

property owner within the district was to pay. Weber (the successor to the original property owner who protested) challenged the assessment as violative of the public purpose requirement, claiming that it benefited only Enstar. That was because Enstar would receive all of the assessment proceeds and, in the end, would own and operate the gas line.

In *Weber* the Alaska Supreme Court concluded: "The issue turns not on who is being paid but on what will be provided." In doing so the court relied on an earlier U.S. Supreme Court pronouncement⁸ and its own early decision in *Lien v. City of Ketchikan*, 383 P.2d 721 (Alaska 1963) ". . . [T]he test of whether a public purpose is being served does not depend on the . . . nature of the [entity] that will operate the . . . property, but upon the character of the use to which the property will be put."⁹

I have struggled with the applicability of the public purpose section to the Port of Juneau. I specifically opposed use of the marine passenger fee proceeds to fund shoreside power. What troubled me most was the manner in which the project was put together. Two private entities entered into a contract for shoreside power that included provisions for the financing of the project and then, six months later, successfully requested that the assembly pay for the project from marine passenger fee proceeds instead. Under *Weber* the expenditures fulfilled the public purpose requirement.

Senator Elton Engstrom, and Msrs. Chip Thoma and Joseph Geldhof have each expressed their concern about expenditures proposed for the A.J. Juneau Dock and Franklin Dock. None has argued that there should be an absolute bar to expenditures at the private docks.

Senator Engstrom's objection is that:

The Franklin Dock and A.J. Dock have contracts that give them profit for their enterprises which should include provision for repair and depreciation, if properly drafted. Both of the aforementioned docks are private entities with no open access for the Juneau public. These are structures that are only used for the benefit of the dock company and a cruise line. . . To give them a

⁸ "The test of the public character of an improvement is the use to which it is to be put, not the person by whom it is to be operated." *Milheim v. Moffat Tunnel Improvement District*, 262 U.S. 710 (1923).

⁹ Another Alaska Supreme Court case, *Wright v. City of Palmer*, 468 P.2d 326 (Alaska 1970) is also instructive. Here the court approved a bond issue intended to entice a business into Palmer over the objection that the benefit accrued to the business entity. The court noted that: "There are dangers that an industry locating in a community may end up dominating the political and economic processes. On the other hand, it is recognized that the location of an industry in a particular community may have widespread economic benefits and that these do fulfill the public purpose and the general welfare of the community, broadly conceived". *Ibid* at 330-31. The court further observed: "The benefits from the plan of the City of Palmer may be enjoyed in part by some individuals more than by others. But collective advantages to the community at large can be perceived quite readily." *Id.* at 331

Marine Passenger and Port Development Fees

April 25, 2011

Page 8 of 13

share of the head tax would be a gift which is not expected or deserved.

(undated; presented to the assembly in early April 2011)

Mr. Thoma lauded the proposal to fund a grey water connection from the AJ Juneau Dock to the Thane treatment plant. On the other hand, he has challenged the navigation hazard study, declaring that "Private entities should do their own business and capital improvement planning, not the CBJ." (April 11, 2011).

Mr. Geldhof observed that "... the CBJ has the ability to make payment to the private docks and other private entities so long as the public obtains some value from the transaction." He objected to many of the proposed expenditures, however, as "nothing more than a subsidy by the public to private enterprise entities for what is essentially routine maintenance or property upgrades." (April 11, 2011).

Legal representatives of the Franklin Dock Co. and A.J. Dock Co., on the other hand, have argued that:

To absorb the fees collected from vessels calling at the private docks (and to comply with federal law) ... the CBJ will need to make substantial additional appropriations for projects to maintain the docks at the high standard necessary to continue attracting cruise business (and related economic activity) to Juneau.

Stephen Rummage and Rebecca Francis (December 7, 2010)

While supporting projects proposed for the private docks, Mr. Bob Stone, chairman of the Alaska Cruise Association has challenged the decision to expand the downtown public docks, in part because "that project will not benefit the passengers who would be paying the fees to defray the costs, thus running afoul of federal law. (Indeed, most of those passengers do not even call at the public docks)." In his letter to me, dated January 11, 2011, he continued: "The industry also has serious concerns regarding the seawalk and other components of the Long-Range Waterfront Plan."

I appreciate Mr. Stone's focus on the Long-Range Waterfront Plan because it is for me the linchpin of our approach to the imposition and expenditure of our fees. The plan views the Port of Juneau as an integrated area, intended to service vessels, their passengers and crew in a way that is safe and efficient, but also with amenities that benefit these visitors and residents alike. The fees are a partial offset to the costs associated with the infrastructure and governmental services provided and in mitigation of the impacts that a million and a half people, both passengers and crew, bring in a four month period to a community of 31,000.

Any given year is a snapshot in time. Discrete projects may be concentrated in one part of the Port in one year, in another in a second year, and so on. At the end of the planning

horizon, however—and with modifications as time goes on—the Port will have been fully developed and will have enhanced both the safety of vessel, passengers and crew and their efficient movement along and through the waterfront.

I agree with Mr. Rummage and Ms. Francis that we do need to maintain both public and private docks “at the high standard necessary to continue attracting cruise business (and related economic activity) to Juneau.” For that reason, I can support funding for projects at the private docks. In the first instance, however, I leave it to the manager to evaluate all proposals for expenditures of the marine passenger fee proceeds and to recommend those that he concludes are most justified.

There are two residual questions from this discussion: (1) what, more specifically, can we spend the fees on? And, (2) must all fees collected from passengers disembarking at the private docks be used exclusively at the private docks?

There is no magic list that allows us to definitively say which projects qualify and which do not. However, the Second Circuit Court of Appeals decision in *Bridgeport and Port Jefferson Steamboat Co. v. Bridgeport Port Authority*, 567 F.3d 79 (2d Cir. 2009), is instructive. The port authority, established by the City of Bridgeport, CT, included lands 1,000 feet inland from the waterways of Bridgeport and Black Rock Harbors as well as certain lands outside of it. It also encompassed a dry shipping terminal, a site of a former major steel complex and a shipyard. The ferry company docked at the authority’s facilities. The authority imposed a passenger fee on ferry passengers from which virtually all of its operations were funded. The court affirmed a lower court decision enjoining the collection of a passenger wharfage fee until the fee was revised. Specifically, it approved of the district’s court’s segregation of permissible and impermissible uses of the fee proceeds. I highlight here some of the markers that should help us in making our own expenditure decisions:

- “The Port District . . . includes many projects beyond the Dock that are not functionally related to the ferry operation, and are not intended to benefit the travelers on ferries or to facilitate their boat travel from Connecticut to Long Island.”
- “The Court concluded that the following BPA activities benefitted ferry passengers: (1) construction and maintenance of a new ferry terminal building, (2) repair of the bulkhead of the Dock, (3) construction of the access road, (4) planning of the parking facility for ferry passengers, (5) security for the Dock, and (6) daily operations related to the ferry.”
- “A user fee. . . may reasonably support the budget of a governmental unit that operates facilities that bear at least a ‘functional relationship’ to facilities used by the fee payers.”

I do not believe that we are required to expend all monies collected from passengers disembarking at the private dock facilities only on those facilities. I essentially agree with Senator Engstrom’s observation that “[t]he Franklin Dock and A.J. Dock are not the

nexus of the taxable event supporting the passenger charge. The basis is the vessel being in the waters adjacent to the city of Juneau.” The fees are used for improvements to the Port of Juneau, of which the private facilities are merely a part.

Two airline cases discussed in *Bridgeport* above make clear that there is no requirement that “the amount of a user fee must be precisely calibrated to the use that a party makes of Government services.”

In *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*, 405 U.S. 707 (1972), respondents challenged a “use and service charge” of \$1 “for each passenger enplaning any commercial aircraft operated from the Dress Memorial Airport” in Evansville, Indiana. The funds were to be used for the improvement and maintenance of the airport. The Supreme Court upheld the fee. Among its conclusions:

- A charge designed to make the user of state-provided facilities pay a reasonable fee for their construction and maintenance may constitutionally be imposed on interstate and intrastate users alike.
- Although not all users of the airport facilities are subject to the fees, and there are distinctions among different classes of passengers and aircraft, the charges reflect a fair, albeit imperfect, approximation of the use of the facilities by those for whose benefit they are imposed, and the exemptions are not wholly unreasonable.

In *Alamo Rent-a-Car, Inc. V. Sarasota-Manatee-Airport Authority*, 906 F.2d 516 (11th Cir. 1990), the rental car agency was the only one of six agencies located off the airport premises. It was assessed a ten percent fee to the airport authority, but prohibited from soliciting business in the airport and from picking up passengers who lacked a reservation. The on-site agencies also paid the fee, but were otherwise unrestricted. It challenged the imposition of the user fee, relying on the *Evansville* case above that the fee must “reflect a fair, if imperfect, approximation of the use of facilities for whose benefit they are imposed.” The agency said that the only use it made of the airport was to drive on the airport roads in order to pick up passengers. For that reason it should be limited only to a “pro rata road use fee”.

The circuit court upheld the fee. Among its observations were

- “. . . [T]he ‘benefit conferred’ language of [*Evansville*] suggests that a broad construction of use is appropriate where the benefit derived by the user depends on the existence of the entire government-provided facility.”
- “Alamo argues that the Authority can only ‘recoup’ expenditures, thus implying that the Authority is restricted to seeking reimbursement for funds already expended to build and maintain the airport facility, and that the Authority is forbidden from levying a fee to fund future development. . . [W]e believe that given the long term nature of maintaining and developing an airport, it was appropriate for the Authority to factor in future development plans when setting user fees. To ignore the future expense of developing and expanding the airport

to meet increased demands, would increase rather than mitigate burdens on interstate commerce. . .”

A third case, decided three weeks ago, *Cohen v. Rhode Island Turnpike and Bridge Authority*, 2011 WL 1319541 (D. Rhode Is. 2011), involved a class-action challenge to, among other things, the turnpike and bridge authority’s (RITBA) use of tolls collected on one bridge to be used for maintenance and improvements on another, non-toll bridge. Here the plaintiff argued that because RITBA used some of the toll monies collected at the tolled-bridge to maintain the other, the toll was not based on a fair approximation of the use of the tolled-bridge.

RITBA countered that there was a “functional relationship” between the two bridges, the presence of the second bridge helping to alleviate the traffic that would exist on the tolled-bridge in its absence. The district court concluded that

This Court is not required to measure the strength of this functional relationship or the precise extent of added congestion that closing the Mount Hope Bridge would produce. . . To defeat [plaintiff’s] argument, all that must be shown is some functional relationship between the two bridges.

The conclusion that I draw from these cases is that fees collected from passengers disembarking at the private docks need not be expended solely at those facilities, that the fees may be used to support discrete projects within the Long-Range Waterfront Plan and that their use for construction of public dock facilities would be permissible because of the functional relationship existing between the facilities.¹⁰

Where do we go from here?

The Finance Committee did not act on the Capital Improvements Program budget set forth in Resolution 2571 at its April 13, 2011 meeting because of concerns about projects funded by the marine passenger proceeds, even though the committee had independently forwarded the Marine Passenger Fee funding recommendations to the assembly at its April 6, 2011 meeting without objection.

I propose that we move forward at our special Assembly meeting on Wednesday in the following manner:

- 1) We should pull Resolution 2571 “A Resolution Adopting the CBJ CIP for FY 2012 Through 2017” from the consent agenda and move it to the bottom of the agenda.
- 2) Once we reach Resolution 2571, I will ask to suspend the rules in order to decide “by exception” projects to be considered. Specifically, I ask that we:

¹⁰ I reiterate that I believe it is permissible to expend monies on the private dock facilities and that it is advisable to do so where the result will be to enhance safety, efficient movement of passengers and crew and help standardize high quality infrastructure throughout the Port of Juneau.

- a) determine whether there are any non-marine passenger fee projects to which there is objection and decide these;
- b) determine whether there are any marine passenger fee projects to which there is objection and decide these;
- c) determine the distribution of any disapproved funds (for example, directing remaining monies to the seawalk, Statter Harbor, or other projects that did not make the manager's list); and
- d) formally act on Resolution 2571 and on dispositions of the marine passenger fee proceeds.

MEMORANDUM

CITY/BOROUGH OF JUNEAU
City & Borough Manager's Office
155 S. Seward St., Juneau, Alaska 99801
Rod_Swope@ci.juneau.ak.us

Voice (907) 586-5240
Fax (907) 586-5385



DATE: April 22, 20

TO: Mayor and Assembly

FROM: *Rod*
Rod Swope
City & Borough Manager

SUBJECT: List of proposed marine passenger fee projects

Operations

1. CBJ general government operations	\$1,400,000
2. CCFR air medevac bad debt reimbursement	\$25,000
3. Airlift Northwest air medevac bad debt reimbursement	\$50,000
4. Bartlett Regional Hospital general bad debt reimbursement	\$29,400
5. Tourism Best Management Practices support	\$15,000
6. Downtown crossing guards	\$125,000
7. Additional downtown summer JPD foot and bike patrol	\$122,600
8. Cleaning & maintenance for downtown CBJ restroom facilities	\$75,000
9. Additional downtown street, sidewalk and trash receptacle cleaning	\$89,000
10. Additional summer transit bus service	\$278,000
11. JCVB summer visitor information program	\$127,000
12. CCFR summer EMS transport program	\$129,700
13. DBA summer downtown ambassador program	\$56,300
14. CBJ docks general operations	\$154,000
15. CBJ airport general operations	\$159,100
16. Restroom cleaning and maintenance for the AJ Dock facility	\$20,000
17. Manning and maintenance of a port security boat at the AJ Dock facility	\$19,600
18. Port security training for the AJ Dock facility	\$44,000
19. Restroom cleaning and maintenance for the Franklin Dock facility	\$20,000

Capitol Projects

20. CBJ waterfront seawalk	603,900
21. Cathodic protection for the AJ Dock	160,400
22. Replacement of a canvas covering for the AJ Dock entrance/staging area	\$10,000
23. Installation of security gates at the AJ Dock	\$48,000
24. Redesign the covered pedestrian ramp at the AJ Dock	\$48,000
25. Planning and design of two information kiosks at the AJ Dock	\$32,000
26. Partial funding for gray water connection at the AJ Dock	\$218,000
27. Security personnel training and a new security tent for the Franklin Dock	\$100,000
28. Dock resurfacing at the Franklin Dock	\$40,000
29. Corrosion control at the Franklin Dock	\$60,000
30. Retaining wall improvements at the Franklin Dock	\$150,000
31. Replace the canvas cover of the staging area at the Franklin Dock	\$30,000
32. Pave the parking area behind the restrooms at the Franklin Dock	\$75,000
33. Analysis of new floating dock to replace the existing Franklin Dock	\$100,000
34. Provide a cover for the passenger waiting area on the main Franklin Dock	\$25,000

MEMORANDUM

CITY/BOROUGH OF JUNEAU
City & Borough Manager's Office
155 S. Seward St., Juneau, Alaska 99801
Rod_Swope@ci.juneau.ak.us



Voice (907) 586-5240
Fax (907) 586-5385

DATE: April 1, 2011
TO: Assembly Finance Committee
FROM: Rod Swope
City & Borough Manager
SUBJECT: Draft FY12 Passenger Fee Proceeds Recommendations

Based on our latest projections, the amount of revenue available in FY12 is anticipated to be \$4,639,000. I am recommending that the proceeds be divided between operations and capital projects as follows:

OPERATIONS

Identified Government Operations

Project Description

On May 10, 2000, the Assembly Finance Committee approved a formula that reflects cruise ship passenger impacts on specific government services and is used to determine an amount of Marine Passenger Fee (MPF) proceeds to be used in support of identified government operations. Further, in 2003 a full cost analysis, reviewed by the NorthWest CruiseShip Association and evaluated by Elgee, Rehfield and Mertz, LLC, was done to determine whether this formula provided a fair and accurate assessment of costs. Although not inclusive, examples of expenses include landscaping and maintenance of baskets/barrels at the public docks and along the seawalk in addition to flower beds and grass areas at the steamship plaza and marine park; additional wear and maintenance on the downtown library restrooms; wear on public roads and sidewalks by tourists, tour buses, charter vans and increased taxi service; time spent by the finance department accounting for expenditures of passenger fees to monitor fund balances and ensure compliance with the law; time spent by the accounting division on purchase of supplies, equipment and materials/services funded by passenger fees; costs incurred by CCFR to remain current on shipboard fire suppression training; time spent by the Emergency Program Manager and CBJ staff training for emergency preparedness in the event of a cruise ship mishap or disease outbreak while in port; maintenance and replacement of tourist information signs; and time spent by the manager's office and law department on passenger fee and tourism related issues. **\$1,400,000**



Capital City Fire/Rescue (CCFR) Air Medevac Support

Project Description

This funding is an offset for unrecoverable costs incurred by the fire department for the air medevac program in response to medical events involving cruise ship passengers or crew. This past year, 50% of air medevacs were in response to situations involving cruise ship passengers or crew. On average, CCFR only recovers 36% of the total costs from patient billings. **\$25,000**

Non-Profit Air Medevac Support

Project Description

Airlift Northwest, a non-profit ambulance transport service, was founded in 1983 to provide air ambulance service to Southeast Alaska. According to Airlift Northwest, the requested amount is to offset unrecoverable costs related to transport of cruise ship passengers and crew from Juneau this past year. **\$50,000**

Bartlett Regional Hospital Support

Project Description

For the past three fiscal years, cruise ship passengers have accounted for an annual average 4.5% of Bartlett Regional Hospital's patients (inpatients and outpatients). The hospital bad debt incurred from cruise ship passengers and crew for this past year was \$29,428. **\$29,400**

Tourism Best Management Practices Support

Project Description

This provides funding for printing, public notices, advertisements, and a contractual amount for Juneau Convention and Visitors Bureau (JCVB) staff to provide support to the Tourism Best Management Practices (TBMP) effort. TBMP is a voluntary industry-managed program, designed to provide services to vessel passengers and address impacts, including safety issues, of tourism on local residents. The JCVB administers the program with funding provided by Marine Passenger Fee proceeds. **\$15,000**

Crossing Guards

Project Description

The purpose of this program is to facilitate safe traffic flow in the downtown area, encourage pedestrians to stay on the sidewalks, increase pedestrian safety, and control the crossing locations where summer pedestrians can cross the streets. This will fund part-time seasonal crossing guards during the summer visitor season. This funding also provides for some limited equipment



purchases, general training, scheduling, and deployment of the crossing guards. This program is currently administered by the Juneau Convention and Visitors Bureau. **\$125,000**

Downtown Foot/Bike Patrol

Project Description

This provides additional foot and bike patrol presence by Juneau Police Department (JPD) officers in the downtown area during the summer. JPD's presence is important to ensure the safety of visitors, provide assistance and direction, and mitigate problems that can occur between some of the regular downtown locals and summertime visitors. These officers are regular police officers that volunteer for this duty during their off-duty hours. In addition, we have assigned one additional full-time patrol officer, dedicated to downtown year-round. This funding also supports the full-time patrol officer's salary during the summer months. Further, we are continuing the program using retired police officers, as seasonal employees, to patrol the downtown area during the summer. **\$122,600**

Downtown Restroom Maintenance

Project Description

This provides contractual services (labor and materials) required to clean the public restrooms in City Hall, Steamship Plaza, and the new Downtown Transportation Center seven days a week, six times per day, for five months during the summer. **\$75,000**

Restroom Cleaning and Maintenance – AJ Juneau Dock, LLC

Project Description

This provides funding for restroom cleaning and maintenance supplies for cruise ship passenger and public restrooms. **\$20,000**

Restrooms – Franklin Dock Enterprises, LLC

Project Description

This provides funding for restroom cleaning and maintenance supplies for cruise ship passenger and public restrooms. **\$20,000**

Juneau Port Security and Short-Range Response Boat – AJ Juneau Dock, LLC

Project Description

The Department of Homeland Security awarded the AJ dock with a port security and short range response boat that conducts port security patrols, at-sea deliveries to cruise ships in port (some items can not go across the docks for security reasons), is designed to accommodate medevac's,



spill response, salvage operations, and on-scene support for emergency or law enforcement issues when ships are at anchor or at sea. This request is solely to cover the manning, maintenance and operational expenses related to this vessel. **\$19,600**

Port Security Guard, Security Training and Exercises – AJ Juneau Dock, LLC

Project Description

This is a single request to fund a number of port security related expenses and projects. The training and exercise funding will benefit all regulated Juneau cruise ship passenger facilities. The AJ dock has been host to two large maritime security exercises. The AJ dock and other local facilities participate in annual security training. **\$44,000**

Downtown Cleaning

Project Description

Due to heavy summer use by visitors, the downtown sidewalks require extra cleaning and litter/garbage removal to keep them clean and safe. This funding provides for two temporary summer employees to operate and maintain the newly acquired sidewalk sweepers and empty downtown garbage containers. This year, there is also some funding to replace cigarette butt receptacles and a few garbage cans. **\$89,000**

Transit Public Bus Service

Project Description

Visitors heavily use local bus service during the summer, making it necessary to increase services in order to accommodate locals adequately in addition to summer visitors. The bus system provides a safe, efficient, and cost-effective way for visitors to visit the glacier and view other areas of Juneau. The additional revenue from summer visitors does help offset the cost of providing additional summer bus services; however, our transit system is heavily subsidized and the additional costs are not completely offset by the revenue received. This summer we will provide increased bus service in the mornings and evenings. **\$278,000**

Juneau Convention and Visitors Bureau (JCVB)

Project Description

The JCVB provides summer visitors with information, directions, and assistance. Program expenses include administrative support for training and supervision of 130 volunteers, managing the cruise ship terminal kiosk and Centennial Hall information centers, a paid seasonal visitor information position, and printed materials. **\$127,000**



Seasonal EMS Transport Program

Project Description

CBJ provides ambulance transport service for cruise ship patients that need to be transported from cruise ships and/or Bartlett Hospital to the airport for medevac to Anchorage or Seattle. The demand for patient transport service increases considerably during the summer due to cruise ship patients and does create situations, on a regular basis, in which we do not have available staff to provide transport service when requested. Two years ago, the cruise ship industry reported delays of 15 minutes to an hour and a half being encountered approximately 33% of the time during the summer. This causes delays for the medevac flight crews, resulting in costs and complications with regard to personnel, aircraft, weather, scheduling, etc. This program was implemented last summer and proved to be very effective in resolving this problem. This funding pays for four temporary seasonal EMTs to work 12-hour shifts during the summer (May through September) to cover transports and other EMS calls as needed. **\$127,900**

Downtown Ambassador Program

Project Description

Funding for this program supports two uniformed security officers that patrol the downtown area on foot from May through September. These security officers assist visitors with information, directions, and patrol the downtown area for loitering, panhandling, public intoxication, and other public nuisances potentially impacting summer visitors and local residents. With regard to public safety issues and infractions of the law, the security officers refer these issues to JPD to handle. This program is provided through a private contract administered by the Downtown Business Association. **\$56,300**

Identified Docks and Facilities Operations

Project Description

The Docks and Harbors Board has requested funding to offset the costs and impacts of providing area wide services and support to cruise ship passengers. The Board reviewed its budget and apportioned expenses associated with those services and estimated that approximately 9% of the annual docks budget, approximately \$1,711,677 in FY12, will be attributed to providing areawide service to cruise ship passengers. **\$154,000**

Identified Airport Operations

Project Description

In FY10, the Finance Committee approved the use of a portion of Marine Passenger Fee proceeds for airport operations to offset impacts for services provided to the cruise ship industry and for support to the cruise ship passengers and crew. The current request conforms to the same formula that was used for the last cycle. **\$159,100**



CAPITAL PROJECTS

Waterfront Seawalk

Project Description

This project will provide funding to continue the design, examination of right-of-way issues, pedestrian access and safety, and construction of seawalk in accordance with the Waterfront Development Plan. Funding for construction of additional seawalk was a recommendation of the Planning Commission and is one of the top FY11 priorities of the Assembly. **\$605,700**

Cathodic Protection – AJ Juneau Dock, LLC

Project Description

This project is critical to the longevity of the steel infrastructure of the facility and will include the installation of appropriately engineered zinc cathodic protection. **\$160,400**

Canvas Replacement – AJ Juneau Dock, LLC

Project Description

The canvas sections for the AJ covered areas, including the dock entrance and staging area, have been patched and portions replaced but the canvas life has expired and is now due for a full replacement. **\$10,000**

Security – Franklin Dock Enterprises, LLC

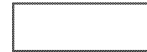
Project Description

Funding to provide training for security personnel to achieve compliance with the Coast Guard required security plan and to construct a new security tent for the approach dock. **\$100,000**

Security Gates – AJ Juneau Dock, LLC

Project Description

The AJ dock has four road access points. When the facility is not in use portable barriers are placed at these locations to enhance port security and deter vandalism. This project will construct swing gates at each access location that can be closed when the facility is not in use. **\$48,000**



Permanent Covered Walkway – AJ Juneau Dock, LLC

Project Description

This project would redesign the covered pedestrian ramp so that it has a permanent cover to protect the electrical lighting fixtures and block the southeast wind. **\$48,000**

Tour and Information Kiosk and Shuttle Kiosk – AJ Juneau Dock, LLC

Project Description

This will fund the initial planning and design of the two kiosks and may be sufficient to build one of the kiosks by 2012. **\$32,000**

Grey Water Connection and CBJ Lift Station Improvements – AJ Juneau Dock, LLC

Project Description

Preliminary engineering work for this project has been completed. This connection could be operational for the 2012 if the Thane Treatment Plant could be upgraded to handle the increase volume. This estimate provides a portion of the funding for construction, engineering, utility easement, permits and design. **\$218,000**

Dock Resurfacing – Franklin Dock Enterprises, LLC

Project Description

This will fund replacement of the enamel non-skid surface on the dock with Permacrete which also helps to seal the concrete and minimize future cracking in the concrete dock surface. The original coating is past its useful life. **\$40,000**

Corrosion Control – Franklin Dock Enterprises, LLC

Project Description

This will fund cleaning and repainting of areas under the dock which have been subjected to corrosion. It will also be used to take electrolysis measurements on the pilings and add new zinc anodes as necessary to protect the integrity of the pilings. **\$60,000**

Retaining Wall Improvements – Franklin Dock Enterprises, LLC

Project Description

This project will involve rebuilding the retaining wall from the dock entrance south to the edge of the pavement to combat subsidence and slope failure. **\$150,000**



Staging Area Improvements – Franklin Dock Enterprises, LLC

Project Description

This project will replace the canvas top on the covered staging area which has exceeded its useful life. **\$30,000**

Parking Area Improvements – Franklin Dock Enterprises, LLC

Project Description

This project will pave the parking area behind the restrooms. **\$75,000**

Analysis of a New Floating Dock – Franklin Dock Enterprises, LLC

Project Description

This would provide funding for an engineering firm to do an analysis and cost estimate for construction of a new floating dock that would eliminate any hazard to navigation that might be created by construction of the new city dock. **\$100,000**

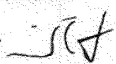
Staging Area Improvements – Franklin Dock Enterprises, LLC

Project Description

Funding to provide a cover for the passenger waiting area on the main dock. **\$25,000**



MEMORANDUM
CBJ Law Department

To: Waterfront Development Committee
From: John W. Hartle, City Attorney 
Subject: Use of Marine Passenger Fees for Specified Projects
Date: June 21, 2005

You have asked about the use of Marine Passenger Fees (MPF) for certain capital improvement projects under consideration by the Committee. This memorandum is intended to provide a quick review of the use of marine passenger fees for these projects.

Attached please find my March 12, 2005, memorandum outlining federal limitations on the use of cruise industry fees. That memorandum is intended to give a more complete picture of the legal issues surrounding the imposition of fees on vessels. The main legal concern is that *no* general taxes can be levied on cruise ships; non-federal entities are restricted to imposing fees for services, only. The imposition of such fees is also limited by the Maritime Security Act of 2002. Accordingly, the Assembly should be very cautious about any MPF spending, and avoid routinely replacing general fund spending with the use of MPF. Litigation with the cruise industry is still a real possibility, to be avoided if possible.¹

The rules established by the U.S. Congress in the Maritime Security Act of 2002, set forth in my earlier memorandum, unfortunately, are not exceptionally clear. Fees can be levied "solely to pay the cost of a service to the vessel . . . to enhance the safety and efficiency of interstate and foreign commerce," so long as such fees "do not impose more than a small burden" on the commerce. These limitations require a fact-specific inquiry for each proposed project.

¹The risks of such litigation, in my view, however, are far greater for the cruise industry than for the CBJ. For example, such litigation might easily result in a ruling adverse to the industry from the U.S. Court of Appeals for the Ninth Circuit; such a ruling could have national consequences. Also, while a court might redirect some CBJ MPF spending, it seems unlikely that a court would preclude reasonable fee levies on a cruise industry bringing nearly a million visitors annually to a town of 30,000. Services provided by the municipality to the ships and passengers are expensive. Finally, determining whether a particular fee imposes "more than a small burden on interstate or foreign commerce" could require a substantial inquiry in discovery that could easily consume any marginal gains from redirected spending.

Finally, the limitations on spending marine passenger fees are not the only limitations that must be addressed in capital spending. CBJ Charter Section 9.13 provides:

Section 9.13. Administration of budget.

(a) No payment may be made and no obligation incurred against the municipality except in accordance with appropriations duly made. No payment may be made and no obligation incurred against any appropriation unless the manager ascertains that there is a sufficient unencumbered balance in the appropriation and that sufficient funds are or will be available to cover the obligation.

(b) Every obligation incurred and every authorization of payment in violation of this Charter shall be void. Every payment made in violation of the provisions of this Charter shall be illegal. All officers or employees of the municipality who knowingly authorize or make such payment shall be jointly and severally liable to the municipality for the full amount so paid. The manager shall proceed forthwith to collect the indebtedness unless otherwise directed by the assembly.

Under the Charter, money can only be spent in accordance with appropriations "duly made." Again, this requires a fact-specific inquiry, particularly when funds are to be transferred to new projects.

The three projects that I understand you to wish to have reviewed are: 1) Gold Creek Enhancement 2) North Douglas Launch Ramp Improvements, and 3) Airport Restroom Refurbishment.

1. Gold Creek Enhancement.

The 2001 CBJ CIP plan outlines this project as follows:

Project entails joint project with Corps of Engineers to enhance wildlife habitat and pedestrian access to the mouth of Gold Creek.

According to John Stone, CBJ Port Director, the present plan is as follows:

We are anticipating completing our grant with the Corps of Engineers within the next year and would like to transfer the remaining project balance to a project called the "Support Marina Design and Permitting." This project was created in the FY 03 CIP. The primary purpose of the marina is to provide a facility for smaller passenger-for-hire vessels, six-pack to 100 passengers.

The FY 03 CIP program describes this as follows: "Begin initial site selection and design for a small marina at the Subport area. Also includes required permitting."

CBJ 69.20.050(a)(1) exempts vessels having accommodations for 40 or fewer passengers from imposition of the marine passenger fee. Thus, it appears that use of marine passenger fees would be appropriate to the extent that the purpose of the facility is to accommodate vessels subject to the fee (to 100 passengers, as noted by Mr. Stone, above).²

2. North Douglas Boat Launch Improvements.

Mr. Stone provided the following information on this project:

This project received marine passenger fee appropriations, one in FY 01 and one in FY 04. FY 01 was done through the MPF resolution and FY 04 was done through the FY 04 CIP resolution 2221. There is \$27,000 left in the project. We intend to use it to refurbish the launch ramp boarding floats. The facility is used for cruise ship passenger tours.

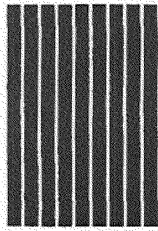
Again, because the funds are proposed to be spent on a facility to serve cruise ship passengers, continued use of the MPF seems appropriate.

3. Airport Restroom Refurbishment.


This is the only item on that list that really concerns me, the \$150,000 MPF expenditure for restrooms at the airport. I understand that there is no record of the Assembly's intent regarding whether or not this is a loan, but such intent could be inferred from the circumstances in which it was appropriated, in advance of anticipated funding from the FAA. In any event, expenditure of marine passenger fees for this purpose is questionable under the Maritime Security Act of 2002 as a service to the vessels. Holding the funds in an account for years in anticipation of a possible use in rebuilding the terminal would also leave CBJ open to criticism from the industry (as has been experienced recently with other unclosed MPF capital projects). Neither use seems appropriate, general airport improvements or holding the funds for future use.

²Expenditures by the Docks and Harbors Department are also governed by CBJ 85.02.063(f), which provides:

(f) Any lease, disposal, or use of land shall conform to the Long Range Waterfront Plan, the land management plan adopted above, Juneau Coastal Management Plan, and all other adopted City and Borough land use plans.



M *CBJ Law Department*
MEMORANDUM

To: Mayor and Assembly
From: John W Hartle, City Attorney 
Subject: Fees on Cruise Lines; Resolution 2294b.
Date: March 12, 2005

You have asked for an analysis of the objections raised by Jim Reeves of Dorsey and Whitney regarding the proposed increases in cruise line fees in Resolution 2294b. I have analyzed all the cases cited by Mr. Reeves, and the other major case law as well. The short answer is that, while there is always some risk regarding particular expenditures, and federal law does provide special protection to interstate and foreign shipping, it appears that the present proposal would pass muster under the U.S. Constitution because the proposal is a fee for services and facilities that benefit the cruise industry, rather than a tax to raise general revenues.

The Tonnage Clause.

The Tonnage Clause of the U.S. Constitution gives the shipping industry a measure of special protection from state and local taxation. The clause provides: "No State shall, without the Consent of Congress, lay any Duty of Tonnage." U.S. Const. Art. I, § 10, cl. 3. It was added to the Constitution on September 15, 1787, according to the notes of James Madison, essentially as a supplement to the Commerce Clause, which also serves to limit state and local regulation or taxation of interstate or foreign commerce.

Under the Tonnage Clause, a municipality cannot levy a general tax on ships for the privilege of entering port; fees for services and facilities, however, can be imposed. There are many cases that make this point. Closest to home is the July, 2004, Superior Court decision in *Polar Tankers, Inc. v. City of Valdez*. Case No. 3AN-00-9665CI. In that case, the court struck down the City of Valdez's Ordinance 99-17 which imposed the "Tanker Tax," a business personal property tax levied mainly on oil tankers. Because the tax was imposed for the admitted purpose of raising general revenues, not based on a particular service or facility for the tankers, the court struck it down.

The fee increase proposed in Resolution 2294b, by contrast, is not intended as a general revenue measure. The resolution would impose fees for the purpose of constructing facilities outlined in the Long-Range Waterfront Plan that benefit the cruise industry. See Resolution 2294b, Sec. 2(e), pg. 3, line 22. Courts have consistently found that state or local fees for services or facilities do not violate the Tonnage Clause. In 1877, the U.S. Supreme Court summarized the law as follows:

To determine whether the charge prescribed by the ordinance in question is a duty of tonnage, within the meaning of the Constitution, it is necessary to observe carefully its object and essence. If the charge is clearly a duty, a tax, or burden, which in its essence is a contribution claimed for the privilege of entering the port of Keokuk, or remaining in it, or departing from it, imposed, as it is, by authority of the State, and measured by the capacity of the vessel, it is doubtless embraced by the constitutional prohibition of such a duty. *But a charge for services rendered or for conveniences provided is in no sense a tax or a duty.* It is not a hindrance or impediment to free navigation. *The prohibition to the State against the imposition of a duty of tonnage was designed to guard against local hindrances to trade and carriage by vessels, not to relieve them from liability to claims for assistance rendered and facilities furnished for trade and commerce.*

Keokuk Northern Line Packet Co. v. City of Keokuk, 95 U.S. 80, 84 -85 (1877) (emphasis added).

125 years later, courts are still saying the same thing:

"[A] charge for services rendered or for conveniences provided is in no sense a tax or a duty. It is not a hindrance or impediment to free navigation."; see also *Barber v. Hawai'i*, 42 F.3d 1185, 1196 (9th Cir.1994) ("[A] state is not prohibited from charging reasonable fees in return for services rendered.")...For example, a harbor fee charged for the use of restroom facilities, parking, trash disposal, and security is not a "duty of tonnage" because services are provided in exchange for the fee. See *Barber*, 42 F.3d at 1196. Similarly, if fees are for pilotage, wharfage, use of locks on a navigable river, or for medical inspection, those fees are not unconstitutional duties of tonnage. See *Clyde Mallory*, 296 U.S. at 266, 56 S.Ct. 194.

Captain Andy's Sailing, Inc. v. Johns, 195 F.Supp.2d 1157, 1172 (D.Hawai'i 2001).

A fee charged to ensure that emergency services are available is also not a duty of tonnage, even if not every ship paying the fee needs the service.

New Orleans Steamship Ass'n v. Plaquemines Port, Harbor & Terminal Dist., 874 F.2d 1018, 1023 (5th Cir.1989), cert. denied, 495 U.S. 932 (1990).

The Commerce Clause.

The Commerce Clause of the U.S. Constitution provides: "The Congress shall have power . . . To regulate commerce with foreign nations, and among the several states . . ." Allocating this authority over foreign and interstate commerce to Congress means that such authority is *not* allocated to states or municipalities; the negative sweep of the Commerce Clause precludes state or local regulation. There are many cases interpreting the Commerce Clause from the earliest days of the federal courts. In the context of shipping, however, the Commerce Clause is not as restrictive as the Tonnage Clause. If a fee or practice is allowed under the Tonnage Clause, the Commerce Clause is not likely to prohibit it.



The Maritime Transportation Security Act of 2002.

As a fairly recent enactment of Congress, this act has no body of developed case law interpreting it. However, from its plain language, it can be seen as the most restrictive of the three main areas of federal law restricting municipal fees on shipping interests. Although not mentioned in Mr. Reeves' memo regarding Resolution 2294b, the Maritime Security Act of 2002 provides his best argument. It provides:

(b) No taxes, tolls, operating charges, fees, or any other impositions whatever shall be levied upon or collected from any vessel or other water craft, or from its 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, or under the right to freedom of navigation on those waters, except for

- (1) fees charged under section 2236 of this title;
- (2) reasonable fees charged on a fair and equitable basis that--
 - (A) are used solely to pay the cost of a service to the vessel or water craft;
 - (B) enhance the safety and efficiency of interstate and foreign commerce; and
 - (C) do not impose more than a small burden on interstate or foreign commerce; or
- (3) property taxes on vessels or watercraft, other than vessels or watercraft that are primarily engaged in foreign commerce if those taxes are permissible under the United States Constitution.

This federal statute, among others, in my view comprises "the Consent of Congress" contemplated by the Tonnage Clause. Accordingly, if a project fits its requirements, it will pass muster under the Tonnage Clause and the Commerce Clause as well. This is the statute CBJ has been acting under since its enactment. Sponsored by Rep. Don Young, it was intended to clarify the requirements of the Commerce Clause, according to his address to Congress upon its passage:

Section 445 [the Act] addresses the current problem, and the potential for greater future problems, of local jurisdictions seeking to impose taxes and fees on vessels merely transiting or making innocent passage through navigable waters subject to the authority of the United States that are adjacent to the taxing community. We are seeing instances in which local communities are seeking to impose taxes or fees on vessels even where the vessel is not calling on, or landing, in the local community. These are cases where no passengers are disembarking, in case of passenger vessels, or no cargo is being unloaded in the case of cargo vessels and where the vessels are not stopping for the purpose of receiving any other service offered by the port. In most instances, these types of taxes would not be allowed under the Commerce Clause of the United States Constitution. Unfortunately, without a statutory clarification, the only means to determine whether the burden is an impermissible burden under the Constitution is to pursue years of litigation. . .



Conference Report on S. 1214, Maritime Transportation Security Act of 2002; Speech of Hon. Don Young, of Alaska, in the House of Representatives, Thursday, November 14, 2002.

The requirements of this federal statute appear to be straight out of the case law, particularly, the Fifth Circuit's summary of the U.S. Supreme Court *Clyde Mallory* decision. See *Plaquimines*, 874 F.2d 1018, 1021 (5th Cir. 1989). One additional issue raised is that of the requirement that any fee "not impose more than a small burden on interstate or foreign commerce" All indications are that the cruise industry is financially healthy at this time, and that the proposed additional one dollar per passenger could be contractually passed on to the cruise consumer, and, therefore, would not impose more than a small burden on interstate or foreign commerce.

Conclusion.

Resolution 2294b would increase the Port Development Fee by one dollar per passenger. Because the resolution requires that all funds collected by the Port Development Fund be spent on projects outlined in the Long-Range Waterfront Plan that benefit the cruise industry, the fee increase would very likely survive a challenge based on the case law from the U.S. Supreme Court and the U.S. Court of Appeals for the Ninth Circuit. In my view, so long as CBJ continues its vigilance in following the requirements of federal law and close cooperation with the industry in making expenditures (as required by Resolution 2294b), a legal challenge would be unlikely to succeed.



