**MILWAUKEE COUNTY**
**INTER-OFFICE MEMORANDUM**

TO: Michael Mayo, Sr.
Chair, Transportation, Public Works and Transit Committee

FROM: Timothy R. Karaskiewicz
Principal Assistant Corporation Counsel

DATE: March 30, 2011

RE: Proposed Off-Airport Privilege Fee and Courtesy Vehicle Fee Structure File Nos. 11-102 and 11-92

The following issues have been referred to this office for opinion and comment: whether the proposed off-airport privilege fee and courtesy vehicle fee structure:

1) Are improper restrictions on the free use of a public road in violation of WSA §349.03;
2) Constitute a violation of WSA §114.14(3)(b)(1) because they deprive the public of the equal and uniform use of the airport;
3) Are an impermissible tax rather than a user fee;
4) Demonstrate a rational relationship between the application of the proposed fee and airport congestion and reimbursement for airport costs and expenses; or
5) Improperly discriminate between different classes of parking operators (public and private) and off-airport business operators (such as hotels, gas stations, and restaurants).

## STATUTORY, REGULATORY, AND CONTRACTUAL CONTEXT

Airport sponsors are under a continuing obligation to follow various federal and state rules, regulations and statutes. In addition, as part of each federal grant airport sponsors are required to make certain assurances and promises. Thus, airport sponsors assure the federal government that, as a condition of accepting federal grants, the airport sponsor will: 1) use all revenue derived from airport property for the operation, maintenance, and development of the airport and 2) maintain an airport fee and rental structure for use of airport facilities and services that will make the airport as self-sustaining as possible. Airport sponsors are also obligated to carry out all of these assurances without unjustly discriminating among users of the airport. The failure or refusal to apply fees equally and reasonably among airport users may constitute a form of unjust discrimination. Milwaukee County has accepted federal grants and is bound by these grant assurances. *FAA Airport Compliance Manual* 5190.6B (2010). The County has similar contractual obligations to its airport tenants, most notably the signatory airlines. Thus, the Signatory Airline Lease prohibits the County from diverting airport revenue for purposes other than airport maintenance and operation, and capital development.

**Section 515** **Commitment of Airport Revenues**
County hereby covenants and agrees that insofar as legally permitted to do so under federal and state law and the Bond Resolution, all revenues and receipts from rents, fees, charges, or income from any source received or accruing to the Airport System shall be used exclusively by County for Airport System purposes as contemplated herein.

Passengers arriving at or departing from General Mitchell International Airport (GMIA) use a number of facilities constructed for that purpose: taxiways, ramps, runways, terminal buildings, baggage claim areas, and roadways. These facilities were all constructed using federal funds and airport "revenue and receipts" and are thus subject to the requirements of federal rules and regulations (including the County's grant assurances) and to the County's contractual obligations with the Signatory Airlines. Airport lease holders, including the airlines who serve GMIA, may complain that the County's failure to impose on off-airport operators a reasonable user fee violates the County's obligations under its lease and the federal grant assurances.

Chapter 114 of the Wisconsin Statutes provides the source for the County's authority to regulate operations at GMIA. WSA §114.14(1) provides that the "County may adopt regulations, and establish fees or charges for the use of [its] airport." (emphasis added). The Wisconsin Supreme Court has long recognized that this direct statutory authority provides the

County with the "exclusive right to manage [GMIA], including the right to regulate the ground transportation . . . furnished to airline passengers arriving at and departing from [GMIA]." *Milwaukee County v. Town of Lake*, 48 NW 2d 1 (1951).

## I. THE PROPOSED FEES CANNOT BE CHARACTERIZED AS TAXES.

Municipalities act in both governmental and proprietary capacities. When municipalities act in a proprietary capacity, they act as a private corporation. Charges imposed by municipalities acting in a proprietary capacity are fees and cannot be characterized as taxes. Wisconsin and other courts have held that when a municipality operates an airport, it is acting in a proprietary capacity. Consequently, the proposed fees imposed in the context of the County's operation of the airport cannot be characterized as taxes. The County's federal regulatory and contractual obligations to use all revenue for airport purposes further precludes the characterization of airport fees as taxes.

Case law defines a fee as a charge imposed by a municipality for the funding of a particular service or the maintenance and operation of a particular facility – such as an airport. A tax, on the other hand, is the assessment of monies for application to a general revenue fund - such as the general fund that supports all government operations. The courts in the several jurisdictions that have addressed this issue have

recognized this distinction and have concluded that fees imposed by airports cannot be characterized as taxes. This conclusion is based in large part on the federal requirement that all airport revenue must be used for airport purposes. In other words, if airport revenue cannot be diverted to a general fund, it cannot be characterized as a tax.

## II. THE PROPOSED FEES ARE REASONABLE.

Even if the proposed charges are fees and cannot be characterized as taxes, they still must bear a reasonable relationship to the services and facilities they support. In this instance, the relationship between the proposed fees and the airport services and the facilities they support is transparent.

There are at least two possible justifications for the proposed fees. First, the proposed fees are necessary to recoup the costs associated with the specific rights-of-way used by the off-airport shuttles and all of the related costs for their construction, maintenance, and operations. Second, the charges are necessary to recoup the costs associated with the shuttles' use of the entire airport.

The memoranda submitted in support of the proposed fees demonstrate adequately the costs of the specific airport facilities and services used by the off-airport shuttle operators. Those costs are significantly larger than the revenue that would

be generated by the proposed fees. Courts that have addressed this issue, however, have concluded that fees imposed on off-airport commercial operators need not be limited but may be based on costs associated with the entire airport. This is because the off-airport commercial operators actually "use" the entirety of the airport rather than the limited rights-of-way they travel upon. This conclusion is based on the theory that the very existence of the off-airport operators is wholly dependent on the market created by the airport and its passengers. Consequently, the off-airport commercial operators may be required to share in supporting the entire airport facility - as well as its construction, maintenance and operation - which they are dependent upon. Accordingly, regardless of the measure that is used, there exists a reasonable relationship between the proposed fees and the facilities, services, and operations that they are being asked to support.

## III. THE PROPOSED FEES ARE NOT TRAFFIC REGULATIONS AND EVEN IF THEY ARE, THEY ARE SPECIFICALLY AUTHORIZED BY STATUTE.

WSA §349.03(1) establishes uniform traffic regulations throughout the state. The benefits of such a uniform system of regulation are obvious where highways and through streets are at issue. Those benefits are not so obvious where access roads and rights-of-way are involved. Accordingly, §349.03(1)(b) contains

an exception that allows for municipal traffic regulations where another statute specifically authorizes municipal action.

Access to GMIA is had by a number of rights-of-way that are neither highways nor through streets; nor have these rights-of-way been dedicated. Because these rights-of-way merely provide access to a county-owned and -operated facility, they may not be considered highways or roadways subject to the requirements of §349.03(1). Still further, the proposed fees cannot conflict with §349.03(1) because the proposed fees are not traffic regulations within the meaning of that section. The proposed fees do not regulate traffic; rather, as explained above, they merely assess a fee for the commercial use of a county facility.

Even if the airport rights-of-way could be considered highways or roadways subject to §349.03(1) and even if the proposed fees could be characterized as a traffic regulation within the meaning of that section, the proposed fees would still be legitimate because they are specifically authorized by another statutory section - §114.14(1). WSA §114.14(1) specifically provides that the "county may adopt regulations, and establish fees or charges for the use of [its] airport" (emphasis added). The Wisconsin Supreme Court has found that this specific delegation of statutory authority provides the County with the "exclusive right to manage [GMIA], including the right to regulate the ground transportation . . . furnished to

airline passengers arriving and departing from [GMIA]." *Milwaukee County v. Town of Lake*, 48 N.W.2d 1(1951). This authority to regulate extends to all matters affecting the use of the airport. *Id.* at 11-12. Accordingly, the proposed fees are not in conflict with the requirements of WSA § 349.03.

## IV. THE PROPOSED FEES DO NOT DISCRIMINATE AGAINST THE VARIOUS CLASSES OF OFF-AIRPORT COMMERCIAL OPERATORS.

Equal protection of the laws requires that the County treat similarly situated classes in a similar manner. The committee has asked whether (for the purposes of the proposed fee) off-airport parking operators are similarly situated to other off-airport commercial operators such as hotels, restaurants, and gas stations. The short answer is that they are not. Courts have concluded that different kinds of off-airport commercial operators are not similarly situated because their business operations are different. E.g., *Alamo Rent-A-Car v. Sarasota Airport Auth.*, 825 F.2d 367, 370 (CA 11 1987); *All Right Colorado, Inc. v. City of Denver,* 937 F.2d 1502, 1512 (CA 10 1991).

Even if these off-airport commercial operations did not have materially different business operations, equal protection would only require that the County Board have some rational basis for treating them differently. *Id.* That test is easily satisfied because this committee could reasonably believe that

each group of off-airport commercial operators receives a discreet set of benefits from the existence and operation of the airport, their use of the airport, and that any vehicle operated on airport rights-of-way may obtain a specific and distinct benefit from such use. Accordingly, the proposed fees are not irrational in their application and will likely survive an equal protection challenge.

## V. THE PROPOSED FEES DO NOT DEPRIVE OFF-AIRPORT COMMERCIAL OPERATORS OF THE EQUAL AND UNIFORM USE OF THE AIRPORT.

The committee has asked whether the Wisconsin Supreme Court's decision in *Williams v. Milwaukee County*, 301 Wis.2d 134(2006) affects the validity of the proposed fees. That case was decided under different facts and does not preclude the proposed fees.

*Williams* involved a challenge to a Milwaukee County Ordinance that forbade non-permitted taxicabs from picking up "pre-arranged" fares at the passenger loading area at GMIA. As the committee knows, Milwaukee County General Ordinance 4.05 allows only permitted taxicabs to pick up fares at GMIA. The taxicabs at issue in *Williams* sought to provide services similar to limousines in which passengers called the taxicab company and arranged for a passenger pick-up for a specified time at a specified fee and were met by a taxicab at the curb when they arrived. Milwaukee County issued citations for these hybrid

activities because it perceived them as the actions of non-permitted taxicabs in violation of Milwaukee County General Ordinance 4.05 and because the taxicabs never requested to provide services as limousines. Consequently, these taxicabs were forbidden from providing these hybrid services at GMIA.

The *Williams* court disagreed and held that Milwaukee County could not foreclose completely and without justification the hybrid services that the taxicabs wished to provide. *Williams* does not stand for the rule that the County may not charge a fee for commercial operations at GMIA. In fact, the court recognized and reaffirmed the County's authority to regulate ground transportation at GMIA.

The off-airport shuttle fees proposed in this instance do not, as in *Williams*, foreclose completely the opportunity to provide any commercial activity at GMIA. No off-airport shuttles are excluded from providing a commercial operation at GMIA. Instead, off-airport shuttles are required to pay a fee for providing a service that makes use of the airport's facilities and markets services to airport passengers - services that would not otherwise be provided in the absence of the airport or its passengers. Although the proposed fee would be charged when off-airport shuttles use airport rights-of-way, the fee is optional because the commercial operators may decide on the frequency of their trips on airport rights-of-way or whether

to serve airport customers at all. Accordingly, the *Williams* case has no application to the fees proposed by airport staff.

TIMOTHY R. KARASKIEWICZ
Principal Assistant Corporation Counsel

L:\Users\TKARASK\GMIA\Memos\Opinions Memos\Off Airport Memo Final.doc