

Presented by: The Manager
Presented: 3/14/2022
Drafted by: R. Palmer III

RESOLUTION OF THE CITY AND BOROUGH OF JUNEAU, ALASKA

Serial No. 2979

A Resolution Authorizing the Manager to Amend the CLIAA Settlement Agreement.

WHEREAS, Resolution 2852 (Mar. 22, 2019) authorized the Manager to execute a settlement agreement to resolve the litigation related to the legality of the collection and expenditure of fees imposed upon a vessel related to the provision of municipal services and the construction of capital improvements;

WHEREAS, paragraphs 3(d) and 7 of the settlement agreement encourage the parties to annually consult to discuss any new proposed projects and services for which CBJ passenger fees are sought to be expended;

WHEREAS, the amendments authorized by this resolution would update information and clarify that CLIA is waiving objection to the expenditure of up to \$10 million in passenger fees for support to the Capital Civic Center project.

NOW, THEREFORE, BE IT RESOLVED BY THE ASSEMBLY OF THE CITY AND BOROUGH OF JUNEAU, ALASKA:

Section 1. Authorization. The Manager may execute the amended settlement agreement in substantially the same form as attached in Exhibit A.

Section 2. Effective Date. This resolution shall be effective immediately after its adoption.

Adopted this _____ day of _____, 2022.

Beth A. Weldon, Mayor

Attest:

Elizabeth J. McEwen, Municipal Clerk

MEMORANDUM OF AGREEMENT (AMENDMENT 1)

This Memorandum of Agreement (hereinafter, the “Agreement”) is made and entered into effective as of March 2019, by and between Cruise Lines International Association Alaska and Cruise Lines International Association (“Plaintiffs or CLIA”), on the one hand and The City and Borough of Juneau, Alaska and Rorie Watt (hereinafter “CBJ” and “Watt” respectively and collectively “Defendants”), on the other hand (Plaintiffs and Defendants may sometimes be referred to hereinafter collectively as the “Parties,” or any one of them individually, a “Party”) and reflects amendments agreed to on March _____, 2022, in accordance with Paragraph 3(d), below.

RECITALS

A. WHEREAS, on or about April 13, 2016, Plaintiff filed an action in the United States District Court for the District of Alaska entitled Cruise Lines International Association Alaska and Cruise Lines International Association v. The City and Borough of Juneau, Alaska and Rorie Watt, bearing case number 1:16-cv-0008-HRH (the "Action"). In the Action, Plaintiffs challenged two fees imposed on vessels by the CBJ (the Marine Passenger Fee (MPF) a \$5-per passenger fee and the Port Development Fee (PDF) a \$3-per passenger fee, collectively referred to as “Fees”) that enter CBJ public or private docks, alleging the Fees were either facially unconstitutional or being expended by CBJ in an unconstitutional manner. Defendants disputed the Plaintiffs’ claims made in the Action, and generally and specifically disputed that the Fees were unconstitutional or unlawful, while asserting that CBJ’s use of the Fees was proper in all respects.

B. WHEREAS, Plaintiffs and Defendants filed cross motions for summary judgement and Defendants filed a motion to determine the law of the case. After oral argument the United States District Court Judge, Hon. H. Russel Holland, issued an Order on December 6, 2018 (“MSJ Order”) holding the Fees are permissible under the Tonnage Clause (“Tonnage Clause”) of the United States Constitution and the Rivers and Harbors Appropriation Act of 1899 (RHAA) codified at 33 U.S.C. section 5; provided said Fees are used for services to a vessel or rendered to facilitate the marine enterprise/operations of the vessel and not for services that only benefit passengers. While Judge Holland’s rulings clarified the law, they leave the parties discretion to amicably apply the Court Rulings. Thereafter, on January 25, 2019, Judge Holland entered a Final Judgement in the Action affirming the holding of the MSJ Order (MSJ Order and Final Judgement collectively referred to as “Court Rulings”).

C. WHEREAS, it is the desire of the Parties hereto to abide by this Agreement and resolve the Disputes raised by the Parties in the Action in a manner consistent with the terms of the MSJ Order and in compliance with the Final Judgement, unless the underlying legal authority changes. The parties agree that amicable resolution of the issues is better than continued litigation. This Agreement shall further set forth the terms and conditions of the Parties continuing relationship based on the terms of the MSJ Order and Final Judgment and under which Fees, if any, will be collected and expended. The MSJ Order and Final Judgment shall be subject to the good faith interpretation of the Parties for certain projects. The Parties wish to avoid the costs and the expenditure of resources in pursuing and defending continued litigation pertaining to the various claims and/or defenses raised in the Action. The Parties agree that the terms and conditions set forth in this Agreement are intended to be fully enforceable.

49 D. WHEREAS, other communities in Southeast Alaska are concerned about the
 50 impact of the Court Rulings on their communities and have voluntarily offered the CBJ monetary
 51 support to appeal the Court Rulings, and as such, any amicable resolution between CBJ and CLIA
 52 must be practical, not harmful to other communities in Southeast, and should acknowledge each
 53 community must exercise local control in its decision making because each community has unique
 54 approaches and issues. The Parties also acknowledge that CBJ's Marine Passenger Fee and Port
 55 Development Fee are fees imposed upon a vessel, and not fees imposed upon a passenger like the
 56 State Commercial Passenger Vessel excise tax (A.S. 43.52.200 et. seq). The Parties agree that the
 57 State Commercial Passenger Vessel excise tax was not litigated or an issue in the Action. The
 58 State of Alaska and a predecessor of CLIA settled a dispute involving the State Commercial
 59 Passenger Vessel excise tax in 2010 resulting from No. 3:09-cv-00015-TMB, United States
 60 District Court for the District of Alaska.

61
 62 E. WHEREAS, CBJ acknowledges that the construction of the western seawalk
 63 project from Gold Creek to Overstreet Park may or may not have survived legal challenge and
 64 that because CLIA chose not to seek an injunction for this part of the construction, this project
 65 was not delayed and was successfully constructed; and while CLIA acknowledges that the western
 66 seawalk project may or may not have survived a legal challenge, CLIA also acknowledges the
 67 entire seawalk has been a part of CBJ's Long Range Waterfront Plan for more than 10 years, the
 68 project has the support of the Juneau public and such public support is instrumental and necessary
 69 to the development of the Juneau waterfront and the growth of the cruise industry.

70
 71 F. WHEREAS, the Parties shall engage in annual meetings to discuss their respective
 72 issues and positions, regarding major development projects, as early as possible. For example,
 73 during the 2019 consultations with the City Manager, CLIA did not object to the CBJ using fees,
 74 subject to Assembly appropriation, imposed on a vessel or passenger to lease space away from
 75 the downtown Juneau area to temporarily stage containers during the cruise season to enable
 76 vessels to efficiently unload, load, and timely depart instead of having containers trucked through
 77 the Maritime Industry Zone during peak periods, and does not object to the use of an amount not
 78 to exceed \$10 million in fees over no longer than a five year period to support renovations/
 79 improvements/additions to the Capital Civic Center.

80
 81 G. WHEREAS, the Parties affirm that nothing in this Agreement is an attempt to
 82 interfere with the Assembly's responsibility to govern the affairs of the City and Borough of
 83 Juneau but is provided to the Assembly as best practices pertaining to the collection and
 84 appropriation of Passenger fees so that future disputes may be avoided.

85
 86 NOW, THEREFORE, for valid and binding consideration acknowledged by the Parties,
 87 the Parties hereby agree as follows:

88 **DEFINITIONS**

89
 90 A. The term "Cruise Lines International Association" shall include its Members
 91 calling in Juneau, Alaska, specifically and without limitation to include: Carnival Cruise Lines,
 92 Crystal Cruises, Disney Cruise Lines, Holland America Line, Norwegian Cruise Line, Oceana
 93 Cruises, Princess Cruises, Regent Seven Seas Cruises, Royal Caribbean International and
 94 Silverseas Cruises and any person or entity, past or present, acting on behalf of any of the
 95 foregoing, including, but not limited to, each of their present and former agents, representatives,
 96 owners, officers, executives, partners, directors, employees, insurers and/or attorneys.

B. The term "Cruise Lines International Association Alaska" (together with Cruise Lines International Association, "CLIA") shall also include CLIA Northwest & Canada and any person or entity, past or present, acting on behalf of any of the foregoing, including, but not limited to, each of their present and former agents, representatives, owners, officers, executives, partners, directors, employees, insurers and/or attorneys.

C. The term "The City and Borough of Juneau, Alaska" shall include any person or entity, past or present, acting on its behalf, in the collection and expenditure of those certain Fees collected from cruise vessels calling at the docks and local waters within the jurisdiction of CBJ, including, but not limited to, each of their present and former members, representatives, officers, executives, partners, directors, employees, insurers and/or attorneys, but not individual Assemblymembers.

D. The term "Rorie Watt" shall include Mr. Watt in his official capacity as City Manager of Juneau, Alaska and any person or entity, past, present or future, acting in the official capacity as City Manager of Juneau, Alaska, including, but not limited to, each of their successors, assigns, representatives, officers, executives, partners, directors, employees, insurers and/or attorneys.

E. The term "Dispute(s)" shall be defined as all claims, defenses and/or allegations arising out of and in any way connected with the pleadings filed in the Action. The term shall not include future business dealings with respect to the collection and expenditure of Fees, except as otherwise agreed in this Agreement.

F. The term "Marine Passenger Fee" ("MPF") shall mean that certain five U.S. dollar (US\$5.00) per passenger fee assessed on certain passenger vessels as codified by CBJ Code Sections 69.20.030 and 69.20.040.

G. The term "Port Development Fee" ("PDF") shall mean that certain three U.S. dollar (US\$ 3.00) per passenger fee assessed on vessels carrying passengers for compensation on port calls in the City and Borough of Juneau pursuant to Resolution 2552 (2010).

H. The term "Motion for Summary Judgment Order" ("MSJ Order") is defined above. The terms of the MSJ are incorporated herein by this and any other reference. The MSJ Order is attached hereto as Exhibit A.

I. The term "Final Judgment" refers to that certain Judgment In A Civil Case filed by the United States District Court Judge for the District of Alaska, Hon. H. Russel Holland, on January 25, 2019, and entered in the Action at Docket No. 217; the terms of which are incorporated herein by this and any other reference. The Final Judgment is attached hereto as Exhibit B.

J. The term "Maritime Industry Zone" shall refer to that certain map attached hereto as Exhibit D.

K. The term "Effective Date" shall be defined as the date of full execution of this Agreement by both parties.

AGREEMENTS

1. **Incorporation.** This Agreement hereby incorporates the Recitals and Definitions stated above.

2. **Operational Services Budget.** Attached as Exhibit C to this Agreement and incorporated herein by this reference is a true and correct copy of the CBJ FY 2019 Budgeted MPFs expenditures. The Parties acknowledge the allocation of Fees stated therein and, for purposes of this Agreement, CLIA does not object to each of the line item expenditures for FY 2019. With respect to the allocation of Fees for General Government Services in the successive years following FY 2019 governed by this Agreement, the Parties agree that in lieu of a line item allocation for General Government Services, CBJ will obtain a cost allocation study of said General Government Services and will allocate Fees based on the results of the future study effective FY2021 (July 1, 2020). The Parties understand and agree the intent of procuring an audit under this paragraph is that the cost of operational services will not vary significantly (+/- ten percent) from historical allocations for operational services. The parties agree that from time to time inflationary adjustments will likely be necessary.

3. **Agreed Use of Fees in Maritime Industry Zone.** The Parties acknowledge and agree to the collection and expenditure of Fees in the Maritime Industry Zone. The Parties attach hereto as Exhibit D an area map of downtown Juneau wherein CBJ provides (Zone A) or could provide (Zone B) the infrastructure for cruise vessels, the support services for such vessels while in port, and infrastructure and services that further the marine enterprise/operation of such vessels, including: dockage, lightering, ship to shore infrastructure including utilities and debt service, ship to ship infrastructure including debt service, seawalks, restrooms, signage/wayfinding, motor coach staging, passenger queuing, terminal or emergency assembly facilities, access and parking facilities for vehicles serving a vessel, and any infrastructure required or recommended by the Department of Homeland Security (i.e. USCG and USCBP). The following expenditures are agreed to by the Parties:

a. Debt service on the Cruise Ship Berth Enhancement project (commonly known as 16B) and the planning, design and construction necessary to improve private and public cruise ship docks. The cost of acquiring land, tidelands, and easements required for the construction of capital improvements would be considered eligible project costs. For purposes of this Agreement, CLIA does not object to Fee expenditures for those purposes.

b. For the purposes of this Agreement, CLIA does not object to Capital improvements within Zone A of the Maritime Industry Zone that further the marine enterprise/operation of vessels as described above including: dockage, lightering, ship to shore infrastructure including utilities and debt service, ship to ship infrastructure including debt service, seawalks, restrooms, signage/wayfinding, motor coach staging, passenger queuing facilities, access and parking facilities for vehicles serving a vessel, and any infrastructure required or recommended by the Department of Homeland Security (i.e. USCG and USCBP). The Parties agree to the expenditure of Fees for this infrastructure in Zone A and acknowledge that the CBJ may need to expand or change such services and infrastructure in Zone A due to a change in circumstances, such as changes in vessel size, scheduling, and demands for such services or infrastructure by the changes in circumstance. The cost of acquiring land, tidelands, and easements required for the construction of capital improvements would be considered eligible project costs. For purposes of this Agreement, CLIA does not object to Fee expenditures for those purposes.

c. Operational Services provided within Zone A pursuant to Paragraph 2, including but not limited to the following services that the CBJ provided in 2018 to CLIA, its passengers or crew: dockage, lightering, restroom maintenance, crossing guards, police/security patrols and infrastructure, fire and emergency medical service, weather monitoring, tug assist, trash collection and disposal, and any service required or recommended by the Department of Homeland Security (i.e. USCG and USCBP). The Parties agree to the expenditure of Fees for these services in Zone A and acknowledge that the CBJ may need to expand or change such services and infrastructure in Zone A due to a change in circumstances, such as changes in vessel size, scheduling, and demands for such services or infrastructure by the changes in circumstance. For purposes of this Agreement, CLIA does not object to Fee expenditures for those purposes.

d. For proposed capital improvements or operational services within Zone B, the parties agree to discuss these ideas at the annual meeting. CLIA does not object to a Fee expenditure in Zone B of an amount not to exceed \$10 million (\$10,000,000), over no longer than a five year period, for the Centennial Hall Expansion Project (also known as the "Capital Civic Center").

e. The Parties agree that expenditure of Fees outside of Zones A and B may be necessary. In such case, the parties shall discuss such ideas in accordance with paragraph 7.

4. **Statter Harbor Improvement Project.** CBJ has developed construction plans for improvements to Statter Harbor that will promote marine commerce in the area and provide services to vessels. CLIA contends the full scope of construction of the Statter Harbor Project may be beyond the scope of permissible expenditure of Fees set forth in the MSJ Order, but for purposes of this Agreement, CLIA does not object to a Fee expenditure up to seventy-five percent (75%) of a total project budget not to exceed twelve million four hundred thousand dollars (US\$12,400,000.) CBJ agrees to finance the remainder of the Statter Harbor Project construction through other funding sources.

5. **Attorney's Fees.** Both Parties shall be reimbursed for their respective attorney's fees incurred litigating the Disputes brought in the Action. The Parties agree that CBJ shall cause one million five hundred thousand dollars (\$1,500,000) to be paid from the MPF collected from CLIA Members to partially reimburse CLIA for its attorney's fees incurred in the Action. The Parties acknowledge that CBJ incurred approximately Eight Hundred Thousand (\$800,000) in legal fees defending the Action and prior to the Effective Date of this Agreement has used approximately Three Hundred and Fifty Thousand Dollars (\$350,000) from MPF collected from CLIA Members. The Parties agree that CBJ may cause the remaining Four Hundred and Fifty Thousand Dollars (\$450,000) to be paid from the MPF collected from CLIA Members and use those funds as an "other funding source" in accordance with paragraph 5. Payment to CLIA shall be made on or shortly after March 22, 2019. The Parties acknowledge that the CBJ has initially provided the \$1.95M payments from FY2019 general funds (Ord. 2018-11(AF)); For purposes of this Agreement, CLIA does not object to the CBJ reimbursing the \$1.95M payments of general funds with FY20 MPF funds (Ord. 2019-14). Neither payment shall be deemed or constitute an admission of liability or wrongdoing by either Party nor shall either Party be considered the prevailing party.

6. **Public Records.** CBJ shall keep true and accurate records, sufficient to determine the amount of Fees collected and the appropriation, allocation and expenditure of said Fees during any Fiscal Year wherein Fees are collected from CLIA. Consistent with Alaska public records laws (e.g. A.S. 40.25.110 and CBJC 01.70), these records shall be maintained and open to inspection at CLIA's expense at reasonable intervals by an independent auditor during regular business hours of CBJ. All audit expenses shall be considered costs recoverable to the prevailing party in any dispute resolution initiated pursuant to Paragraph 9.

7. **Annual Consultation.** Guided by the timelines in CBJC 69.20.120(b) (March 14, 2019), the Parties agree for each and every Fiscal Year, the Parties shall endeavor to meet in person to discuss in good-faith any new proposed projects and services for which Fees are sought to be expended in the following Fiscal Year with the ultimate decision resting with the Assembly.

8. **Amount of Fees.** CBJ acknowledges and agrees the MPF should remain at \$5.00 per passenger and the PDF should remain at \$3.00 per passenger for at least the next three years from the Effective date. However, if an Assembly determines otherwise during the next three years, the parties agree to meet and discuss consistent with paragraph 7. If there is any change to the State Commercial Passenger Vessel statutes (A.S. 43.52.200-295) during the three year period, then the intent of this section is null and void.

9. **Dispute Resolution.** In the event of any dispute, claim, question, or disagreement arising out of or relating to this Agreement or the annual project planning meeting or any breach thereof, including any claims relating to collection and expenditure of the Fees, the Parties hereto shall use their best efforts to settle such disputes, claims, questions or disagreements through direct discussions and, if the matter cannot be settled through direct discussions, the parties agree to first endeavor to settle the dispute in an amicable manner by non-binding mediation, before resorting to litigation. The parties agree that upon notice to the other demanding mediation, the statute of limitations for the matter is tolled. If the parties cannot reach a resolution through mediation, then either party may file their claim in the United States District Court for the District of Alaska, which shall be the sole and exclusive forum for resolving such matters. The Parties agree that all claims shall be filed and adjudicated in the United States District Court for the District of Alaska. The intent of this paragraph is to provide a process to resolve only justiciable issues that the CBJ has undertaken or is reasonably certain to undertake with Fees; This paragraph is not intended to limit or compel the legislative discretion of the Assembly.

10. **Cost of Enforcement.** In the event that either party shall institute any action (whether mediation and/or court litigation), at law or in equity, against the other party to enforce or interpret any provision(s) of the this Agreement, or for breach hereof or default hereunder, the prevailing party shall be entitled to reasonable legal fees and costs, and such other relief to which it may be entitled, for the enforcement of any of its rights hereunder consistent with Alaska Civil Rule 79 and 82.

11. **Complete Agreement.** This Amended Memorandum of Agreement represents the complete and exclusive agreement by and between the Parties and supersedes all prior and contemporaneous promises and agreements of any kind relating to the resolution of the Disputes,

as well as all negotiations and discussions between the Parties hereto and/or their respective legal counsel with respect to the subject matters covered hereby. No other agreements, covenants, representations or warranties, express or implied, oral or written, have been made by any of the Parties hereto concerning the subject matter hereof. This is an integrated agreement.

12. **Term of Agreement**. The term of this Agreement shall be ten years from the effective date with automatic ten year renewals unless either Party provides written notice to the other, sixty days prior to the renewal date, to terminate this Agreement.

13. **Successors and Assigns**. All of the terms and provisions of the Agreement shall be binding upon and inure to the benefit of and be enforceable by the respective successors and assigns of the Parties.

14. **Governing Law**. This Agreement, the rights and obligations of the parties hereto, and any claims or disputes relating thereto, shall be governed by and construed in accordance with the laws of the United States of America and the State of Alaska.

15. **Waiver of Breach**. No waiver of any breach of any term or provision of this Agreement shall be construed to be, or shall be, a waiver of any other breach of this Agreement. No waiver shall be binding unless in writing and signed by the party waiving the breach.

16. **No Admission of Liability**: The Parties agree that the execution of this Agreement is done solely for the purposes of compromise, and to eliminate the burden and expense of further litigation, and does not constitute, and shall not be construed as, an admission of liability, wrongdoing, fault or as evidence with respect thereto, by any Party, on account of any claims or matters arising between CLIA on the one side and the CBJ on the other side raised in the Action. The Parties further agree that this Agreement shall not be offered or received against any of the Parties as evidence of a presumption, concession or admission with respect to any liability, fault or wrongdoing, other than such proceedings as may be necessary to effectuate the terms of this Agreement, the MSJ Order and Final Judgment. The parties acknowledge and agree that nothing in this Agreement is intended to prohibit disclosure by CLIA Members to their passengers and guests of Fees paid to CBJ pursuant to this agreement or to prohibit CLIA Members from continuing to assess passengers/guests for reimbursement of fees paid to CBJ.

17. **Third party claims**. In the event that a third-party files a claim or lawsuit against the CBJ resulting from or related to this Agreement and/or the collection and expenditure of the Fees, CLIA shall have no obligation to defend or indemnify the CBJ for such claim and/or lawsuit. CLIA's agreements and/or cooperation with respect to the CBJ's collection and expenditure of Fees, does not bind the CBJ in any manner to collect and expend the Fees nor does CLIA have any responsibility for the expenditure of the Fees once the Fees are collected from CLIA Members.

18. **Notice.** Any notice required to be given pursuant to this Agreement shall be deemed to have been sufficiently given either when served personally or when served by first-class mail addressed to the other Parties.

a. Notice to CLIA shall be effective only when addressed to:

~~President~~Chairman, CLIA Alaska

360 K Street Suite 300

Anchorage, AK 99501

with copy to:

President, CLIA

1201 F Street NW

Suite 250

Washington, DC 20004

b. Notice to CBJ shall be effective only when addressed to:

City and Borough of Juneau

c/o City Manager

155 S. Seward St

Juneau, AK 99801

19. **Mutual Drafters.** All Parties have cooperated in the drafting and preparation of this Agreement. Hence, this Agreement shall not be construed against any party on the basis that the party was the drafter.

20. **Severability.** If any provision of this Agreement shall be held by any court of competent jurisdiction to be illegal, void or unenforceable, such provision shall be of no force and effect, but the illegality or unenforceability of such provision shall have no effect upon and shall not impair the enforceability of any other provision of this Agreement.

IN WITNESS WHEREOF, the Parties hereto have executed this Memorandum of Agreement (Amendment 1).

Cruise Lines International Association Alaska

By: _____

Its: _____

Dated: _____

Cruise Lines International Association

By: _____

Its: _____

Dated: _____

The City and Borough of Juneau

By: _____

Its: _____

Dated: _____

Rorie Watt

By: _____

Dated: _____