



CBJ Law Department **MEMORANDUM**

To: Mayor and Assembly
From: John R. Corso, City & Borough Attorney
Subject: Cap on Tourism
Date: August 9, 1996

I. Introduction

You have asked whether the city and borough may lawfully impose a "cap on tourists". If a cap on tourists is enacted into CBJ law it will, like any other governmental policy enacted into law, have a purpose and a method for advancing that purpose. If a court is called upon to review the law, it will examine both of these elements. It will determine whether the purpose is legitimate and the method is reasonable.

At this point it is difficult to determine what a court might do with a "cap on tourists" because the term has no settled meaning. One person might think that the purpose of a cap is to limit all tourists; another might think that the purpose is to limit only cruise ship tourists; to a third it might mean a limit on tourists who use local trails and other recreational facilities. Some people might believe that the best method of accomplishing their purpose is a direct limit expressed as the maximum number of tourists allowed in town in one year, others might prefer to arrive at their goal through indirect limitations imposed on ships, buses, and other parts of the tourism infrastructure.

I can identify some of the purposes that a cap might have, and some of the methods it might use. I can suggest the purposes and methods that are clearly illegal, and provide an analytical framework for considering the legal consequences of other programs that might be developed. However, lawyers should not initiate policy. If the city and borough is to limit or manage the local tourism industry, the purpose and method for doing so should be decided first by policy makers.

Part III of this memo discusses the different purposes that a cap on tourists might have. Part IV suggests some of the methods that might be used to accomplish these purposes. Part V identifies the legal theories that could be applied to these issues.¹

II. Short Answer

The short answer to your inquiry is that the U.S. Constitution prohibits the city and borough from directly limiting the number of tourists who enter our jurisdiction. The last time anything like that was attempted was during the Great Depression when the State of California attempted to limit the number of indigent immigrants arriving from Midwest dustbowl states. The Supreme Court struck

¹ My thanks to Assistant City & Borough Attorney Jonathan Sperber for his help in researching the legal issues discussed in this memo.

down the California law on the grounds that it violated the commerce clause of the Constitution and infringed on the basic right of U.S. citizens to travel throughout their country.² It would do the same if CBJ attempted to impose a direct numerical cap on tourists or any other group of Americans.

It may be possible to limit tourism through the use of regulatory mechanisms aimed at particular impacts of tourism.

III. Possible Purposes of a Cap on Tourists

A. Examples

Is your mother a tourist? If she comes to Juneau just to see her grandchildren, maybe not. But what if she wants to see the glacier, too? Suppose she is accompanied by a traveling companion: is the companion a tourist? They tell you that they don't want to impose on you, so they will stay at a hotel: are they tourists? If their real reason for staying at the hotel is the quilting convention that's held there: does that make a difference? If one of the grandsons lives in Hoonah and comes to Juneau for the visit, is he a tourist?

While in Seattle you meet someone who might be interested in investing in your business. She accepts your invitation to come to Juneau and inspect your business. She will bring her husband and make it a "working vacation". She doesn't like airplanes and the ferry is full, so they will arrive on a cruise ship. He likes to fish, she likes to hike. You might be able to take him on your boat and her on the trail, but business comes first, so you arrange a charter and a guided hike as backup. Is he a tourist? Is she? Does it make a difference that she is fascinated with your business and spends the entire visit pouring over your books?

A retired couple books passage on a cruise ship. They like the food and the view from deck, but they have trouble getting around and have no intention of debarking in Juneau. He enjoys the voyage through the Inside Passage, but he brought the wrong shoes, and his feet begin to hurt. By the time they arrive in Juneau his feet are really bothering him, so he decides to come ashore long enough to buy the shoes he needs. Is he a tourist? Does it make a difference if his new shoes feel so good he decides to walk around town before returning to the ship?

B. Types of Issues

The foregoing examples are the kinds of problems that law professors love to inflict on their students, but these "hypotheticals" are not entirely academic: judges are fond of posing them from the bench. And sometimes real life serves them up, too.³ They illustrate the need to clearly articulate the purpose of any cap on tourists. If the purpose is unclear, it is difficult or impossible to justify the reasonableness of the method used to accomplish the purpose.

² See page 6 of this memo.

³ The August 8 edition of the *Juneau Empire* reported that former Governor and Mrs. Jay Hammond would be traveling to Juneau on a Princess Lines ship for a book promotion tour. Are they tourists? Does it make a difference that they are traveling only intrastate between ports in Southeast?

1. Is our purpose to limit tourists? A subjective approach.

A tourist, according to the dictionary, is "one who travels for pleasure". This definition is probably too broad for purposes of the present discussion. It would encompass people who travel for the pleasure of seeing their relatives and people who travel for the pleasure of attending a hobbyist convention. Maybe CBJ policy should be most concerned with people who travel for the pleasure of traveling. These are "sightseers": the kind of tourists who have no real "business" to do.

This is a subjective approach to defining tourism and it suffers from the usual disadvantages of subjective measurement: it requires a judgement of somebody else's intent. In the first example above, you thought your mother was coming to see you, but perhaps she was really interested in the quilting convention or a view of the glacier: should her real intention affect her status as a tourist?

2. Is our purpose to limit tourism activities? An objective approach.

Perhaps the policy could avoid some analytical difficulties if it defined tourists not by their intent, but by their actions: how they arrive, how long they stay, and what they do while they are here. People who arrive on cruise ships, who stroll on sidewalks, walk on trails, gather on beaches, paddle on lakes, leave within x days, and so on. These criteria have the advantage of objectivity, but they invite line-drawing problems. In the third example above, the man who came debarked from a cruise ship to buy some shoes for walking — slowly, no doubt — along a downtown sidewalk, but was he really a tourist?

Some kinds of activities are easy to categorize. An elderly couple who arrive on a cruise ship, shop at a gift store, go up a mountain on a tram, then go back to the ship are probably tourists. Other activities are more problematic. An adventure writer who arrives on the ferry, shops at the Nugget, rappels down a mountain on a rope, then goes to dinner at a restaurant, may not be a tourist.

These kinds of line-drawing and definitional problems are not very common, and can be addressed, at least initially, by good legislative drafting. However, technical solutions invite technical challenges. Inventive tour operators and their lawyers might be tempted to create tourism opportunities designed to avoid application of the tourism activities cap. This invites amendment of the tourism ordinance, further maneuvering by the industry, and yet more amendments in an endless process.

3. Is our purpose to manage tourism impacts? An analytic approach.

Perhaps it is not the tourists as such, but their impacts on the quality of life in Juneau that concerns us. Some of these impacts, such as crowds on sidewalks or a lack of seating in Marine Park, result from the physical presence of a particular number of tourists at a particular time. Other impacts, such as diesel smoke and airplane noise, vary directly but not one-to-one with the number of tourists. (Larger or quieter vehicles might accommodate more tourists but produce fewer impacts: at least for a while.)

Some impacts, such as groups of hikers or kayakers, are more or less objectionable according to time of day or location. Other impacts, such as the growth of low-skill seasonal service sector employment, may be benign or even positive, depending on who they affect.

If the purpose of the policy is to manage tourism impacts, a wide variety of management tools are available. These tools will be each more finely tuned and more legally defensible than the sledgehammer solution of a cap on the raw number of tourists.

IV. Possible Methods of Capping Tourism

The policy approach selected by the Assembly will dictate the method of regulation used to implement it. A variety of methods are possible.

A. Direct Limits on the Number of Tourists

It is difficult to hypothesize a practical method of directly limiting the number of tourists entering the city and borough. Presumably the Assembly would annually establish an upper limit expressed as a number. Perhaps this quota would limit the allowable number of tourists per year, per month, or during the tourist season.

Governments usually enforce these kinds of policies with passports, checkpoints, and border guards. But these are the tools of sovereign nations. The concept of CBJ visas and border guards is comical, but helps illustrate the basic interests at stake in any attempt to limit access by outsiders.

Another way to impose direct limitations might be to cap the number of tourists who could disembark from a tour ship after it had arrived in town. This might require posting CBJ agents at gangways, where they could count the number of passengers disembarking and returning to the ship. If this becomes unmanageable, the cruise ships could be issued a limited number of shore passes or medallions to be worn in a prominent manner by tourists while they are ashore. This approach would probably attract some sort of publicity for the Capital City.

B. Direct Limits on the Number of Tourist Vehicles

A more reasonable approach might be to limit the number of tourists by limiting the number, size, or schedule of vehicles and vessels that bring tourists to town. A rough limit is imposed by Juneau's lack of road access and the carrying capacity of its harbors and airport. A limit short of that capacity might be imposed in the form of docking or landing permits. These techniques would be of dubious utility for some forms of transportation: efforts to limit the number of landings at the airport might violate the terms of federal airport grants or federal statutes regarding airport accessibility⁴ and efforts to limit state ferries would be preempted by state law.

A program to limit cruise ship traffic could be more defensible: CBJ might be able to limit the number of cruise ships per day allowed in the harbor, or it might limit the hours for cruise ship operations. The City of Key West, Florida, has done this. We have spoken with Mr. Chuck Hamlin, Assistant Transportation Planner for Key West, who reports that his city has adopted a regulation imposing a limit of three cruise ships per day within the city limits. This regulation has never been enforced. Key West also has a regulation limiting the hours that cruise ships may use the city-operated Mallory Dock. The dock is reserved for the use of vendors, street performers, and the public during sunset. This regulation is enforced, but has never been challenged.

The port dues collected by CBJ pursuant to CBJ 85.02.105 would be a complicating factor in any attempt by CBJ to limit cruise ship use of municipal docks. The dues have been collected from cruise

⁴ See, e.g., 49 U.S.C.A. §47107

lines for the express purpose of maintaining port facilities⁵ and the cruise industry can be expected to object to any limitation on its ability to amortize this investment through passenger revenues.

Experience with dockside vending regulations suggests that any system for limiting ship visits would involve some form of lottery, auction, brokerage, or other system designed to address priorities and conflicts among tour ship companies. This could generate revenue, but would entail some administrative overhead.

C. Techniques for Managing Tourism Impacts

The techniques available for managing tourism impacts are as varied as the impacts themselves, and beyond the scope of this memo. They involve the issuance and revocation of permits, concessions, leases, and regulations. These tools address the number and type of tourists, tourist vehicles, and tourist businesses allowed to use public and private space in the city and borough. They would address hours, litter, noise, damage, fees, rates of return, and similar concepts. They could, if properly done, be rationally related to a legitimate government purpose.

V. Legal Theories Applicable to a Cap on Tourists

Most of the tourists subject to the cap would be traveling from other states or other countries. The primary legal authority applicable to state and local regulation of interstate and foreign travel is the United States Constitution. The Constitution is in large measure the result of need to regulate travel and commerce between the states. Prior to the Declaration of Independence, the British Board of Trade supervised commercial transactions between the colonies. After the signing of the Declaration of Independence, there was no central control over commercial transactions in the new states. The new states were fearful of having their trade subjected to discriminatory restriction either by states with conflicting commercial interests, or by a central government that could be controlled by such interests. Accordingly, when they formed a national government under the Articles of Confederation, they granted the Continental Congress some powers over national affairs, but none over commerce between the states. They even limited Congressional power over foreign affairs by providing that no federal treaties might limit the individual states' powers over commerce and the taxation of imports and exports.

The result was economic chaos. When trade with Britain declined, the states responded by protecting their positions in the newly limited marketplace. Individual states, especially port states like New York, set up trade barriers by imposing economic sanctions against the products of other states and by taxing trade passing through their territory. The target states retaliated with taxes so high as to foreclose access to their markets. The situation deteriorated to a state of economic warfare, and national leaders feared a dissolution of the union. They called for convention to amend the powers of the national government so that it could deal with multi-state commercial problems. A convention was held, but it soon became clear that more than a few amendments would be needed. There was a call for a new convention which we now know as the Constitutional Convention. This convention

⁵ CBJ 85.02.105(c): In changing the base rate, the factors to be considered shall be the amount of revenue necessary to: retire outstanding bonded indebtedness for port facilities; perform scheduled port facility improvements, major maintenance, and land acquisition; and maintain a fund balance in the port development and major maintenance fund sufficient to offset reasonable fluctuations in annual cruise ship visits without an additional change to the base rate, and reflecting changes in port usage.

began in May of 1787 and had as one of its principal achievements the creation of a national government authorized to regulate “commerce among the states”.⁶

Interstate commerce is one element in the concept of federalism; the central organizing principal of American government. For present purposes, this principal finds expression in four constitutional doctrines: the right to travel, the equal protection clause, the commerce clause, and the privileges and immunities clause.⁷ These constitutional provisions are the ones most likely to be used to test the legality of a cap on tourism. I cannot predict the various combinations of purposes and methods that would be tested, but whatever the mix, the following constitutional principles would be applied.

A. The Right to Travel

The concept of a constitutional right to travel is well established in American law. Although its origins are obscure — there is no express mention of a right to travel in the Constitution — it is often cited.⁸ Justice Potter Stewart observed that “[t]he constitutional right to travel from one state to another... occupies a position fundamental to the concept of our federal union... [A] right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the new Constitution created.”⁹ The right to travel is recognized as a personal right.¹⁰

This right was clearly affirmed in two cases involving direct limitations on travel: *Crandall v. Nevada*¹¹ and *Edwards v. California*¹². In *Crandall*, Nevada attempted to impose a tax of one dollar on every person leaving the state by paid transportation. The Court struck down the tax, declaring “[w]e are all citizens of the United States, and as members of the same community must have the right to pass and repass through every part of it without interruption.” The *Edwards* case concerned a California law enacted to stop waves of immigrants from the dustbowl states during the Great Depression. Like some versions of the proposed cap on tourism, the law was a direct limit on entry into the state, forbidding “anyone knowingly to bring or assist in bringing into the state a nonresident ‘indigent person’”. The Court was unanimous in its decision to strike down this law, but split on the rationale for doing so: five justices relied on the interstate commerce clause, but four relied on the inherent right of Americans to travel throughout their country.

⁶ Nowak, Rotunda, and Young, *Constitutional Law*, West Publishing (1978)

⁷ To the extent that Juneau attracts tourists from other countries, a policy limiting their access might run afoul of the exclusive federal jurisdiction over foreign affairs and immigration. *Mathews v. Diaz*, 426 U.S. 67, 81-82, 48 L.Ed.2d 478, 490-91, 96 S.Ct. 1883 (1976) (“For reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government.”).

⁸ *Shapiro v. Thompson*, 394 U.S. 618, 630, 22 L.Ed.2d 600, 612, 89 S.Ct. 1322 (1969) (“We have no occasion to ascribe the source of this right to travel interstate to a particular constitutional provision.”).

⁹ *United States v. Guest*, 383 U.S. 745, 757-58 (1966)

¹⁰ *Williams v. Fears*, 179 U.S. 270, 274, 45 L.Ed. 186, 21 S.Ct. 128 (1900) (“Undoubtedly the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty, and the right, ordinarily, of free transit from or through the territory of any state is a right secured by the 14th Amendment and by other provisions of the Constitution.”).

¹¹ 73 U.S. 35 (1868)

¹² 314 U.S. 160 (1941)

This right to travel is not absolute: state and local governments may prevent a citizen from leaving if he is a fugitive from justice, carrying a contagious disease, or subject to criminal arrest. Likewise, a citizen may be prevented from traveling into an area if she would be endangered by flood, fire, or pestilence.¹³

B. The Equal Protection Clause

Both the federal and state constitutions require that citizens enjoy the equal protection of the laws: that persons similarly situated be treated the same. Courts require that if the government draws distinctions between groups of people and then treats them differently based on that distinction, that it have some rationale basis for doing so. If a state distinguishes between residents and nonresidents, courts will apply a "strict scrutiny" test requiring that the policy serve some compelling government interest and be narrowly drawn to effectuate that purpose. The requirement that the policy be narrowly drawn is best served by tourism regulations aimed at particular impacts rather than broad classes of persons.

Some equal protection cases dealing with residency, such as the famous *Zobel* case,¹⁴ which tested the residency requirements of the Alaska Permanent Fund Dividend, involve durational residency. In these cases the government discriminates among residents based on how long they have resided in the state. A different set of standards is used for these cases. They would probably not be involved in a tourism program, unless CBJ proposed to regulate resident seasonal tourism workers.

C. The Interstate Commerce Clause

It is settled law that the transportation of persons is "commerce" within the meaning of the commerce clause.¹⁵ Prohibiting the transport of a class of persons into a state is an unconstitutional barrier to interstate commerce.¹⁶ Such a regulation is unconstitutional, even when based upon a huge influx of migrants resulting in health, morals, and financial problems of staggering proportions.¹⁷ A state or locality may not close its borders.¹⁸

Although it is not possible for cities to prohibit or discriminate against a certain class of interstate commerce, it is possible for them to regulate commerce, including the interstate commerce. Courts

¹³ *Zemel v. Rusk*, 381 U.S. 1, 15, 14 L.Ed.2d 179, 189, 85 S.Ct. 1271, *reh'g denied* 382 U.S. 873, 15 L.Ed.2d 114, 86 S.Ct. 17 (1965).

¹⁴ *Williams v. Zobel*, 619 P.2d 422, 426 (Alaska 1980), *rev'd on other grounds*, 457 U.S. 55, 102 S.Ct. 2309, 72 L.Ed.2d 672 (1982), citing *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 94 S.Ct. 1076, 39 L.Ed.2d 306 (1974) and *Sosna v. Iowa*, 419 U.S. 393, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975).

¹⁵ *Edwards*, 314 U.S. at 172 ("[I]t is settled beyond question that the transportation of persons is 'commerce,' within the meaning of that provision.").

¹⁶ *Id.* at 173.

¹⁷ *Id.*

¹⁸ *Id.* (No boundary "to the permissible area of State legislative activity . . . is more certain than the prohibition against attempts on the part of any single State to isolate itself from difficulties common to all of them by restraining the transportation of persons and property across its borders.").

take a two-tiered approach¹⁹ to such regulatory activity, asking first: does the regulation regulate evenhandedly with only incidental effects on interstate commerce? If so, the regulation is valid unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. This kind of analysis might apply to a CBJ program that limited *all* tourists, even those from within Alaska.²⁰

If the regulation discriminates against interstate commerce, (meaning differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter) it is virtually *per se* invalid: The regulation will be struck down, unless it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives. A "strictest scrutiny test" will be applied and the regulator's burden of justification is so heavy that it cannot, as a practical matter, be sustained.

D. The Privileges and Immunities Clause

The privileges and immunities clause of the U.S. Constitution states that the citizens of each state are entitled to all privileges and immunities of citizens in the several states.²¹ The U.S. Supreme court has interpreted this to mean that less favorable treatment by a state towards non-residents violates the privileges and immunities clause if the activity in question is sufficiently basic to the livelihood of the nation as to fall within the purview of the clause²², and is not closely related to the advancement of a substantial state interest. The availability of less restrictive means is relevant in determining whether the discrimination bears a close relationship to the permissible purpose.

An ordinance may pass muster under the clause if the city shows something to indicate that non-residents constitute "a peculiar source of evil" at which the ordinance is aimed. It is unlikely that the mere presence of people, tourists or otherwise, constitutes an "evil" warranting their exclusion. It is arguable whether tourism impacts are sufficiently "peculiar" that they justify a ban or limit on tourists or their activities, although regulation of the impacts of those activities would be more defensible, since that would be the least restrictive method of addressing the legitimate interest in quality of life issues.

¹⁹ *Oregon Waste Systems, Inc. v. Oregon Dept. of Env'tl. Quality*, 511 U.S. ___, 128 L.Ed.2d 13, 21-22 114 S.Ct. ___ (1994); *Barber v. State of Hawaii*, 42 F.3d 1185, 1194-95 (9th Cir. 1994).

²⁰ I am not altogether confident of this analysis: a municipal effort to limit tourism from outside the city but within Alaska might still be the kind of parochial legislation that would be struck down by the Alaska Supreme Court, if not the federal courts.

²¹ U.S. Constitution, Art. IV, § 2 ("The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states"); *Toomer v. Witsell*, 334 U.S. 385, 395-96, 68 S.Ct. 1156, 1162, 92 L.Ed. 1460, *reh'g denied*, 335 U.S. 837, 69 S.Ct. 12, 93 L.Ed. 389 (1948) ("The primary purposes of this clause . . . was to help fuse into one Nation a collection of independent, sovereign States. It was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy . . .").

²² *Baldwin v. Montana Fish and Game Comm'n.*, 436 U.S. 371, 388, 98 S.Ct. 1852, 1862-63, 56 L.Ed.2d 354 (1978) (In holding that elk hunting by non-residents in Montana is not "fundamental" under the privileges and immunities clause, the Court stated that: "Equality in access to Montana elk is not basic to the maintenance or well-being of the Union. Appellants do not - and cannot - contend that they are deprived of a means of a livelihood by the system or of access to any part of the State to which they may seek to travel.") (emphasis added); discussed in *Hawaii Boating Ass'n. v. Water Transp. Facilities*, 651 F.2d 661, 666-67 (9th Cir. 1981).

VI. Conclusion

James Madison, the principal architect of the Constitution wrote in *The Federalist Papers*, about the parochialism of the Continental Congress and how it justified approval of the new federal system:

What is the spirit that has in general characterized the proceedings of Congress? A perusal of their journals, as well as the candid acknowledgments of such as have had a seat in that assembly, will inform us, that the members have but too frequently displayed the character, rather of partisans of their respective States, than of impartial guardians of a common interest; that where on one occasion improper sacrifices have been made of local considerations, to the aggrandizement of the federal government, the great interests of the nation have suffered on a hundred, from an undue attention to the local prejudices, interests, and views of the particular States. I mean not by these reflections to insinuate, that the new federal government will not embrace a more enlarged plan of policy than the existing government may have pursued; much less, that its views will be as confined as those of the State legislatures; but only that it will partake sufficiently of the spirit of both, to be disinclined to invade the rights of the individual States, or the prerogatives of their governments. The motives on the part of the State governments, to augment their prerogatives by defalcations from the federal government, will be overruled by no reciprocal predispositions in the members.

James Madison, *The Federalist*, #46

The protection of interstate commerce and national citizenship, like the separation of powers and a republican form of government, is built into the bones of the Constitution. Judges, particularly federal judges, will look very closely at any effort by one state or locality to exclude or disfavor people from someplace else.

Tourists, by definition, are people from someplace else. The Assembly should proceed very carefully before imposing a cap on tourism. A better approach would be to limit the impacts of tourism.

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