



DATE: January 21, 2020  
TO: Chair Triem, Visitor Industry Task Force  
FROM: Robert Palmer, Municipal Attorney  
SUBJECT: Preliminary Legal Issues with Managing Tourism

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I have been asked to provide preliminary legal guidance for managing tourism from cruise ships. This topic can be legally complicated. I am not aware of any definitive legal authority that would be helpful at this stage because the overarching policy visions need to mature. At this stage, the VITF should focus on the desired policy visions and how to achieve those policy visions, while having awareness of some potential legal sideboards. The following legal issues may arise depending on what policy and regulation, if any, the CBJ ultimately wants to impose.

1. **U.S. Constitutional Right to Travel.** The Privileges and Immunities Clause limits laws that treat out-of-state citizens differently than in-state citizens. For example, there is a right to travel from one state to another and to use the instruments of interstate commerce, which includes “the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second state.” *Saenz v. Roe*, 526 U.S. 489, 500 (1999).
2. **U.S. Constitution Commerce Clause.** Generally, laws that unduly burden interstate commerce are unconstitutional, which require courts to balance interests.
3. **U.S. Constitution Tonnage Clause.** See the recently settled *CLIAA v. CBJ* litigation. The Tonnage Clause limits fees imposed on vessels for entering a port and how those fees can be expended.
4. **U.S. Constitution Contract Clause.** The Contract Clause can limit laws that unreasonably and substantially impair existing contractual rights.
5. **Takings/Inverse Condemnation.** Private property shall not be taken or damaged for public use, without just compensation.
6. **Public Trust Doctrine.** The doctrine protects navigation on, commerce in, fishing on, and access to navigable water, but the rights protected are not absolute.
7. **Level of scrutiny.** All regulations must at least satisfy rational basis scrutiny (i.e. is the regulation rationally related to any governmental interest). Some regulations may need to satisfy a heightened scrutiny, which could require the CBJ to prove the regulation is

narrowly tailored to promote a compelling governmental interest and the regulation is the least restrictive means to vindicate that interest.

8. **Interference/Preemption of Aviation and Maritime Matters.** The federal government has primary jurisdiction of aviation (FAA) and maritime (USCG) matters. The FAA's jurisdiction is almost exclusive, and local governments have limited authority to regulate aviation matters. The CBJ has broader authority to regulate maritime matters especially if the local regulation does not conflict with a federal law.
9. **16B Revenue Bond limitations.** The 2015 revenue bonds include provisions that prohibit the CBJ from reducing the \$3 Port Development Fee or undertaking actions that put the debt service payments in jeopardy. The bonds are scheduled to be paid off in 2034, but the CBJ can prepay the bonds as early as March 1, 2026.
10. **CBJ as property owner versus CBJ as regulator.** The CBJ has broad authority to manage its property (i.e. CBJ docks, tidelands, trails). When the CBJ acts as a regulator of non-CBJ property (i.e. private docks, State tidelands), the CBJ has substantial authority but it is subject to a variety of other laws (i.e. Takings, Interference/Preemption). For example, the CBJ regulates commercial buses (CBJC 20.40) and land use/development (CBJC Title 49).

As the Visitor Industry Task Force and the Assembly consider the preliminary legal sideboards, the following policies may be worthy of further discussion:

- A. **Voluntary Action.** The recent cruise ship litigation settlement requires an annual consultation. As community concerns arise, the cruise ship companies may be willing to voluntarily adjust their practices, which would eliminate a substantial amount of legal risks then if the CBJ simply imposes regulations.
- B. **Prepay the 16B Revenue Bonds.** The CBJ could consider satisfying the debt service from the 16B revenue bonds at the earliest opportunity (\$12.8M on March 1, 2026), which would give the CBJ more discretion regarding how the CBJ docks are used.
- C. **Articulate Specific Governmental Interests.** Because of the potential constitutional rights implicated with restricting the number of cruise ship passengers, the CBJ could consider developing, measuring, and tracking indicators of tourism to establish specific governmental interests. Such indicators would be helpful to justify and defend any cruise ship or passenger restrictions or carrying capacities.
- D. **Proprietary Control of Docks.** The CBJ currently owns two of the four cruise ship docks. If the CBJ wants to have more control of when and how long ships are in port, the CBJ could consider purchasing the two private docks and having ownership control of any new docks.
- E. **Infrastructure and Geographical Limitations.** The size of ships, the location of docks, and the geographical features of Gastineau Channel can indirectly limit cruise ship tourism. Further consultation with the USCG could result in a regulatory scheme that prohibits "anchoring out" if a new dock was constructed, which would indirectly cap cruise ships.