

DEPARTMENT OF TRANSPORTATION

HARBORS DIVISION

STATE OF HAWAII

HARBORS DIVISION

16 SEP 28 P5:32

In re the Matter of:)	FINDINGS OF FACT AND
)	CONCLUSIONS OF LAW,
)	DECISION AND ORDER;
FRIENDS OF FALLS OF CLYDE AND)	CERTIFICATE OF SERVICE
VESSEL FALLS OF CLYDE)	
)	
)	
)	
Petitioner)	Hearing Date: August 24, 2016
)	Time: 10:00 a.m.
)	Hearings Officer: Keith Y. Tanaka
)	
)	

**FINDINGS OF FACT AND CONCLUSIONS OF LAW,
DECISION AND ORDER**

FINDINGS OF FACT

1. The vessel Falls of Clyde (Vessel), a National Historic Landmark, has been moored at Pier 7 Honolulu Harbor pursuant to Revocable Permit No. H-09-2645 (Permit) issued by the Harbors Division of the State of Hawaii's Department of Transportation (State) to The Friends of Falls of Clyde (Petitioner) on April 30, 2009.

2. The Permit encompasses approximately 42,867 square feet of submerged lands with the specific purpose of restoring the Vessel on the water column. No rent is being charged.

3. The Permit was granted on a month-to-month basis and was subject to termination by either party, without cause, upon thirty days' advance written notice.

4. On May 16, 2016, the State notified the Petitioner via certified mail that the permit would be terminated effective June 15, 2016 due to (a) Petitioner's continued failure to assure the State that Petitioner could satisfactorily meet the financial commitments required for the restoration and maintenance of the Vessel and (b) the need to repair unsafe conditions at Pier 7 itself. This notice ordered the Petitioner to remove the Vessel from Pier 7 by July 15, 2016.

5. Since the Vessel continued to remain at Pier 7 without a permit, on August 10, 2016, the State served Petitioner with a Notice of Illegal Mooring and a Notice to Remove Vessel. These notices stated that the Petitioner had 72 hours to comply with the terms set forth therein. As such, the Petitioner was under the obligation to remove the Vessel and was aware that the failure to do so would result in the impoundment of the Vessel.

6. Since the Petitioner did not remove the Vessel from Pier 7, the State began the impoundment process on August 13, 2016. A Notice of Impoundment was sent to and received by the Petitioner and was also posted on the Vessel. The Notice of Impoundment provided the Petitioner the right to request an administrative hearing to contest

the impoundment, and Petitioner exercised this option on August 16, 2016.

7. On August 24, 2016, an administrative hearing was duly and properly held, solely for the limited purpose of allowing the Petitioner to contest the State's basis for the impoundment of the Vessel. The hearing afforded the parties an opportunity to call witnesses and to introduce relevant evidence regarding the impoundment of the Vessel.

8. The State defends the validity of the impoundment on the grounds that the Vessel's permit for Pier 7 could be terminated without cause; that the Vessel's permit was terminated on June 15, 2016; and that inasmuch as the Vessel did not have a permit, it was subject to impoundment. Moreover, it is uncontroverted that the State followed all the regulatory procedures for terminating the permit and impounding the Vessel.

9. The Petitioner argues that the State's termination of the Vessel's permit and subsequent impoundment is arbitrary and capricious and not in good faith. However, the evidence submitted shows that the State's decision to terminate the permit and impound the Vessel was not made on a whim. Indeed, the State continually communicated and met with the Petitioner in an effort to resolve the State's long-standing concerns regarding safety issues, the Vessel's seaworthiness, and the need to repair portions of Pier 7. Ostensibly, since the Petitioner could not satisfy the State that it

had the means and capability of addressing the State's concerns in a timely manner, the State acted to terminate the Vessel's permit. An unfavorable decision by the State is not in and of itself an arbitrary and capricious exercise of the State's discretion, especially where there is a legitimate interest in protecting public safety.

10. The Petitioner further argues that as an "historic property" and National Historic Landmark, the Vessel is entitled to certain protections under state (Chapter 6E, HRS) and federal laws (Section 106 of the National Historic Preservation Act of 1966). The issues here raised by the Petitioner are at this time premature and outside the scope of this impoundment hearing. Neither of the laws in question has provisions or requirements that are imposed by the subject permit termination and Vessel impoundment. At this point of the proceedings, there is no "project" by the State that requires review by another agency. Indeed, the purpose of the impoundment hearing is narrowly limited to only affording the Petitioner a hearing to contest the basis given by the State for the impoundment.

CONCLUSIONS OF LAW

1. As of July 16, 2016, the Vessel has been moored at Pier 7 without a required permit.

2. An illegally moored vessel is deemed an unauthorized vessel and is subject to impoundment. Section 266-27 HRS and Section 19-42-56 HAR.

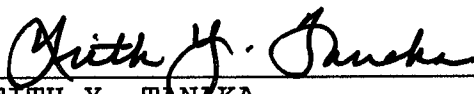
3. Pursuant to Section 91-10 HRS, Petitioner has the burden of proving by a preponderance of evidence that the impoundment of the Vessel was not conducted in accordance with Section 266-27 HRS and Section 19-42-56 HAR (i.e. that the State did not have a valid basis for impounding the Vessel).

4. Petitioner failed to prove by a preponderance of the evidence that the basis for the State's impoundment of the Vessel was wrongful and not in accordance with law.

DECISION AND ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, the Hearings Officer finds that the impoundment of the vessel Falls of Clyde on August 13, 2016, was done in accordance with applicable statutes and administrative rules, and upholds the State's impoundment of the vessel Falls of Clyde.

DATED: Honolulu, Hawaii, September 27, 2016.



KEITH Y. TANAKA
Hearings Officer