



January 12, 2011

Mayor Bruce Botelho
City and Borough of Juneau
155 South Seward Street
Juneau, AK 99801

Dear Mayor Botelho:

The recently enacted resolution number 2552, repealing the sunset date on the Port Development Fee, raises a significant issue that will need careful consideration, especially in light of recent legislative changes to the statewide head tax on large commercial passenger vessels.

As you are probably aware, October 1, 2010, Senate Bill 312 became effective, imposing restrictions on the use of passenger fees collected by the state and distributed to local communities. Commissioner Susan Bell recently sent a letter to all port communities addressing this issue, and I refer you to her letter to review the restrictions.

The changes in state law were based upon federal statutory law, as well as the U.S. Constitution's Commerce Clause and Tonnage Clause, which limit the use of both state and locally collected passenger fees. In evaluating the Constitutional provisions and the Maritime Security Act of 2002, the City and Borough of Juneau's attorney in 2003 explained:

The new language [in the federal statute] says that fees must be used "solely" to provide a service to the vessel, must "enhance the safety and efficiency" of interstate commerce, **and** must impose only a "small" burden on the commerce...

...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.

More recently, the United States Court of Appeals for the Second Circuit (Bridgeport case, 2009) and the United States Supreme Court (Polar Tanker case, 2009) invalidated local fees imposed upon marine vessels, based primarily on the fact that the fees did not simply defray the cost of services provided to the vessels and their passengers.

The Alaska Legislature designed SB 312 to implement these interpretations of federal law. That legislation, including especially its limitations in the use of passenger fees, prompted the industry's agreement to withdraw the passenger fee litigation, which challenged the State's passenger tax in its entirety. For that reason, we have a special interest in making sure that state and local governments honor both the letter and the spirit of the law.

The new legislation has a direct bearing on the recent actions of the City and Borough of Juneau. With the permanent extension of the \$3 Port Development Fee and the \$5 state passenger fee

shared revenue, the City and Borough of Juneau will be collecting a significant amount of revenue in addition to the \$5 local passenger fee. We are concerned, however, that the City and Borough will use these funds to develop projects that do not meet the legal test for appropriate use of passenger fees and fund projects that have excessive costs.

Most notably, as we have stated and documented on many occasions, the cruise industry does not see the need or support the decision to expand the downtown docks. The benefit of adding 200 feet of future usable dock length simply does not justify the \$50 to \$60 million it will likely take to complete this project. Further, 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.) We continue to believe, based upon need, the more responsible course of action would be to repair and maintain the existing facility.

The industry also has serious concerns regarding the seawalk and other components of the Long-Range Waterfront Plan. We understand the need for a revenue source to fund the Long-Range Waterfront Plan was used to justify the Port Development Fee extension. But many aspects of this plan would not use fees solely to provide service to vessels and their passengers, would not “enhance the safety and efficiency” of interstate commerce, and would impose a burden on commerce—and therefore would not comply with the legal use of passenger fees. We oppose any additional projects that do not meet this legal test.

Now that the State passenger fee litigation is settled, we have a renewed interest in ensuring all funds are used in accordance with the law. We request that you distribute Commissioner Bell’s letter to the Assembly, the Docks and Harbors Department and the Docks and Harbors Board.

Thank you for your consideration and we look forward to continuing a productive dialogue regarding the infrastructure needs in Juneau.

Sincerely,



Bob Stone
Chairman
Alaska Cruise Association

CC: City & Borough of Juneau Assembly
City & Borough of Juneau Docks & Harbors Board
John Stone, Port Director, Juneau Docks & Harbors