



September 24, 2007

**VIA MESSENGER**

The Honorable Andrew B. Steinberg  
Assistant Secretary for Aviation and International Affairs  
The Honorable D.J. Gribbin  
General Counsel  
U.S. Department of Transportation  
Office of the Secretary  
1200 New Jersey Ave, SE  
Washington, DC 20590

Re: Tinicum Township "Privilege Fees" at Philadelphia International Airport

Dear Assistant Secretary Steinberg and Mr. Gribbin:

Enclosed is a "Petition for Declaratory Order Regarding Tinicum Township Ordinance No. 2007-809" which is being submitted to the Department of Transportation today. As set forth in the Petition, the Air Transport Association and the Air Carrier Association of America, on behalf of themselves and their passenger and cargo member airlines, urge the Department to exercise its authority in the area and declare that the new "privilege fee" imposed by the Township of Tinicum, Delaware County, Pennsylvania ("Tinicum") on aircraft landing at Philadelphia International Airport ("PHL" or the "Airport") (the "Landing Fee") is preempted and prohibited by the Anti-Head Tax Act, currently codified at 49 U.S.C. § 40116 (the "AHTA" or "Act").

In a misguided, unprecedented, and unlawful attempt by a local government to siphon off revenues from airlines, the Tinicum Landing Fee requires carriers to pay a fee to Tinicum for use of PHL runways, despite the fact that Tinicum neither furnishes, maintains, or protects those runways. Tinicum's fee is in addition to, in fact largely duplicative of, landing fees that the airlines already pay to PHL, the FAA-authorized owner and operator of the airport.

There is a strong federal interest in the DOT taking quick and decisive action against this new Fee. Requiring the airlines at PHL to pay the additional Landing Fee would create a

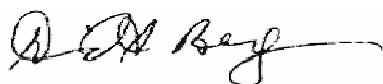
The Honorable Andrew B. Steinberg  
The Honorable D.J. Gribbin  
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disastrous precedent for the airline industry and the national air transportation system. It would embolden other municipal governments and political subdivisions throughout the United States that do not own or operate airports, but in which airports are located (either wholly or partially) to seek revenue via similar so-called privilege fees or other charges on the airlines. Unless the Landing Fee is struck down, its example will invite cities, towns, and other political bodies around the country to impose similar fees on airlines, resulting in precisely the type of "hodpodge of Balkanized assessments and levies against non-resident travelers whose business or leisure takes them across State lines" that Congress sought to prohibit with the AHTA

Allowing the Tincum fee and similar fees to stand also would impose significant additional costs on air carriers that are already subject to enormous cost pressures from operating costs, labor, fuel, airport-sponsor-imposed landing fees, terminal rents and other airport charges, and could force airlines to reduce or eliminate service to affected airports. This proliferation of taxes, fees and other charges by governmental entities which are not airport proprietors could cripple the national air transportation system. We therefore urge the DOT to accept the Petition and rule as expeditiously as possible that the Tincum Landing Fee is preempted and prohibited by the AHTA, and contrary to the federal interest in a financially healthy and competitive airline industry.

Sincerely,

Air Transport Association of America, Inc.



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Enclosure



September 24, 2007

**VIA HAND DELIVERY AND E-MAIL**

The Honorable Andrew B. Steinberg  
Assistant Secretary for Aviation and  
International Affairs  
Office of the Secretary  
U.S. Department of Transportation  
1200 New Jersey Ave, SE  
Washington, DC 20590

Re: Petition for Declaratory Order Regarding Tincum  
Township Ordinance No. 2007-809

Dear Mr. Steinberg:

The Air Transportation Association of America, Inc. (“ATA”)<sup>1</sup> and the Air Carrier Association of America, Inc. (“ACAA”),<sup>2</sup> jointly and on behalf of themselves and their passenger and cargo member airlines, hereby respectfully petition the Department to issue a ruling regarding the new “privilege fee” imposed by the Township of Tincum, Delaware County, Pennsylvania (“Tincum” or “Township”) on aircraft landing at Philadelphia

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<sup>1</sup>The ATA is the principal trade and service organization for the U.S. scheduled service industry. Members are: ABX Air, Alaska Airlines, American Airlines, ASTAR Air Cargo, Atlas Air, Continental Airlines, Delta Air Lines, Evergreen International Airlines, FedEx Corp., Hawaiian Airlines, JetBlue Airways, Midwest Airlines, Northwest Airlines, Southwest Airlines, United Airlines, UPS Airlines, and US Airways. Associate members are Air Canada, Air Jamaica and Mexicana.

<sup>2</sup>ACAA represents low-cost carriers including AirTran Airways, Inc., Frontier Airlines, Inc., Spirit Airlines, and Sun Country Airlines.

International Airport (“PHL” or the “Airport”) (the “Landing Fee”).<sup>3</sup> For the reasons set forth below, the Department should find that the Landing Fee – which is based on the same "maximum landed weight" methodology utilized by airport operators across the country to charge landing fees for use of runways – is not authorized by, and is in fact prohibited by the Anti-Head Tax Act, currently codified at 49 U.S.C. § 40116 (the “AHTA” or “Act”).

## INTRODUCTION

The AHTA prohibits the imposition of taxes, fees, and charges by state and local jurisdictions on airlines and other airport users. Congress intended the AHTA to prevent the undue burden on interstate commerce and the economic harm on airlines, passengers and shippers that would be the natural result if state and local governments were left to their own devices to raise general revenues on the back of commercial aviation. Only under certain enumerated exceptions to the statute’s general prohibition may state and local authorities impose and collect such taxes and fees. Congress, for example, made sure that airport owners and operators, which in most cases are local government bodies, are able to recover the costs of providing facilities and services to airlines.

As discussed in detail below, the Landing Fee does not fall within any of the statutory exceptions to the general prohibition of the AHTA, and is therefore barred by the AHTA. There is no merit to Tinicum's argument that its Landing Fee is authorized by subsection 40116(c) of the AHTA, 49 U.S.C. § 40116(c). To begin with, it is clear from the terms of subsection (c) that it imposes a *prohibition* on state and local taxes, rather than an *authorization*. Specifically, it bars states and local governments from imposing taxes "related to a flight of a commercial aircraft or an activity or service on the aircraft" which are otherwise authorized in the AHTA or other federal law but are being applied to aircraft with no nexus to the taxing jurisdiction. Such taxes may be levied "only if the aircraft takes off or lands in the State or political subdivision as part of the flight." 49 U.S.C. § 40116(c).

The fact that subsection (c) sets forth a *prohibition* rather than an *authorization* is also evident from its legislative history. As set forth below the subsection was initially enacted in 1990 as 49 U.S.C. App. § 1513(f). It provided that "No State . . . or political subdivision thereof shall levy or collect any tax on or with respect to any flight of a commercial aircraft or any activity or service on board such aircraft unless such aircraft takes off or lands in such State or political subdivision as part of such flight." This language was changed to the current version of

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<sup>3</sup>The DOT is authorized in 14 C.F.R. Part 302.400 and its delegated powers to take the necessary actions to enforce the provisions of Subtitle VII of Title VII of Title 49 of the United States Code (Transportation). *See, e.g., Hawaiian Airlines, Inc.* Declaratory Order, Docket OST-2006-25612, Order 2007-4-4 (April 4, 2007).

subsection 40116(c) as part of the re-codification of Title 49, U.S. Code, in 1994. But that process was not intended to make any substantive changes to the statute, and Congress has since clarified that the current subsection 40116(c) is to be interpreted the same as the original subsection 1513(f). In sum, the legislative history is fatal to the Township's effort to rely on subsection 40116(c) to support its Landing Fee.

In addition, as its name indicates, the Tincum "privilege fee" is a fee rather than a tax, and therefore clearly outside the ambit of subsection (c).

Furthermore, to allow non-airport owners/operators to impose additional landing fees or taxes on airlines (including cargo airlines) and their passengers is contrary to Congress' overriding objective in the Act to preclude multiple "systems of user taxation." The airlines at PHL already pay approximately \$45 million per year in landing fees to the City of Philadelphia – the airport proprietor. They also pay terminal and cargo facility rents. In addition, airline passengers pay substantial passenger facility charges ("PFCs") imposed by PHL and collected by the airlines.

Moreover, requiring the airlines at Philadelphia to pay an additional landing fee to the Township would create a dangerous precedent for the airline industry and adversely affect the national air transportation system. It would embolden other municipal governments and political subdivisions throughout the United States that do not own or operate airports, but in which airports are located (either wholly or partially)<sup>4</sup> to seek to impose similar so-called landing fees or other charges. Allowing Tincum's fee to stand would invite cities, towns, and other political bodies around the country to impose similar fees on airlines, resulting in precisely the type of "hodpodge of Balkanized assessments and levies against non-resident travelers whose business or leisure takes them across State lines" that Congress sought to prohibit with the AHTA. 119 Cong. Rec. 3349-50 (1973); *see also Aloha Airlines, Inc. v. Director of Taxation of Hawaii*, 464 U.S. 7, 9 (1983); *Salem Transp. Co. v. Port Authority of New York & New Jersey*, 611 F. Supp. 254, 257 (S.D.N.Y. 1985) (referencing Congress' intent that air travelers no longer be subject to double taxation resulting from state and local head taxes as well as national user charges).

Allowing the Tincum situation to continue and be mimicked across the country also would impose significant additional costs on air carriers that are already subject to enormous cost pressures from operating costs, labor, fuel, landing fees, terminal rents and other airport charges,

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<sup>4</sup>Examples of other airports which are wholly or partially located in jurisdictions of non-proprietors include, without limitation, Cincinnati, San Diego, Atlanta, San Jose, Monterey Peninsula, Charleston (South Carolina), Des Moines, Detroit, Baltimore-Washington International Thurgood Marshall Airport, Moline and Kent County. Letter from Airports Council International-North America to DOT, September 14, 2007, at 2. "It is very likely that other commercial service airports in the U.S., particularly airport authorities, stand to be affected if ordinances similar to Tincum's are enacted." *Id.*

and could force airlines to reduce or eliminate service to affected airports.<sup>5</sup> It is not difficult to imagine how quickly a proliferation of taxes, fees and other charges by governmental entities which are not airport proprietors could cripple the national air transportation system. This would be a disaster and it must be stopped here and now.

Accordingly, DOT should exercise its jurisdiction over this dispute and act quickly. The Department is the appropriate forum to resolve this controversy due to its broad authority over aviation law and policy, the important federal interest at stake, and the Department's special expertise regarding airport-related fees and charges. DOT is the pre-eminent body that enforces the federal aviation laws (including the AHTA). The Department has previously exercised its jurisdiction to issue "a ruling on . . . major federal law issues . . . which involve the interpretation of federal statutes whose administration is the responsibility of the Department." Instituting Order, *Love Field Service Interpretation Proc.*, OST-98-4363, Order 98-8-29 (Aug. 25, 1998) (dealing with Love Field usage). Courts have affirmed DOT's special role in interpreting federal aviation laws. *American Airlines, Inc. v. DOT*, 202 F.3d 788 (5<sup>th</sup> Cir.), *cert. denied*, 530 U.S. 1284 (2000) (affirming DOT ruling regarding meaning of Shelby Amendment for Love Field); *New England Legal Found. v. Mass. Port Auth.*, 853 F.2d 157 (1<sup>st</sup> Cir. 1989) (trial court erred in not deferring to DOT's primary jurisdiction to determine whether new Logan Airport landing fees violated Federal Aviation Act); *Continental Air Lines, Inc. v. DOT*, 843 F.2d 1444 (D.C. Cir. 1988) (DOT reasonably interpreted Wright Amendment for Love Field). This past April the DOT granted a petition for declaratory order by Hawaiian Airlines, and ruled that the attempts by American Samoa to prevent the carrier from serving the territory violated the Airline Deregulation Act, 49 U.S.C. § 41713. *See* Declaratory Order, Docket OST-2006-25612, Order 2007-4-4 (April 4, 2007).

DOT action here will ensure administrative expertise and uniformity in application of the AHTA. In particular, DOT is in a position to consider the significant policy implications of Tinicum's failure to comply with the AHTA and impose its privilege fee, including the impact of multiple jurisdictions imposing similar fees or taxes on airlines and our national air transportation system. As the Supreme Court has acknowledged, the Department of Transportation "is equipped, as courts are not, to survey the field nationwide, and to regulate based on a full view of the relevant facts and circumstances." *Northwest Airlines, Inc. v. County of Kent, Mich.*, 510 U.S. 355, 367 (1994).

Finally, DOT action is critical because some courts have held that air carriers have no private right of action to enforce the AHTA. Although we disagree with this conclusion, it does

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<sup>5</sup>US Airways estimates that the new Landing Fee will cost it approximately \$660,000 per year at PHL, which it must pay on top of the millions of dollars it remits to the Airport each year in Airport landing fees.

present the possibility that airlines could end up having no judicial recourse available to them if other local governments elsewhere seek to impose similar fees or taxes.<sup>6</sup>

## **BACKGROUND**

### **Philadelphia International Airport**

The City of Philadelphia "owns and operates [PHL], which is located partly in Philadelphia County and partly in Delaware County." *Delaware County v. City of Philadelphia*, 153 Pa. Cmm. 167, 620 A.2d 666, 666 (1993). The Township does not own or operate any portion of the Airport.<sup>7</sup> The Township also did not construct or pay for the runways at the Airport and does not maintain them.

Pursuant to a settlement agreement reached in 1998 but which expired at the end of May 2007, the City was paying \$700,000 per year (for the last three years) to the Township, Delaware County and the Interboro School District (which they allocated amongst themselves) in settlement of claims for property taxes by those entities. Tinicum received a portion of that payment. However, to date, the City and Tinicum have been unable this year to reach an agreement this year for the renewal or replacement of that Agreement. Had those parties reached a new agreement, it is apparent this matter never would have arisen.

### **The Landing Fee Ordinance**

After the Township was unable to reach an acceptable arrangement with Philadelphia for a new agreement for payment of money by the City to Tinicum, the Township, on June 18, 2007, enacted Tinicum Ordinance No. 2007-809 (the "Ordinance"), a copy of which is attached as Ex. A hereto. The Ordinance requires "aircraft users"<sup>8</sup> at the Airport to pay a "privilege fee for use

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<sup>6</sup>Even if airlines in those jurisdictions may raise the AHTA as a defense to a collection action, it is improper and unfair to require carriers to have to wait to be sued (and subject to a claim for onerous non-payment penalties) in order for that carrier to challenge a tax, fee or charge that violates the AHTA.

<sup>7</sup>Although some portion of the Airport is within Tinicum Township, the Township only owns (and leases to the Airport) a tiny fraction of the Airport land. According to the City of Philadelphia, the City owns 2,300 acres of the land on which the Airport sits. By contrast, the Township owns less than one percent of that amount (21.1 acres of land), which it leases to the airport for a runway safety area (which is still under design). See Press Release October 3, 2005, [www.phl.org/news/051003.html](http://www.phl.org/news/051003.html). The City pays Tinicum approximately \$85,000 per year for those 21.1 acres. Of course, the fact that the Township owns and leases to the Airport a small fraction of the land utilized (or to be utilized) by the Airport does not make the Township an "owner" of the Airport any more than the owner of land leased to a restaurant is the "owner" of the restaurant operating on the premises.

<sup>8</sup>The ordinary use of the term "aircraft users" would suggest the Ordinance should apply to airline passengers – those who use aircraft for transportation – rather than those who own and operate aircraft.

of" Airport runways "located within Tincicum Township" (*i.e.*, the "Landing Fees"). Article III, § 2-4(A). The Ordinance specifically states:

A. Privilege Fee: For the privilege of doing business within the area that comprises Tincicum Township, there shall be imposed upon all aircraft users a privilege fee under this section.

1. The privilege fee for use of property located within Tincicum Township for landing of aircraft shall be \$.03 per one thousand (1,000) pounds or part thereof of approved maximum landed weight. Fees will be determined by weight listed in the Federal Aviation Administration type certificate data sheet. (Article III, § 2-4(A)).

In addition, Article VI, Section 2-8, entitled "Violations and Penalties," provides that "Any user who shall fail, neglect or refuse to comply with any of the terms or provisions of this Ordinance or of any regulations or requirement pursuant thereto, and authorized hereby, shall be subject to a fine not to exceed Six Hundred (\$600.00) Dollars for each such offense. Every day in which a user shall be in violation of this Ordinance shall constitute a separate offense subject to the penalties provided herein."

### **Tincicum's Attempts to Enforce the Ordinance**

On July 18, 2007 – which was the first day in which the Ordinance became effective and the Landing Fee was imposed – the Township filed a complaint against Frontier Airlines, Inc. in the Court of Common Pleas for Delaware County, Pennsylvania, *Township of Tincicum, Delaware County, PA v. Frontier Airlines, Inc.*, Case No. 07-8903, alleging that Frontier had breached the Ordinance: "Frontier has an obligation pursuant to the ordinance to pay the fees immediately upon landing, effective July 18, 2007, unless they post a bond. Frontier has not posted a bond and has not paid the fees." *Id.* ¶ 9. After Frontier "removed" the case to the U.S. District Court for the Eastern District of Pennsylvania (Civil Action No. 2:07-CV-3409 (LP)), the Township amended its complaint to add AirTran Airways, American Airlines, America West Airlines (now part of US Airways), Atlantic Aviation Corp., Continental Airlines, Delta Air Lines, DHL Express (U.S.), Inc., Federal Express, Midwest Airlines, Northwest Airlines, Southwest Airlines, United Air Lines, United Parcel Service, and US Airways to the case.

On August 30, 2007, Frontier filed a motion to dismiss the amended complaint for failure to state a claim upon which relief can be granted.<sup>9</sup> Frontier primarily argued that the Landing

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<sup>9</sup>Copies of the "Brief in Support of Defendant Frontier Airlines, Inc.'s Motion to Dismiss or Stay Action Pending Administrative Review," (Aug. 30, 2007), and "Plaintiff Tincicum Township, Delaware County, Pennsylvania's Brief in Opposition to Defendant Frontier's Motion to Dismiss Plaintiff's Complaint or Stay Action," Sept. 13, 2007 ("Tincicum Br."), are provided as Exhibits B and C hereto. Petitioners will subsequently submit as Exhibit D the (footnote continued)

Fee was preempted and prohibited by the Anti-Head Tax Act. Frontier alternatively requested that the federal court, pursuant to the doctrine of primary jurisdiction, stay the action to enable the DOT to rule on the lawfulness of the Landing Fee under the Anti-Head Tax Act and other applicable federal law. That motion is currently pending before the court.

In its brief in opposition to Frontier's motion to dismiss, Tincum contended that the Landing Fee is authorized by the "plain meaning of subsection (c) of 49 U.S.C. § 40116."<sup>10</sup> However, as will be discussed in detail below, this is simply an incorrect reading of the statute and, not surprising, Tincum cited neither case law nor legislative history to support its argument.

### **THE ANTI-HEAD TAX ACT**

The Anti-Head Tax Act, Pub. L. No. 93-44, 87 Stat. 88, was passed by Congress in 1973 as a reaction to a 1972 U.S. Supreme Court decision that upheld a locally imposed "head" tax on airline passengers. *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707, 709 (1972). Following *Evansville-Vanderburgh*, "Committees in both Houses of Congress held hearings on local taxation of air transportation." *Aloha Airlines, supra*, 464 U.S. at 9.<sup>11</sup> "Both Committees concluded that the proliferation of local taxes burdened interstate air transportation, and, when coupled with the federal Trust Fund levies, imposed double taxation on air travelers." *Id.* To deal with these problems, Congress passed § 7(a) of the Airport Development Acceleration Act of 1973, which became known as the Anti-Head Tax Act.<sup>12</sup> Congress intended the AHTA to "ensure . . . that local 'head' taxes will not be permitted to inhibit the flow of interstate commerce." *See id.*; S. Rep. No. 93-12, p. 4, 1973 U.S.C.C.A.N. 1434 (1973). In the legislative history of the Act, Congress stated:

Recent experience with [a] Philadelphia tax is indicative of the chaos which . . . local taxation works on the national air transportation system. The head tax brings on confusion, delay, anger, and resentment and cuts against the grain of the traditional American right to travel among the States unburdened by travel taxes.

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"Reply Brief in Support of Defendant Frontier Airlines, Inc.'s Motion to Dismiss or Stay Action Pending Administrative Review," which is being submitted to the federal court today.

<sup>10</sup>Tincum Br. at 2.

<sup>11</sup>*See* Hearings on S. 2397 et al. before the Subcommittee on Aviation of the Senate Committee on Commerce, 92d Cong., 2d Sess., 129-198 (1972); Hearings on H.R. 2337 et al. before the Subcommittee on Transportation and Aeronautics of the House Committee on Interstate and Foreign Commerce, 92d Cong., 2d Sess. (1972).

<sup>12</sup>The Act was originally codified at 49 U.S.C. app. § 1513. The original statute was eventually superseded by 49 U.S.C. § 40116, which retained essentially the same language as the original statute, save that the "directly or indirectly" language was deleted "as surplus." Historical and Statutory Notes, 49 U.S.C. § 40116(b) (2000).

*Id.*, 1973 U.S.C.C.A.N. at 1446; *see also id.* at 1455 ("local taxation on passengers or on the carriage of passengers . . . [is] inimical to the development of a national system funded in large part by uniform Federal taxes"). One of the two managers of Senate Bill 38, the basis for the Act, stated:

Presently, at least 31 different government jurisdictions have levied head taxes and many other communities are in the process of doing so or are seriously considering it. We believe this proliferation of local taxes can and will undermine a sound national transportation system by causing confusion, delay, inequities, and discrimination in air transportation and must be prohibited before it gets any further out of hand. There is no need for two systems of user taxation; . . . .

119 Cong. Rec. 3349-50 (Cannon). The other manager of the Bill emphasized:

If more than 500 localities – or even a significant portion of this number – were unilaterally to levy taxes on airline passenger fares, there would result an unconscionable and unacceptable burden on interstate commerce. The national system of air service upon which 180 million airline passengers depend annually would become a hodgepodge of Balkanized assessments and levies against non-resident travelers whose business or leisure takes them across State lines. . . . .

*Id.* (Pearson) (emphasis added); *see also Indianapolis Airport Auth. v. American Airlines*, 733 F.2d 1262 (7<sup>th</sup> Cir. 1984) (Anti-Head Tax Act was passed in order to prevent placing of unreasonable burdens on interstate air transportation); *Salem Transp., supra*, 611 F. Supp. 254 (in enacting the Act, Congress was concerned with ensuring that air travelers would not be subject to double taxation resulting from state and local head taxes as well as national user charges).

## **ARGUMENT**

### **I. THE ANTI-HEAD TAX ACT PREEMPTS AND PROHIBITS THE LANDING FEE IMPOSED BY THE TOWNSHIP.**

The Landing Fee that the Township is imposing on the airlines at PHL is preempted and prohibited by the Anti-Head Tax Act. Under the Act, no political subdivision of a State may "levy or collect a tax, fee, head charge, or other charge on," *inter alia*, "the transportation of an individual traveling in air commerce" or "the sale of air transportation," 49 U.S.C. § 40116(b). The Landing Fee is unquestionably a charge on the transportation of individuals traveling or shipping goods in air commerce and/or the sale of air transportation. It is imposed by reason of air carriers "landing" their aircraft on the Airport runways to transport passengers and cargo by air. Further, as set forth above, the prohibition in section 40116(b) is read broadly to encompass

taxes and fees that are both directly and indirectly imposed on air passengers and shippers. Thus, it "prohibits the levying of State or local head taxes, fees, gross receipts, taxes or other such charges whether on passengers or on the carriage of such passengers in interstate commerce." 119 Cong. Rec. 3349 (1973) (emphasis added); *Aloha Airlines, supra*, 464 U.S. 7, 12-13 (emphasis added).<sup>13</sup>

Subsection (b) of the Anti-Head Tax Act, as amended, provides that "Except as provided in subsection (c) . . . and [49 U.S.C. § 40117; relating to passenger facility charges], a State, a political subdivision of a State, and any person that has purchased or leased an airport under [49 U.S.C. § 47134] may not levy or collect a tax, fee, head charge, or other charge on—

- (1) an individual traveling in air commerce;
- (2) the transportation of an individual traveling in air commerce;
- (3) the sale of air transportation; or
- (4) the gross receipts from that air commerce or transportation."

49 U.S.C. § 40116(b).<sup>14</sup> As discussed below, the phrase "[e]xcept as provided in subsection (c)" was a drafting error inserted in 1994 as part of the non-substantive re-codification of Title 49, U.S. Code.

The U.S. Supreme Court has construed the Anti-Head Tax Act broadly in order to effectuate Congress' intent. Thus, the ban applies even if the charge is directly imposed on the carriers rather than their passengers. For example, in *Aloha Airlines, supra*, 464 U.S. 7, 12-13, the Supreme Court held that a state tax on the annual gross income of airlines operating within Hawaii was preempted and barred by the AHTA despite the fact that the tax at issue was styled as a property tax and was imposed on airlines rather than their passengers. Lower courts

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<sup>13</sup>This protection applies equally to air cargo because, as set forth *supra*, "air transportation" is defined to include the transportation of cargo. 49 U.S.C. §§ 40102(a)(5), (22), (25).

<sup>14</sup>"Air transportation" is defined to include the transportation of cargo. 49 U.S.C. §§ 40102(a)(5), (22), (25). Thus, the AHTA also applies to local taxes, fees and charges that are sought to be imposed on air cargo operations.

consistently have given the AHTA broad application.<sup>15</sup>

In *Allegheny Airlines, Inc. v. City of Philadelphia*, 453 Pa. 181, 309 A.2d 157 (1973), airlines challenged a City of Philadelphia ordinance which established a \$3.00 “head tax” on some (but not all) passengers departing from Philadelphia airports, excluding continuous flight passengers who remained in Philadelphia not more than six hours. *Id.* at 183, 309 A.2d at 158. In ruling that the head taxes were preempted and prohibited by the Anti-Head Tax Act, the court stated:

This legislation, enacted pursuant to Congress’ constitutional authority to regulate interstate commerce, has undeniably pre-empted any state, or local, intervention in the field of airport head taxes. . . . The Act renders constitutionally invalid and impermissible existing state or local airport head taxes. The Federal Government, having exercised its express constitutional authority over interstate commerce, that field is not available for state or local action. Here . . . state intrusion is precluded.

*Id.* at 186, 309 A.2d at 159.

Similarly here, the Tincum Landing Fee is an impermissible charge on the carriage of passengers and cargo by air.

## **II. SUBSECTION 40116c) DOES NOT AUTHORIZE THE TINICUM LANDING FEE.**

Subsection 40116(c) of the AHTA states:

A State or political subdivision of a State may levy or collect a tax on or related to a flight of a commercial aircraft or an activity or service on the aircraft only if the aircraft takes off or lands in the State or political subdivision as part of the flight.

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<sup>15</sup>See, e.g., *New England Legal Found. v. Massachusetts Port Auth.*, 883 F.2d 157, 170 n. 22 (1<sup>st</sup> Cir. 1989) (“The prohibition is broader than just against head taxes”); *Interface Group v. Massachusetts Port Authority*, 816 F.2d 9, 16 (1<sup>st</sup> Cir. 1986) (even if the “primary beneficiaries of the [Anti-Head Tax Act] are . . . air travelers, . . . by prohibiting the levying of taxes on the *carriage of persons*, the statute, at least in some instances gives air carriers a ‘benefit’ that is ‘especial,’ at least when compared with the benefit conferred on the general public. The ban on head taxes means that air carriers will neither have to face diminished demand for costlier services nor have to absorb all or part of the charge by reducing ticket prices.”); *Indianapolis Airport Auth.*, *supra*, 733 F.2d at 1267 (“Whether airline or passenger ultimately bears the cost of an airport fee depends on the conditions of supply and demand rather than on who is assessed the charge”); and see 119 Cong. Rec. 3349 (1973) (“The bill prohibits the levying of State or local head taxes, fees, gross receipts, taxes or other such charges whether on passengers or on the carriage of such passengers in interstate commerce”) (emphasis added).

49 U.S.C. § 40116(c). For all the reasons set forth below, it is clear that subsection 40116(c) does not authorize the Landing Fee.

**A. Subsection 40116(c) was Intended to Prohibit Certain State and Local Taxation, and Not to Authorize Any Taxes.**

The DOT need look no further than the plain language of subsection (c) to conclude that it is a *limiting* provision: it does not in and of itself grant the right to states and local governments to impose taxes on air carriers; but instead expressly limits any such rights to flights that have the requisite nexus to the taxing jurisdiction – those that land or take off in the state or political subdivision. *See Northwest Airlines, Inc. v. Wisconsin Dep't of Revenue*, 293 Wis. 2d 202, 221 n. 13, 717 N.W.2d 280, 289 n. 13 ("49 U.S.C. § 40116(c) constitutes another prohibition on state and local taxation"); *id.* at 223 n. 16, 717 N.W.2d at 290 n. 16 (2006) ("subsection (c) . . . constrains the ability of states to tax air carriers"). In enacting subsection 40116(c), Congress wanted to make sure that the mere fact of an aircraft flying over the taxing jurisdiction (*i.e.*, an "overflight") would not be sufficient "nexus" with the jurisdiction to support a tax that otherwise would comply with subsections (b), (d) and (e) of the Anti-Head Tax Act.

Beyond the language of subsection (c) itself, the relevant legislative history for this provision makes a compelling case that it was never intended to authorize any state or local tax, including the Tincum Landing Fee.

**1. 1990: Congress Prohibits Certain State and Local Taxation**

The predecessor of subsection (c) was added to the Anti-Head Tax Act in 1990 (as part of the Omnibus Budget Reconciliation Act of 1990, Pub. L. 101-508) and originally codified as 49 U.S.C. App. § 1513(f). Subsection 1513(f) stated as follows:

**(f) Flight takeoff or landing requirement for State taxation.**

*No State* (as such term is defined under subsection (d)(2)(E) of this section or political subdivision thereof *shall levy or collect any tax* on or with respect to any flight of a commercial aircraft or any activity or service on board such aircraft unless such aircraft takes off or lands in such State or political subdivision as part of such flight.

Exhibit E hereto (emphasis added). Nearly identical language was included as part of the "Airport Capacity Act" of 1990, S. 3094, introduced by the Senate on September 24, 1990. 136 Cong. Rec. S13616-05. Title IV of the proposed Airport Capacity Act was entitled "Passenger Facility Charges." At the end of ten numbered paragraphs relating to the PFC's, the Senate inserted the following:

"(11) No state (or political subdivision thereof, including the commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more states) shall levy or collect any tax on or with respect to any commercial aircraft flight, or any activity or service on board such flight, if such flight neither takes off nor lands in such state or jurisdiction."

Exhibit F hereto, at 20. In other words, the Senate intended to create an express prohibition: states and local governments "shall" not charge a tax on aircraft that "neither takes off nor lands in the such state or jurisdiction."

One month later (in October 1990) the House Conference Report stated as follows with regard to this provision:

"21. STATE TAXING AUTHORITY

House bill

No similar provision.

Senate amendment

*State may not tax aircraft flights which do not take off or land in state.*

Conference substitute

Senate amendment."

H.R. Conf. Rep. 101-964, 1990 U.S.C.C.A.N. 2374, 2714 (October 27, 1990), Ex. G hereto (emphasis added).

In addition, one of the principal Senate sponsors of the Airport Capacity Act of 1990 (S. 3094) made it clear that the Senators were concerned about the increased burden that PFC's would impose on airline passengers:

Our colleagues in the House of Representatives passed an FAA reauthorization bill which includes a PFC. I have resisted the idea and have not been shy about say[ing] so. Passengers are already paying plenty to fly. The revenues from the existing 8% ticket tax are sitting unused in the Airport and Airway Trust Fund to the tune of \$7.6 billion. I am certain that the budget summitters will increase that tax to 10 percent. Fares are high and one reason[] they are is that airlines need to pay off the bonds which they bought to finance airport projects. So we

already have the passenger paying twice for airport improvements. Now if you add up to \$12.00 to the cost of a ticket, as the Administration proposes and the House bill authorizes [from PFC's], you have added significantly to the cost of travel.

136 Cong. Rec. S13616-05 (Senator Ford, speaking on behalf of himself and Senators McCain and Danforth) (Exhibit F hereto, at 10). Clearly this Congressional sentiment was against imposing more taxes on air carriers and their customers, not in favor of it.

## **2. 1994: The Non-Substantive Re-Codification of Title 49, U.S.C.**

Nearly four years later, Congress enacted Pub. L. 103-272, 108 Stat. 745 (July 5, 1994, which Congress described as "An Act to revise, codify, and enact *without substantive change* certain general and permanent laws, related to transportation, as subtitles II, III, and V-X of title 49, United States Code, 'Transportation,' and to make other technical improvements in the Code." Exhibit H hereto, at 1 (emphasis added). This law re-codified the Anti-Head Tax Act from 49 U.S.C. § 1513 to 49 U.S.C. § 40116, including the current "except as provided in subsection (c)" language in subsection 40116(b); and the current language in subsection (c). Exhibit H, at 434. However, although the language changed as part of the re-codification, it is clear that no substantive revision was intended. In Senate Report No. 103-265 to accompany H.R. 1758, the Senate stated: "The purpose of H.R. 1758 is to restate in comprehensive form, *without substantive change*, certain general and permanent laws related to transportation and to enact those laws as subtitles II, III, and V-X of title 49, United States Code, and to make other technical improvements to the Code." 1994 WL 261999 (Leg. Hist.), Exhibit I hereto, at 1 (emphasis added).

The fact that the new language of subsection 40116(c) was inserted into the AHTA pursuant to a non-substantive re-codification of Title 49 is fatal to the Township's argument that the current version of subsection (c) authorizes its Landing Fee. "Under established canons of statutory construction, it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed." *Finley v. United States*, 490 U.S. 545, 554 (1989). Indeed, a recent case involving the same 1994 statute (Pub. L. 103-272) makes it clear that the 1994 re-codification of the AHTA did not intend to make any substantive change to what was then subsection 1513(f). In *Newton v. FAA*, 457 F.3d 1133, 1143 (10<sup>th</sup> Cir. 2006), the court was confronted with the re-codification (also in 1994) of 49 U.S.C. § 1429(a) into 49 U.S.C. § 44709(b)(1). The court acknowledged that the new statutory language could be construed to make a substantive change to the law, namely that the FAA Administrator could amend, modify, suspend or revoke all FAA-authorized certificates, and not merely those enumerated in section 44702(a). *Id.* at 1143. However, in refusing to interpret the new statute in such a way, the court explained that such a reading "is foreclosed by the statutory purpose stated in the title to the revision: "An Act to revise codify, and enact *without substantive change* certain general and permanent laws, related to transportation, ... and to make other

technical improvements in the Code." *Id.* (citing to Pub.L. 103-272, 108 Stat. 745, 1190 (1994)).  
The court explained:

Although ordinarily the title is merely an aid to construction, which must yield to unambiguous statutory language . . . we should not close our eyes to the likelihood that a Member of Congress reading the title of the 1994 statute would likely find it unnecessary to read further, realizing that the statute is not changing the law. Indeed, under established canons of statutory construction, it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed. . . . This is true, even though in the course of revision or consolidation the language of the original sections has been changed. Ordinarily, the new language will be attributed to a desire to condense and simplify the text and to improve phraseology.<sup>16</sup>

*Id.* at 1143 (citations and internal quotation marks omitted).

The exact same outcome is required here. Just as the court in *Newton v. FAA* recognized Public Law 103-272 did not substantively amend the federal aviation statute at issue in that case, it is equally true here that the re-codification of the Anti-Head Tax Act in that same Congressional action did not substantively revise the original 49 U.S.C. App. § 1513(f) when it was converted into what is today subsection 40116(c).

### **3. 1996: Congress Confirms Original Intent of Subsection (c)**

After the Anti-Head Tax Act was re-codified in Public Law 103-272, members of Congress realized that a mistake was made in the process of implementing what was supposed to be a non-substantive re-codification of subsection 1513 into subsection 40116. In 1996, the House of Representatives proposed language for the Federal Aviation Reauthorization Act of 1996, P.L. 104-264 (the "1996 Act"), which would have made a "technical correction" by amending subsection 40116(b) to remove the reference to subsection (c), as follows:

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<sup>16</sup>See also *American Airlines v. Wolens*, 513 U.S. 219, 222-23, n. 1 (1995) ("Reenacting Title 49 of the U.S. Code in 1994 . . . Congress intended the revision to make no substantive change"); *Zukas v. Hinson*, 124 F.3d 1407, 1411 (11th Cir. 1997) ("The purpose of this recodification was 'to restate in comprehensive form, without substantive change, certain general and permanent laws related to transportation'").

## **SEC. 402. TECHNICAL CORRECTION RELATING TO STATE TAXATION.**

Section 40116(b) is amended by striking "subsection (c) of this section and".

H.R. Rep. 104-714(I), 1996 U.S.C.C.A.N. 3658, 3685 (July 26, 1996) (relevant language at Ex. J hereto, at 15). The accompanying House Report stated:

### **Section 402. Technical correction related to State taxation**

*This section corrects a mistake that was made when section 1113 of the Federal Aviation Act of 1958 (49 U.S.C. 1513) was recodified as section 40116 of Title 49. As recodified, the section seems to permit a State or political subdivision to impose any type of tax, fee, or head charge as long as the airline's aircraft lands or takes off in the State or political subdivision. In fact, this is broader than old section 1113 [49 U.S.C. 1513] ever allowed. That section prohibited States and political subdivisions from imposing a tax, fee, or head charge, except the PFC in section 40117, even if where [sic] the aircraft lands or takes off there. This technical correction is designed to conform new section 40116 to old section 1113 in this respect and return the issue of State taxation to the status quo as it existed before the recodification.*

*Id.* at 3696. Ex. J at p. 48 (emphasis added).

The Senate Report issued the same day described the proposed amendment as follows:

### **Section 402. Technical correction of title 49 codification**

Section 402 *corrects a mistake related to state taxation that was made when title 49 was recodified.* As the statute currently reads, states arguably could tax certain aviation-related activities *contrary to the intent of Congress.*

Senate Report 104-333 (July 26, 1996), 1996 WL 431987 (Leg. Hist.), at \*28, Ex. K hereto, at 22 (emphasis added). The Report further stated:

State Taxing Authority. The bill contains a provision intended as a technical correction to the section of Title 49 establishing the authority of states to levy certain aviation-related taxes. *When that section of the United States Code was recodified, it appeared to broaden the power of states to tax airlines. The correction is intended to return the issue of state taxation to the status quo as it existed before the recodification.*

The impact of this provision, however, is unclear. A simple correction would impose no new mandates. *There is concern among some tax experts, however,*

*that the proposed change goes beyond the intended fix and would impose new preemptions on states' taxing authority.* A number of state tax officials assert that the proposed correction would increase the ambiguities in the statute and could lead to an interpretation of the law that would prohibit states from imposing aviation-related property, net income, and other taxes. Under such an interpretation, the provision would constitute a mandate on state governments as defined by Public Law 104-4. Because some states raise significant amounts of revenues through these types of taxes, it is possible that the direct costs to states could exceed the \$50 million annual threshold established in the mandates law.

CBO is continuing to review this issue and will include its analysis in the final intergovernmental mandates statement.

*Id.* at \*21, Ex. K at 16 (emphasis added).

Although the correction ultimately was not included in the 1996 Act because of uncertainty whether the language would go beyond the status quo which existed prior to re-codification of the AHTA in 1994, Congress made clear its intention that all of section 40116 (including subsection 40116(c)) be interpreted and applied as was section 1513 prior to re-codification. The "Joint Explanatory Statement of the Committee of the Conference" stated:

### **31. TECHNICAL CORRECTION RELATING TO STATE TAXATION**

#### **House bill**

Section 403: This section corrects a mistake that was made when section 1113 of the Federal Aviation Act of 1958 (49 U.S.C. 1513) was recodified as section 40116 of Title 49.

#### **Senate amendment**

No provision.

#### **Conference substitute**

No provision. The managers recognize that this technical correction has created confusion. In order to provide more time for review, the provision has not been included in this bill. *However, the managers continue to believe that the recodification of section 1113 was done incorrectly and would expect that the new section 40116 would continue to be interpreted in the same way as former section 1113.*

H.R. CONF. REP. 104-848, 1996 U.S.C.C.A.N. 3703, 3715 (Sept. 26, 1996), 1996 WL 563330 (Leg. Hist.), Ex. L hereto, at 82 (emphasis added). Thus, the House and Senate floor managers expressed their mutual recognition that section 40116 (including subsection (c)) should "continue to be interpreted in the same way as former" section 1513 (including subsection (f)).

These views of the House and Senate Managers – that section 40116 "should be interpreted in the same way as" the former section 1513 – are entitled to significant weight. *See Martin Oil Service, Inc. v. Koch Refining Co.*, 582 F. Supp. 1061, 1065 (N.D. Ill. 1984) ("The views of a subsequent congressional committee on the meaning of a statute are entitled to significant weight"); *see also Bobsee Corp. v. United States*, 411 F.2d 231, 237, n. 18 (5<sup>th</sup> Cir. 1969) (legislative statements subsequent to enactment of statute are not part of legislative history but are entitled to some consideration as being secondarily authoritative expression of expert opinion); *Bell v. Hettleman*, 558 F. Supp. 386, 394 n. 12 (D. Md.), *aff'd*, 721 F.2d 131 (3<sup>rd</sup> Cir. 1983); *cert. denied*, 470 U.S. 1050 (1985) ("although committee reports commenting on a previously enacted statute are not said to be part of the legislative history of that statute, they are nevertheless "entitled to some consideration as a secondarily authoritative expression of expert opinion"") (citation omitted).

Moreover, there is absolutely no legislative history to counter-balance this guidance from Congress. None of the legislative history from 1990, 1994 and 1996 contains any indication whatsoever that Congress intended for the original subsection 1513(f) or its successor (40116(c)) to *authorize* states and local governments to tax airlines. All that is left is the obvious: an unintended (and subsequently disavowed) potential confusion was created in the codification of section 1513 into section 40116, and Congress never intended for the change from section 1513 to 40116 to substantively change the law. Rather, Congress has made it clear that the former subsection 1513(f) continues to reflect Congress' intent with regard to the current subsection 40116(c). Where, as here, there is clear evidence that a mistake was made in drafting of a federal statute, courts will acknowledge the error and apply the statute in a manner consistent with Congress' actual intent. *See, e.g., United States National Bank of Oregon v. Indep. Ins. Agents of America, Inc.*, 508 U.S. 439, 462 (1993) ("the placement of the quotation marks in the 1916 Act was a simple scrivener's error, a mistake made by someone unfamiliar with the law's object and design," and therefore the 1916 Act "should be read as if the closing quotation marks do not appear at the end of the paragraph"); *United States v. Colon-Ortiz*, 866 F.2d 6, 10-11 (1<sup>st</sup> Cir. 1989), *cert. denied*, 490 U.S. 1051 (1989) ("Though a statute should generally be interpreted to give effect to every provision, a provision resulting from legislative inadvertence or mistake should not be given effect"; accordingly "the correct interpretation of the statute is to disregard the 'or both' language" which included in the statute pursuant to "an inadvertent drafting error"); *Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1041 (D.C. Cir. 2001) (correcting internal cross-reference in the Clean Air Act due to a scrivener's error). Accordingly, the Township's attempt to use the language of subsection 40116(c) to justify its Landing Fee must be rejected.

**C. The Tinicum Landing Fee is Prohibited by the Anti-Head Tax Act As a Whole.**

Subsection (c) cannot be considered in a vacuum, disconnected from the other provisions in, and purpose behind, the Anti-Head Tax Act. It would be impermissible to construe subsection 40116(c) in a manner that essentially ignores the anti-discrimination provisions in subsection (d)(2)(A)(iv) (*see infra*), the restriction on imposition of landing fees set forth in subsection 40116(e) (*see infra*), and the basic prohibition in subsection 40116(b). *See Acceptance Ins. Co. v. Sloan*, 263 F.3d 278, 283 (3d Cir. 2001) ("sections of statutes are not to be isolated from the context in which they arise such that an individual interpretation is accorded one section which does not take into account the related sections of the same statute. Statutes do not exist sentence by sentence. Their sections and sentences comprise a composite of their stated purpose") (citation omitted); *United States v. Bonanno Organized Crime Family of La Cosa Nostra*, 879 F.2d 20, 24 (2d Cir. 1989) ("In ascertaining the proper construction of a specific statutory provision [the decision maker must] render it consistent with . . . the statutory scheme of which it is a part"); *Boise Cascade Corp. v. United States EPA*, 942 F.2d 1427, 1432 (9th Cir. 1991) ("Under accepted canons of statutory interpretation, we must interpret statutes as a whole, giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous").<sup>17</sup>

**D. Subsection 40116(c) Does Not Authorize the Tinicum Landing Fee Because it is a Fee and Not a Tax.**

The Township's argument that its Landing Fee is authorized by subsection 40116(c) also should be rejected because subsection 40116(c) relates solely to a "tax" and does not apply to other types of charges, including "landing fees." As the Ordinance states, the charge being imposed by Tinicum on airlines that use runways at Philadelphia International Airport is a "privilege *fee*" and not a "privilege *tax*." Moreover, because the Landing Fee is imposed in exchange for the *benefit* of using the runways (albeit a benefit supplied by the Airport rather than the Township, and one not based on actual Airport costs, as required in the DOT Policy Statement on Airport Rates and Charges) it is properly classified as a "fee" rather than a "tax."

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<sup>17</sup>*See also U.S. v. Pacheco*, 225 F.3d 148, 154 (2d Cir. 2000), *cert. denied*, 533 U.S. 904 (2001) ("The 'whole act' rule of statutory construction exhorts us to read a section of a statute not 'in isolation from the context of the whole Act' but to 'look to the provisions of the whole law, and to its object and policy'") (citation and internal quotation marks omitted); 2A SUTHERLAND STATUTORY CONSTRUCTION § 46:5 (7th ed.) ("[S]tatutes must be construed to further the intent of the legislature as evidenced by the entire statutory scheme; a statutory subsection may not be considered in a vacuum, but must be considered in reference to the statute as a whole and in reference to statutes dealing with the same general subject matter.")

In *National Cable Television v. United States*, 415 U.S. 336 (1974), the Supreme Court explained the distinction between "taxes" and "fees":

Taxation is a legislative function, and Congress, which is the sole organ for levying taxes, may act arbitrarily and disregard benefits bestowed by the Government on a taxpayer and go solely on ability to pay, based on property or income. ***A fee, however, is incident to a voluntary act, e.g., a request that a public agency permit an application to practice law or medicine or construct a house or run a broadcast station. The public agency performing those services normally may exact a fee for a grant which, presumably, bestows a benefit on the applicant, not shared by other members of society. . . . A "fee" connotes a "benefit."***

*Id.* at 340-41 (emphasis added); *see also United States v. City of Huntington*, 999 F.2d 71, 74 (4<sup>th</sup> Cir. 1993) ("User fees are payments given in return for a government-provided benefit. Taxes, on the other hand, are 'enforced contributions for the support of government'"), *cert. denied*, 510 U.S. 1109 (1994) (citing *United States v. La Franca*, 282 U.S. 568, 572 (1931); *City of Vanceburg v. FERC*, 571 F.2d 630, 644 (D.C. Cir. 1977), *cert. denied*, 439 U.S. 818 (1978) (charges for use of dam were "fees" rather than "taxes" because they were "exactd against a license in exchange for a privilege which the licensee has requested or applied for and from which the licensee derives a special benefit").

The Landing Fee is clearly a "fee" because it is imposed "incident to a voluntary act," *e.g.*, the voluntary act of an aircraft landing on the runway at Philadelphia International Airport. In exchange for the benefit (or "privilege") of being able to land the aircraft, the airline is required to pay a "privilege fee." Indeed, the drafters of the Tinicum Ordinance apparently understood this when they labeled the charge a "privilege fee."<sup>18</sup> Of course, the Township provides no *benefit* whatsoever to the airlines because it is the Airport, and not Tinicum, provides, maintains and protects the runways. However, the application and amount of the

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<sup>18</sup>Furthermore, charges linked to use of an airport or airport property are typically deemed to be fees rather than taxes. *See, e.g., Ace Rent-A-Car, Inc. v. Indianapolis Airport Auth.*, 612 N.E.2d 1104, 1108 (Ind. App. 1993) (seven percent fee imposed on car rental companies by airport authority was user fee rather than tax even though the fee was based on revenue; "[a] tax is compulsory and not optional; it entitles the taxpayer to receive nothing in return, other than the rights of government which are enjoyed by all citizens. . . . On the other hand, a user fee is optional and represents a specific charge for the use of publicly-owned or publicly-provided facilities or services."); *A & E Parking v. Detroit Metropolitan Wayne County Airport Auth.*, 723 N.W.2d 223 (Mich. App. 2006) (fees imposed on airport shuttle service providers for access to airport were fees rather than taxes; shuttle service providers were not being forced to pay the fees but could choose, if they wished to avoid the fees, to attempt to obtain business elsewhere).

Landing Fee is clearly tied to the use of the runways by the airlines. In other words the airlines are being charged for a *benefit* they receive, but not one that is being provided by the entity that is imposing the fee.

**II. THE LANDING FEE VIOLATES SUBSECTION 40116(D)(2)(A)(IV) BECAUSE THE FEE IS NOT “WHOLLY UTILIZED FOR AIRPORT OR AERONAUTICAL PURPOSES.”**

Subsection 40116(d)(2)(A)(iv) of the Act provides that:

A State, political subdivision of a State, or authority acting for a State or political subdivision may not do any of the following acts because those acts unreasonably burden and discriminate against interstate commerce . . .

[L]evy or collect a tax, fee, or charge . . . exclusively upon any business located at a commercial service airport or operating as a permittee of such an airport other than a tax, fee, or charge wholly utilized for airport or aeronautical purposes.

49 U.S.C. § 40116(d)(2)(A)(iv). This provision was added by Section 112 to the Federal Aviation Administration Authorization Act of 1994, P.L. 103-305. Section 112 was entitled "Additional Enforcement Against Illegal Diversion of Airport Revenue." The language was added as part of the Conference amendments to H.R. 2739. House Conference Report No. 103-677, 1994 U.S.C.C.A.N. 1715. The legislative history states:

The Conference Substitute also adds a prohibition, effective after date of enactment, against a State or subdivision collecting a new tax, fee, or charge which is imposed exclusively upon any business located at an airport or operating as a permittee of the airport, other than a tax, fee, or charge utilized for airport or aeronautical purposes. This prohibition applies only to new taxes imposed exclusively on businesses located at airports or permittees. It does not apply to general taxes on all businesses, although a state or subdivision would be prohibited from imposing a general tax that purports to apply to all businesses when in reality it applies only to airport businesses." (*Id.* at \*67)

Under the plain language of the statute, airlines operating at an airport fall within the coverage of subsection (d)(2)(A)(iv) because they are unquestionably a "business" located at that airport and/or are "operating as a permittee of such an airport." The fact that the term "business" encompasses more than airlines most certainly does not mean that airlines should be excluded from the protections of subsection 40116(d)(2)(A)(iv). If Congress had intended to exclude airlines within (d)(2)(A)(iv), it could have done so. Clearly it chose not to. The statutory language is not ambiguous. Thus, the revenues derived from any tax, fee or charge that is

imposed exclusively on an air carrier operating at an airport must be "wholly utilized" for that airport or aeronautical purposes relating thereto.<sup>19</sup>

Thus, the only way for the Landing Fee to be sustained despite its discriminatory nature<sup>20</sup> is for the revenues from the Fee to be "wholly utilized for airport or aeronautical purposes." 49 U.S.C. § 40116(d)(2)(A)(iv). However, this is not the case. The Airport, and not Tincum, is responsible for maintaining, patrolling and inspecting the terminals and runways.<sup>21</sup>

The Township also contends that it "must respond to crimes and other emergencies arising at PHL when summoned." Tincum Br. at 3. This argument is illusory. Tincum does not assert, much less provide, evidence that the Tincum Police have ever entered the terminals or runways to respond to a crime or make an arrest. On the other hand, the Philadelphia police department maintains a separate police unit at the Airport, with a total of 152 officers stationed there.

The Township further asserts that it "owns and maintains major roadways and arteries that encircle the Airport as well as those that allow access to the Airport . . ." Tincum Br. at 4. But Tincum nowhere contends (much less establishes) that such roadways are *dedicated* to accessing the Airport. Because the Fee may be applied to maintain roadways that "encircle" and "access" the Airport and are used not only by airport patrons – but also other non-Airport related drivers proceeding through the Township – the Fee is clearly not being "wholly utilized for airport or aeronautical purposes," as the statute mandates. There also is no language in the Ordinance that restricts how the revenues from the Landing Fee are to be utilized. For all these reasons, the Landing Fee violates subsection 40116(d)(2)(A)(iv).

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<sup>19</sup>In *Northwest Airlines, Inc. v. Wisconsin Dep't of Revenue*, *supra*, 293 Wis. 2d 202, 717 N.W.2d 280, the court recognized that sections 40116(b) and (d) reflect Congress' intention to "prevent unfair methods of taxation." *Id.* at 230, 717 N.W.2d at 294. However, the tax at issue in *Northwest Airlines* – which exempted carriers that maintained airport hubs within the state – was not deemed to violate subsection 40116(d) because the alleged discrimination was between airlines, and not between airlines and non-transportation commercial businesses, which is what subsection (d) prohibits. *See Id.* at 225, 717 N.W.2d at 291.

<sup>20</sup>Assuming, *arguendo*, the Fee is a tax, it is discriminatory because it applies only to airlines operating at PHL; it does not apply to all businesses in the Township. Such discrimination against airlines is unlawful. *Western Air Lines, Inc. v. Bd. of Equalization*, 480 U.S. 123, 131-32 (1987).

<sup>21</sup>The Township asserts that "Large portions of the Airport's terminals are located within the borders of Tincum." Tincum Br. at 3 (citing the Map at Ex. B). This is both incorrect and irrelevant. According to Exhibit B, only Terminals A East and A West are within Tincum. By contrast, Terminals B through F are within Philadelphia. In addition the single short runway and most of the North-South runway appear to be in Philadelphia, and not Tincum. But, in any event, the Airport and not Tincum is responsible for the Airport terminals and runways.

**II. THE TINICUM LANDING FEE IS BARRED BY SUBSECTION (e)(2) OF THE ANTI-HEAD TAX ACT.**

Subsection 40116(e) of the Act states as follows:

(e) Other allowable taxes and charges.--Except as provided in subsection (d) of this section, a State or political subdivision of a State may levy or collect—

(1) taxes (except those taxes enumerated in subsection (b) of this section), including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services; and

(2) reasonable rental charges, landing fees, and other service charges from aircraft operators for using airport facilities of an airport owned or operated by that State or subdivision.

49 U.S.C. § 40116(e). This provision is essentially a savings clause to permit taxes not otherwise prohibited in paragraphs (b) and (d), and to permit airport owners or operators to charge reasonable landing fees. This language evidences Congress' clear intention that airport "landing fees" must be tied to the carriers' "use" of "airport facilities of an airport owned or operated by" the State or subdivision that is charging the fees.

Because the Tincum Landing Fee is a "landing fee" rather than a "tax," it is expressly barred by 49 U.S.C. § 40116(e)(2). Subsection (e)(2) permits "reasonable rental charges, landing fees, and other service charges from aircraft operators for *using airport facilities of an airport owned or operated by that State or subdivision.*" (Emphasis added). Given the undisputed fact that Tincum neither owns nor operates the Philadelphia International Airport, its Landing Fee violates subsection 40116(e)(2).

**CONCLUSION**

Landing fees are the prerogative of airport sponsors. A political subdivision that neither owns nor operates an airport cannot require carriers to pay money to the town in order to land aircraft at that airport, even if part of the airport lies within its borders. The Anti-Head Tax Act allows states and towns to levy only certain taxes on carriers. *See* 49 U.S.C. § 40116(e)(1) ("property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services"). But nothing in the Act – including the limitation provision of subsection 40116(c) – authorizes a municipal government that neither owns nor operates an airport from imposing a landing fee on an airline, at least where, as here, the revenue is not "wholly utilized for airport or aeronautical purposes." 49 U.S.C. 40116(d)(2)(A)(iv).

The Honorable Andrew B. Steinberg  
September 24, 2007  
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There is no precedent for what Tinicum is attempting to do to the airlines at Philadelphia International Airport. If Tinicum is successful and allowed to impose its "privilege fee," it will create a model for cities and towns across the United States to raise revenue on the backs of airlines and their customers. There is no telling how much financial damage will be inflicted on airlines, but the precedent it would set would be disastrous. If permitted to stand, Tinicum's Landing Fee, and others that will surely follow at other airports around the country, will irreparably harm the national air transportation system and impede the free flow of interstate commerce. The Department should act quickly and forcefully exercise its pre-eminent authority to ensure that these unacceptable consequences never occur.

For the reasons set forth above, ATA and ACAA, on behalf of their member airlines, respectfully request that the DOT grant this Petition for Declaratory Order and rule that the Tinicum Landing Fee is preempted and prohibited by the Anti-Head Tax Act.

Sincerely,

Air Transport Association of America, Inc.

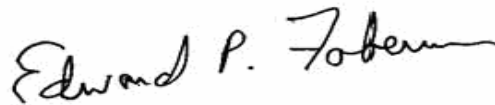


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