

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MAINE**

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

*Plaintiffs,* )

Civil Action No. 1:22-cv-416

PENOBSCOT BAY AND RIVER PILOTS )  
ASSOCIATION, )

*Plaintiff-Intervenor,* )

v. )

TOWN OF BAR HARBOR, a municipal )  
corporation of the State of Maine, )

*Defendant,* )

CHARLES SIDMAN, )

*Defendant-Intervenor.* )

**DEFENDANT-INTERVENOR CHARLES SIDMAN’S  
FINAL PRETRIAL MEMORANDUM**

Defendant-Intervenor Charles Sidman (“Mr. Sidman”), by and through undersigned counsel, respectfully submits this final pretrial memorandum pursuant to the Court’s May 11, 2023 Notice of Rescheduled Hearing (Dkt. No. 92) and Local Rule 16.4(b), and states as follows:

**INTRODUCTION**

This case will determine whether the international cruise ship industry and their allies can subvert the rational desire of the citizens of the Town of Bar Harbor (“Bar Harbor” or “Town”) to put reasonable limits on congestion and crowding in their much-loved downtown. Against the

citizens' most elemental exercise of small-town sovereignty, Plaintiffs offer three specious arguments that are not supported by the facts or well-settled law.

As we previously argued in our Motion to Dismiss (Dkt. No. 74), neither state nor federal preemption doctrines apply to preclude Bar Harbor's rational and reasonable efforts to regulate land use. The Town's Ordinance does not interfere with interstate or international commerce. Indeed, it has no effect on interstate commerce. Finally, the Plaintiffs have no substantive due process argument because, *inter alia*, the ordinance easily passes the applicable rational basis test and there is no basis for heightened scrutiny.

## **LEGAL DISCUSSION**

### 1. Statement of Defenses

The Ordinance represents the will of the voters in Bar Harbor, who decided that the volume of disembarking cruise ship passengers is too high and have a negative impact on the Town and its residents. The Ordinance is rationally related to the Town's legitimate purpose to protect, preserve, and promote the general health, safety, welfare, and peace of the community in the Town. The Ordinance does not seek to regulate the transport of persons by water. The Ordinance does not regulate ship size, construction, accessibility, navigation, or otherwise. Rather, the Ordinance reaches "landward" and only regulates how land within the Town is used, which is a valid exercise of local police power.

The evidence will show that the Ordinance serves the legitimate purpose of preventing the negative impacts associated with disembarking cruise ship passengers. The evidence will show that the Ordinance will not restrict cruise ships from anchoring at Bar Harbor, and that smaller cruise ships will still disembark their passengers. The evidence will also show that the Town will not enforce the Ordinance against seafarers, pilots, or union representatives.

Alternative means of accessing Bar Harbor do not present the same problems because they do not result in surges of people descending on the Town all at once. Plaintiffs and the Pilots will not be able to show that the Ordinance deprives them of any property right, or that it will render their property valueless. Nor does the Ordinance interfere with any of the provisions or policy considerations of Maine's pilotage or tourism laws.

2. Controverted Points of Law

a. *The Ordinance is not preempted by federal law.*

Federal law does not prohibit any municipal regulation of cruise ships disembarking passengers into towns. Plaintiffs' reliance on federal regulations are inapposite. *See, e.g.*, 46 C.F.R. §§ 70-80 (regulating combustible liquid cargo, lifesaving appliances, fire detection system, safety information); 46 C.F.R. §§ 70.01 et seq. (inapplicable Coast Guard regulations).<sup>1</sup> Plaintiffs' contention that the Ordinance is preempted by federal law is premised on a mischaracterization that the Ordinance attempts to regulate conduct on the water, an interpretation that "'push[es] the line shoreward' and 'engulf[s] everything' historically left to coastal jurisdictions." *Portland Pipe Line Corp. v. City of So. Portland*, 288 F. Supp. 3d 321, 447 (D. Me. 2017) (quoting *Askew*, 411 U.S. 325, 344 (1973)). Rather, the *land use* Ordinance only controls use of the Town's *own land* by limiting the number of disembarking passengers *on land located within the Town*. *See Tart v. Com. of Massachusetts*, 949 F.2d 490 (1st Cir. 1991) (state statute prohibiting the "land[ing] of raw fish" within state boundaries an appropriate exercise of state police power because it regulates land use); *Portland Pipe Line Corp.*, 288 F. Supp. 3d at 477 (restricting "on-shore facilities and conduct" does not implicate federal

---

<sup>1</sup> As stated above, the Town will not enforce the Ordinance against seafarers, pilots, and union representatives. Accordingly, the Ordinance does not interfere with 33 C.F.R. § 105.237.

preemption). Contrary to Plaintiffs' assertions, the Ordinance does not prohibit any vessel from operating or anchoring in Frenchman Bay, or anywhere else on the sea.

*b. The Ordinance does not violate the Commerce Clause.*

At trial, Plaintiffs will not be able to show that the Ordinance discriminates against interstate commerce or foreign commerce, in purpose nor effect. Nor will they be able to prove that the Ordinance has an incidental effect on interstate commerce. Even if the Ordinance has an incidental effect on interstate commerce, the Ordinance passes the *Pike* balancing test because it serves legitimate local purposes in preventing congestion and improving the quality of life of its residents and local businesses. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

Plaintiffs' reliance on *Henderson v. Mayor of City of New York*, 92 U.S. 259 (1875), is misplaced. *Henderson* involved a New York state tax on immigration from foreign countries, imposed upon the owner of the vessel, which is clearly the province of the federal government. *Henderson*, 92 U.S. at 268-69. The generally applicable fine imposed by the Ordinance, which Plaintiffs have not challenged, does not discriminate against foreign passengers, and is levied against real property owners in the Town, not the cruise ships or passengers.

*c. The Ordinance does not deprive Plaintiffs of substantive Due Process.*

Plaintiffs will not be able to establish that the Ordinance interferes with any of their rights, let alone a fundamental right. Coast guard approvals and the profitability of Plaintiffs' businesses are not property interests for substantive due process purposes. *See Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 447 (1960); *Medeiros v. Vincent*, 431 F.3d 25, 32 (1st Cir. 2005). Therefore, the Ordinance is reviewed under the rational basis test. *Kenyon v. Cedeno-Rivera*, 47 F.4th 12, 24 (1st Cir. 2022). The Ordinance's benefits to the quality of life in

Bar Harbor easily survives rational basis review because it is rationally related to legitimate governmental interests. *See Cook v. Gates*, 528 F.3d 42, 55 (1st Cir. 2008).

*d. The Ordinance is not preempted by state law.*

The Pilots Association will not be able to prove that the Ordinance is preempted by state law. The Harbor Masters Act permits municipalities to enforce regulations related to the function of municipal harbors. *See* 38 M.R.S. § 7. Both laws complained of—Maine’s pilotage statutory scheme and broad goal of economic development—contemplate this grant of authority municipalities have over their own harbors—and will be unaffected by the enforcement of the Ordinance. *See* 5 M.R.S. § 13052; 38 M.R.S. §§ 85, et seq.

3. Stipulations, witnesses, and exhibits.

The parties have filed joint stipulations with the Court. (Dkt. No. 137.) Mr. Sidman’s witness list is attached as Exhibit A. Mr. Sidman’s exhibit list is attached as Exhibit B. Because Plaintiffs are still producing documents to the parties, with their latest production being June 16, 2023 (ten days after the close of discovery (Dkt. No. 109)), Mr. Sidman is still reviewing document productions. Accordingly, Mr. Sidman reserves the right to amend both his witness and exhibit lists pending further review of the documents.

Respectfully submitted,

Dated: June 21, 2023

/s/ Robert Papazian  
Richard P. Olson, Esq., Bar No. 7275  
Robert Papazian, Esq., Bar No. 6491  
CURTIS THAXTER LLC  
One Canal Plaza, Suite 1000/P.O. Box 7320  
Portland, Maine 04112-7320  
(207) 774-9000  
rolson@curtisthaxter.com  
rpapazian@curtisthaxter.com

*Attorneys for Defendant-Intervenor  
Charles Sidman*

**CERTIFICATE OF SERVICE**

I hereby certify that on June 21, 2023, the foregoing was electronically filed with the Clerk of this Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

Dated: June 21, 2023

/s/Robert Papazian  
Richard P. Olson, Bar No. 7275  
Robert Papazian, Bar No. 6491  
CURTIS THAXTER LLC  
One Canal Plaza, Suite 1000/P.O. Box 7320  
Portland, Maine 04112-7320  
(207) 774-9000  
rolson@curtisthaxter.com  
rpapazian@curtisthaxter.com

*Attorneys for Defendant-Intervenor  
Charles Sidman*

Exhibit A: Witness List<sup>1</sup>

Name	Contact Information
Charles Sidman	c/o Counsel for Defendant-Intervenor One Canal Plaza, Suite 1000 P.O. Box 7320 Portland, ME 04112-7320
Amy Stapleton Sidman	395 Main St., P.O. Box 200, Bar Harbor, ME 04609
Barbara Fenderson	243 Oak Hill Road, Bar Harbor, ME 04609
Donna Karlson	8 Devon Road, Bar Harbor, ME 04609
Pat Murphy	13 Arata Drive, Bar Harbor, ME 04609
Jim O'Connell	5 Higgins Terrace, Bar Harbor, ME 04609
Valerie Peacock	Town of Bar Harbor Bar Harbor, Maine
Matthew A. Hochman	
Gary Friedmann	
Joseph Minutolo	
Jefferson G. Dobbs	
Erin E. Cough	
Jill Goldthwait	
Michael P. Walsh	
Mark T. Walsh	

---

<sup>1</sup> Mr. Sidman reserves the right to amend both witness and exhibit lists pending further review of the parties' produced documents.

<b>Name</b>	<b>Contact Information</b>
William J. Walsh	
Patrick F. Walsh	
Suzanne Walsh-Lanigan	
Michael Simeon	
Kevin DesVeaux	
Loren Hubbard	
Glenn Tucker	
Shawn Moody	
Chris Mastrippolito	
Eben Salvatore	
Richard Ade	
Kevin Sutherland	
Nathan Young	
Christopher K. Wharff	
Chris Johansen	
James Willis	
David Gelinis	
Prentice Strong III	
David Smith	
Adam Philbrook	
Paul Paradis	
Cornell Knight	



<b>Name</b>	<b>Contact Information</b>
Dana Reed	
Sarah Gilbert	Town of Bar Harbor Bar Harbor, Maine
Angie Chamberlain	
Seth Libby	
Christopher Walsh	
Robert Garland	
Anne Krieg	
Amy Powers	
Sarah Flink	
Gregory Gordon	
Renata Moise	
Julie Veilleux	
Lincoln Millstein	
Carrie Jones	
Faith deAmbrose	
Bill Horner	
Kristi Bond	
Shawn Porter	
Heather Davis	
Tom Testa	
Kristi Bond	
Gary "Bo" Jennings	

<b>Name</b>	<b>Contact Information</b>
AnnLinn Kruger	
David Balkin	
Greg Veilleux	
Russ D'Alessio	
Linda D'Alessio	
Earl Brechlin	
Beth Warner	
Judith Blank	
Robert Gallon	
Ellen Grover	
Ann G. Benz	
Cara Ryan	
Witnesses designated by Plaintiffs	
Witnesses designated by Plaintiff-Intervenor Penobscot Bay and River Pilots Association	
Witnesses designated by Defendant Town of Bar Harbor	
Customers of Argosy Gallery	
Voters in Bar Harbor	

Exhibit B: Exhibit List<sup>1</sup>

1. All documents produced by Plaintiffs.
2. All documents produced by Plaintiff-Intervenor.
3. All documents produced by Defendant.
4. All documents produced by Defendant-Intervenor.
5. All deposition transcripts, deposition exhibits, and documents shared with the parties relating to all witnesses deposed.
6. All Deposition transcripts, deposition exhibits, and documents shared with the parties relating to all expert witnesses and rebuttal expert witnesses deposed.
7. News articles relating to cruise ships in Bar Harbor.
8. Photographs and videography depicting Bar Harbor on Cruise Ship visitation days and non-cruise ship visitation days.
9. Any and all exhibits produced by Plaintiffs, Plaintiff-Intervenor, Defendant, or Defendant-Intervenor during discovery.
10. Communications to or from the Town of Bar Harbor relating to cruise ships.
11. Any and all exhibits introduced, identified, or referred to by Defendant-Intervenor at trial.

---

<sup>1</sup> Mr. Sidman reserves the right to amend both witness and exhibit lists pending further review of the parties' produced documents.