption problem, without affording Plaintiffs and Plaintiff-Intervenor the relief they are seeking.

FINDINGS

The Parties

The Plaintiffs in this action are the Association to Preserve and Protect Local Livelihoods ("APPLL"); B.H. Piers, L.L.C.; Golden Anchor, L.C., doing business as Harborside Hotel; BHOW LLC, doing business as Bar Harbor Whale Watch; Delray Explorer Hull 495 LLC; Delray Explorer Hull 493 LLC; and Acadia Explorer 492, LLC.

APPLL is a business league comprised of members who own or operate businesses in Bar Harbor and seek to capitalize on the economic opportunities associated with the provision of goods and services to cruise ship passengers. APPLL members include owners and employees of local restaurants, retail stores, and tour-related businesses.

The Delray Explorer Hulls and the Acadia Explorer are tender vessels owned by similarly named limited liability companies. The vessels carry cruise ship passengers from cruise ships anchored in Frenchman Bay to Bar Harbor. B.H. Piers and Golden Anchor own piers in Bar Harbor where the tender vessels disembark and embark cruise ship passengers. BH Piers operates the pier located at 1 West Street, known as Harbor Place. Golden Anchor operates the pier located at 55 West Street. The pier owners have received approval from the Coast Guard for the use of the piers for this purpose.

BHWW is a limited liability company doing business as Bar Harbor Whale Watch Company. BHWW coordinates whale watching tours to cater to the cruise lines' passengers.

The Penobscot Bay and River Pilots Association appears in this matter as Intervenor-Plaintiff. The Pilots Association is a private corporation that provides pilotage services in a region that extends 75 miles from Boothbay Harbor to Frenchman Bay and 75 miles from the west pilot station on Penobscot Bay to the Penobscot River Port of Brewer. By law, foreign-flagged and certain domestic cruise ships must be piloted within Frenchman Bay by a local pilot who is familiar with the Bay and its channels. Pilots board cruise ships (and other large vessels) eight to twelve miles offshore and direct navigation to anchorage grounds in Frenchman Bay (or to other destinations in Penobscot Bay). The

anchorage grounds in Frenchman Bay are roughly two miles from the Bar Harbor waterfront and piers. The Pilots Association's pilotage operations are regulated by the Maine Pilotage Commission. In response to the expansion of cruise vessel traffic, the Pilots Association has invested in vessels and has expanded its employment of pilots. In particular, the Pilots Association now has a dedicated crew and purpose-built vessel to handle the piloting demands associated with cruise vessel traffic in Frenchman Bay. Fees for piloting services are established by law and are a function of the size of the vessel. Ex. 39. The larger the ship, the greater the fee.

The Defendant is the Town of Bar Harbor. Bar Harbor is, among other things, a Class A port of entry for foreign-flagged cruise vessels reentering the United States and a popular port-of-call on North Atlantic cruise ship itineraries. Bar Harbor is governed by a Town Council. The Bar Harbor Town Council has sponsored a cruise ship committee for more than a dozen years, but recently disbanded the committee. The Town of Bar Harbor 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.

One of the residents of Bar Harbor is Charles Sidman, Intervenor Defendant. Mr. Sidman owns an art gallery in town. Mr. Sidman was a primary proponent and co-author of the initiative that resulted in the land use ordinance challenged in this case.

Non-Parties of Note

Among the cruise lines that visit Bar Harbor are several lines owning foreign-flagged cruise vessels. When they call, these vessels typically spend about nine hours at

anchorage, enough time for passengers to clear customs and participate in a shore visit of reasonable duration.

The State of Maine has two other Class A ports of entry, Eastport and Portland. Neither is as proximate to Acadia National Park as Bar Harbor. If a cruise ship called in Eastport or Portland, travel by motor coach to reach and return from Acadia National Park would consume much of the day.

The Maine Office of Tourism is a marketing agency for the State of Maine. CruiseMaine, part of the Maine Office of Tourism, promotes cruise communities in Maine and Maine-based cruise ship tourism in general. CruiseMaine engages with cruise lines and the cruise industry trade association and sometimes functions as a municipality-to-cruise-line liaison. The Maine Office of Tourism and CruiseMaine perceive cruise travel as a positive type of tourism for Maine because it introduces many first-time visitors to Maine from a broader geographical region as compared to visitors who travel by land, most of whom are from east coast states and Canada. CruiseMaine maintains a software platform called the PortCall system, <https://maine.portcall.com>. Through the PortCall system, CruiseMaine posts real-time data related to vessel movements and port operations. State funding supports CruiseMaine.

Carnival, Royal Caribbean, and Norwegian are among the cruise line companies that are active in New England and market cruise itineraries that feature Bar Harbor as a marquee port. These three cruise lines are noted because they operate foreign-flagged vessels and operate some of the largest cruise vessels that call in Bar Harbor and elsewhere

along the Maine coast.² The foreign-flagged lines see Bar Harbor as the most convenient and desirable port of entry when coming from foreign waters (such as Canadian waters).

Background Facts

The Town of Bar Harbor lies on the shores of Frenchman Bay in the North Atlantic on the eastern side of Mount Desert Island. The Town is nestled in an area of great scenic beauty abutting Acadia National Park, a national asset that the Park Service refers to as the Crown Jewel of the North Atlantic Coast. Given Bar Harbor and Acadia National Park's placement and prominence among other North Atlantic attractions accessible by sea, the cruise ship industry regards Bar Harbor as a marquee destination, the kind which appeals to customers and around which an appealing cruise itinerary can be built.

Although Bar Harbor had long experienced healthy tourist seasons, in the 2000s there was room for growth. Additionally, the season was limited to the period between Memorial Day and Labor Day. Local businesses and their representatives on the Town Council hoped to expand the tourist season and saw cruise tourism as one means of doing so.

In 2006, the Maine Department of Transportation, the Maine Port Authority, and the Town of Bar Harbor joined in a task force to commission a cruise tourism destination management plan for Bar Harbor. The authors of the management plan proposed architectural and engineering improvements to develop the Town to facilitate expanded

² MSC Cruises is a fourth cruise line that fits the description. The executive director of CruiseMaine characterized the domestic cruise lines as "smaller." In addition to Bar Harbor, Eastport, Portland, and Rockland have ports suited to larger foreign vessels. Only Bar Harbor and Portland have significant traffic involving foreign cruise vessels seeking a Class A port of entry, with Bar Harbor and Portland having roughly 60% and 40%, respectively.

cruise ship passenger access, chiefly by means of improved pier facilities. Ex. 260. In 2008, the Town accepted a recommendation from the task force to embody a cruise ship committee and establish a policy of daily cruise passenger caps of 3,500 passengers for the peak-tourism, summer months of July and August, and 5,500 passengers for the shoulder-season months of May, June, September, October, and November. The cruise ship lines were receptive to the invitation and amenable to the passenger caps, and cruise ships began to call in Frenchman Bay in ever-increasing numbers. Local enterprise and investment gradually expanded to meet the increased demand for passenger tendering and other local services.

The Town established its daily passenger caps largely by reference to the lower berth capacities of existing cruise vessels. The caps were understood to be “voluntary” in that they were mutually acceptable to the then-existing Council and the cruise lines. The Council and the cruise line industry were able to agree that cruise line passengers generally would not be well served in Bar Harbor if two or more cruise ships each with an especially large lower berth capacity were to disembark on the same day, even during the quieter shoulder season. They also recognized that it was sensible to lower the cap during Bar Harbor’s peak summer season, given the competing demand for local services generated by peak, land-based tourism. The progenitors of Bar Harbor’s cruise ship management plan also understood that cruise ship visitations impose certain municipal burdens,³

³ Bar Harbor maintains a per-passenger fee structure for cruise ship visits. Ex. 29. The Town has used the fees generated in this manner (roughly \$1 million per year) to fund town salaries and enlarge its police force, among other things. The increase in personnel, particularly law enforcement, is itself indicative of the localized impacts of increased traffic.

including congestion, that can detract from the character of the Town and reduce the quality of life for residents. To manage the cap, the Town instituted a reservation system overseen by its harbormaster. When the new reservation system was first instituted, cruise ship visits were not yet a daily phenomenon, despite the reference to “daily” caps.

Over the past 15 years, Bar Harbor has experienced a steady growth in its tourist season, due chiefly to its proximity to Acadia National Park. In 2021, Acadia National Park attracted roughly four million visitors. For many of these visitors, a trip to Acadia includes a visit to downtown Bar Harbor. Meanwhile, more and larger cruise ships anchored in Frenchman Bay and cruise ship passenger visitation levels started to approach or meet the established daily caps on an ever-increasing and consistent basis. Although cruise ship passengers account for a limited portion of the total number of annual visitors to greater Bar Harbor and Mount Desert Island, they arrive at a destination that is already blessed and burdened by land-based tourism and at a waterfront of rather limited area. Cruise ship passenger traffic also has a pronounced impact on and near the waterfront, including the eastern portion of West Street and the northern portion of Main Street.

Over the same period of years, the process of tendering passengers to shore has become a more efficient operation. In the early years, the Tender Parties (i.e., the pier owners, tender-vessel LLCs, and BHWW) would augment the cruise lines’ tender operations so that passengers came ashore in a variety of ships, including whale watch ships. In 2017, the Tender Parties designed and built three vessels dedicated to tendering cruise ship passengers. They also invested in barges to facilitate the movement of passengers from the cruise ships to the tender vessels. While these developments are

commendable from the standpoint of market efficiency, part of the transactional cost is that the demand for tender operations means that cruise ship tenders have become the dominant harbor traffic during the expanded cruising season.⁴

For some, the expansion of tourism resulted in a return on planning and investment. For others, it resulted in a growing disaffection with municipal life. Increasingly, town leaders heard from constituents who were experiencing this disaffection.⁵ Then came COVID. During the visitation-hiatus brought about by COVID quarantine orders—which restrictions impacted both land and sea visitation to Bar Harbor and Acadia National Park—some residents of Bar Harbor were reminded that there are measures of a municipality’s success other than its volume of business.

In January of 2021, Bar Harbor commissioned a marketing research firm to perform a quantitative study and write a report concerning local opinions.⁶ Ex. 323. The survey

⁴ Each of the three tender vessels is licensed to hold 149 passengers and they steadily rotate into and out of the harbor in roughly 30-minute intervals, primarily disembarking passengers onto the piers mid-morning and embarking them again in the afternoon, though passengers move back and forth throughout the day. Consequently, there are times of day that involve more intense movement of people in either direction, not unlike the tide, albeit more regular in terms of timing. Foreign-flagged vessels, for example, arrive mid-morning and spend on average nine hours at anchorage. Their passengers spend on average six to seven hours on land in various locations, including downtown Bar Harbor. In the morning, passengers congregate near the piers and waterfront, including at motor coach staging areas, while some passengers walk into the Town. Passengers may be in any number of locations during the day, such as on a whale watch tour or an Acadia bus tour, or at a local restaurant or business. In the afternoon, passengers (and their assorted conveyances) again congregate near the piers to obtain passage back to their cruise ship.

⁵ Town Council Chair Valerie Peacock testified that in 2020 and continuing residents of Bar Harbor have expressed strong feelings of angst over the perceived negative impact of the cruise ship industry, but also concern over the expansion of tourism in general. July 13 Tr. at 112–13, 121–25.

⁶ Pan Atlantic Research’s study surveyed year-round and seasonal residents, property owners, and business owners of Bar Harbor to examine what they thought about sea-based tourism. *See generally* Ex. 323. Overcrowding, too many ships/tourists, and environmental concerns ranked among the most popular answers to Bar Harbor’s greatest challenges in managing cruise ship tourism. Ex. 323 at 29; *see also* July 13 Tr. at 212:14–214:9 (describing the increased street traffic and congestion at the waterfront when cruise ships arrive).

had a healthy response rate. Many respondents voiced concern for the congestion⁷ caused by cruise ship visits and ranked cruise ship tourism a net negative for the Town. The growing concern over popular sentiment was also acknowledged by the cruise industry. In July of 2021, the president of the Cruise Lines International Association proposed new passenger caps as part of a “negotiation” with the Town. The proposal, accepted by the Town Council, involved a daily passenger reduction for the shoulder season⁸ and a new monthly cap of 65,000 visitors specifically to address concerns of capacity. Although public pressure was growing, the Bar Harbor Town Council, ultimately, was not then constituted to provide the pressure relief that many citizens hoped for.⁹

On February 15, 2022, the Council approved the formation and membership of a new working group to explore the modification of the daily passenger limits for the 2023 and 2024 cruise seasons.¹⁰ On August 16, 2022, the Town Council accepted the task force’s recommendation to enter into a memorandum of agreement (“MOA”) with each

⁷ Congestion is not exclusively a matter of pedestrian congestion on sidewalks. Congestion includes vehicular congestion and overcrowding of stores, parks, and other public spaces.

⁸ By 2019, it was a misnomer to describe the months of September and October as a “shoulder season” when describing the volume of cruise ship passengers coming ashore in Bar Harbor. In fact, over 60 percent of Bar Harbor’s annual cruise ship passenger visits occur in September and October. September and October are also the months that see the most visitation by the very largest vessels (>3,500 passengers). *See, e.g.*, Ex. 165. According to CruiseMaine’s director, the number of cruise visitors entering Bar Harbor in September and October is roughly equivalent to the number of tourists on town streets in June and July.

⁹ At trial, counsel for Plaintiffs worried that testimony concerning public disaffection and council activities (much of Chair Peacock’s testimony) was an attempt to construct a false legislative history in support of the Ordinance. I have not interpreted the testimony in that fashion. Rather, the testimony related some of the contemporaneous local history that set the stage for the success of the Initiative.

¹⁰ Separately, the Bar Harbor Cruise Ship Committee was already corresponding with the Cruise Lines International Association to explore ways of reducing cruise visitation. Ex. 214.

cruise line and directed the preparation of a form MOA for circulation.¹¹ The resulting MOA withdrew the months of April and November from the Town's reservation system, lowered daily passenger caps from 5,500 to 3,800 for the months of May, June, September, and October (with a +200-passenger leeway), and instituted a new monthly cap of 65,000. In September and October of 2022, the Town entered into MOAs with American Cruise Lines, Disney Cruise Lines, Holland America Line, Hurtigruten Expeditions, Norwegian Cruise Line, Pearl Seas Cruises, Princess Cruises, Rogay Caribbean Cruises, Seabourn Cruise Line, Viking Cruises, and Windstar Cruises Marshall Islands.

While the Town Council publicly pursued its voluntary measures, a group of local residents formed a petitioning committee to advance a citizens' initiative that would achieve more significant reductions by mandatory means. Their initiative proposed amending the Bar Harbor Code to require a permit to disembark cruise ship passengers "on, over, or across any property located within the Town of Bar Harbor." Ex. 243A. It also specified that "no more than 1,000 passengers, in the aggregate, may disembark on a single calendar day." *Id.* The Initiative called for a \$100 minimum penalty per excess unauthorized disembarkation, which would be assessed against the property owners (the Pier Operators). The Initiative states that the harbormaster shall develop rules and regulations to establish a reservation system for disembarkation, a mechanism for counting and tracking disembarkations, a procedure for reporting violations, and "any other

¹¹ Two weeks prior, on August 2, 2022, the Town Council went into executive session to discuss the citizens' petition that would become the Ordinance but was, at that time, still in need of voter approval. Exs. 207-210. The Town Council also conducted a workshop on that date to discuss the future of cruise tourism in Bar Harbor. Among other matters under consideration were cautionary litigation warnings from the Cruise Lines International Association. Ex. 211.

provisions” deemed necessary. *Id.* By the time the Initiative went to vote, the citizens’ group had revised it by substituting the word “persons” for “passengers.” Ex. 243B. They did this based on a group member’s observation that cruise ships carry a great many crewmembers as well as passengers. The group decided it would be best to use the term persons to capture both passengers and crew. Ex. 230.

The Initiative included a lengthy statement of purpose focusing on quality of life, but also expressing concern for public safety and the commercial interests of businesses other than those seeking the patronage of cruise ship passengers.

Concerning quality of life, the Initiative’s sponsors wrote:

Underlying this proposed amendment is the fact that, in recent years, the Town has been a popular port of call for cruise ships of varying sizes, from which passengers disembark via tender boats that offload passengers directly into the downtown area. The large numbers of passengers have overwhelmed the downtown area, resulting in excessive congestion and traffic on public streets and sidewalks, frequent overcrowding of parks and other public spaces, and inundating local amenities and attractions, all of which result in a diminished quality of life for Town residents.

Ex. 243A. Concerning public safety and other business interests, the sponsors wrote:

The unchecked and continued influx of disembarking cruise ship passengers in the downtown area jeopardizes the Town’s ability to deliver municipal services to Town residents and visitors (for example, cruise ship passengers), including the provision of public safety services (police and fire), emergency medical services (EMS), in-patient and out-patient services at local hospitals, pandemic control measures, and public sanitation services, and also impacts the ability of local shops, restaurants, and other businesses to attract and serve customers.

Id. The sponsors then summarized:

A town-wide survey was conducted in 2021, showing that a majority of respondents believe that the volume of disembarking cruise ship passengers is too high and has a negative impact on the Town and the health, safety and welfare of its residents.

Id.

The Initiative was listed as an article on the warrant for Bar Harbor's November 8, 2022, special town meeting. A majority of the registered voters who voted supported the article. Bar Harbor now has a land use ordinance that establishes a disembarkation cap of 1,000 persons per day.

During trial, Mr. Sidman testified that the 1,000-person cap was not the product of "a rigorously defensible finding or study or calculation." July 13 Tr. at 312:20–21. The group proposed various caps, some higher, but ultimately arrived at 1,000 persons. In communication with other members of his group, Mr. Sidman expressed a preference for smaller cruise ships because the passengers on smaller cruise ships tend to be more well-to-do. He also expressed a dislike of "the biggies," meaning the larger cruise ships.

Subsequent Rulemaking

A variety of details remain for purposes of sorting out the best approach to implementing the Ordinance. These include proposed rulemaking to exclude crew from the 1,000-person limit (for reasons that will be explained shortly), determining how best to monitor passenger volume, and determining how to proceed in the event the limit is disregarded by the Pier Owners. *See, e.g.*, Exs. 66, 204. However, at present implementation and rulemaking are suspended pending this immediate facial challenge to the Ordinance.

Findings Concerning the Initiative's Stated Purposes

To the extent the Initiative expresses concern for public safety due to congestion located anywhere other than the waterfront, West Street and lower Main Street, there is no

empirical data to enable a fact finder to allocate responsibility for a degradation in overall municipal public safety between cruise and land-based tourism. But at the waterfront, the press of cruise ship passengers is sufficient to raise safety concerns. Indeed, the initiative sponsors' stated concern for public safety is echoed by the cruise industry. Ex. 32 §§ 5.3, 5.4. However, at least to date there does not appear to be an incident illustrating any past failure in the delivery of public services occasioned by passenger congestion at the waterfront.

Where the stated purposes have greater significance is in regard to congestion and all that congestion entails, such as overtaxed public facilities, long lines, crowded sidewalks and businesses, slowed traffic, and the like. To be fair, some days with pronounced congestion in Bar Harbor may occur when a cruise ship is not at anchorage. Nighttime congestion may be particularly bad on some evenings, despite the absence of cruise ship passengers. But the idea proposed by Plaintiffs and Plaintiff-Intervenor that cruise ship traffic has a negligible impact on local conditions is disingenuous. What video evidence was presented by Plaintiffs or Plaintiff-Intervenor was more in the nature of pro-cruise marketing material that was not representative of the daily impact of cruise-related visitation and, instead, depicted quieter moments on quieter days.

It is not the fault of cruise ship passengers that the area is congested; it simply is the reality of conditions existing on the ground. Cruise ship passengers come ashore in an area of limited space nestled between the Public Pier and Harborside Hotel. One of the piers over which cruise ship passengers travel sits at the east end the harbor, adjacent to the Public Pier, near the juncture of Main Street and West Street. The other pier sits at the

west end of the harbor. Between them is a short stretch of commercialized waterfront along West Street. The passengers' impact on the relatively confined waterfront area is marked,¹² though their spillover impact on the Town more widely is best described as cumulative. But even further up Main Street and in public areas the impact is real and tangible to locals who visit the downtown.

As attested to by witnesses Dr. Bill Horner, Nathan Young, and Seth Libby, the press of people in the downtown intensifies on cruise ship days. Dr. Horner described it as a dramatic growth in the press of people with a tremendous amount of traffic, particularly in the waterfront area. Mr. Young described sidewalks busy enough that he prefers to walk in the street when he has to go downtown on a cruise ship day. Mr. Libby described the scene similarly, stating that cruise ship visits produce greater crowding. The witnesses also testified that they avoid the downtown on cruise ship days due to the extent of the congestion. Horner, Libby, and Young all testified that they voted in favor of the initiative because they felt that elected officials had failed to act in a timely or meaningful manner to curtail the impact of cruise ship visits. I find that these witnesses provided a fair and accurate assessment of the impact of cruise ship visits in terms of both the intensification of congestion and the undesirability of a trip downtown for many residents on "cruise ship days," which increasingly means most days of the cruise ship season.¹³

¹² See, e.g., Ex. 32 § 5.3. Congestion is bad enough that the Cruise Line Industry Association has proposed that Bar Harbor give over to cruise passenger traffic most of the public pier as well. *Id.* at §§ 5.3, 5.8. This would effectively give over the vast majority of Bar Harbor's waterfront to the primary function of facilitating cruise ship passenger arrival and departure during the cruising season.

¹³ Plaintiffs and Plaintiff-Intervenor offered the testimony of Professor Todd Gabe, Ph.D., of the University of Maine, who studied congestion in Bar Harbor's tourist district. One study occurred at the tail end of August and essentially concluded that allowing 680 *additional* cruise ship passengers (i.e., more than the

Congestion in downtown Bar Harbor is a seasonal fact of life, but it is empirically exacerbated by the regular morning and afternoon pulse of cruise ship passengers and the tour buses and other vehicles¹⁴ that arrive to cater to them. In addition, fall congestion is largely a function of cruise ship visitation, resulting in an undeniable change to the annual rhythm of municipal life. Cruise ship passenger visitations may well be viewed by rational voters as indulgent and burdensome surplusage in an already taxed ecosystem. In this sense, the initiative sponsors' stated concern for generalized welfare and quality-of-life considerations is neither unsubstantiated nor unrelated to the unique congestion problem associated with high-berth cruise tourism, let alone arbitrary and irrational.¹⁵

Findings Concerning the Ordinance's Impacts

Most of the cruise lines that schedule visits to Bar Harbor plan visits in cruise ships having a lower berth capacity in excess of 1,000. Only 27 of the 134 ships scheduled to make calls in the 2023 season would be able to disembark their entire complement of passengers without exceeding the cap. It appears unlikely that a cruise line will schedule

daily 3,500 passenger cap for August) would result in only a negligible *further* experience of congestion in a town already impacted by land-based tourism and the baseline 3,500 cruise ship passengers. Ex. 319 at 2. Professor Gabe also spent a number of days walking about Bar Harbor and recording his subjective experience at various times and locations. About half of the walks he took were "at times early in the morning, during months outside the peak tourism seasons and in inclement weather, or at places located on the outskirts of the tourism district." Ex. 319 at 6. I did not find Professor Gabe's testimony or reports to be helpful in terms of achieving whatever finding Plaintiffs and Plaintiff-Intervenor intended me to draw.

¹⁴ See, e.g., Ex. 12A; Ex. 32 § 4.2. In addition to tour buses, there are vans, minibuses, motor coaches, taxis, and bike tours. While the pulses of congestion are most keen in the mid-morning and afternoon, there is a greater mid-day press as well, which the restaurateur members of APPLL seek to capitalize on.

¹⁵ Plaintiffs insist that the Town of Bar Harbor must prove that the Ordinance can be based on a finding that the one-thousand-and-first passenger disembarked and every passenger who follows is somehow a "noxious" or "toxic" threat to the well-being of the Town. See, e.g., Pls.' Reply Br. at 6, 16, 20, 34. I do not believe that is the test. The Ordinance is obviously designed to draw a line between levels of impact occasioned by the berth capacities of cruise ships, not the relative innocuousness or noxiousness of individuals.

a port call for purposes of a shore visit if it cannot disembark its ship's entire complement of passengers on a single day. Consequently, in terms of the volume of visitors disembarking from cruise ships, the likely avoidance of the large vessels will reduce passenger visitation volume by a significant percentage, likely north of 80 and possibly as high as 90 percent (in the short term) compared with the peak numbers experienced in 2022 and 2023.

Cruise lines with large ships will, necessarily, adjust their itineraries and reroute high-berth ships to other ports. Plaintiffs would likely feel a financial impact occasioned by reduced cruise passenger patronage. The pier and tender boat operators will likely lose fees, the APPL members will likely experience a reduction in business and will perhaps close during the shoulder season or retain fewer employees in those months, and the Pilots Association will have decisions to make related to maintaining personnel, vessels, and equipment without the revenue generated by regular piloting of the largest cruise ships into and out of Frenchman Bay.

Because no ecosystem is static, presumably some cruise lines will adjust practices to maximize utilization of the new caps. However, the record does not contain evidence that would allow for a reliable calculation on that score, nor would I expect it to.¹⁶ There is no evidence to suggest, for example, that the cruise lines with the smaller ships have

¹⁶ The cruise industry stated in 2019 that it "is poised to continue its overall expansion, adding new ships faster than retiring them." Ex. 32 § 6. "The demographics of the passengers seeking cruises in a given area will largely dictate the size and amenities of vessels. Vessels should be considered moveable high-value assets for generating shareholder profits. To this end, cruise companies will evaluate the yield achievable by a ship assignment in a given market." *Id.* Conceivably, if, as the cruise lines evidently fear, more municipalities impose capacity restrictions, then certain cruise lines will reconsider their decision to focus on maximization of economies of scale in cruise ship design.

either a sufficient number of ships or that their cruises are in sufficient demand to approach the caps on a regular daily basis. Even if visitation is eventually maximized under the Ordinance, the overall number of cruise ship passenger visits would be significantly less than the level of visitation experienced in 2022 and 2023 and less than a third of the level authorized under the recent MOAs.

DISCUSSION

Plaintiffs allege in their Complaint (ECF No. 1) that Bar Harbor's new Ordinance is preempted by operation of the United States Constitution's Supremacy Clause (Count 1), violates the Commerce Clause (Count 2), and offends "substantive due process" (Count 3). Plaintiff-Intervenors similarly allege in their Complaint-in-Intervention (ECF No. 43) that the ordinance violates the Supremacy Clause (Count 1) and the Commerce Clause (Count 2), but additionally allege that the ordinance is preempted under the Maine Constitution based on alleged conflict with Maine's statutory pilotage system (Count 3) and its statutory economic and community development program (Count 4).

I address the Maine Constitution first before turning to the federal claims.

A. The Maine Constitution

The Maine Constitution affords municipalities home rule authority. "The inhabitants of any municipality shall have the power to alter and amend their charters on all matters, not prohibited by Constitution or general law, which are local and municipal in character. The Legislature shall prescribe the procedure by which the municipality may so act." Me. Const. art. VIII, pt. 2, § 1. Home rule authority has been conferred on Maine municipalities by the Maine Legislature to the maximum extent of the Legislature's power

to grant it, excepting only home rule authority that is elsewhere denied expressly or by clear implication in Maine law, *see* 30-A M.R.S. § 3001, or where “the municipal ordinance in question would frustrate the purpose of any state law,” *id.* § 3001(3). When the exercise of home rule is challenged, the municipal power authorized under Maine law is to be “liberally construed to effect its purposes” and courts must apply a “rebuttable presumption that any ordinance . . . is a valid exercise of a municipality’s home rule authority.” *Id.* § 3001(1), (2).

The Maine Constitution also extends to each Maine municipality the authority to provide for their electors to exercise “the direct initiative . . . in regard to its municipal affairs.” Me. Const. art IV, pt. 3, § 21. The authority of municipal electors (i.e., voters) to legislate by means of a direct initiative is coextensive with the authority of the municipality to exert its home rule authority. *Portland Reg’l Chamber of Commerce v. City of Portland*, 253 A.3d 586, 592–93 (Me. 2021). It was thus an exercise of home rule authority when the petition committee circulated the initiative that resulted in Bar Harbor’s challenged Ordinance.

Plaintiff-Intervenor does not contend that the petition process and resulting initiative exceeded any state or municipal law or rule insofar as the Ordinance’s enactment is concerned. Nor does it contend that the initiative is not an exercise of home rule authority involving municipal affairs. Instead, Plaintiff-Intervenor contends that the Ordinance prevents the accomplishment of state priorities articulated in state laws respecting the establishment of a system of pilotage and a program of economic and community development. Challenges involving the “implied” prohibition “must be evaluated on a

case-by-case basis by examining the language of the ordinance and any statutes enacted by the Legislature.” *Id.* at 593.

In Maine Revised Statutes Title 38 the Maine Legislature has declared a policy and purpose “to provide for a system of state pilotage in order to provide maximum safety from the dangers of navigation,” “to maintain a state pilotage system devoted to the preservation and protection of lives, property, the environment and vessels,” and “to insure the availability of pilots” 38 M.R.S. § 85. The pilotage statute then goes on to define terms, outline jurisdiction, specify the vessels that must take pilots, prohibit piloting without a license, establish a pilotage commission and outline its duties, and set up a system of licensure for pilots. None of these statutory provisions prohibits a municipality from enacting an ordinance that restricts local passage from private piers onto municipal property. Nor does the Ordinance conflict with the objective of the Legislature when it comes to pilotage. Pilots remain free to conduct their profession and to pilot vessels within the region, including by piloting them to Frenchman Bay anchorages. Nothing in the pilotage statute can reasonably be construed as a legislative intention, express or implied, to divest municipalities of home rule authority over local, land-based, police power concerns whenever the exercise of that authority could foreseeably impact the volume of business available to pilots. The establishment of a pilotage system is not an implicit statutory surrogate for compulsory, maximal municipal participation in cruise tourism.

Plaintiff-Intervenor also argues that Maine’s statutory intention of “formulat[ing] and implement[ing] economic development policies and programs” that are coordinated among the State’s several agencies and various “municipal and regional economic efforts,”

5 M.R.S. § 13052, will not tolerate an exercise in municipal home rule that curtails cruise tourism. With the statute in question, the Maine Legislature organized a Department of Economic and Community Development. *Id.* §§ 13054, 13055. The Department is empowered to, among other things, implement policies and programs, work with other organization including municipalities, conduct planning and research, communicate with the private sector, prepare and distribute publications, and implement programs assigned to it by the Governor or Legislature. *Id.* § 13056. The Department's Office of Tourism is empowered to engage in promotional and informational activities, encourage development, review and comment activities, and similar activities. *Id.* §§ 13090-C, 13090-E. However, it has no power to compel or even regulate municipal engagement with cruise line tourism.

While the Department and the Office have rule-making authority, Plaintiff-Intervenor does not rely on any rules to support its preemption claim. Instead, Plaintiff-Intervenor argues that any municipal action inconsistent with greater economic development necessarily prevents coordination as well as economic and community development. The argument is essentially that through declaration of an economic and community development goal and creation of a related department and tourism office, the Maine Legislature has imposed a duty on every municipality and political subdivision to act in the best interest of the Chamber of Commerce. Of course, if the maximization of commerce were compulsory, a vast body of zoning and land use regulation would not be worth the paper it is written on. To be certain, most municipalities yearn for the types of burdens of fortune that Bar Harbor experiences. The broad and undifferentiated aspiration toward commercial health made manifest by the Legislature's creation of the Office of

Tourism and CruiseMaine is sensible and one supposes is in league with the desires of most municipalities most of the time. However, the picture of commercial development is not painted in primary colors alone but rather exists in a pastiche of other municipal considerations. A municipality that rationally exercises its home rule authority in a manner which is modestly in tension with the highest marginal commercial harvest, the type which is the sine qua non of the tourism office, is not an outlaw.

The fact is that the Legislature has not empowered these instrumentalities to override municipal home rule authority. The Legislature has not even empowered these instrumentalities to wield the interstitial power of a special master or an ombudsman in matters of municipal and cruise line conflict. If it had, then some manner of administrative process would have preceded before or alongside this litigation. Yes, CruiseMaine may support, educate, promote, and play the part of a sales broker when it comes to cruise tourism, but decidedly missing from the enumerated powers is the power to trump home rule authority to dictate acceptable levels of municipal participation in cruise tourism.

Nor can the mere existence of the Department or its tourism-focused instrumentalities be regarded as an implied prohibition against a local municipal determination to reduce engagement with the cruise line industry. Public bodies may exercise only the powers conferred upon them by law. The conferral of powers must be found “in the enabling statute either expressly or by necessary inference as an incidence essential to the full exercise of powers specifically granted.” *Hallssey v. Sch. Admin. Dist. No. 77*, 755 A.2d 1068, 1072 (Me. 2000). The derogation of home rule authority must rest on something more immediate and direct than the Legislature’s pro-commerce

proclamations and the institution of a body tasked with broadly supporting and promoting, but not regulating, tourism. If home rule authority is to be overcome it ought to be based on something with a little more starch, such as the text of the law. As is so often the case, when textual (i.e., legal) support for a challenge to home rule authority is lacking, an invitation is made to the court to begin at the intellectual equivalent of divining legislative intent from high upon the pillars, which is to say, an appeal toward sophistry. To be certain, for some there is an intoxicating appeal to wielding such authority, acting as a sort of judicial “God of the gaps” and the line is long of those only too eager to cast their light upon the unwashed masses to shepherd us through the darkness left by the democratic process. For ease of analysis, this case does not present a close call of implied prohibition of home rule. Any argument of implied prohibition of municipal home rule authority must be attended by a particularly muscular example of how the purpose of the enabling legislation is at cross purposes with the home rule. The analysis cannot be one of contingencies or at least if it is, must ultimately be tethered to the noncontingent, a prime mover example in the law that demonstrates how home rule errs.

The Legislature should not be viewed as having impliedly prohibited the exercise of municipal home rule authority in an area that the Legislature has not even attempted to regulate in any direct manner. Even in areas that the Legislature has regulated directly, municipal home rule authority is not so easily preempted. *See, e.g., Portland Reg'l Chamber*, 253 A.3d at 591 (upholding Portland’s minimum wage ordinance despite existence of state minimum wage statute); *Portland Pipe Line Corp. v. City of S. Portland*, 240 A.3d 364, 368 (Me. 2020) (holding that Maine Coastal Conveyance Act, which

involved the State's exercise of police power in matters of oil transfers, did not preempt a local ordinance that prohibited an activity even though the Maine Department of Environmental Protection ("DEP") had issued an approval that allowed for but did not require the activity in question); *E. Perry Iron & Metal Co., Inc. v. City of Portland*, 941 A.2d 457, 463 (Me. 2008) (upholding municipal regulation of junkyard in absence of evidence that it frustrated the purposes of Maine's Solid Waste Act); *Smith v. Town of Pittston*, 820 A.2d 1200, 1201 (Me. 2003) (4-3) (upholding municipal ordinance banning the spread of septage in the Town of Pittston despite existence of DEP rules establishing minimal performance criteria for such spreading, DEP's award of permit application to conduct such spreading, and legislative intent to encourage development of affordable, environmentally suitable waste disposal sites). When it comes to the growth of tourism in Maine there simply is no state-sanctioned regulatory scheme to frustrate, only a broadly worded aspirational objective of regional economic coordination and an associated initiative of the Office of Tourism to support, educate, and promote cruise communities.

Plaintiff-Intervenor's claims of preemption under the Maine Constitution (Complaint in Intervention Counts 3 and 4) fail.

B. The United States Constitution

Plaintiffs and Plaintiff-Intervenor mount challenges to Bar Harbor's Ordinance based on the Supremacy Clause and the Commerce Clause. Pls.' Compl. Counts 1-2; Compl. in Intervention Counts 1-2. Plaintiffs add a claim under the Due Process Clause. Pls.' Compl. Count 3. I begin my review with the Supremacy Clause, move on to the Due Process Clause, and finish with the Commerce Clause.

1. The Supremacy Clause

The Supremacy Clause provides that “the Laws of the United States . . . and all Treaties made . . . under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.” U.S. Const. art. VI, cl. 2. Due to the Supremacy Clause, when Congress enacts a statute, state law is preempted to the extent of any conflict with the federal statute. *Haaland v. Brackeen*, 599 U.S. 255, 287 (2023). Sometimes a federal statute will expressly preempt state law, but preemption also can arise “by virtue of restrictions or rights that are inferred from statutory law.” *Kansas v. Garcia*, 140 S. Ct. 791, 801 (2020). Preemption can result, for example, based on the inference that Congress has effectively occupied the field in a certain area of regulation even though Congress has not announced a preemptive intention. *City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624, 633 (1973). Preemption can also result based on the existence of competing commands, allowances, or standards in federal and state law. “If federal law ‘imposes restrictions or confers rights on private actors’ and ‘a state law confers rights or imposes restrictions that conflict with the federal law,’ ‘the federal law takes precedence and the state law is preempted.’” *Garcia*, 140 S. Ct. at 801 (quoting *Murphy v. National Collegiate Athletic Assn.*, 138 S. Ct. 1461, 1480 (2018)). However, “[i]nvoing some brooding federal interest or appealing to a judicial policy preference should never be enough to win preemption of a state law.” *Virginia Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1901 (2019).

“‘[T]he basic question involved in [Supremacy Clause] cases . . . is never one of

interpretation of the Federal Constitution but inevitably one of comparing two statutes.” *Swift & Co. v. Wickham*, 382 U.S. 111, 120 (1965). “[F]or the purposes of the Supremacy Clause, the constitutionality of local ordinances is analyzed in the same way as that of statewide laws.” *Hillsborough Cnty., Fla. v. Automated Med. Laboratories, Inc.*, 471 U.S. 707, 713 (1985).

a. Federal regulation of maritime matters

Plaintiffs point to the many ways in which federal law applies to vessels, seafarers, and ports or “maritime terminal facilities” to argue that there is no room for a municipality to restrict shore access via port facilities. The cited federal law, rules, and regulations, however, do nothing to legislate in the area of cruise tourism (or even—with one exception—landward passage). Plaintiffs cite the Federal Maritime Transportation Security Act, 46 U.S.C. §§ 70101-70132, which governs “port security,” and the entire Coast Guard Authorization Act, Pub. L. 111-281, 124 Stat. 2905 (Oct. 15, 2010), which as the title suggests authorizes appropriations for the Coast Guard. Bar Harbor’s Ordinance clearly does not compete with federal law in the area of port security or Coast Guard operations.¹⁷

Plaintiff-Intervenor advances similar preemption arguments to those pressed by Plaintiffs but shifts the focus slightly to contemplate the regulatory burdens imposed on

¹⁷ In Plaintiffs’ rundown of federal law touching on vessels and maritime facilities, they cite 33 C.F.R. § 105.105(a)(2) for the proposition that Coast Guard regulations under the Maritime Transportation Security Act are intended to be preemptive. Pls.’ Br. at 20. The reference is perplexing because it merely states that the requirements of maritime security for facilities apply to the owner or operator of a facility that receives vessels certified to carry more than 150 passengers, yet Plaintiffs have elsewhere informed the Court that the tender vessels are licensed to hold 149 passengers. In any event, clearly the Bar Harbor Ordinance was not drawn to impose competing security standards for maritime facilities.

cruise lines and pilots. The Pilots Association argues that because “[t]he federal presence in the area of navigation, safety, and environmental protection is extensive, pervasive, demanding, and complex,” and “follows a vessel from its design phase through its ultimate scrapping,” and “link[s with] a series of international agreements dependent upon the predictability of access to ports,” and involves oversight by the Coast Guard, Customs and Border Protection, the Centers for Disease Control and Prevention, the Environmental Protection Agency, and the Federal Maritime Commission, “[l]ocal restrictions on vessel operations . . . pose a direct threat to the necessary uniformity of federal oversight and the efficient operation of cruise . . . vessels.” Pl.-Int.’s Br. at 9–10 (ECF No. 190). This language checks off the lawyerly rhetoric box but fails to tease out any actual conflict. The Ordinance simply does not purport to regulate vessel requirements or make the operation or navigation of cruise vessels any less safe, environmentally sound, or efficient. Nor does it interfere in any way with the performance of cruise line oversight by the Coast Guard, CBP, CDC, EPA, or the FMC. Nor can it be said that any one of the identified agencies has attempted to occupy the regulatory field when it comes to balancing competing interests related to a municipality’s participation in cruise tourism. Federal regulation in this arena is not even extant, let alone pervasive. *City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624, 633 (1973) (“It is the pervasive nature of the scheme of federal regulation of aircraft noise that leads us to conclude that there is pre-emption.”).

Plaintiffs and Plaintiff-Intervenor’s invocation of all the many ways that federal law touches upon maritime traffic is precisely the kind of “brooding federal interest” mentioned in *Hillsborough*, 471 U.S. at 713. As such, it does not suffice to support the preemption of

Bar Harbor's disembarkation restriction.¹⁸

b. Seafarer shore access

When Plaintiffs and Plaintiff-Intervenors do dive down into the maritime regulations to retrieve something specific, the palatable¹⁹ oyster they surface with is a preemptive maritime security regulation that requires the owners or operators of maritime facilities (such as Plaintiff Pier Owners) to ensure shore access for seafarers who wish to transit from a vessel through or over regulated facilities. 33 C.F.R. § 105.237.²⁰

(a) Access required. Each facility owner or operator must implement a system . . . for providing access through the facility that enables individuals to transit to and from a vessel moored at the facility and the facility gate in accordance with the requirements in this section. The system must provide timely access as described in paragraph (c) of this section and incorporate the access methods described in paragraph (d) of this section at no cost to the individuals covered.

(b) Individuals covered. The individuals to whom the facility owner or operator must provide the access described in this section include—

¹⁸ Plaintiffs muse in their post-trial brief that the Ordinance is unenforceable because the Pier Owners lack the authority to stop or turn back cruise ship passengers who arrive at the pier. Pls.' Br. at 31 n.27 (also noting that this point is "not part of this legal challenge"). The idea that the Pier Owners cannot lawfully comply ignores the reality that cruise ship passengers (and crew) arrive at the piers pursuant to a prearranged reservation system and have long done so with the understanding that a free-for-all would result in chaos and passenger dissatisfaction with the shoreside experience. Besides, compliance should present no difficulty as we are assured by Plaintiffs and Plaintiff-Intervenor that oversized cruise ships will no longer call at Bar Harbor.

¹⁹ Plaintiff-Intervenor also cites 33 U.S.C. § 5, which prohibits the levying of tolls "or any other impositions whatever," upon vessels, water craft, or their passengers or crew, by "any non-Federal interest, if the vessel or water craft is operating on any navigable waters subject to the authority of the United States." Pl.-Int.'s Reply Br. at 12. This oyster has spoiled. The argument is waived for purposes of this litigation since it was first raised in a reply brief. But in any event, the Ordinance is designed to prevent excessive disembarkations from cruise ships, subject to a fine imposed against the pier owner to ensure compliance. It is not a toll, fee, or other imposition directed toward cruise ships or their passengers and crew associated with their use or enjoyment of navigable waters.

²⁰ The regulations provide that part 105 has preemptive effect "insofar as a State or local law or regulation applicable to the facilities . . . would conflict with the regulations in part 105, either by actually conflicting or by frustrating an overriding Federal need for uniformity." 33 C.F.R. § 101.112(b).

- (1) Seafarers assigned to a vessel at that facility;
- (2) Pilots; and
- (3) Representatives of seafarers' welfare and labor organizations.

Id. § 105.237. Cruise ship passengers are not seafarers. Seafarers are persons “assigned to a vessel” (i.e., crew) or “pilots” or “[r]epresentatives of seafarers’ welfare and labor organizations.” *Id.* § 105.237(b); *see also id.* § 96.250(f)(4) (providing that safety management systems include personnel procedures ensuring that “[e]ach vessel is properly crewed with qualified, certificated and medically fit seafarers”).

Because the Bar Harbor Ordinance is drawn as a restriction on the numbers of “persons” and not just “passengers” who may be disembarked on or over municipal land, Plaintiffs and Plaintiff-Intervenor proclaim a victory. I agree with Plaintiffs and Plaintiff-Intervenor (and evidently with Defendant and Defendant-Intervenor) that the Ordinance cannot stand as a barrier to seafarers’ shore access when a seafarer is assigned to a vessel moored at either pier facility owned by the Plaintiff Pier Owners. To the extent the Ordinance might be read to require a different conclusion, it cannot be enforced. However, it does not follow that the entire Ordinance is invalidated or that any meaningful relief is to be awarded in this litigation as a result of the limited (and hypothetical) preemption occasioned by the seafarers’ access regulation.

The scope of preemption “is guided by the rule that the purpose of Congress is the ultimate touchstone in every pre-emption case.” *Altria Group, Inc. v. Good*, 555 U.S. 70, 76 (2008) (cleaned up). “That approach is consistent with both federalism concerns and the historic primacy of state regulation of matters of health and safety.” *Medtronic, Inc. v.*

Lohr, 518 U.S. 470, 485 (1996); see also *Consumer Data Indus. Ass'n v. Frey*, 26 F.4th 1, 12 (1st Cir. 2022) (remanding for district court to analyze the scope of a federal law's preemptive impact), *cert. denied*, 143 S. Ct. 777 (2023). Here, the purpose of the federal regulation is to assure seafarer access to shore when seafarers are aboard and assigned to a vessel moored at the regulated facility. Consequently, the preemptive reach of the federal seafarers' access regulation extends no farther than to a controversy involving an attempt by Bar Harbor to deny shore access to a seafarer on a vessel moored at either facility.

This case does not present any actual controversy of that (or any other actual) kind. Moreover, even if the conflict preemption associated with the seafarers' access regulation is appropriately resolved in the context of this litigation, it would not achieve the result that Plaintiffs and Plaintiff-Intervenor seek, which is total invalidation of the Ordinance. A limited invalidation of the Ordinance for purposes of seafarers' access would not render the Ordinance an ineffective instrument to impose a disembarkation cap against cruise ship passengers, since passengers are not seafarers.

Plaintiffs and Plaintiff-Intervenor insist nonetheless that invalidation of the Ordinance based on its use of the word "persons" instead of "passengers" should be total. I digress to address this assertion, though it is unavailing. The genesis of the digression is the fact that Bar Harbor has indicated that it will author a rule that limits the Ordinance by recognizing an exception for shore access for seafarers. When a state, municipality or local agency interprets or enforces a law in a manner that avoids a conflict with federal law, ordinarily mere facial constitutional challenges are effectively deflected. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 456 (2008); *Ward v. Rock Against*

Racism, 491 U.S. 781, 795–96 (1989); *McGuire v. Reilly*, 386 F.3d 45, 58 (1st Cir. 2004). However, here the Ordinance’s use of “persons” unambiguously extends to seafarers, so it is “not readily susceptible to a narrowing construction.” *Rhode Island Ass’n of Realtors, Inc. v. Whitehouse*, 199 F.3d 26, 35 (1st Cir. 1999).

Plaintiffs also cite Maine Supreme Judicial Court opinions that they say preclude efforts by a municipality to confine the reach of a citizen initiative by means of a rulemaking process. They contend that the only available fix requires an initiative and election do-over. The cases Plaintiffs cite do not support the proposition. *See Wawenock, LLC v. Dep’t of Transp.*, 187 A.3d 609, 618 (Me. 2018) (discussing methods of interpreting the “will of the people” when construing citizen initiatives); *Davis v. SBA Towers II, LLC*, 979 A.2d 86, 92–93 (Me. 2008) (“Although Gridcom argues that the Planning Board’s decision to redefine the term was also procedurally improper, we need not address this claim.”). And while Plaintiffs correctly observe that Maine law requires that an ordinance be revised “only by following the procedure required for its original enactment,” 30-A M.R.S. § 3004(4), it does not compel that an ordinance be invalidated *in toto* based on a limited conflict with federal law. The default rule of constitutional jurisprudence is to the contrary, and here it takes little imagination to appreciate 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. *See Town of Windham v. LaPointe*, 308 A.2d 286, 292 (Me. 1973); *see also Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329–30 (2006).

In summary, yes, the Ordinance has the potential to conflict with the preemptive

seafarers' access regulation and requires that Bar Harbor avoid any application of the Ordinance that would run afoul of 33 C.F.R. § 105.237. However, the limited conceptual conflict does not achieve the result that Plaintiffs and Plaintiff-Intervenor are after, which is total invalidation of the Ordinance.²¹

c. Customs and immigration

Plaintiff-Intervenor also argues that the Ordinance “obstructs customs and immigration screening of entrants to the United States.” Pl.-Int.’s Br. at 14. The idea is that cruise itineraries in the North Atlantic often include calls in Canadian ports before returning to U.S. waters, so if the first port of call in the U.S. chosen by the cruise ship's captain is Bar Harbor, then Bar Harbor must permit unrestricted disembarkation from the cruise ship as a logical consequence of any immigration and customs inspection that transpires aboard the ship while it is anchored in Frenchman Bay.

The conflict is imagined, not real. The Ordinance does not prohibit or otherwise prevent entry to the United States. Anyone admitted to the United States by CPB through a process that transpires aboard ship in Frenchman Bay may enter the United States, including in Bar Harbor. The Ordinance does not impose an additional condition for admission or otherwise purport to supply a basis for exclusion from the United States, it

²¹ Plaintiffs and Plaintiff-Intervenor fail to articulate a set of circumstances in which an as-applied challenge by a seafarer necessarily would arise and hypothetical notions about what might transpire do not suffice since “litigants mounting a facial challenge to a statute normally ‘must establish that *no set of circumstances* exists under which the [statute] would be valid.’” *United States v. Hansen*, 599 U.S. 762, 769 (2023) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987), and discussing the exception for overbroad restraints on free speech)). Assuming reservations are booked and tendering arrangements are made such that a combined total of more than 1,000 passengers and seafarers would be disembarked on a given day, further constitutional litigation based on the preemptive force of 33 C.F.R. § 105.237 is susceptible to avoidance when the Court is assured that the handling of any such scenario will be addressed in advance by the Town's rulemaking process in recognition of the partial preemption of the Ordinance. The facial challenge presented in this litigation should not prevent that process from unfolding.

imposes only a limitation on local disembarkations and a fine for excessive disembarkations, regardless of the admission status of persons disembarked.²² Nevertheless, Plaintiff-Intervenor likens this case to *Takashi v. Fish & Game Commission*, 334 U.S. 410 (1948), and *Maine Forest Products Council v. Cormier*, 586 F. Supp. 3d 22 (D. Me. 2022). Pl.-Int.'s Br. at 14–16. This case is unlike either.

In *Takashi*, the Supreme Court invalidated, on a variety of grounds, a discriminatory California law that banned lawful residents ineligible for citizenship from engaging in commercial fishing. 334 U.S. at 413–415, 422. Plaintiff-Intervenor says the Ordinance similarly discriminates. The discrimination argument relies on the fact that the largest cruise ships are all foreign-flagged vessels and the fact that all cruise ships customarily carry passengers who are foreign nationals. However, the Ordinance is not drawn in discriminatory language and nothing that transpired at trial betrayed a discriminatory purpose to exclude foreign-flagged vessels or the citizens of other nations. The Ordinance is drawn with the passenger capacity of ships in mind, not the nationality of the ships' owners or passengers.

In *Cormier*, Judge Woodcock issued a preliminary injunction enjoining enforcement of a protectionist state statute designed to prevent foreign workers from

²² It bears repeating that cruise ships with passenger capacities in excess of 1,000 will likely not have Bar Harbor on their itineraries. Visitation at a port is arranged many months in advance, with local, daily passenger caps in mind. Consequently, the imagined conflict between an admission decision and a refusal to allow disembarkation (or imposition of a fine on the Pier Owners for excessive disembarkations) is entirely at odds with the actual practices long observed in Bar Harbor in relation to pre-scheduled port calls. Plaintiff-Intervenor also neglected to call an expert witness to substantiate its hypothetical customs scenario of a cruise ship returning from foreign waters intent on making an appointment with CPB in Frenchman Bay as a means of forcing an unreserved port call in Bar Harbor (assuming CBP would even condone such a maneuver).

engaging in the intrastate transportation of forest products. There, the federal regulatory regime for alien work visas resulted in the issuance of work visas for the performance of specific jobs identified as part of a certification process and based on the Department of Labor's specific findings that domestic workers were not available in sufficient numbers and employment of the aliens would not negatively impact local wages and work conditions. *Id.* at 39–41 & n.12. In that context, the federal government's occupation of the field of foreign worker authorization was manifest, as was the conflict between the Maine act and federal law. *Id.* at 46. That is not the situation in this case. There is no evidence in this case or cited law demonstrating that cruise lines obtain advance federal authorization to disembark their entire complement of passengers specifically in Bar Harbor. Cruise lines present their passengers for inspection when they arrive at the Class A port designated on their own itineraries. Cruise lines are not required by federal law to apply for preauthorization to call at a particular port, let alone to disembark every passenger upon arrival. Nor does CPB make specific findings based on any federal law or regulation that cruise line passengers may disembark in any particular location in any particular numbers based on the cruise ship's passenger capacity and local conditions.

Plaintiff-Intervenor's customs- and immigration-based arguments for preemption fail to make way.

d. Anchorages

Finally, Plaintiff-Intervenor argues that because the Secretary of Homeland Security has established federal anchorages in Frenchman Bay for purposes of safe navigation, *see* 46 U.S.C. § 70006; 33 C.F.R. § 110.130, the Ordinance's regulation of onshore

disembarkation is preempted since large cruise ships with North Atlantic itineraries will otherwise have rare occasion to use the anchorages. Pl.-Int.'s Br. at 17–18. This final Supremacy Clause challenge is like the others. It fails to support an inference of federal field preemption expansive enough to blockade local regulation in matters of cruise line passenger shore access. It also fails to expose any actual conflict between federal and state law as the Ordinance imposes no restriction whatsoever on Frenchman Bay anchorage access. Cruise ships of whatever size are free to anchor in Frenchman Bay. If cruise lines chose not to anchor in Frenchman Bay because of the Ordinance, that is a function of the cruise lines' own cost and benefit calculations. By the mere act of establishing anchorages the Secretary of Homeland Security has not conferred a charter of privileges on cruise lines to disembark their entire complement of passengers in any municipality in which there are pier operators who would welcome them. Like the other shots fired in Plaintiff-Intervenor's Supremacy Clause fusillade, the final shot fails to sink the Ordinance.

2. *The Due Process Clause*

Plaintiffs, but not Plaintiff-Intervenor, claim that the Ordinance offends the Due Process Clause. The Fourteenth Amendment prohibits the States from “depriv[ing] any person of life, liberty, or property, without due process of law.” U.S. Const. amend. XIV. Around the dawn of the Twentieth Century—an era sometimes described as the “*Lochner* era” by Supreme Court historians—the Supreme Court instilled in the Due Process Clause substantive overtones based on a natural-law preoccupation with the freedom to contract. Essentially, if two parties were willing to engage in a commercial relationship, an expression of their individual liberty, what should stand in their way or interfere with their

decisions about how to structure the relationship? According to the Court, not the majority of their peers acting through their elected representatives. *See, e.g., Allgeyer v. Louisiana*, 165 U.S. 578 (1897) (invalidating a law regulating marine insurance); *Lochner v. New York*, 198 U.S. 45 (1905) (invalidating a labor law designed to limit the hours worked by bakers); *Adkins v. Children's Hosp. of the D.C.*, 261 U.S. 525 (1923) (invalidating a law establishing a board and an investigative and consultative process to establish minimum wages for women).

When we speak of the *Lochner* Era's substantive due process jurisprudence today, it is mostly to express bewilderment that the Court engaged in such a freehanded practice of judicial policymaking in favor of those having commercial advantage in the marketplace, or else to extol the noteworthy dissents of the era, such as the work of Justice Oliver Wendell Holmes in *Lochner* and the work of Justice Holmes and Chief Justice William Howard Taft in *Adkins*. It reminds us, and is worthy of perennial reminding, that judicial policymaking is an insidious, antidemocratic, and narcissistic instinct still very much alive that must be resisted. Lessons from the *Lochner*-era season of judicial mischief making that are worthy of mention include the observance that "[t]he 14th Amendment does not enact Mr. Herbert Spencer's Social Statics," *Lochner*, 198 U.S. at 75; that a court should avoid "pricking out a line in successive cases" when the process is akin to legislative policymaking, *Adkins*, 261 U.S. at 562 (Taft, C.J., dissenting); that the substantive "contours" of the Due Process Clause are decidedly "vague" in relation to the freedom to contract, *id.* at 568 (Holmes, J., dissenting); that when it comes to liberty "pretty much all law consists in forbidding men to do some things that they want to do," *id.*; and that

deciding whether a law's benefits are worth its costs is a matter assigned to the legislative rather than the judicial branch of government, *id.* at 571.

When the Supreme Court finally abandoned using the freedom to contract as an antidemocratic talisman, it reaffirmed what a great many of its other decisions had long established, summing up the concern over individual liberty as follows:

[F]reedom of contract is a qualified, and not an absolute, right. There is no absolute freedom to do as one will or to contract as one chooses. The guarantee of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to the government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulation and prohibitions imposed in the interest of the community.

W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 392 (1937).

And so it comes as something of a surprise that I now consider a due process challenge to the Bar Harbor Ordinance that pits the Plaintiffs' freedom to contract²³ against restrictions imposed in the interest of the community. But to their credit, Plaintiffs do not come right out and say it. Instead, they adopt the language of modern due process standards, contending that there is no "rational nexus" between the Ordinance's "purpose and standards and the processes . . . employ[ed] to achieve [them]." Pls.' Br. at 52 (ECF No. 191) (citing *Pennell v. City of San Jose*, 485 U.S. 1, 11 (1988) (upholding municipal rent control ordinance over a due process challenge)).

When it comes to the evaluation of the existence of a rational nexus, "courts should

²³ Plaintiffs have also asserted that the Ordinance unlawfully restrains the non-party cruise lines' and their passengers' right to travel. Presumably the freedom to travel is no more sacrosanct than the freedom to contract. I can see no reasons why natural law would elevate one over the other. Plaintiffs did not assert that the Ordinance violates individuals' right to travel in their complaint; instead, they raised this issue for the first time in their post-trial brief in a perfunctory fashion. Consequently, I do not consider the freedom to travel in this Decision and Order.

refrain from substituting their regulatory wisdom for that of the legislature. *Vaqueria Tres Monjitas, Inc. v. Irizarry*, 587 F.3d 464, 483 (1st Cir. 2009). “[A] court’s Due Process inquiry should be satisfied ‘[i]f the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory.’” *Id.* (quoting *Nebbia v. New York*, 291 U.S. 502, 537 (1934)). “This inquiry should focus on whether a program’s procedures are inadequate or whether, overall, a program is arbitrary, discriminatory or irrelevant to a legitimate legislative goal.” *Id.* (internal quotation marks omitted).

Plaintiffs argue that the Ordinance defies the rational nexus requirement because it imposes a strict limit of 1,000 persons per day “for every single day of the year,” without accounting for seasonal variation in the congestion experienced in Bar Harbor as the result of tourism. Pls.’ Br. at 53. In support of their position, Plaintiffs emphasize that Mr. Sidman testified that the fixed restriction to 1,000 persons daily was not the product of “a rigorously defensible finding or study or calculation,” July 13 Tr. at 312:20–21, and that his group “just didn’t want to get into various limits at different times of the year.” *Id.* at 313:24–25.

Plaintiffs’ argument is that because Bar Harbor long employed different summer-season and shoulder-season caps it is now irrational for Bar Harbor to do otherwise. I am not convinced that adopting this rationale would be any different than imposing by judicial fiat the rule that a fixed cap is unwise policy and therefore unconstitutional because it fails to maximize tourism—because, in effect, it is my opinion or another judge’s opinion that the Ordinance’s local benefits are not worth their costs. That might as well be said about

fixing a minimum wage or imposing rent control. It is of course rational to propose that passenger caps rise and fall inversely to land-based tourism, but it does not follow that a fixed cap is therefore irrational.²⁴ The Constitution “is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question.” *Lochner*, 198 U.S. at 75–76 (1905) (Holmes, J., dissenting). The Due Process Clause does not compel Bar Harbor to eliminate visitation lulls during the shoulder season by means of increased cruise ship visitation. Nor, to my knowledge, does the Due Process Clause forbid municipalities from enacting ordinances that have the effect of preserving seasonal fluctuations in the blessings and burdens of tourism. Though Plaintiffs evidently see it as their constitutional right to maximize the burden that their commercial activity imposes on the commons, at least up to a level that approaches their capacity to serve, they have not cited any authority for that proposition.

The Ordinance’s 1,000-person daily cap reduces the profit that can be achieved from commercial engagement with cruise lines and cruise ship passengers, but it also preserves that engagement to a degree. Is it irrational for the citizens of Bar Harbor to desire a passenger cap that enhances their own relative enjoyment of their community during the summer and shoulder seasons while maintaining a measure of cruise tourism commerce? I cannot say that it is. If I were to conclude otherwise, I would simply be ratifying the

²⁴ I am not concerned here with the alleged irrationality of a “year-round” cap because this case does not involve year-round cruise ship traffic. When the Ordinance came into being, the MOAs between the Town and the cruise lines involved a season beginning in May and ending in October. The cruise lines have voluntarily passed on visitation between November 1 and April 30.

Plaintiffs' policy preference as being in league with my own, not because the Ordinance is discordant with the Due Process Clause. I adhere to an antiquated notion that judges should not allow robes to suffocate a sense of judicial humility by steering wildly outside their lane into the role delegated to elected representatives. Whether the Ordinance is the wisest expression of democratic will is a question for which the Constitution does not hold the answer. What may seem like a sensible policy today may strike voters as needing some renovation down the road. This is merely a *Schoolhouse Rock*-level civics lesson that nevertheless bears repeating in constitutional challenges that more appear to challenge the marginal wisdom of the law than satisfy the more capacious test of whether it offends the Constitution. Even if I were equipped to play the role of the Oracle of Delphi to answer the question of whether the Ordinance is sensible, which I am not, that is not the role assigned to me by the Constitution, contemporary trends notwithstanding.

Plaintiffs argue that it is discriminatory that the amelioration of congestion falls exclusively on them, without imposing restrictions on other accommodations or tourists who contribute to the problem. Based on my review of the record, I am not persuaded that the Ordinance discriminates in an irrational manner. Congestion in Bar Harbor is real and is experienced throughout the summer and fall months. When the Pier Owners and Tender LLCs disembark several thousand persons on a daily basis, they substantially burden Bar Harbor's waterfront and intensify the experience of congestion more widely.

Cruise line passenger traffic stands out as worthy of special consideration for a variety of reasons. For purposes of this context, among these reasons are the industry's own longstanding selective and voluntary approach to municipal engagement and its

acknowledged need for management by means of a reservation system that employs caps. Land-based tourism is not equally amenable to management and Plaintiffs have not suggested any ready means of stemming that particular stream of visitation. Cruise-based tourism is also unlike land-based tourism in that cruise ships carry passengers in numbers quite unlike any land-based conveyance. While cruise lines evidently consider local conditions in terms of the capacity of the area to provide their passengers with goods and services, they are not deterred by local “no vacancy” conditions that would deter land-based visitors. Upon arrival, cruise line passengers congregate in volume, in relatively intense morning and afternoon waves, though they also enhance congestion throughout the day. When they arrive, they are joined by a caravan of the vehicles that cater to them, congesting the waterfront area with buses, minibuses, vans, motor coaches, and taxis. Their arrival demands significant attention by municipal authorities, mostly law enforcement personnel hired to manage the press of people and conveyances. Cruise lines also have the relatively unique ability to transform the shoulder season, calling in Bar Harbor on a near daily basis in especially large cruise ships. These are distinct features of cruise tourism in Bar Harbor that make differential treatment rational.

Ultimately, the costs and benefits of the various features of cruise tourism and the 1000-person daily passenger cap do not boil down to a neat finding of arbitrariness, irrationality, irrelevance, or discrimination. A rational voter could take these features into consideration and conclude that a 1,000-passenger cap is an appropriate means of recalibrating the Town’s approach to this very local concern.

3. *The Commerce Clause*

Among the powers the Constitution vests in Congress is the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” U.S. Const. art I, § 8. The conferral upon Congress of the power to regulate commerce clearly authorizes Congress to override competing regulations adopted by the states, but it also acts as a bulwark against state and local regulations that would, if permitted to stand, either discriminate against foreign and interstate commerce for local protectionist purposes or produce a Balkanized system in which commerce among the states and with other nations is overburdened by a need to satisfy multifarious regulations imposed by different states on the very same commercial activity. *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, 520 U.S. 564, 571, 576–77 (1997) (concerning discriminatory regulation); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 523–530 (1959) (concerning regulation inimical to the orderly movement of good across state lines). The bulwark against pernicious regulation is varyingly described as the “dormant” Commerce Clause or the “negative command” of the Commerce Clause. *Nat’l Pork Producers Council v. Ross*, 598 U.S. 356, 368 (2023). Judicial decisions discussing the dormant Commerce Clause are legion and not all of the precedent fits neatly into the categories outlined above.

Plaintiff-Intervenor breaks its argument into three overarching assertions with subparts. Pl.-Int.’s Br. at 18–44. The first contention is that the Bar Harbor Ordinance is protectionist and discriminatory. *Id.* at 22–38. The second contention is that the burdens of the Ordinance far exceed the local benefits. *Id.* at 38–43. The third is that the Ordinance violates the Foreign Commerce Clause. *Id.* at 43–44. Plaintiffs, on the other hand, advance

their position under twelve headings, three of which are prefatory. Pls.' Br. at 22–52. The resulting nine arguments cover a similar range of subjects and bounce back and forth thematically. I address Plaintiff-Intervenor's and Plaintiffs' arguments together but impose my own outline.

a. Discrimination against foreign commerce

“‘[T]he’ Commerce Clause is really three distinct Clauses rolled into one: a Foreign Commerce Clause, an Interstate Commerce Clause, and an Indian Commerce Clause.” *Haaland v. Brackeen*, 599 U.S. 255, 320 (2023) (Gorsuch, J., concurring). Each clause is construed to effectuate its purposes, resulting in differing applications. *Id.* Here, the contention is that the Ordinance discriminates against foreign commerce because cruise lines conduct an international operation, some utilizing exclusively foreign-flagged vessels, and their vessels frequently call in the ports of two or more nations during a solitary tour. Plaintiffs assert that cruise lines have the right to call on any Class A port that is convenient, such as the Port of Bar Harbor, and, consequently, the Ordinance disrupts the flow of foreign commerce. Pls.' Br. at 51. Plaintiff-Intervenor agrees, arguing that the Ordinance overwhelmingly burdens foreign commerce because the largest ships are foreign-flagged, and it is essential that there be uniformity in regulation. Pl.-Int.'s Br. at 43.

These assertions lack persuasive force. The Ordinance does not discriminate on the basis of a “foreign” attribute. The Ordinance is indifferent to whether passengers arrive on foreign-flagged vessels or are themselves citizens of foreign states. The Ordinance also is silent on the subject of foreign navigation. The Ordinance imposes a capacity limitation

on the disembarkation of passengers regardless of the origin of the vessel carrying them or the itinerary that informs the vessel's movements. The imposition of a restriction on local daily disembarkations into a small town does not meddle in an area of commerce that must of necessity be ironed out between nations.²⁵

There is no cause to think that the ability of municipalities to govern the extent of their participation in cruise tourism for local welfare reasons will undermine the cruise tourism industry or result in cruise lines having to modify their vessels, crews, passenger capacities or anything else in order to continue plying the seas to visit whatever nations, states, and municipalities remain on their itineraries, of which there are, evidently, a great many. If anything, permitting municipalities to establish terms and conditions on local participation in cruise tourism may encourage more municipalities to consider participation, knowing that they will not thereby be compelled to accommodate whatever level of traffic the cruise lines and their local partners wish to impose. That more ports may be open to smaller vessels is to be expected rather than condemned on "constitutional" grounds.

The record fails to justify the notion that there is a need for uniformity²⁶ in the terms and conditions of municipal partnering with the cruise tourism industry, let alone that

²⁵ This case is unlike *Henderson v. Mayor of the City of New York*, in which the Supreme Court struck down a state statute that imposed certain financial obligations on ship owners whose ships carried foreign subjects migrating to the United States, explaining that the terms of our Nation's immigration policy, 92 U.S. 259, 270 (1875), "require exclusive legislation by Congress," as the subject "in an eminent degree . . . concerns our international relations." *Id.* at 273.

²⁶ Plaintiffs assert: "No other significant port physically capable of disembarking passengers from similar-sized vessels restricts disembarkation in the same manner as the Ordinance." Pls.' Br. at 30. The statement not only admits that other ports impose restrictions, but also is so laden with qualifiers that its meaning is uncertain. No party introduced the kind of evidence that would enable me to unpack this assertion, let alone give it any weight in my analysis.

uniformity is necessary to foreign (or interstate) commerce. Congress has not seen fit to regulate the terms and conditions of municipality and cruise line engagement and it is not at all apparent or even probable that allowing municipalities the ability to regulate their level of engagement will undermine the ability of any of the several coastal states to participate fully in cruise tourism involving every size cruise ship imaginable and bearing whatever flag. What this case really involves is the contention that cruise lines are able to compel local accommodation of their private assessment of the ideal economies of scale for cruise tourism. *See* Pl.-Int.'s Br. at 30-31; Pls.' Br. at 26. The Foreign Commerce Clause does not demand such a result.²⁷

b. Discrimination-qua-protectionism

At the “very core” of the Supreme Court’s Commerce Clause jurisprudence lies an “anti-discrimination principle.” *Nat’l Pork Producers Council*, 598 U.S. at 369. The anti-discrimination principle “prohibits the enforcement of state laws driven by economic protectionism.” *Id.* (cleaned up). Protectionist state and local laws are those that impose restrictions or grant benefits that favor in-state or local economic interests and disadvantage their out-of-state competitors. *Id.* Such measures are barred by the negative command of the dormant Commerce Clause because the alternative would result in the existence of state-by-state protectionist initiatives and reprisals that would prevent the operation of a

²⁷ Cases cited in support of the “foreign commerce” argument are distinguishable. *See Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363 (2000) (holding that state law boycotting companies that do business with Burma violated Supremacy Clause); *United States v. Locke*, 529 U.S. 89 (2000) (holding Washington law regulating oil tankers was preempted in part by comprehensive federal regulatory regime and remanding for further consideration of certain state regulations); *Kraft Gen. Foods, Inc. v. Iowa Dep’t of Revenue and Fin.*, 505 U.S. 71 (1992) (invalidating state corporate tax law that gave preferential tax treatment to dividend-income received from domestic subsidiaries versus dividends from foreign subsidiaries).

national, cohesive and competitive marketplace. *Id.* at 371–73 (discussing cases illustrating this core concern). Thus:

We have understood this construction to serve the Commerce Clause’s purpose of preventing a State from retreating into economic isolation or jeopardizing the welfare of the Nation as a whole, as it would do if it were free to place burdens on the flow of commerce across its borders that commerce wholly within those borders would not bear. The provision thus “reflect[s] a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.”

Oklahoma Tax Comm’n v. Jefferson Lines, Inc., 514 U.S. 175, 179–80 (1995); *see also* *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 539 (1949); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 522 (1935). The Framers feared interstate commercial strife, not impartial regulations enacted for local welfare ends, with which they were no doubt familiar.

State and local regulations that are not protectionist in purpose or effect are not prohibited by the negative command of the Commerce Clause simply because they impact an out-of-state economic interest associated with commerce. *Nat’l Pork Producers Council*, 598 U.S. at 374. After all, “[i]n our interconnected national marketplace, many (maybe most) state laws have the practical effect of controlling extraterritorial behavior,” *id.* (internal quotation marks omitted), including “an immense mass of inspection laws, quarantine laws, and health laws of every description that have a considerable influence of commerce outside their borders.” *Id.* at 375 (cleaned up, quotation marks omitted);²⁸ *see*

²⁸ In *National Pork Producers Council v. Ross*, the Supreme Court rejected a challenge to a California law requiring that all pork sold in California derived from breeding pigs or their offspring be raised according

also *Camps Newfound/Owatonna*, 520 U.S. at 596 (“In our zeal to advance [open markets] we must take care not to overstep our mandate, for the Commerce Clause was not intended ‘to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country.’” (Scalia, J., dissenting) (quoting *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 443–444 (1960))).

Plaintiffs argue that Bar Harbor’s Ordinance is facially and per se discriminatory and protectionist because it impacts only travelers arriving by sea, without attempting to regulate the congestive impact of land-based travelers. Pls.’ Br. at 28 (citing *Chem. Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 344 n.6 (1992) (explaining that a per se rule of invalidity applies “not only to laws motivated solely by a desire to protect local industries from out-of-state competition, but also to laws that respond to legitimate local concerns by discriminating arbitrarily against interstate trade’’)). In *Hunt*, the Supreme Court struck down an Alabama law that imposed fees on the deposit of out-of-state hazardous waste (but not in-state hazardous waste) in an in-state commercial landfill, classifying the law as a facial violation of the Commerce Clause. 504 U.S. at 336–37; see *Or. Waste Sys., Inc. v. Dep’t of Env’tl. Quality of State of Or.*, 511 U.S. 93, 98–99 (1994) (invalidating protectionist surcharge imposed on solid waste trucked from out of state destined for in-state landfill). However, unlike these protectionist circumstances, the circumstances here involve a

to certain standards. 598 U.S. at 365. The law did not discriminate based on the state or country of origin of the pork, but the impact of the law was felt predominantly by producers operating outside of California, most if not all of whom want to access California’s enormous marketplace. *Id.* at 367. The Supreme Court affirmed the dismissal of the case at the pleading stage for lack of any plausible inference of a discriminatory/protectionist purpose or effect. *Id.* at 368, 391.

neutral regulation that applies regardless of the state of origin of those passengers arriving after exhaustion of the 1,000-person limitation. Additionally, the supposed preference afforded to land-based travelers is not one that is conditioned on the state or national citizenship of land-based travelers.²⁹

The burdens and benefits of Bar Harbor's Ordinance do not discriminate based on the interstate or international character of those persons seeking to participate in the local economy. The burden is not imposed because of the interstate nature of the traffic but rather because of various features of that traffic, already discussed, that hamper the experience of local welfare. Like Californians' decision to prohibit traffic in certain food products produced under locally disfavored conditions, *Nat'l Pork Producers Council*, 598 U.S. at 363, Bar Harbor's voters have decided to regulate traffic in persons based on that traffic's distinctive contribution to locally disfavored conditions. Doing so, they have not advanced any discernable local commercial interest. In fact, a primary consequence of the Ordinance is to frustrate local commercial interests.

Nor have the voters of Bar Harbor engaged in a parochial or isolationist exercise. They have, instead, engaged in the exercise of imposing a restriction based on their first-hand experience of the relative deleterious impact of high-volume disembarkations at the waterfront while remaining open to the entire world's visitation. In both purpose and effect, they have acted only to limit the extent to which Bar Harbor must be victim to its

²⁹ Another oft-cited precedent under the discrimination heading is *Hughes v. Oklahoma*, 441 U.S. 322 (1979), in which the Supreme Court invalidated a state law that prohibited the out-of-state sale of locally grown minnows, effectively hoarding them for local purchase. *Id.* at 336–37. This case is unlike *Hughes*. Bar Harbor is not hoarding local resources for local consumption. Bar Harbor is open to global traffic.

own success, while continuing to welcome travelers from every corner of the world. These on-the-ground realities are quite unlike the isolationist and protectionist circumstances discussed in the expansive corpus of dormant Commerce Clause jurisprudence.

Plaintiffs and Plaintiff-Intervenor persist by arguing that the Ordinance is discriminatory and protectionist because it has the effect of favoring hotels and other land-based overnight accommodations. They explain that cruise lines are in competition with land-based accommodations because they are competing for the patronage of travelers seeking to visit a particular destination. Pl.-Int.'s Br. at 35–36; Pls.' Br. at 28, Pl.-Int.'s Reply Br. at 27–28 (ECF No. 199). However, the Ordinance is not drawn to effectuate an advantage for local hoteliers, and I do not find that the Ordinance in fact produces such a result.³⁰ I have no evidence from which to draw the conclusion other than the testimony of former or current cruise line executives who stated that cruise lines compete in the hospitality sector against land-based accommodations for the consumer's discretionary travel dollar. As interesting as the testimony was, it was reductionist in the extreme. The same comparison might be drawn between two non-Californian producers of pork products seeking to place their products in California stores, where one complies with California law and the other does not. Or we might compare a non-Californian producer of pork products with a Californian producer of beef products. In either example, the producers compete for dollars directed toward meat consumption, yet that obvious point did not

³⁰ Plaintiff-Intervenor also argues that the Ordinance is protectionist because reduced waterfront traffic will enable the Town to collect more paid parking revenue and because Mr. Sidman stated that he preferred smaller ships with their more well-to-do passengers. Pl.-Int.'s Br. at 26. The paid parking contention is a straw grasp and as such does not warrant serious consideration. As for Mr. Sidman's personal opinion about passengers arriving on smaller ships, there is no evidence to support a finding that his opinion informed the public's assessment of the Ordinance's merits or that his opinion is "protectionist" in nature.

inform the Supreme Court's evaluation of the merits in *National Pork Producers Council*. I can see no reason why it should control here. Reducing the constitutional inquiry so that discrimination is found and heightened standards are imposed whenever one product or service is impacted by a regulation but a competing product or service is not is a recipe for widescale elimination of state and local regulations impacting the provision of goods and services.³¹

c. Arteries of Commerce

Finally, the negative command of the Commerce Clause means that state and local governments have restricted power to issue legislation or regulations that serve to slow or obstruct the flow of commerce. *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2089–90 (2018). Obstructions that are protectionist in nature are routinely struck down, as discussed in the preceding section. Like the concern over protectionist measures that stack the deck in favor of in-state economic interests, the concern for the health of the Nation's arteries ensures that the Nation avoids economic Balkanization, meaning the isolation of neighboring states into separate economic units. *Id.* at 2089. Unlike discriminatory scenarios, classic “free-flow” commerce cases are cases in which a state enacts a law evenhandedly to regulate in-state economic activity (*e.g.*, trucking), but does so in a manner that prevents operation of the enterprise within the enacting state according to a standard observed in neighboring or surrounding states, effectively halting interstate transportation

³¹ The argument also disregards the fact that travelers staying in hotels are dispersed throughout the Town and Mount Desert Island. They do not impact the waterfront the same way that cruise lines and their passengers do. Many land-based tourists intent upon visiting Acadia National Park may well avoid Bar Harbor's waterfront (and its downtown) for the same reason that local citizens do.

through that state. *See Kassel v. Consolidated Freightways Corporation of Delaware*, 450 U.S. 662, 671 (1981) (invalidating Iowa law barring trucks longer than 60 feet); *S. Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761 (1945) (invalidating state law that prohibited the operation of interstate trains having more than a certain number of railroad cars). Less common, but similarly concerning cases arise out of a state's creation of a monopolistic enterprise that prohibits competition. *See, e.g., Buck v. Kuykendall*, 267 U.S. 307, 315–16 (1925) (invalidating state law prohibiting common carriers from using highways to carry persons between Seattle, Washington and Portland, Oregon without first obtaining a certificate of public convenience and necessity from the State of Washington, where issuance of a certificate to one carrier for purposes of a given route precluded issuance of a certificate to another carrier for the same route). The Ordinance does not fit into either category.

Plaintiffs argue that the Ordinance clogs “the arteries of commerce” by impeding “the ability of large cruise ships to move persons from port to port according to itineraries that are interstate and frequently international.” Pls.’ Br. at 26. They emphasize that cruise lines are engaged in the transportation of persons free to travel as they see fit. *Id.* at 26–27. Plaintiff-Intervenors observe that the Commerce Clause exists in part to ensure open access to the facilities of interstate traffic and the free flow of persons and property without undue restraint. Pl.-Int.’s Br. at 19–23.

The record in this case demonstrates that the Ordinance does indeed stem the flow of interstate commercial activity by reducing the daily volume of persons disembarked into Bar Harbor from cruise ships. However, the mere fact that a state or local law impedes the

free flow of commerce does not result in an automatic finding of invalidity. “State laws that ‘regulat[e] even-handedly to effectuate a legitimate local public interest . . . will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.’” *Wayfair*, 138 S. Ct. at 2091 (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)). The burden-benefit calculus recognizes that, “in the absence of conflicting legislation by Congress, there is a residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it.” *S. Pac. Co.*, 325 U.S. at 767.³² When considering whether local regulation comes within the residuum of state power, courts may consider factors such as whether the matter regulated is a localized concern, the extent to which the regulation interferes with national commerce, and the incentive at the national level to attempt to regulate what would amount to multifarious and diverse local concerns. *Id.*; *Duckworth v. Arkansas*, 314 U.S. 390, 394 (1941); *see also Sproles v. Binford*, 286 U.S. 374, 390 (1932) (recognizing “the established principle that in matters admitting of diversity of treatment, according to the special requirements of local conditions, the states may act within their respective jurisdictions until Congress sees fit to act.”). “But ever since *Gibbons v. Ogden*, [22 U.S. (9 Wheat.) 1 (1824)], the states have

³² *See National Pork Producers Council*, 598 U.S. at 375 (recognizing “the usual legislative power of a State to act upon persons and property within the limits of its own territory, a feature of our constitutional order that allows different communities to live with different local standards” (internal quotation marks and citation omitted)); *Maine v. Taylor*, 477 U.S. 131, 151 (1986) (“The Commerce Clause significantly limits the ability of States and localities to regulate or otherwise burden the flow of interstate commerce, but it does not elevate free trade above all other values. As long as a State does not needlessly obstruct interstate trade or attempt to place itself in a position of economic isolation, it retains broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources.” (internal quotation marks omitted)).

not been deemed to have authority to impede substantially the free flow of commerce from state to state, or to regulate those phases of the national commerce which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority.” *S. Pac. Co.*, 325 U.S. at 767.³³

I reject the contention that the question of a local municipality’s relative tolerance of cruise tourism based on local conditions is an aspect of the national commerce that requires the national uniformity that only Congress can provide. There are a great many varieties of port facilities and communities that house them. Cruise tourism, based on the record before me, is a function of cruise line and local community collaboration.³⁴ *See, e.g.*, Exs. 32 & 161. It has always proceeded on that basis in Bar Harbor. *See, e.g.*, Ex. 260 at 1 (Bar Harbor Cruise Tourism Destination Management Plan, “prepared for the use of the Town of Bar Harbor residents, stakeholders, municipal agencies and cruise industry partners”). I have no reason to conclude that it does not proceed on a similar basis elsewhere. The parties are agreed that different municipalities impose a variety of constraints, such as caps and limited cruise ship days, though no party has attempted to canvas the variety of measures employed by domestic municipalities for purposes of this litigation.³⁵ In any event, this case illustrates that the impact of cruise tourism on local

³³ *Gibbons v. Ogden* is a formative Commerce Clause decision that struck down a New York enactment that granted one company the exclusive right to navigate coastal waters in vessels powered by steam, which enactment was in direct conflict with the federal government’s grant of coasting licenses to other steamboat owners. 22 U.S. at 221.

³⁴ For example, Rockland has “a very limited number of slots that it allows for ships over a lower berth capacity of 500.” Ex. 195 at 56. Rockland permits only “six bookings per year per season unless” it “authorize[s] a waiver to add any ships beyond that.” *Id.*

³⁵ This phenomenon may well suggest a nationwide interest among cruise tourism communities to impose restrictions. *Cf. Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 128 (1978) (“The evil that appellants

living conditions is a hyperlocal concern that is not well suited to a one-size-fits-all regulatory approach at the federal level.

Furthermore, Bar Harbor is regulating a “matter[] of local concern” in both “character and effect.” *S. Pac. Co.*, 325 U.S. at 767. The history of cruise tourism at Bar Harbor demonstrates the unique challenges that cruise tourism imposes on Bar Harbor. These challenges gave rise to a democratic effort, where the voters weighed the relevant local commercial and noncommercial interests and ultimately adopted the Ordinance. Modern-day, board-directed cruise practices (particularly those of foreign-flagged cruise lines³⁶) do not allow much room for smaller municipalities to manage their local experiences based on daily limits on the number of passengers coming ashore. Cruise lines are utilizing ever larger vessels to achieve unprecedented economies of scale, principally for shareholder profit. At the same time, cruise lines will not call at a port unless the entire complement of passengers is permitted to come ashore.³⁷ These characteristics of cruise tourism make it unworthy of overly solicitous judicial action that would negate an exercise in democratic self-determination that is better informed of existing, localized conditions. Nothing in the Constitution dictates municipal obeisance to the economies of scale of cruise tourism. Nor, as far as I can tell, does the dormant Commerce Clause legislate adherence

perceive in this litigation is not that the several States will enact differing regulations, but rather that they will all conclude that divestiture provisions are warranted.”).

³⁶ The representative voices of cruise tourism offered at trial, like Plaintiffs’ and Plaintiff-Intervenor’s briefing, did not speak to a need for moderation but rather have thematically favored catering to the interests of the cruise lines with the very largest capacity vessels. Those cruise lines happen to conduct their trade with foreign-flagged vessels.

³⁷ *But see* Ex. 193 at 8–9. Chris Martin, Director of Port Operations for Holland America, testified at his deposition that Holland America stops at ports that limit the number of passenger disembarkations, such as in Bergen, Norway. *Id.*

to neoclassical liberalism any more than the Due Process Clause compels observation of Mr. Herbert Spencer's Social Statics.

In the absence of federal or state law dictating the outcome, reasonable citizens at the municipal level will come to different conclusions about the proper balance between unabated cruise tourism and relative calm, and the outcome of their democratic process is the best measure of the polity's tolerance in light of local conditions. For this reason, I conclude that non-discriminatory and non-monopolistic state laws and local regulations that have the impact of restraining outside cruise tourism do not deserve per se invalidation or a heightened standard of review through which judges rather than citizens become the final arbiters of the terms by which cruise tourism will be conducted in every port in the Nation. In other words, "[c]ompelling reasons justify treating these laws differently from laws favoring particular private businesses over their competitors." *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 342 (2007) (relying, in part, on *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985) ("The States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons" (internal quotation marks omitted))).

d. Burdens versus benefits

Although the Bar Harbor Ordinance "regulates even-handedly to effectuate a legitimate local public interest" while imposing "incidental" effects on commerce, it remains necessary to determine whether "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142. Under this

standard, “the extent of the burden that will be tolerated will . . . depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.” *Id.* But even so, “[p]reventing 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.’” *Nat’l Pork Producers Council*, 598 U.S. at 390 (quoting *Conway v. Taylor’s Executor*, 66 U.S. (1 Black) 603 (1862)).

The parties disagree as to whether the Ordinance’s burdens on commerce are clearly excessive in comparison to the local benefits. Plaintiffs and Plaintiff-Intervenor view the Ordinance’s benefits as purely speculative and Bar Harbor’s interest in reducing cruise tourism as illegitimate. On the other hand, Bar Harbor and Mr. Sidman characterize the Ordinance as imposing a burden on the cruise industry’s business model rather than on interstate commerce. To the extent that the Ordinance does affect commerce, they argue that its burdens are not clearly excessive in relation to the local benefits.

I first consider the Ordinance’s burdens on commerce. There is no doubt that the Ordinance will have some effect on commerce since almost 80% of the cruise ships that presently visit Bar Harbor have a lower berth capacity in excess of 1,000 and are thus unlikely to call at Bar Harbor.³⁸ But it is impossible to predict the Ordinance’s precise consequences. The Ordinance continues to permit the daily disembarkation of persons traveling by cruise ship in large numbers, even if those numbers are inadequate to

³⁸ As of December 2022, 107 of the 134 cruise vessel calls for the 2023 cruise season were scheduled for vessels that have a lower berth capacity in excess of 1,000. Ex. 8.

accommodate most of the cruise ships plying the Atlantic seaboard these days. Milton Friedman and the Chicago school would recoil at the claim made by business interests that the free market economy of private actors cannot adapt to the limitation at the Bar Harbor waterfront, and who instead seek snug harbor behind a constitutional challenge that strikes me as not well fitted to the facts on the ground. Given the attractiveness of the port of Bar Harbor, it is to be expected that cruise enthusiasts intent of reaching Bar Harbor will find a cruise line to carry them there. Some cruise lines already offer suitable vessels with Bar Harbor itineraries. Other cruise lines no doubt will adjust to serve the emerging market charted by municipalities interested in following Bar Harbor's example by accommodating cruise tourism subject to more constituency-pleasing passenger caps (something that is unlikely to develop so long as cruise lines and their proxies threaten constitutional litigation over limited access). *See id.* at 385 (plurality opinion) (“But from all anyone can tell, *other* out-of-state competitors seeking to enhance their own profits may choose to modify their existing operations or create new ones to fill the void.”).

Insofar as the Ordinance causes visitors to travel to Bar Harbor through other means, like smaller cruise ships, the Ordinance is best described as burdening the cruise line industry's business model, rather than interstate commerce. *See Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127 (1978) (reasoning that Maryland's law prohibiting petroleum producers from operating retail gas stations in-state did not unduly burden commerce because “interstate commerce is not subjected to an impermissible burden simply because an otherwise valid regulation causes some business to shift from one interstate supplier to another” when “there [was] no reason to assume that their share of

the entire supply [would] not be promptly replaced” by other companies). Unfortunately for Plaintiffs and Plaintiff-Intervenor, the Commerce Clause does not protect the cruise line industry’s “particular structure [and] methods of operation.” *Id.* While the Ordinance will likely cause visitation to Bar Harbor to decrease, thereby affecting interstate commerce, it is impossible to know exactly how many fewer visitors will travel to Bar Harbor. Thus, I conclude that the Ordinance will impose an uncertain burden on interstate commerce.

I next consider the Ordinance’s local benefits. I reject Plaintiffs and Plaintiff-Intervenor’s arguments that Bar Harbor’s proffered interests in lessening congestion and conserving municipal resources are illegitimate.³⁹ Courts have held that similar local interests are legitimate in a variety of contexts. *See, e.g., Maine v. Taylor*, 477 U.S. 131, 151 (1986) (“The Commerce Clause significantly limits the ability of States and localities to regulate or otherwise burden the flow of interstate commerce, but it does not elevate free trade above all other values” [because] States “retain[] broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources.”); *Memphis v. Greene*, 451 U.S. 100, 126–27 (1981) (describing a city’s “decision to reduce the flow of traffic” as “legitimate” and the “residential interest in comparative tranquility” as “unquestionably legitimate” in analyzing a claim under the Thirteenth Amendment);⁴⁰

³⁹ On this point, they rely on *Young v. Coloma-Agaran*, No. 1:00-CV-00774-HG-BMK, 2001 WL 1677259, at *11 (D. Haw. Dec. 27, 2001) (stating that “[e]liminating the presence of tourists from the Bay is not a proper reason for the Ban as it directly contradicts the very purpose of the Commerce Clause”), *aff’d*, 340 F.3d 1053 (9th Cir. 2003). The district court cited no authority for this proposition, and while the Ninth Circuit affirmed the district court, the Ninth Circuit decided the case on alternative grounds and thus did not opine on the Commerce Clause.

Tart v. Massachusetts, 949 F.2d 490, 501 (1st Cir. 1991) (discussing the legitimate local interest in promoting public health). Insofar as the Ordinance reduces the number of persons who visit Bar Harbor by cruise ship, the Ordinance commensurably advances Bar Harbor’s local interest in lessening congestion—particularly at the waterfront, over which the cruise industry will otherwise domineer. This noneconomic benefit, while not precisely measurable, is both real and reasonably well calibrated to ameliorate the particularized excesses of modern cruise tourism and how it interfaces with Bar Harbor’s waterfront.

In short, the Ordinance imposes some burden on the “free flow” of commerce, but that burden is impossible to quantify. The 1,000-person limitation is a significant downshift from the passenger caps previously observed in Bar Harbor. But that downshift also promotes noneconomic interests.⁴¹ Bar Harbor with the MOA passenger limits and Bar Harbor with the 1,000 daily passenger limit are significantly different places. The voters of Bar Harbor “weigh[ed] the relevant ‘political and economic’ costs and benefits for themselves,” and the voters evidently decided that the noneconomic benefits of the Ordinance favored adopting it. *Nat’l Pork Producers Council*, 598 U.S. at 382 (plurality opinion) (quoting *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 279 (1978)). Considering the

⁴⁰ The circumstances in *Greene* gave rise to a lively dissent based on the observation that the interest in comparative tranquility can be a pretext for walling off white communities from communities of color. *Greene*, 451 U.S. at 136 (Marshall, J., dissenting). Unlike *Greene*, this case has no undertones of invidious discrimination.

⁴¹ Plaintiffs and Plaintiff-Intervenor see the impact on the movement of vessels and persons as burdens so weighty as to compel per se invalidation of the Ordinance. Obviously, I have not viewed it the same way. The lead authority they cite is *Edwards v. California*, 314 U.S. 160 (1941), in which California attempted to minimize the extent to which it would bear the burden of indigent migration secondary to the Dust Bowl—a “grave and perplexing social and economic dislocation” (i.e., the greatest natural disaster of our Nation’s history), *id.* at 173. The analogy between Dust Bowl migration and cruise tourism is strained, to say the least.

intimate “nature of the local interest[s]” involved in Bar Harbor’s decision to limit cruise tourism, I cannot say that the Ordinance imposes a burden on commerce that “is clearly excessive in relation to the putative local benefits.” *Pike*, 397 U.S. at 142.⁴²

CONCLUSION

For the reasons set forth above, I conclude as follows:

The challenged Bar Harbor Ordinance, Bar Harbor Code Chapter 125, Article VII, Section 125-77, is a lawful exercise of home rule authority under the Maine Constitution and is not preempted by state law.

The Ordinance does not violate the Due Process Clause or the Commerce Clause of the United States Constitution.

The Ordinance is in part conflict preempted under the Supremacy Clause. Specifically, the 1,000-person cap is conflict preempted insofar as seafarer shore access is concerned. But insofar as cruise ship passengers are concerned, the 1,000-person cap survives challenge under the Supremacy Clause.

Based on these legal conclusions, judgment will enter for the Town of Bar Harbor on Counts II and III of Plaintiffs’ Complaint and on Counts II, III, and IV of Plaintiff-Intervenor’s Complaint in Intervention. As for the Supremacy Clause claims stated in the first counts of the Plaintiffs’ Complaint and the Plaintiff-Intervenor’s Complaint in Intervention, judgment will enter IN PART for the Town of Bar Harbor, as Plaintiffs and

⁴² *Cf. Nat’l Pork Producers Council*, 598 U.S. at 382 (plurality opinion) (describing that weighing out-of-state producers’ costs of compliance against the moral and health interests of California’s residents as “a task no court is equipped to undertake” and stating that in “a functioning democracy, policy choices like these usually belong to the people and their elected representatives”).

Plaintiff-Intervenor fail to demonstrate cause to invalidate the Ordinance insofar as it operates as a restriction on passenger disembarkations, and IN PART for Plaintiffs and Plaintiff-Intervenor, as they have demonstrated that the Ordinance is partially preempted in relation to seafarer shore access, although it is by no means self-evident that any material alteration of the legal relationship of the parties has thereby been achieved.

SO ORDERED.

Dated this 1st day of March, 2024.

/s/ Lance E. Walker
UNITED STATES DISTRICT JUDGE