Post-it® Fax Note 7671	Date	# of pages ▶ 12
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CBJ Law Department

MEMORANDUM

To: Mayor and Assembly

From: John R. Corso, City & Borough Attorney

Subject: Passenger Fee Litigation

Date: July 22, 1999

I. Summary

- This memo is not an opinion on the fee initiative: it is too late for that. Instead, this suggests goals, strategies, and procedures for managing litigation to defend or enforce the fee.
- Litigation serves many purposes, not all of them decisive. Our goal will be to win a passenger fee lawsuit, but if that is not possible, we should use the occasion to learn as much as possible about the issue and the industry.
- A carefully researched and prepared passenger fee could easily avoid a legal challenge. The proposed fee raises some issues under the Commerce Clause of the U.S. Constitution because it contains exceptions that could be read to discriminate against interstate commerce. It may also have some trouble under the Tonnage Clause of the U.S. Constitution if the fee cannot be justified as payment for services rendered directly to the vessel. Other theories are available.
- We should begin preparing now for a lawsuit. I have contacted McDowell Group for assistance in collecting current information about cruise industry costs and revenues and for providing expert testimony during litigation. Outside counsel is not yet necessary.

II. General Strategy

This memorandum will discuss the legal issues you have probably heard will be at stake if the initiative passes and the cruise industry sues. I will discuss the interstate commerce clause, the tonnage clause, and similar legal doctrines. I will outline the facts we need to collect, the analysis we need to conduct, and my best guess at the kinds of judgments we could get.

This memo is not, as KTOO recently asked me about, "an opinion on the passenger fee." At this late date there is little point in passing judgment on the proposed ordinance because there is nothing to be done about it: we must live with the ordinance as the petitioners have given it to us. As discussed below, the current initiative has some flaws. If the people nonetheless adopt it, our goal should be to overcome these flaws and prevail in any litigation necessary to enforce the ordinance.

Lawsuits can be exciting and expensive, and they are often presented as the dramatic conclusion in movies. This sort of thing inclines people to think of litigation as decisive, and sometimes it is. But often

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it is just part of a process. The real point is not the litigation, but what comes after the litigation. If the cruise industry applies its considerable resources to an all-out legal fight, the city may lose this round, but we will learn much in the process. For this reason, litigation will be as much about the next initiative as it is about this one. A hard-fought trial and a comprehensive ruling will provide definitive guidance for the next petitioner's committee.[1]

I must note a couple of exceptions to this view. It is possible that there is no economic justification for a fee of any amount and there never will be. As discussed below, I doubt this is the case, but it's possible. It is also possible that the cruise lines will seek and get federal or state legislation directly prohibiting or limiting passenger fees by "intermediate ports" or municipalities. If that happens before a Juneau fee is in place, the matter is closed. If it happens after a Juneau fee is in place, the fee might be grandfathered. For fee proponents, this is a reason to establish a fee as quickly as possible.[2] This is especially true if a state prohibition on municipal passenger fees is part of a bill imposing a state passenger fee.

Regardless of the outcome, the parties will have the opportunity for discovery. I expect the cruise industry to argue that it generates large sums of money for Juneau. If so, it is only fair to ask just how much money, where it comes from, and where it goes. We will seek copies of balance sheets, contracts, policies, internal memoranda, and other documents. We will conduct depositions with local representatives, regional officers, and crewmembers. Although our inquiries must be relevant to the lawsuit, relevance is a broad standard, and there is no limit to the use we can make of the information we receive.

III. Legal Issues

A. Sources of the Ordinance

The ordinance now before the Assembly appears to be based on the 1996 initiative proposed by Judy Crondahl and Karla Hart. It was prepared in a hurry and, like the 1996 measure, without time for a real review by the Law Department. I discussed it informally with Joe Geldhof and gave the petitioners an old memo and a few suggestions, but I was unable to do a proper job and they were unable or unwilling to follow the suggestions. The situation is thus unlike the 1995 tax cap initiative, when Gary Jenkins and I worked for months on Charter §9.7(c), a law which reminds me of a Citroën: ugly, but well-engineered.

As I recall from my conversations with Ms. Crondahl, the $7 rate in 1996 was calculated by reference to the hotel-motel tax. I suspect that the current $5 rate is little more than an estimate of what the market will bear.

The absence of a legislative history is not altogether a bad thing: it could allow us a greater scope of argument in proposing justifications for the fee.

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[1] That is how the large mine permit litigation turned out. It would have been better to win the first round, but the loss was instructive and resulted in a second-round permit that was largely appeal-proof, or so the mine opponents concluded.

[2] There is a limit to how quickly petitioners can move: Charter §7.13(b) provides that an election on an initiative precludes the filing of a new initiative on the same or substantially the same matter sooner than one year after voter approval or disapproval of the initiative.

B. The Commerce Clause

It is likely that most of the legal issues in this case will arise under the U.S. Constitution. The cruise lines may have some difficulty working up popular sympathy for the constitutional rights of Monrovian ships, but they need only convince the judge. Their first argument will probably center on the Commerce Clause.

The driving force behind the Constitutional Convention of 1787 was not human rights or national defense. It was money. The Articles of Confederation were not capable of restraining the avarice of the former colonies each of which was attempting to tax the other. Merchants were unable to take a cargo wagon from Boston to New York without paying duty at the Rhode Island and Connecticut borders. This was an untenable situation, and it was addressed in the constitution at Article I, Section 8, Clause 3, which empowers Congress "To regulate commerce with foreign nations, and among the several States, and with the Indian tribes". The Supreme Court has long read this to contain a "dormant commerce clause" which limits state and local interference with interstate commerce even when Congress has not regulated the issue in question. There have been twists and turns in the Court's philosophy on this subject over the years[3] and the current rule was established in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), and most recently described in *Oklahoma Tax Commissioner v. Jefferson Lines, Inc.*, 514 U.S. 175 (1995):

> In *Complete Auto*, a business engaged in transporting cars manufactured outside the taxing State to dealers within it challenged a franchise tax assessed equally on all gross income derived from transportation for hire within the State. The taxpayer's challenge resting solely on the fact that the State had taxed the privilege of engaging in an interstate commercial activity was turned back, and in sustaining the tax, we explicitly returned to our prior decisions that
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> > considered not the formal language of the tax statute, but rather its practical effect, and have sustained a tax against Commerce Clause challenge when the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State.
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> 430 U.S. at 279. Since then, we have often applied, and somewhat refined, what has come to be known as *Complete Auto's* four-part test.

I think that as a general matter, a CBJ passenger fee can survive the four-part *Complete Auto* test. Whether this particular fee can do so will require an analysis something like this:

1. The "substantial nexus" test.

The cruise ships have a "substantial nexus" with Juneau because the event subject to the fee – docking in Juneau – is a physical event occurring in this jurisdiction. The "nexus" requirement can be an issue in exotic Internet transactions, but not here.

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[3] There are likely to be more. The Rehnquist Court appears eager to rewrite the rules on federalism, and in a rare departure from New Deal routine, has found the Commerce Clause inadequate to support federal legislation. *United States v. Lopez*, 514 U.S. 549 (1995) (Congressional power to regulate commerce does not extend to prohibiting handguns in school zones.)

2. The "fairly apportioned" test.

The fee will be "fairly apportioned" because CBJ is seeking only its fair share of the event subject to the fee: docking in Juneau.

The second part of the *Complete Auto* test is designed to protect interstate transactions from multiple taxation, and we may hear the cruise lines complain that SE communities will subject them to multiple fees for the same cruise. I expect to argue that the event for which the fee is charged is not the cruise, it is the visit in our town. If every town the ship visits extracts a reasonable fee for the visit *to that town*, the ship is not hit multiple times for the same transaction. Here's how the Supreme Court of Alaska described it in *Alyeska Pipeline Service Co. v. Williams*, 687 P.2d 323 (Alaska 1984) when Alyeska objected to a gross receipts tax on its trans-Alaska pipeline (TAPS) revenues.

> Alyeska focuses its commerce clause argument on the third factor, the requirement of a fair apportionment. Alyeska points out that the design and planning stage of the TAPS project took place outside Alaska, as did the reimbursement to Alyeska for costs incurred in that stage. Arguing that the "Department [of Revenue] has refused to apportion the tax so as to distinguish between intrastate and interstate activities", Alyeska alleges a commerce clause violation.
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> In response, the Department cites *Sjong v. State, Department of Revenue*, 622 P.2d 967, 975 (Alaska 1981)
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> > The purpose of apportionment is to ensure that only activities within the taxing state are subject to taxation. An apportionment formula is valid under the due process and commerce clauses only if, as a tax measure, it assigns to a state income that can reasonably be said to result from activities or properties within its borders.
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> In *Sjong* we further recognized that the Supreme Court of the United States has been deferential in its constitutional scrutiny of "honest state efforts" to apportion income taxes.
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> The recent decision in *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159, (1983) reflects a continuing pattern of deference. To show unfair apportionment, the taxpayer must demonstrate that "there is no rational relationship between the income attributed to the State and the intrastate values of the enterprise" ... by proving that the income apportioned to [the taxing state] under the statute is "out of all appropriate proportions to the business transacted in that State."

The Juneau fee is not, like the Alyeska tax, levied on revenues, but on passengers for an event – coming ashore in Juneau – that occurs 100% in Juneau. Accordingly, there is nothing to apportion. Even if the cruise lines seek to characterize the fee as a tax, we can argue that it is fairly apportioned because $5 per passenger is not "out of all appropriate proportions" to the business transacted in Juneau.

3. The "discrimination against interstate commerce" test.

We can expect to hear the industry claim that the fee discriminates against interstate commerce because it exempts small vessels, those without berths, those that are "noncommercial", those holding a 501(c)(3) exemption from federal taxation, and those operated by the state. Were it not for these exemptions the fee would have a much better chance of surviving a discrimination claim because it would be very much like

the airport user fee in *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*, 405 U.S. 707 (1972), which the Supreme Court described in a recent case about Pennsylvania's efforts to impose axle fees for trucks passing through the state.

> *Evansville-Vanderburgh* involved the question whether a municipal airport authority could collect a flat service fee of $1 for each passenger boarding a commercial aircraft operating from the airport. After reviewing our decisions concerning highway tolls, as well as the cases holding that a State may impose a flat fee for the privilege of using its roads without regard to the actual use by particular vehicles, so long as the fee is not excessive, we stated:
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> > At least so long as the toll is based on some fair approximation of use or privilege for use, as was that before us in *Capitol Greyhound [Lines v. Brice*, 339 U.S. 542 (1950)], and is neither discriminatory against interstate commerce nor excessive in comparison with the governmental benefit conferred, it will pass constitutional muster, even though some other formula might reflect more exactly the relative use of the state facilities by individual users.
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> We then explained why the $1 fee satisfied the two essential conditions that it be neither discriminatory nor excessive:
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> > The Indiana and New Hampshire charges meet those standards. First, neither fee discriminates against interstate commerce and travel. While the vast majority of passengers who board flights at the airports involved are traveling interstate, both interstate and intrastate flights are subject to the same charges. Furthermore, there is no showing of any inherent difference between these two classes of flights, such that the application of the same fee to both would amount to discrimination against one or the other.
> >
> > Second, these charges reflect a fair, if imperfect, approximation of the use of facilities for whose benefit they are imposed.
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> Pennsylvania's flat taxes satisfy neither of these conditions: they discriminate against out-of-state vehicles by subjecting them to a much higher charge per mile traveled in the State, and they do not even purport to approximate fairly the cost or value of the use of Pennsylvania's roads.

American Trucking v. Scheiner, 483 U.S. 266 (1987). Note the degree of flexibility the court allows: a fee need only be "a fair approximation" of the value of the service, and the traveler need not actually use the road or other facility to justify charging a fee for it.

But note also the court's sensitivity to any difference in treatment between interstate and intrastate commerce. The facts behind the ruling against Pennsylvania are too complicated to repeat here, but the language about the Evansville airport can easily be applied to the Juneau passenger fee: even though the vast majority of passengers who use the harbor are interstate travelers, we could properly charge a fee to all passengers. The initiative, however, does not do this. It exempts several classes of vessels.[4] This is not

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[4] My thanks to Lee Sharp, former CBJ attorney, who helped me sort through the issues on the exemptions. I have not yet sorted them all out: the status of state ferries is particularly problematic. Is it discriminatory to exempt state vessels if we cannot charge them a fee? Does it make a difference if the ferry in question is carrying mostly interstate or mostly intrastate passengers?

the place to speculate about the purposes behind these exemptions or their effect. I am sure plaintiffs will come up with plenty of unfavorable explanations. I have been informed that Goldbelt vessels are larger than 40 feet and will thus be subject to the fee. This should help us counter claims that the exceptions are intended to favor intrastate commerce.

It was this section of the ordinance I warned Joe Geldhof about. The petitioner's committee chose to retain the exemptions. Mr. Geldhof argued that the "severability clause" would save the day. Section 6 of the initiative provides: "If any provision of this proposed amendment, or the application thereof to any person or circumstances is held invalid, the remainder of this amendment and the application to other persons or circumstances shall not be affected."

I am uncertain if or how a court would apply the severability clause. It could simply revoke the exemptions, and leave us to sort out the problem of charging fees against Greens Creek and Goldbelt vessels, state ferries, and others.

I propose to slug it out on the exemptions: they're a problem, and the more argument and analysis we stir up with the plaintiffs, the more guidance we will get from the judge. If we win the whole ordinance, that's the end of it. But if we win via the severability clause, or if we lose, I want to confront the small boat operator, or the next petitioner's committee, as the case may be, with a clear ruling that tells us just what we can and cannot do.

4. The "fairly related to the services performed" test.

Whether the fee is "fairly related to the service performed" under the *Complete Auto* test depends on what service is performed. The "findings" section of the initiative says that the fee is for "services and infrastructure usage by cruise ship passengers visiting Juneau, including emergency services, transportation impacts and recreation infrastructure use." This is a broad purpose, but even if it were narrow, it need not be controlling: there is case law that allows courts to interpret initiatives broadly, given that they have no legislative history. However if we interpret the purpose too broadly, we will hear an argument from plaintiffs that passengers from Hoonah, and passengers on airplanes involve "emergency services, transportation impacts and recreation infrastructure use", and the failure to charge them a fee is an unconstitutional discrimination against interstate commerce.

Except to the extent it implicates discrimination against interstate commerce, the "fair relation" test is not particularly difficult to satisfy. We are not limited to charging passengers only for the direct services they use, or might use, while they are here. As Justice Souter explained in *Oklahoma Tax Commissioner v. Jefferson Lines, Inc.*, 514 U.S. 175 (1995) regarding the Oklahoma tax on the sale of interstate bus tickets:

> The fair relation prong of *Complete Auto* requires no detailed accounting of the services provided to the taxpayer on account of the activity being taxed, nor, indeed, is a State limited to offsetting the public costs created by the taxed activity. If the event is taxable, the proceeds from the tax may ordinarily be used for purposes unrelated to the taxable event. Interstate commerce may thus be made to pay its fair share of state expenses and "contribute to the cost of providing all governmental services, including those services from which it arguably receives no direct 'benefit.'" *Goldberg, supra*, at 267, quoting *Commonwealth Edison, supra*, at 627, n.16 (emphasis in original). The bus terminal may not catch fire during the sale, and no robbery there may be foiled while

> the buyer is getting his ticket, but police and fire protection, along with the usual and usually forgotten advantages conferred by the State's maintenance of a civilized society, are justifications enough for the imposition of a tax. See *ibid. Complete Auto's* fourth criterion asks only that the measure of the tax be reasonably related to the taxpayer's presence or activities in the State.

C. The Tonnage Clause

The second major constitutional argument I expect to encounter will be based on the Tonnage Clause, Article I, Section 10, Clause 3 of the Constitution, which says that "No State shall, without the consent of Congress, lay any Duty of Tonnage..." This prohibition on state meddling in commerce would appear to duplicate the restrictions imposed by the Commerce Clause, and so James Madison argued at the constitutional convention, but Mr. Sherman argued that the regulation of tonnage was an essential regulation of trade and the states ought to have nothing to do with it. He then proposed the tonnage clause and it passed.

The Tonnage Clause is not often litigated, but the D.C. Court of Appeals was called upon to do so in *Plaquemines Port, Harbor and Terminal Dist. v. Federal Maritime Com'n*, 838 F.2d 536 (C.A.D.C. 1988).

The case arose when the Port of Plaquemines, Louisiana, which owned no wharves, docks, or similar waterside facilities, attempted to impose a charge for fire and emergency service against vessels docking at privately owned wharves in the Port. Vessel operators filed suit and on his way to finding in favor of the Port, Judge Robert Bork provided the following basic analysis:

> Our analysis of the tonnage clause is a direct application of the Supreme Court's decision in *Clyde Mallory Lines v. Alabama*, 296 U.S. 261 (1935). The Port of Mobile, Alabama policed the harbor to insure the safety and facility of the movement of vessels. It charged a fee for the purpose of meeting the expenses associated with the supervision of the port and the execution of its regulations. The Court noted that the tonnage clause prohibits "all taxes and duties regardless of their name or form, and even though not measured by the tonnage of the vessel, which operate to impose a charge for the privilege of entering, trading in, or lying in a port." The clause does not, however, prohibit charges made by a state authority for services rendered such as pilotage, wharfage, charges for the use of locks, or fees for medical inspections. The Court therefore upheld Mobile's fee.
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> The *Clyde Mallory* Court distinguished the general services rendered by the Port of Mobile from earlier cases which involved a tax, levied in the guise of wharfage or medical inspections. The latter were condemned because they were imposed on all vessels entering a port whether or not they received the benefit of the services. In contrast, the services rendered by the Port of Mobile inured to all who entered the port. A reasonable charge for general services is not a prohibited tonnage duty. The services rendered by the Port also inure to all who use the Port of Plaquemines. All vessels, whether or not they catch fire or need rescue services, benefit from their availability. Given the seriousness of explosions, fires or other accidents, particularly in view of the crowded condition of this stretch of the Mississippi River, it is especially important that rescue operations be swift and that fires be promptly extinguished.

The Port of Plaquemines is strategically located at the mouth of the Mississippi River, and its fees generated considerable litigation in several courts over a 10-year period. They were argued in the 5th Circuit, which agreed with the D.C. Circuit that reasonable fees for services rendered are not subject to

the Tonnage Clause, and went on to note that the Clause allows other fees "with the consent of Congress". Congress has given such consent in the form of the Harbor Development and Navigation Improvement Act of 1986, which allows local fees for harbor improvements under the supervision of the Federal Maritime Commission. Any attempt to justify the Juneau passenger fee on the basis of this statute would require approval of the Commission.

It is fairly clear that in order to pass muster under the Tonnage Clause, the proposed passenger fee must be linked to services more closely connected with shipping than is required under the Commerce Clause. The purposes listed in the initiative may not be close enough, but I will argue we are not limited to those purposes, and we may advance any lawful purpose as sufficient to support the passenger fee.

I expect to encounter the argument that total municipal revenues – direct, indirect, and induced – from cruise ship passengers exceed total municipal costs – marginal, direct, and indirect – and that therefore no fee is justifiable.[5] We will respond that this is a policy argument, and is irrelevant to Tonnage Clause analysis which requires only that the particular fee at issue be justified by a particular service or services.

D. Other Legal Theories

I think the theories discussed above will be the major ones, but others are possible. If our strategy is to flush out all possible arguments and secure a definitive ruling, I will inject these issues if the plaintiffs fail to do so, particularly if things are going badly for us.

One such theory involves foreign commerce. Cruise ships are engaged in foreign commerce, and so there is an additional two-part test for validity under the Commerce Clause of the U.S. Constitution. This test asks: (1) whether the tax, notwithstanding apportionment, creates a substantial risk of international multiple taxation, and (2) whether the tax prevents the federal government from "speaking with one voice" when regulating commercial relations with foreign governments. Because only Juneau can tax a landing in Juneau, the proposed passenger fee creates no risk of multiple taxation, and because we would be required as a "marine terminal operator" under the 1984 Shipping Act to register the fee with the Federal Maritime Commission, thus allowing the federal government to speak "with one voice".

The exemptions created by the proposed ordinance may give rise to a claim that the fee violates the Equal Protection provisions of the state and federal constitutions. Faced with this kind of claim, we must offer a rational basis for exempting vessels under 40 feet, noncommercial vessels, etc.

Other theories are limited only by the imagination of counsel: the fee restricts interstate travel in violation of the Privileges and Immunities Clause of the federal constitution; the fee is in fact a tax in excess of our municipal authority, etc.

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[5] These terms will be familiar to those who have read the McDowell/Sheinberg studies described later in this memo. Briefly, direct revenues are taxes and fees, such as sales taxes, paid by the passengers themselves; indirect revenues are payments, such as harbor fees, paid by passenger-related businesses; and induced revenues are payments, such as real property taxes, paid by the passenger-related population. Marginal costs, such as an extra ambulance, are those that are incurred directly as a result of the passengers; direct overhead costs, such as the decrease in available Capital Transit seats, are those allocated to the passenger industry; and indirect overhead costs, such as schools, are those attributable to passenger-industry related population.

E. Preparation for Litigation

1. Legal Research Plan.

As a result of the 1996 initiative experience, we have some research resources at hand, including an outline by Jonathan Sperber, a lawyer we hired to fill in while Barbara Craver was on maternity leave. A copy of this outline was provided to the petitioners' committee when it was drafting the measure.[6] We also have a fine 1989 memo from Elizabeth Cuadra to Skagway when it was considering a passenger fee, and several other older items. We are updating this material with our usual array of paper and electronic resources.

Other jurisdictions could be a valuable resource. Although it is no guarantee they are legal, passenger fees or "wharfage fees" appear to be routine. According to a 1988 House Research Agency report to Representative Hudson,[7] fees ranging from $1.50 to $8.50 are charged for passenger embarkation, debarkation, or both, in Los Angeles, Miami, New Orleans, New York, Philadelphia, San Diego, and Vancouver B.C.

These cities and others should be a resource in any legal battle over passenger fees. The petitioners' committee has informed me that they have a collection of legal documents from other jurisdictions. We have asked for copies of these documents, but have not yet received them. If they don't arrive soon, we will contact the cities directly.

I welcome additional ideas members may have for making use of outside resources.

2. Factual Research Plan.

A proper presentation of this case will require analysis of CBJ revenues and expenditures associated with cruise ship traffic. Much relevant information is available in the form of the September 1996 McDowell/Sheinberg study on tourism in Juneau and the 1998 McDowell study on cruise ship tourism in Southeast. I have contacted the McDowell Group to see if the firm is available to update these numbers, to respond to arguments from the other side, to serve as expert witnesses at trial, and to generally help us understand the economic issues. The firm is available, and I have commenced the procurement paperwork necessary to contract for its services. There is $5,000 available in the Law Department budget for contractors, and the Manager has indicated that his discretionary fund could be available for this purpose. Resources are limited, but it would be wise to establish a basic professional relationship with the McDowell group before the cruise industry does so.

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[6] I have posted it on the Law Department "work in progress" page: go to www.cbjlaw.com and click on the gold seal. Look for the link called "outline".

[7] The report was authored by Karla Hart and Brad Pierce. I have posted it on the "work in progress" page. Look for "hudson".

5. Staff Resources.

Depending on what the McDowell Group can reasonably accomplish in the time available, it may be necessary to request assistance from CBJ departments in assessing the impact of cruise ship passengers. Such assistance was required for the 1996 study, and may be again.

I expect that any lawsuit would be filed in federal court. If it involves intense discovery, numerous experts, a jury trial, and similar demands, it could require more time and expertise than is available from the Law Department. If that happens, or appears likely to, I will suggest outside counsel. The Assembly, of course, is free to substitute counsel of its own choosing for this or any other case. I do not think it is yet necessary, and if this fight shapes up like the Riverbend project labor agreement (another public policy under attack in federal court) outside counsel may never be necessary. I have assigned John Hartle to assist in the case, and we are both enthusiastic about this interesting litigation.

Joe Geldhof has been providing legal assistance to the petitioners' committee. He proposes to help out in any litigation. I get along OK with Joe and believe we can work together to our mutual advantage. Control of the defense will probably be with CBJ if, as I expect, CBJ is named as the defendant. I am uncertain how events would develop if the plaintiffs sought to settle the case via a reduction in the amount of the fee. It seems likely that the petitioners would be in the best position to take legal action against CBJ if we negotiated a fee too low for their liking, but if the petitioners agreed to a very low fee, some new citizens group might object.

We have at our disposal a 1996 economic study by the McDowell Group entitled *Juneau's Visitor Industry: An Economic Impact Study.* It addresses a variety of relevant points, but is 4 years old and was not designed for the purpose of defending a passenger fee in litigation. I contacted the McDowell Group about application of this study in its present form.

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CBJ Law Department MEMORANDUM

To: Assembly Finance Committee

From: John R. Corso, City & Borough Attorney

Subject: Port Fees; federal law

Date: April 21, 2003

I. Discussion

Last week, KTOO broadcast a story about the Murkowski administration reaction to recent changes in federal maritime law. The law in question is the Maritime Security Act of 2002, which, among other changes, amended 33 USC §5 to provide:

> (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--
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> (1) fees charged under section 208 of the Water Resources Development Act of 1986 (33 U.S.C. 2236); or
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> (2) reasonable fees charged on a fair and equitable basis that--
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> (A) are used solely to pay the cost of a service to the vessel or water craft;
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> (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.

The reference in (b)(1) is to a long-established program for harbor project fee review by the Federal Maritime Commission. The Port Director administers this program for CBJ. I have attached copies of the new language and the referenced FMC statute.

The new statutory language essentially restates the constitutional rule described in my July 22, 1999 memorandum to the Assembly on the passenger fee initiative. Briefly, the rule is that we can impose a fee on visitors only to the extent we provide a service to visitors. We cannot charge them a fee for services we provide to someone else, such as ourselves.

Some services, such as dock construction and maintenance, are clearly justifiable as a service to ships and passengers. Others are less defensible. The statute will prevent the most flagrant abuses, such as a fee imposed on ships that merely pass through local waters without stopping. So said Congressman Young in the November 22, 2001 *Congressional Record*, attached. However, it can be used in less egregious circumstances as well. Mr. Young speculated that "generally taxes will not be allowed under this section". *Id.*

Even though the statute does not break any new legal ground, it does provide a reasonably clear and concise statement of the law. In this respect, it is more usable, (both for us and for plaintiffs) than a fuzzy principle extracted from constitutional text and a few judicial cases; which is all we had to work with before the statute.

Also, the statute adds some new emphasis to the constitutional rule. The new language says that fees must be use "solely" to provide a service to the vessel, must "enhance the safety and efficiency" of interstate and foreign commerce, and must impose only a "small" burden on that commerce. We must await judicial interpretation to learn exactly what these qualifiers mean, but they certainly do not make things easier for local port fees.

According to the KTOO story, the Murkowski administration has concluded that the new law prohibits passenger fees. I'm not sure that the Attorney General shares this view: informal contact with his staff suggests that they see it pretty much as I do.

II. Conclusion:

For the most part, the new statute just restates existing constitutional law. It makes no fundamental changes and does not invalidate our port or passenger fees.

However, it will serve to focus attention on how we use the fee revenue. Also, the statutory language is slightly more stringent than the constitutional rule it supplements. As a result, we should take extra care to spend passenger fee revenues on programs (or parts of programs) that benefit only the people who pay the fee. We may not balance our budget by taxing people who cannot vote.

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1 of 2 DOCUMENTS

*** CURRENT THROUGH P.L. 108–10, APPROVED 3/11/03 ***

TITLE 33. NAVIGATION AND NAVIGABLE WATERS

CHAPTER 1. NAVIGABLE WATERS GENERALLY

GENERAL PROVISIONS

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

33 USCS § 5 (2003)

§ 5. Abolition of tolls on Government canals, canalized rivers, etc.; expense of operation, repairs to and construction of canals, etc.; Panama Canal excepted

(a) No tolls or operating charges whatever shall be levied upon or collected from any vessel, dredge, or other water craft for passing through any lock, canal, canalized river, or other work for the use and benefit of navigation, now belonging to the United States or that may be hereafter acquired or constructed; and for the purpose of preserving and continuing the use and navigation of said canals and other public works without interruption, the Secretary of War [Army], upon the recommendation of the Chief of Engineers, United States Army, is hereby authorized to draw his warrant or requisition, from time to time, upon the Secretary of the Treasury to pay the actual expenses of operating, maintaining, and keeping said works in repair, which warrants or requisitions shall be paid by the Secretary of the Treasury out of any money in the Treasury not otherwise appropriated: Provided, That whenever, in the judgment of the Secretary of War [Army], the condition of any of the aforesaid works is such that its entire reconstruction is absolutely essential to its efficient and economical maintenance and operation as herein provided for, the reconstruction thereof may include such modifications in plan and location as may be necessary to provide adequate facilities for existing navigation: Provided further, That the modifications are necessary to make the reconstructed work conform to similar works previously authorized by Congress and forming a part of the same improvement, and that such modifications shall be considered and approved by the Board of Engineers for Rivers and Harbors and be recommended by the Chief of Engineers before the work of reconstruction is commenced: Provided further, That nothing herein contained shall be held to apply to the Panama Canal.

(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 208 of the Water Resources Development Act of 1986 (33 U.S.C. 2236); or

(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.

HISTORY: (July 5, 1884, ch 229, § 4, 23 Stat. 147; Mar. 3, 1909, ch 264, § 6, 35 Stat. 818; Aug. 30, 1954, ch 1076, § 1(15), 68 Stat. 967.)

(As amended Nov. 25, 2002, P.L. 107–295, Title IV, § 445, 116 Stat. 2133.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Explanatory notes:

The bracketed word "Army" has been inserted on authority of the Transfer of functions note to this section.

LEXSTAT 33 USC 2236

*** CURRENT THROUGH P.L. 108–10, APPROVED 3/11/03 ***

TITLE 33. NAVIGATION AND NAVIGABLE WATERS

CHAPTER 36. WATER RESOURCES DEVELOPMENT

HARBOR DEVELOPMENT

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

33 USCS § 2236 (2003)

§ 2236. Port or harbor dues

(a) Consent of Congress. Subject to the following conditions, a non–Federal interest may levy port or harbor dues (in the form of tonnage duties or fees) on a vessel engaged in trade entering or departing from a harbor and on cargo loaded on or unloaded from that vessel under clauses 2 and 3 of section 10, and under clause 3 of section 8, of Article 1 of the Constitution:

(1) Purposes. Port or harbor dues may be levied only in conjunction with a harbor navigation project whose construction is complete (including a usable increment of the project) and for the following purposes and in amounts not to exceed those necessary to carry out those purposes:

(A) (i) to finance the non–Federal share of construction and operation and maintenance costs of a navigation project for a harbor under the requirements of section 101 of this Act [33 USCS § 2211]; or

(ii) to finance the cost of construction and operation and maintenance of a navigation project for a harbor under section 204 or 205 of this Act; and

(B) provide emergency response services in the harbor, including contingency planning, necessary personnel training, and the procurement of equipment and facilities.

(2) Limitation on port or harbor dues for emergency service. Port or harbor dues may not be levied for the purposes described in paragraph (1)(B) of this subsection after the dues cease to be levied for the purposes described in paragraph (1)(A) of this subsection.

(3) General limitations.

(A) Port or harbor dues may not be levied under this section in conjunction with a deepening feature of a navigation improvement project on any vessel if that vessel, based on its design draft, could have utilized the project at mean low water before construction. In the case of project features which solely—

(i) widen channels or harbors,

(ii) create or enlarge bend easings, turning basins or anchorage areas, or provide protected areas, or

(iii) remove obstructions to navigation,

only vessels at least comparable in size to those used to justify these features may be charged under this section.

(B) In developing port or harbor dues that may be charged under this section on vessels for project features constructed under this title, the non–Federal interest may consider such criteria as: elapsed time of passage, safety of passage, vessel economy of scale, under keel clearance, vessel draft, vessel squat, vessel speed, sinkage, and trim.

(C) Port or harbor dues authorized by this section shall not be imposed on—

(i) vessels owned and operated by the United States Government, a foreign country, a State, or a political subdivision of a country or State, unless engaged in commercial services;

(ii) towing vessels, vessels engaged in dredging activities, or vessels engaged in intraport movements; or

(iii) vessels with design drafts of 20 feet or less when utilizing general cargo and deep–draft navigation projects.

(4) Formulation of port or harbor dues. Port or harbor dues may be levied only on a vessel entering or departing from a harbor and its cargo on a fair and equitable basis. In formulating port and harbor dues, the non–Federal interest shall

consider—

(A) the direct and indirect cost of construction, operations, and maintenance, and providing the facilities and services under paragraph (1) of this subsection;

(B) the value of those facilities and services to the vessel and cargo;

(C) the public policy or interest served; and

(D) any other pertinent factors.

(5) Notice and hearing.

(A) Before the initial levy of or subsequent modification to port or harbor dues under this section, a non–Federal interest shall transmit to the Secretary—

(i) the text of the proposed law, regulation, or ordinance that would establish the port or harbor dues, including provisions for their administration, collection, and enforcement;

(ii) the name, address, and telephone number of an official to whom comments on and requests for further information on the proposal are to be directed;

(iii) the date by which comments on the proposal are due and a date for a public hearing on the proposal at which any interested party may present a statement; however, the non–Federal interest may not set a hearing date earlier than 45 days after the date of publication of the notice in the Federal Register required by subparagraph (B) of this paragraph or set a deadline for receipt of comments earlier than 60 days after the date of publication; and

(iv) a written statement signed by an appropriate official that the non–Federal interest agrees to be governed by the provisions of this section.

(B) On receiving from a non–Federal interest the information required by subparagraph (A) of this paragraph, the Secretary shall transmit the material required by clauses (i) through (iii) of subparagraph (A) of this paragraph to the Federal Register for publication.

(C) Port or harbor dues may be imposed by a non–Federal interest only after meeting the conditions of this paragraph.

(6) Requirements on non–Federal interest. A non–Federal interest shall—

(A) file a schedule of any port or harbor dues levied under this subsection with the Secretary and the Federal Maritime Commission, which the Commission shall make available for public inspection;

(B) provide to the Comptroller General of the United States on request of the Comptroller General any records or other evidence that the Comptroller General considers to be necessary and appropriate to enable the Comptroller General to carry out the audit required under subsection (b) of this section;

(C) designate an officer or authorized representative, including the Secretary of the Treasury acting on a cost–reimbursable basis, to receive tonnage certificates and cargo manifests from vessels which may be subject to the levy of port or harbor dues, export declarations from shippers, consignors, and terminal operators, and such other documents as the non–Federal interest may by law, regulation, or ordinance require for the imposition, computation, and collection of port or harbor dues; and

(D) consent expressly to the exclusive exercise of Federal jurisdiction under subsection (c) of this section.

(b) Jurisdiction.

(1) The district court of the United States for the district in which is located a non–Federal interest that levies port or harbor dues under this section has original and exclusive jurisdiction over any matter arising out of or concerning, the imposition, computation, collection, and enforcement of port or harbor dues by a non–Federal interest under this section.

(2) Any person who suffers legal wrong or is adversely affected or aggrieved by the imposition by a non–Federal interest of a proposed scheme or schedule of port or harbor dues under this section may, not later than 180 days after the date of hearing under subsection (a)(5)(A)(iii) of this section, commence an action to seek judicial review of that proposed scheme or schedule in the appropriate district court under paragraph (1).

(3) On petition of the Attorney General or any other party, that district court may—

(A) grant appropriate injunctive relief to restrain an action by that non–Federal interest violating the conditions of consent in subsection (a) of this section;

(B) order the refund of any port or harbor dues not lawfully collected; and

(C) grant other appropriate relief or remedy.

(c) Collection of duties.

[(1)] Delivery of certificate and manifest.

(A) Upon arrival of vessel. Upon the arrival of a vessel in a harbor in which the vessel may be subject to the levy of port or harbor dues under this section, the master of that vessel shall, within forty–eight hours after arrival and before any cargo is unloaded from that vessel, deliver to the appropriate authorized representative appointed under subsection

(a)(6)(C) of this section a tonnage certificate for the vessel and a manifest of the cargo aboard that vessel or, if the vessel is in ballast, a declaration to that effect.

(B) Before departure of vessel. The shipper, consignor, or terminal operator having custody of any cargo to be loaded on board a vessel while the vessel is in a harbor in which the vessel may be subject to the levy of port or harbor dues under this section shall, within forty–eight hours before departure of that vessel, deliver to the appropriate authorized representative appointed under subsection (a)(6)(C) of this section an export declaration specifying the cargo to be loaded on board that vessel.

(d) Enforcement. At the request of an authorized representative referred to in subsection (a)(6)(C) of this section, the Secretary of the Treasury may:

(1) withhold the clearance required by section 4197 of the Revised Statutes of the United States (46 U.S.C. App. 91) for a vessel if the master, owner, or operator of a vessel subject to port or harbor dues under this section fails to comply with the provisions of this section including any non–Federal law, regulation or ordinance issued hereunder; and

(2) assess a penalty or initiate a forfeiture of the cargo in the same manner and under the same procedures as are applicable for failure to pay customs duties under the Tariff Act of 1930 (19 [App.] U.S.C. 1202 et seq.) if the shipper, consignor, consignee, or terminal operator having title to or custody of cargo subject to port or harbor dues under this section fails to comply with the provisions of this section including any non–Federal law, regulation, or ordinance issued hereunder.

(e) Maritime lien. Port or harbor dues levied under this section against a vessel constitute a maritime lien against the vessel and port or harbor dues levied against cargo constitute a lien against the cargo that may be recovered in an action in the district court of the United States for the district in which the vessel or cargo is found.

(f) [Redesignated]

HISTORY: (Nov. 17, 1986, P.L. 99–662, Title II, § 208, 100 Stat. 4102; Dec. 21, 1995, P.L. 104–66, Title I, Subtitle B, § 1021(g), 109 Stat. 713.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Explanatory notes:

The paragraph designator "(1)" is enclosed in brackets in subsec. (c) because no para. (2) was enacted.

Brackets are inserted around the abbreviation "App." in subsec. (e)(2) to indicate the probable intent of Congress to delete it.

Amendments:

1995. Act Dec. 21, 1995 deleted subsec. (b), which read:

"(b) Audits. The Comptroller General of the United States shall—

"(1) carry out periodic audits of the operations of non–Federal interests that elect to levy port or harbor dues under this section to determine if the conditions of subsection (a) of this section are being complied with;

"(2) submit to each House of the Congress a written report containing the findings resulting from each audit; and

"(3) make any recommendations that the Comptroller General considers appropriate regarding the compliance of those non–Federal interests with the requirements of this section.";

and redesignated subsecs. (c)–(f) as subsecs. (b)–(e), respectively.

INTERPRETIVE NOTES AND DECISIONS

Port is not prevented by 33 USCS § 2236 from imposing charges on ships to finance emergency response services, when port is not financing harbor improvement. New Orleans S.S. Asso. v Plaquemines Port, Harbor & Terminal Dist. (1989, CA5 La) 874 F2d 1018.

Shippers organization's claim that harbor fees imposed by port violate Harbor Development and Navigation Improvement Act of 1986 (33 USCS §§ 2231 et seq.) is dismissed, where it is undisputed that port has not undertaken any navigational improvements or accepted any federal funding under Act, because Act does not prevent or restrict manner in which states may impose harbor fees unless fees are imposed to finance new construction project developed pursuant to Act. New Orleans S.S. Asso. v Plaquemines Port, Harbor & Terminal Dist. (1988, ED La) 690 F Supp 1515.

corporate and private donors are encouraged to provide assistance, including funds, educational material and equipment to NGOs in different regions of the world and to universities to establish or expand their disarmament and non-proliferation libraries with free and open public access to their resources. Member States should be encouraged to fund research institutes that focus on disarmament and non-proliferation and offer scholarships for advanced university students to carry out research on disarmament and non-proliferation and its pedagogy. The United Nations should make greater efforts to tap the financial resources of private enterprises in the fields of information and communications technology.

AMERICAN WILDLIFE ENHANCEMENT ACT OF 2001

SPEECH OF

HON. C.L. "BUTCH" OTTER

OF IDAHO

IN THE HOUSE OF REPRESENTATIVES

Thursday, November 14, 2002

Mr. OTTER. Mr. Speaker, Early on the morning of November 15, 2002 the House of Representatives passed, by unanimous consent, S. 990, the American Wildlife Enhancement Act. This bill, which amends the Pittman-Robertson Wildlife Restoration Act, is purported to improve the provisions relating to wildlife conservation and restoration programs. Had I been present when the House considered this legislation, I would have opposed the bill. I am concerned that as written this bill could undermine private property rights and impact state water rights. I am concerned that no hearings were held in the House and we never had time to consider the full implications of the bill. I am hopeful the bill does not make it to the President's desk this year. If this legislation is introduced next Congress, I will work with my colleagues to ensure the protection of private property and water rights.

HOMELAND SECURITY ACT OF 2002

SPEECH OF

HON. BART STUPAK

OF MICHIGAN

IN THE HOUSE OF REPRESENTATIVES

Thursday, November 14, 2001

Mr. STUPAK. Mr. Speaker, I reluctantly voted for H.R. 5005, the Homeland Security Act of 2002.

I say reluctantly because I have very strong objections to certain provisions contained in the bill which favor ''special interests.''

In particular, I am opposed to provisions in the bill that would protect pharmaceutical firms and other corporations from lawsuits. Gut our efforts to crack down on companies that move abroad to escape U.S. taxes. Provide protection against lawsuits for companies that have provided passenger and baggage screening in airports. Give the new homeland security secretary broad authority to protect companies that sell anti-terrorism technologies.

These provisions were inserted without consulting any Democratic leaders, and put in the bill literally in the middle of the night!

Mr. Speaker, I have a long and well-known record of fighting against provisions such as these.

These provisions were not in the original bill we passed earlier this year and I cannot understand why the Republican Caucus felt it necessary to include them in the most significant reorganization of the federal government in fifty years!

These provisions harm the average American by curtailing their legal rights to seek justice from corporations. Haven't we seen the dangers of allowing big business to operate this way?

The Senate was right in drawing national attention to this sham.

I am hopeful the Republican leadership will live up to its promise to remove these provisions early next Congress, but I fear they are already backing off their promise to do so.

Mr. Speaker, we desperately need a Department of Homeland Security, and that is why I voted for the bill. However, we do not need more give aways for corporate special interests, and I urge my GOP colleagues to move with great speed to remove the provisions early next session.

CONFERENCE REPORT ON H.R. 333, BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2002

SPEECH OF

HON. BETTY McCOLLUM

OF MINNESOTA

IN THE HOUSE OF REPRESENTATIVES

Thursday, November 14, 2001

Ms. McCOLLUM. Mr. Speaker, I rise today in opposition to the Conference Report for the ''Bankruptcy Reform'' bill, H.R. 333. This legislation will impose new restrictions to prevent working families facing financial misfortune from getting back on track. It also does nothing to stop the irresponsible and predatory practices of some businesses and credit card companies. I support efforts to prevent abuse of our bankruptcy system as a financial tool but this legislation goes too far in cutting off avenues to relief for working families who face unmanageable debt.

Central to this legislation is a new, inflexible ''means test'' that will be imposed on every individual filing for bankruptcy. While judges currently have the ability to determine the appropriate relief for consumers, this new ''means test'' will eliminate that flexibility and prevent all but the most impoverished families from filing for bankruptcy under Chapter 7. The implementation of this ''means test'' will also be a costly mandate on our bankruptcy court system, which is already operating on rudimentary funding.

I have listened to concerns of bankruptcy judges in my state of Minnesota who fundamentally oppose this legislation because of the disastrous effect it will have on working families facing financial crises. These judges echoed facts that are widely known—that the vast majority of individuals who file for bankruptcy are low- and moderate-income citizens facing crisis situations such as the loss of a job, medical emergencies or divorce. The actual number of individuals who try to ''game the system'' and escape debts by filing for bankruptcy is very low. According to one bankruptcy judge, abusive filings constitute only about 2–3 percent of all cases and bankruptcy courts are currently able to block about 95 percent of those ''bad faith'' filings by converting or dismissing certain cases.

This legislation would also have a negative impact on the availability of quality, affordable representation for families filing for bankruptcy. Provisions of this legislation would impose new liability standards on bankruptcy attorneys, making them responsible for the accuracy of all information given to them by their clients when filing a bankruptcy petition. Many attorneys will be apprehensive to continue representing clients in bankruptcy cases knowing that they may be sanctioned for inaccurate information. Bankruptcy lawyers in Minnesota have told me that this will severely decrease the number of attorneys willing to provide *pro bono* services, limiting the ability of low-income individuals to obtain quality legal representation.

I agree that something must be done to curb the number of personal bankruptcies that strain our banks, credit unions and responsible financial institutions. But we must be equitable in asking everyone—borrowers and lenders alike—to practice good financial planning. This unbalanced legislation unfairly targets consumers and allows irresponsible companies to continue extending credit to college students and others who are already deep in debt or have had a past history of bad credit. For the working families of Minnesota and the nation, I cannot support this legislation.

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

Mr. YOUNG of Alaska. Mr. Speaker, I rise to speak about the Conference Report on S. 1214, which the House approved last week and is now ready for signature by the President. I would like to point out a particular concern that is addressed in Section 445 of the conference agreement. Section 445 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 the 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.

Section 445 of the Conference Report addresses this problem by clarifying the sole circumstances when a local jurisdiction may impose a tax or fee on vessels. Local governments, and other non-Federal interests, may

impose taxes or fees only under an existing exception under the Water Resources Development Act or under extremely limited circumstances in which reasonable fees can be charged on a fair and equitable basis for the cost of service actually rendered to the vessel. The fees must also enhance the safety and efficiency of interstate and foreign commerce and represent at most a ''small burden'' on interstate and foreign commerce. Generally, taxes will not be allowed under this section. The sole exceptions are stated in Section 445.

Mr. President, I support Section 445 as an important correction of a silence in current law that should not be allowed to imperil legitimate commerce.

E-GOVERNMENT ACT OF 2001

SPEECH OF

HON. STEPHEN HORN

OF CALIFORNIA

IN THE HOUSE OF REPRESENTATIVES

Thursday, November 14, 2002

Mr. HORN. Mr. Speaker, title V of H.R. 2458 incorporates the text of another bill that was recently reported out of the Government Reform Committee: H.R. 5212, the ''Confidential Information Protection and Statistical Efficiency Act of 2002.'' I wish to thank the gentleman from Texas, Mr. TURNER, and the gentleman from Virginia, Mr. DAVIS, for including the Confidential Information Protection and Statistical Efficiency Act of 2002 in their bill.

On July 25, 2002, I introduced the Confidential Information Protection and Statistical Efficiency Act of 2002 on behalf of myself, as well as the gentleman from Ohio, Mr. SAWYER, and the gentlewoman from New York, Mrs. MALONEY. The Subcommittee on Government Efficiency, Financial Management and Intergovernmental Relations, which I chair, held a hearing on the bill on September 17. All witnesses—representing the statistical agencies, the Administration and the private sector-testified in favor of the bill. On the same day, the subcommittee approved the bill by voice vote.

On October 9, the full Committee on Government Reform approved the bill by voice vote and ordered it favorably reported. I want to briefly summarize this important legislation. The committee report on H.R. 5215 explains the Confidential Information Protection and Statistical Efficiency Act of 2002 in much greater detail.

Enactment of the Confidential Information Protection and Statistical Efficiency Act of 2002 will greatly improve the efficiency and quality of Federal statistical activities. Right now, there is much duplication of effort among the Federal Government's three principal statistical agencies—the Bureau of the Census, the Bureau of Labor Statistics and the Bureau of Economic Analysis. Because of their inability to share data, they often collect the same data separately. This wastes taxpayer dollars and imposes unnecessary burdens on those who supply the data.

Furthermore, the inability of the agencies to compare the data they collect results in major disparities in the reports they issue. For example, during the last economic census in 1997, the Bureau of Labor Statistics reported payroll data in the information technology sector that was 13 percent higher than the data reported by the Census Bureau. In addition, there was a 14 percent disparity in the payroll data reported by these two agencies for the motor freight, transportation and warehousing industries.

This legislation will allow the Census Bureau, the Bureau of Economic Analysis and the Bureau of Labor Statistics to share business data they collect for statistical purposes. This data sharing will substantially enhance the accuracy of economic statistics by resolving serious reporting inconsistencies such as those that I just mentioned. It will also reduce reporting burdens on the businesses that must now supply data separately to the individual agencies. I want to emphasize that the data sharing applies only to these three agencies, and it only applies to business data—not personal data.

Of equal importance, the bill ensures that the confidential data that citizens and businesses provide to federal agencies for statistical purposes are subject to uniform and rigorous statutory protections against unauthorized use. Currently, confidentiality protections vary among agencies and are often not based in law. The bill would provide uniformly high confidentiality standards that federal statistical agencies must follow. This part of the bill applies to all federal statistical agencies—not just the Census Bureau, Bureau of Labor Statistics and Bureau of Economic Analysis. Furthermore, it covers all data that all statistical agencies collect on a confidential basis—both business and personal data.

Finally, the bill includes language that will enhance the usefulness of statistical data for congressional decision-making. This language encourages the statistical agencies to provide the Congressional Budget Office with access to statistical data in order to help CBO analyze pension and health care financing issues. However, the bill does not expand CBO's current legal rights of access to statistical data. Thus, it does not permit disclosure of information to CBO in a manner of form that would constitute a violation of existing law.

Mr. Speaker, this worthy legislation has been years in the making. I sponsored a similar bill in 1999, but it encountered last minute concerns and was not enacted. The current bill resolves those concerns as well as all other issues that have been raised. The Administration strongly supports it, as do many individuals and organizations in industry and academic circles. I am delighted that the bill finally will be enacted this year.

pay of a member or former member during periods in which the member willfully remains outside the United States to avoid criminal prosecution or civil liability.

SECTION 445. PROHIBITION OF NAVIGATION FEES

The Senate bill does not contain a comparable provision.

The House amendment does not contain a comparable provision.

The Conference substitute prohibits any non-Federal interest from assessing or collecting any fee on vessels or water craft operating on navigable waters subject to the authority of the United States, or under the freedom of navigation on those waters. This section does not prohibit those instances in which Federal law has permitted the imposition of fees and recognizes those circumstances under which non-Federal interests may charge reasonable port and harbor fees for services rendered.

TITLE V—AUTHORIZATION OF APPROPRIATIONS FOR THE COAST GUARD

SECTION 501. SHORT TITLE

The Senate bill does not contain a comparable provision.

Section 501 of the House amendment states that this title may be cited as the ''Coast Guard Authorization Act for Fiscal Year 2002.''

The Conference substitute states that this title may be cited as the ''Coast Guard Authorization for Fiscal Year 2003.''

SECTION 502. AUTHORIZING OF APPROPRIATIONS

The Senate bill does not contain a comparable provision.

Section 502 of the House amendment authorizes $5.9 billion for Coast Guard programs and operations during fiscal year 2002. Section 502(1) of the amendment authorizes approximately $4.2 billion for Coast Guard operating expenses for fiscal year 2002, including $623 million for domestic maritime homeland security requirements.

Section 502(2) of this amendment authorizes $717.8 million in fiscal year 2002 for the Coast Guard's acquisition, construction, and improvement (AC&I) account. including $58.5 million for homeland security.

The Conference substitute authorizes approximately $6 billion for Coast Guard programs and operations during fiscal year 2003. Section 502(1) authorizes approximately $4.3 billion for Coast Guard operating expenses for fiscal year 2003.

Section 102(2) authorizes $725 million in fiscal year 2003 for the Coast Guard's acquisition, construction, and improvement (AC&I) account.

Within the AC&I account, the Conferees strongly support the Coast Guard's integrated approach to the Deepwater Modernization Project and believe this effort to recapitalize the service's offshore surface fleet, aviation assets, and command and control system is essential to prepare the Coast Guard to meet future challenges. With an aging fleet of cutters and aircraft, maintenance and personnel costs will rise dramatically unless the fleets are replaced. Further, the multi-mission nature of the Coast Guard requires a modern and flexible fleet that will continue serving national security and other core missions. The Integrated Deepwater System request for proposal and the recently awarded contract with the systems integrator were predicated on a consistent funding level of $500 million per year in 1998 dollars over the 20-year implementation timeline. The Conferees are concerned that this program already appears likely to be underfunded in its first year creating delays and pushing back the implementation schedule just as the program is beginning.

The Conferees also strongly support the need to modernize the National Distress & Response System. This system is crucial for the Coast Guard to improve its capabilities to respond to and aid mariners in distress. The Conferees strongly support the Coast Guard receiving $90 million in fiscal year 2003 to begin this procurement which is scheduled to be completed by the end of the fiscal year 2006.

Another necessary area of funding is for the Coast Guard's share of the cost of altering or removing bridges that cause hazards to navigation, pursuant to the Truman-Hobbs Act of June 21, 1940, as amended (33 U.S.C. 511 et seq.). The Conferees expect that $2,000,000 of the funding provided will be utilized for the construction of a new Chelesa Street Bridge over the Chelsea River in Boston, Massachusetts.

SECTION 503. AUTHORIZED LEVELS OF MILITARY STRENGTH

The Senate bill does not contain a comparable provision.

Section 503 of the House amendment authorizes 44,000 Coast Guard active duty military personnel as of September 30, 2002.

The Conference substitute authorizes 45,500 Cost Guard active duty military personnel as of September 30, 2003.

The Conference substitute authorizes 45,500 Coast Guard active duty military personnel as of September 30, 2003, which is larger than the Administration's request. The Conferees note that even before September 11, 2001, Coast Guard missions and demands were expanding and taxing the service's personnel whose current strength is comparable to the Coast Guard of 1966. As the Coast Guard assumes its expanding homeland security role while at the same time continues to carry out its traditional missions, it will require additional personnel. Therefore, the Conference substitute increases the end-of-year strength numbers beyond those recommended by the Administration to ensure the Coast Guard has the flexibility to increase its personnel levels to meet these new challenges and demands.

From the Committee on Transportation and Infrastructure, for consideration of the Senate bill and the House amendment, and modifications committed to conference:

DON YOUNG,
HOWARD COBLE,
FRANK A. LOBIONDO,
JIM OBERSTAR,
CORRINE BROWN.

From the Committee on Ways and Means, for consideration of secs. 112 and 115 of the Senate bill, and sec. 108 of the House amendment, and modifications committed to conference:

WILLIAM THOMAS,
PHIL CRANE,
CHARLES B. RANGEL,
Managers on the Part of the House.

ERNEST F. HOLLINGS,
DANIEL INOUYE,
JOHN F. KERRY,
JOHN BREAUX,
RON WYDEN,
MAX CLELAND,
BARBARA BOXER,
JOHN MCCAIN,
TED STEVENS,
TRENT LOTT,
KAY BAILEY HUTCHISON,
OLYMPIA SNOWE,
GORDON SMITH,
BOB GRAHAM,
CHUCK GRASSLEY,
Managers on the Part of the Senate.

PROVIDING FOR CONSIDERATION OF H.R. 5710, HOMELAND SECURITY ACT OF 2002

Mr. DIAZ-BALART. Mr. Speaker, by direction of the Committee on Rules, I call up House Resolution 600 and ask for its immediate consideration.

The Clerk read the resolution, as follows:

H. RES. 600

Resolved, That upon the adoption of this resolution it shall be in order without intervention of any point of order to consider in the House the bill (H.R. 5710) to establish the Department of Homeland Security, and for other purposes. The bill shall be considered as read for amendment. The previous question shall be considered as ordered on the bill to final passage without intervening motion except: (1) one hour of debate on the bill equally divided and controlled by the chairman and ranking minority member of the Select Committee on Homeland Security; and (2) one motion to recommit.

ANNOUNCEMENT BY THE SPEAKER PRO TEMPORE

The SPEAKER pro tempore (Mr. LAHOOD). The Chair must remind Members not to display communicative badges while under recognition for debate.

The gentleman from Florida (Mr. DIAZ-BALART) is recognized for 1 hour.

Mr. DIAZ-BALART. Mr. Speaker, for purposes of debate only, I yield the customary 30 minutes to the gentlewoman from New York (Ms. SLAUGHTER), pending which I yield myself such time as I may consume. During consideration of this resolution, all time yielded is for the purpose of debate only.

(Mr. DIAZ-BALART asked and was given permission to revise and extend his remarks.)

Mr. DIAZ-BALART. Mr. Speaker, House Resolution 600 is a closed rule allowing for the immediate consideration of the Homeland Security Act of 2002. The rule provides for 1 hour of debate, equally divided and controlled by the chairman and ranking minority member of the Select Committee on Homeland Security. The rule further provides the minority the opportunity to offer a motion to recommit.

Mr. Speaker, this Chamber first acted in July to make the President's goal of a Department of Homeland Security a reality. However, we were not able to send a bill to the President's desk because the other body failed to act.

After months of inaction and gridlock, President Bush has been instrumental in forging a compromise between Democrats and Republicans in order to pass legislation for the creation of the Department of Homeland Security as soon as possible.

I am pleased and honored by the opportunity to take to the House floor today this historic legislation to create the Department of Homeland Security. The security of the American people is the primary function of the Government of the United States. The creation of this new Department to coordinate all security activities on behalf of the American people is of the utmost importance. It has been a high

CBJ Law Department

MEMORANDUM

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.

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[1]The 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.

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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 ""Subport 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.

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[2]Expenditures 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.

CBJ Law Department MEMORANDUM

To: Mayor and Assembly

From: John W Hartle, City Attorney JWH

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:

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> 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.

MEMORANDUM

CITY/BOROUGH OF JUNEAU
Office of the Mayor
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Voice (907) 586-5240
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DATE: April 25, 2011

TO: Borough Assembly

FROM: Bruce Botelho, Mayor

SUBJECT: Marine Passenger Fees and Port Development Fees [REVISED]

During the course of the last months the assembly and its finance committee have discussed whether and how we should make use of monies received from cruise ship passengers. Recently, challenges to some proposed expenditures have been offered by members of the public and these, rightly, should be openly and forthrightly addressed.

In advance of this Wednesday's consideration of the CIP budget for FY 2012, I thought it might be helpful to review the fee structures we have in place, their historical context and my understanding of the applicable law. I do so in recognition that my remaining time on the assembly is limited and that I am the only member who participated in the early development of our fee structures.

Historic cruising

Cruise ship tourism of one sort or another has been part of Southeast Alaska's history for generations, frequently regarded as beginning with John Muir's 1879 visit, immediately before the discovery of gold in what became the Juneau Mining District.

Throughout the first half of the Twentieth Century, tourists travelled to Alaska primarily on vessels of the Alaska Steamship and Canadian Pacific steamship boats. By the mid-1960's, these companies had been supplanted by air travel and the Alaska Marine Highway system.

The first cruise ships in numbers returned to Juneau in the late 1970's and, by 1982, the annual number of passengers had risen to 80,000. Juneau consciously focused on this potential market in the aftermath of a 1982 vote on a bond issue to finance the relocation of the capital. The city recognized the need to diversify and cruise ship tourism offered one attractive alternative. On its own, Juneau undertook the establishment of a

downtown historic district and extensive reconstruction of streets and sidewalks, hoping that these improvements would attract more cruise lines to call on Juneau.[1]

Whether by coincidence or not, the cruise industry did expand its presence in Juneau and by the late 1980's the annual number of cruise passengers exceeded 200,000.

1990 Enactment of a port dues structure

As mayor in January 1989, I requested the assembly adopt an ordinance imposing a $5 marine passenger fee on each cruise ship passenger arriving in Juneau. Juneau's docks were old and could not sustain the volume of ship traffic, consisting of vessels five to ten times the size of those the docks had been built for. Revenue sharing and capital projects from the state to municipalities had fallen sharply since the 1985 recession. The burden of infrastructure development needed to be shifted to the industry that benefited from it.

The cruise industry opposed the imposition of a fee. However, over the course of the next thirteen months, hearings and negotiations between industry representatives and the city took place. And, in February 1990, (over industry opposition) the assembly unanimously enacted a "port dues" ordinance, Ord. 89-52. In the ordinance, the assembly made several findings, among them, that "the establishment of port dues is necessary and appropriate in order to fund capital acquisitions and improvements to the city and borough's port facilities for the use and benefit of the cruise ship industry."

The port dues structure assessed vessels based on their tonnage, with the receipts used to finance specific dock improvements proposed in a General Obligation bond package approved by the voters in 1991. The rate began at $.05 a ton and was readjusted annually.[2]

The Marine Passenger fee

In 1999, City and Borough of Juneau voters passed Proposition 1, assessing a fee of $5 per cruise ship passenger. The proposition, embodied in CBJ 69.20, directed that the fees be placed in a marine passenger fund, from which appropriations were to be made to "address the impacts caused by the marine passenger ship industry." Permissible expenditures included:

(1) Design, construction, operation, or maintenance of capital improvements to relieve impacts of marine passenger ships and marine passengers;

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[1] In addition, between 1978 and 1988 the city invested $9.619 million in waterfront projects.

[2] Two other features of the ordinance are noteworthy. The first was creation of a port development plan that served as the basis for the 1991 GO bond issue. The second was the creation of a port advisory committee whose primary responsibility was to comment on the port development plan and adjustments to all port fees.

(2) Operating funds for personnel, training, commodities, rentals, services and equipment for services provided, made available to, or required as a result of marine passenger ships and marine passengers;

(3) Projects and programs that promote safety, environmental improvements, or enforcement of laws caused or required by marine passenger ships and marine passengers;

(4) Acquisition of land required to execute the activities listed in this section;

(5) Beautification and enhancement of the facilities listed in subsections (a)(1)—(a)(4) of this section;

(6) Surveys, analyses, polls, plans, monitoring, and similar efforts to measure, describe or predict, or manage the impacts of marine passenger ships and marine passengers, for items listed in subsections (a)(1)—(a)(5) of this section.

In 2008, the Assembly amended the ordinance's process for soliciting and deciding projects, but did not alter the list of permissible expenditures. Ord. 2008-07.

The Port Development fee

In January 2002, the port dues ordinance, Ord. 89-52, expired. In April 2002, the assembly adopted Res. 2150, "a Resolution Imposing Port Dues on Vessels Carrying Passengers for Hire." In doing so, the assembly determined that "it is appropriate to implement a replacement that assures better planning, improved community and business partnerships, and the development of broadly supported waterfront improvements".

Despite the title of the resolution, the fee was to be denominated a "port development fee". The initial rate was $1.73 per passenger. Monies were to be used to partially fund Phase I of the Steamship Wharf/Marine Park project, a comprehensive waterfront plan "addressing the area from the Douglas Bridge to the Little Rock Dump", and a feasibility study and preliminary design of a dock extension. The fee was to be collected through December 31, 2005.

The port development fee was the subject of several subsequent resolutions:

(1) Resolution 2163 (July 2, 2002), which, for the first time, differentiated between CBJ owned facilities and private facilities, charging 18 cents per arriving passenger for all vessels and an additional $2.00 on those arriving at CBJ owned facilities;

(2) Resolution 2294b am (March 14, 2005), which increased the fee on all arriving passengers to $1.18 and an additional $2.00 on passengers arriving at CBJ owned facilities. In addition to projects addressed in Res. 2150, Res. 2294b directed funds to implement waterfront development projects identified in the then-recently-adopted Long-Range Waterfront

Plan. The assembly specifically found that the primary user of the downtown waterfront facilities was the cruise line industry and that the safety and efficiency of interstate and foreign commerce would be enhanced by planning, designing, and constructing facilities outlined in the plan;[3]

(3) Resolution 2423(b) am (January 7, 2008), which set the port development fee at $3.00 for all arriving passengers and extended it until January 2011; and

(4) Resolution 2552 (November 29, 2010), which repealed the sunset provision.

Other topics bearing on Marine Passenger and Port Development fees

a. State Commercial Passenger Vessel Excise Tax (CPV)

In August 2006, a voter-approved initiative established the commercial passenger vessel excise tax, popularly known as a "head tax"; of $50 per person disembarking from cruise ships in an Alaska port. Monies were placed into the CPV tax account and were then appropriated annually by the legislature under a formula set forth in the initiative. The initiative's findings included a determination that "the State of Alaska and local governments. . . incur significant costs related to health, safety and other social activities and obligations. These passengers should also contribute their fair share to the costs of the general government of the State of Alaska. . ."

At Governor Parnell's urging, the legislature modified the CPV in the 2010 session, effectively reducing the tax to $34.50 per passenger. Two features were of specific benefit to the City and Borough of Juneau. First, it would receive $5 per passenger. Second, doing so would not be conditioned on repeal of its own marine passenger fee or port development fee.

b. The Long Range Waterfront Plan

As I noted above, one of the uses of the port development fee was to be the completion of a long-range waterfront development plan. After two years of public hearings and preliminary work, the assembly adopted its plan in November 2004 (Ordinance 2004-40). The plan, with a 20-year horizon, embodied the assembly's systematic approach to development of the Port of Juneau.[4] Among its "key organizing elements and themes" were "cruise facility growth" and "expanded transportation mode choice".

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[3] Ord. 2005-02 (imposing market rate port dues on vessels carrying passengers for compensation) was adopted at the same time. It authorized a port tonnage fee on vessels calling at the Port of Juneau, but it has not been implemented.

[4] The Port of Juneau encompasses those facilities located on the downtown waterfront, including the ferry terminal and lightering docks, which are not included under the term "boat harbor" and which are used for commercial purposes related to marine shipping, transportation, and tourism. CBJ 85.05.010

The plan specifically contemplates the reconstruction of CBJ's docks to accommodate two, 1,000 foot cruise vessels, sets forth considerations for additional berthing, and identifies alternatives near Gold Creek to achieve that result.

c. Expenditures from the two city fee structures

Over the course of the period 1990 – 2008 there was another nearly five-fold increase in the number of passengers arriving in Juneau.[5] The volume of visitors and the size of the vessels calling on Juneau both brought major challenges and opportunities to Juneau. Floatplane and, later helicopter, operations, crowding of pedestrians on Juneau streets, bus congestion, air and water quality, and adequacy of docks were all issues successive assemblies have tried to address responsibly.

The fees have been essential in building and maintaining basic infrastructure for nearly-one-million visitors who arrive by cruise ship into the Port of Juneau each year and in partially off-setting the impact of these visitors on municipal government services.

Not including the initial port dues regime, the CBJ has expended $14,776,800 in port development fees on port infrastructure maintenance and construction. The CBJ has expended an additional $22,239,000 on Port of Juneau capital projects from marine passenger proceeds.[6]

Applicable Legal Standards

From the outset, successive assemblies have been conscious of, and conscientious about, complying with federal, state and local laws respecting use of the monies collected from port dues, port development and marine passenger fees. Nevertheless, our application of these standards has evolved, becoming increasingly sophisticated because of greater awareness on the part of assembly members, vigilance by city management and the public and constantly developing case law. This iterative process will continue.[7]

What we all know is that, in addition to complying with our own ordinances, each proposed expenditure must satisfy <u>every</u> federal and state standard in order to be lawful. Here is my cursory outline of these standards, along with my thoughts on their application:

a. Federal constitutional constraints

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[5] The number of passengers arriving in Juneau declined after that point from a high in 2008 of 969,354 visitors, 962,573 in 2009, and 825,916 in 2010 to an anticipated 816,188 visitors this summer, attributed variously to a national recession and to the imposition of the statewide passenger fee discussed above.

[6] Approximately $30 million has been expended on "operations" which has ranged from general support ($14,063,900), shoreside power ($3 million), to the seasonal EMS Transport program ($480,000) and crossing guards ($991,000).

[7] I will have recommendations to make in this regard later this year.

The "dormant" Commerce Clause. The United States Constitution authorizes Congress to regulate "Commerce with foreign Nations, and among the several States, and with the Indian Tribes". Art. I, sec. 8, cl. 3 U.S. Const. This explicit grant of authority to Congress has a converse implicit prohibition known as the "dormant" Commerce Clause which bars states from passing legislation that improperly burdens or discriminates against interstate commerce, even when there is no conflicting federal statute.

The United States Supreme Court has established a three-pronged test to determine whether a state (or local) fee imposed on interstate commerce to pay for facilities used in part by those engaged in interstate commerce is "reasonable" [constitutional]. It is permissible only if it

(1) is based on some fair approximation of use of the facilities,

(2) is not excessive in relation to the benefits conferred, and

(3) does not discriminate against interstate commerce.

Northwest Airlines, Inc. v. County of Kent, 510 U.S. 355, at 369 (1994).

The Tonnage Clause. Article I, section 10 of the United States Constitution declares that "[n]o State shall, without the Consent of Congress, lay any Duty of Tonnage." The Supreme Court has interpreted the clause to apply to "all taxes and duties regardless of their name or form, and even though not measured by the tonnage of the vessel, which operate to impose a charge for the privilege of entering, trading in, or lying in a port." *Clyde Mallory Lines v. Alabama ex rel. State Docks Comm'n.*, 296 U.S. 261, at 265-66 (1935).

Two years ago, the Supreme Court was presented with a challenge to the City of Valdez's imposition of a property tax on large vessels docking at its ports. While striking down the tax, the Court noted: ". . .[N]othing in the history of the adoption of the Clause, the purpose of the Clause, or this Court's interpretation of the Clause suggests that it operates as a ban on *any and all* taxes which fall on vessels that use a State's port, harbor, or other waterways." *Polar Tankers Inc. v. City of Valdez, Alaska,* 129 S.Ct. 2277, at 2283 (2009).

Most pernicious about the tax, not an issue with respect to our own fees, was that it was intended to raise money for general municipal services, it was uniquely targeted at large vessels rather than to any other form of non-affixed personal property, and it was not related to services provided to the vessel.

b. Federal statutory constraints

Language in the Maritime Transportation Security Act of 2002 amended 33 U.S.C. 5 by adding a new subsection (b) that provides in pertinent part:

> No taxes, tolls, operating charges, fees . . . shall be levied upon or collected from any vessel or other water craft, or from its passengers or crew . . . except for . . . 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.

In *State v. Alaska Riverways, Inc.*, 232 P.3d 1203, 1222 (Alaska 2010), the Alaska Supreme Court noted that this section was a codification of the common law concerning the constitutional constraints discussed above.

What is the service we provide? It is rendering the Port of Juneau able to receive passenger ships of current and anticipated capacity into its harbor, permit their passengers and crew to cross our docks, and enter the community, whether on foot, by water taxi or motorized terrestrial vehicle, safely and efficiently. And, when I refer to "our docks", I mean to include those that have been privately developed. Our responsibility to passengers and crew who visit Juneau does not end at a property line. On the other hand, how and in what manner that responsibility is fulfilled will vary, based in part on the ownership of any specific facility within the Port of Juneau.

It is my view of the service we provide that makes me uncomfortable with expenditures outside of the Port of Juneau. For that reason, I have been particularly wary of the use of marine passenger fees for the airport. Use of funds for Statter Harbor presents a much closer question for me, even though it is geographically more remote from the Port of Juneau than the airport. It is because the facilities that are proposed to be constructed are almost exclusively for the use and benefit of marine passengers who disembark in the Port. A court could conclude that it is an appropriate expenditure.

c. State constitutional constraints

Public Purpose Requirement. Article IX, section 6 of the Alaska Constitution reads:

> No tax shall be levied, or appropriation of public money made, or public property transferred, nor shall the public credit be used, except for a public purpose.

This provision enters our discussion because of proposed expenditures to dock facilities that are privately owned. The Alaska Supreme Court has applied this provision on several occasions. A case that structurally bears some resemblance to the situation presented here is *Weber v. Kenai Peninsula Borough,* 990 P.2d 611 (Alaska 1999).

In 1993, certain property owners petitioned the borough to form a utility special assessment district to finance a gas line extension to their area. The extension was to be constructed and owned by Enstar. Once the extension was completed that year, the borough confirmed the assessment roll and set the amount each

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 pronouncement[8] 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 Mssrs. 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

> 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.