



THE STATE  
of **ALASKA**  
GOVERNOR MIKE DUNLEAVY

## Department of Transportation and Public Facilities

OFFICE OF THE COMMISSIONER  
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Dear Mayor Dickason and Whittier City Council Members,

It has been brought to our attention the City of Whittier's proposal to implement a ground passenger fee (GPF). Recognizing the importance of the Whittier tunnel and associated State of Alaska owned and maintained highway and ferry terminal infrastructure, I am writing to ensure any fees implemented do not conflict with the Alaska Department of Transportation and Public Facilities (DOT&PF) responsibilities related to both State and Federal laws and regulations.

DOT&PF has reviewed proposed section 3.14.020 of the Whittier City Code. Our understanding, if adopted, this provision will implement a ground passenger fee (GPF) that will apply in the following manner:

Upon each entry or departure from the City through the Anton Anderson Memorial Tunnel by ground conveyance, including by rail, a ground passenger fee of \$5.00 per passenger shall be assessed. The ground passenger fee shall be assessed on ground passengers being delivered to or from a cruise ship that is exempt from the waterborne passenger fee, as well as to or from other Whittier destinations.<sup>1</sup>

A question arises as to whether the GPF constitutes a toll, which is defined as a proprietor's charge for passage over a highway.<sup>2</sup> Here, the City proposes to assess a fee based upon the frequency of a traveler's use of a specified highway.<sup>3</sup> Courts have focused on similar application criteria in determining whether an assessment constitutes a toll.<sup>4</sup>

If the GPF is a toll, then its legal viability is in doubt.

The Legislature has charged DOT&PF with responsibility for planning, construction, operation, maintenance, control, and protection of the State highway.<sup>5</sup> Included within DOT&PF's authority is the

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<sup>1</sup> Whittier City Code §3.14.020(B) (*Proposed*).

<sup>2</sup> *Rogge v United States*, 128 F.2d 800, 802, 10 Alaska 307 (9<sup>th</sup> Cir. 1942).

<sup>3</sup> The Whittier Tunnel is a component of the State highway. See AS 19.59.001(8) ("highway" includes a highway...tunnel...and other similar or related structure or facility...").

<sup>4</sup> See, e.g., *Carley & Hamilton v Snook*, 281 U.S. 66, 73-74 (1930) (vehicle registration fee not a toll, in part, because fee applied to all residents without reference to any particular highways or to the extent or frequency of use.)

<sup>5</sup> AS 19.05.010; AS 19.05.030(1); AS 19.10.030; AS 44.42.020(a)(7).

power to levy tolls for use of the highway.<sup>6</sup> In contrast, the City has neither a propriety interest nor State legislative authority sufficient to levy a highway toll.

There is an additional consideration. The State constructed the Whittier Tunnel with federal aid administered by the Federal Highway Administration (FHWA). Consequently, DOT&PF is bound by federal restrictions concerning the imposition of tolls, which includes the following:

Except as provided in [23 U.S.C. §129] with respect to certain toll bridges and toll tunnels, all highways constructed under the provisions of this title shall be free from tolls of all kinds.<sup>7</sup>

Subject to DOT&PF's compliance with 29 U.S.C. §129(c)(3),<sup>8</sup> FHWA has authorized DOT&PF to levy tolls on travelers using the Whittier Tunnel. The City has no similar authorization from FHWA.

We hope that this letter aids in the City's deliberations regarding the ground passenger fee. If you would like to discuss further, please feel free to reach out directly.

Sincerely,



Ryan Anderson, P.E.

Commissioner

Alaska Department of Transportation and Public Facilities

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<sup>6</sup> AS 19.05.040(11).

<sup>7</sup> 23 U.S.C. §301.

<sup>8</sup> 23 U.S.C. § 129(c)(3) states:

**Limitations on use of revenues.-**

(A) In general.-A public authority with jurisdiction over a toll facility shall ensure that all toll revenues received from operation of the toll facility are used only for-

- (i) debt service with respect to the projects on or for which the tolls are authorized, including funding of reasonable reserves and debt service on refinancing;
- (ii) a reasonable return on investment of any private person financing the project, as determined by the State or interstate compact of States concerned;
- (iii) any costs necessary for the improvement and proper operation and maintenance of the toll facility, including reconstruction, resurfacing, restoration, and rehabilitation;
- (iv) if the toll facility is subject to a public-private partnership agreement, payments that the party holding the right to toll revenues owes to the other party under the public-private partnership agreement; and
- (v) if the public authority certifies annually that the tolled facility is being adequately maintained, any other purpose for which Federal funds may be obligated by a State under this title.

(B) Annual audit.-

- (i) In general.-A public authority with jurisdiction over a toll facility shall conduct or have an independent auditor conduct an annual audit of toll facility records to verify adequate maintenance and compliance with subparagraph (A), and report the results of the audits, together with the results of the audit under paragraph (9)(C), to the Secretary.

(ii) Records.-On reasonable notice, the public authority shall make all records of the public authority pertaining to the toll facility available for audit by the Secretary.

(C) Noncompliance.-If the Secretary concludes that a public authority has not complied with the limitations on the use of revenues described in subparagraph (A), the Secretary may require the public authority to discontinue collecting tolls until an agreement with the Secretary is reached to achieve compliance with the limitation on the use of revenues described in subparagraph (A).