

State of Hawaii
DEPARTMENT OF LAND AND NATURAL RESOURCES
Division of Boating and Ocean Recreation
333 Queen Street
Honolulu, Hawaii 96813

February 25, 2011

Board of Land and Natural Resources
State of Hawaii
Honolulu, HI

PETITION OF SEABIRD CRUISES, INC. FOR WAIVER OF MINIMUM GROSS RECEIPTS REQUIREMENT FOR REISSUANCE OF COMMERCIAL USE PERMIT FOR MAALAEA SMALL BOAT HARBOR, MAUI.

REMARKS:

Seabird Cruises, Inc. (Seabird) holds a Vessel Moored Elsewhere (VME) commercial use permit for the purpose of conducting commercial tours from Maalaea small boat harbor (SBH) on Maui. Seabird submitted a timely application in January of 2010 for renewal of the VME permit. The Maui district manager determined, however, that Seabird did not qualify for renewal because its gross receipts for 2009 did not meet the minimum required by the Hawaii Administrative Rules (HAR).

HAR §13-231-61(1) allows the department to renew a commercial permit so long as the gross receipts during the twelve-month period under the commercial permit for which reissuance is requested equals or exceeds \$85,000 where the permit is for a vessel such as Seabird's Maui Nui Explorer that is certified by the U.S. Coast Guard to carry forty-nine passengers. Section 13-231-61(2) authorizes the department to excuse insufficient gross receipts if the permittee applies to the department in writing for reissuance and demonstrates conditions and circumstances "wherein a reissuance of the permittee's commercial permit would be fair and warranted."

HAR §13-231-62(b)(2)(C), states in part, "A commercial permit issued to a corporation or other business entity shall automatically expire: (C) If the permittee fails to operate the vessel for which the commercial permit is issued for a period in excess of sixty days, except as provided in section 13-231-61(a)(2), and except when the permittee provides advance notification to the department in writing that operations will be temporarily suspended for a specific period not to exceed four months.

Seabird has held a VME permit for Maalaea Harbor for years. In January 2008, the permit was renewed for a one year term expiring January 31, 2009. On October 8, 2008, a Maalaea harbor agent wrote Seabird that if it "wish[ed] to retain your Commercial Permit, please apply for reissuance before the expiration date, and meet the requirement for a Commercial Permit as set forth in section (sic) 13-256 of the Hawaii Administrative Rules." The form of the

letter was unique to Maalaea Harbor and was accompanied by a renewal application. The letter did not indicate any question concerning Seabird's eligibility for renewal. The letter lists several items that were to accompany the application, including a certificate of liability insurance showing the department as an additional insured.

On November 18, 2008, the Manele harbor agent, using a different form, wrote Seabird that if it "wish[ed] to retain your Commercial Permit and Mooring Permit, please apply for reissuance before the expiration date [January 29, 2009], and meet the requirement for a Commercial Permit as set forth in Section 13-231-61(1) or Section 13-231-61(2) of the Small Boat Harbor Rules and Regulations."

The Manele reminder letter noted that "Section 13-231-61(2) sets forth conditions under which a Commercial Permit maybe (sic) reissued if total gross receipts are not attained. Acceptable evidence must be presented to support failure to generate required gross receipts for operations." The letter indicated Seabird in 2008 met the minimum gross receipts requirement for reissuance.

In November 2008, a Maalaea harbor agent informed Kathy Loui-Yasui (Loui) that Seabird should discontinue its longstanding practice of reporting on a consolidated basis gross receipts earned under its commercial permits for Maalaea, Manele, and Lahaina Small Boat Harbors. Ms. Loui responded by email on November 18, 2008 that Seabird would begin doing so "when you would like [Seabird] to switch the reporting format." She noted that as of September 2008 Seabird's gross receipts under the three commercial permits, approximately \$560,000, was more than twice the minimum required for renewal.

On November 12, 2008, Seabird completed the permit application form that accompanied the Maalaea reminder letter. Delivery of the completed application was acknowledged on December 19, 2008. Accompanying the application was a lease of Maui Nui Explorer (then owned by Big Rib I, Ltd., an affiliated corporation) and an agreement for the management of the vessel's operation. That day, the same Maalaea harbor agent issued Seabird Commercial Permit No. 2 VME - Maalaea, endorsed "Renewal." The permit referenced the Big Rib I lease and a management agreement, and the dates each was to expire. The term of the renewed permit was from February 1, 2009 to January 31, 2010.

In February, Seabird began reporting separately gross receipts earned under the Maalaea VME permit. The effects of the Great Recession continued to buffet Seabird's operations, particularly from Maalaea Harbor. Other, larger operators offered cuts in prices Seabird could not match. By July 2009 Seabird's earnings had dropped to zero despite continued promotion of excursions from the harbor. Seabird continued to pay the \$200 monthly minimum use fee but standing alone its gross receipts under the Maalaea permit fell short of the annual amount required for renewal. Seabird's combined gross receipts under its three permits in 2009 exceeded \$500,000 - - twice the minimum for three permits - - while earnings under the Maalaea VME permit alone fell to \$26,212.

On November 18, 2009, the Manele harbor agent wrote Seabird that its VME permit for that harbor would expire January 29, 2010. The form of the Manele reminder letter was the

same as in 2008. Lahaina harbor agents that year used the same form and also confirmed that Seabird met the minimum gross receipts requirement.

On January 11, 2009, Seabird received by email a reminder from a Maalaea harbor agent of the expiration of the VME permit on January 31, 2009. The email requested the renewal "paperwork." The email did not indicate any issue concerning Seabird's earnings under the Maalaea permit. In response, on January 12, 2010, Kathy Loui emailed a completed renewal application.

On January 18, Ms. Loui telephoned the Maalaea harbor agent and was told for the first time that the district manager would not allow renewal because Seabird's gross earnings fell short of the minimum. She was advised to send a letter explaining Seabird's inability - - at Maalaea - - to meet the threshold amount. Ms. Loui attempted to reach the district manager that day and the next but did not receive a call back.

On January 20, Ms. Loui emailed a letter dated January 18 detailing circumstances that amply justify renewal of the permit. A copy of the letter is attached as Exhibit A. She cited economic conditions, fierce competition and limitations on the passenger capacity of Maui Nui Explorer. The letter concluded:

Principally because of the depressed economic climate and tourism industry, as well as the additional factors outlined above, Seabird has been unable to generate sustained operations which could produce the minimum revenue of \$85,000 per year for the VME permit. Consequently, Seabird requests a waiver of the revenue minimum on its VME permit until the economy and local Maui tourism industry returns to normal numbers and operations; or for at least this current 2010. Under current economic conditions many boating companies have failed during the last two years; however, Seabird continues its operation, admittedly at reduced levels, but, nonetheless as a viable boating company contributing its fair share of harbors tax for its combined Maui operations and its GET revenues to the State of Hawaii. We appreciate your favorable consideration of this request and waiver.

She telephoned a Maalaea harbor agent to report sending the letter.

On January 22, Ms. Loui telephoned the Maui district manager and mailed him the original of the January 18 letter and sent another copy by email.

On January 26, the Maui district manager advised another Seabird representative that he could not renew the permit. On January 27, Ms. Loui left a telephonic message with the Maui district manager requesting a meeting.

On January 28, Ms. Loui flew to Maui and personally delivered a hard copy of the permit renewal package to the Maui district office. She asked to see the district manager but was told he was unavailable. The clerk date stamped the renewal package and Ms. Loui then drove to Maalaea Harbor hoping to find the district manager

Within days of the expiration of the permit, Ms. Loui finally spoke with the Maui district manager who confirmed his receipt of the application package and letter justifying an exception to the gross receipts requirement. He replied that he could not authorize renewal of the permit. Ms. Loui requested a written response but nothing was received for nearly twelve months. The reason for this is that Ms. Loui was informed verbally that the permit could not be renewed because Seabird did not meet the minimum gross receipts requirement and the district manager and Maalaea harbor agent both thought the other had sent the written response.

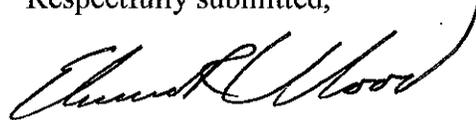
Ms. Loui had several telephone conversations with the Maui district manager and Administrator of DOBOR regarding this permit and by letter dated December 21, 2010, the Maui district manager confirmed the reasons for the denial of renewal. The district manager also indicated that he and other harbor agents should not have renewed the permit in 2007, 2008 and 2009, because Seabird did not meet "the minimum yearly gross income requirements" and its vessel "was not seen operating from Maalaea harbor" during those years, allegations Seabird has denied.

Seabird applied anew for a VME permit last month. The application names a recently completed vessel which Seabird has leased to replace Maui Nui Explorer. Seabird expresses confidence that the new boat together with improved economic conditions will allow it to earn the minimum gross receipts going forward.

RECOMMENDATIONS: That the Board:

1. Determine whether reissuance of a commercial permit for Maalaea Harbor for a vessel moored elsewhere for a one year term to Seabird Cruises, Inc., is justified according to the circumstances that have been outlined in this submittal.
2. Delegate authority to the Chairperson to determine when reissuance of a permittee's commercial permit would be fair and warranted according to HAR §13-231-61.

Respectfully submitted,



Edward R. Underwood
Administrator

APPROVED FOR SUBMITTAL



William J. Aila, Jr.
Chairperson and Member

SEABIRD CRUISES, INC.

January 18, 2010

Mr. Nicholas Glaconi, Maui District Manager
State of Hawaii Department of Land and Natural Resources
Division of Boating and Ocean Recreation
101 Maalaea Boat Harbor Road
Wailuku, Hawaii 96793

Re: Seabird Cruises, Inc., Ma'alaea Harbor VME #2 VME
Molokini Permit #36

Dear Nic,

Seabird Cruises, Inc. ("Seabird") is the holder of the above captioned two permits for commercial boat operations. The decline in tourist travel over the last two years has adversely impacted all commercial boating companies in Maui including Seabird. Seabird's gross revenues are off over 25% in just the last year 2009. As you are aware, the tourism industry throughout the State of Hawaii has suffered greatly with both the reduced tourist visitor counts and reduced spending by those visitors who do come to our state. The activity providers have been greatly impacted, and especially boating companies have been hard hit.

Given the current depressed economic conditions, Seabird has not been able to operate profitably especially with regard to excursions from Ma'alaea Harbor. Competition is very fierce, and profit margins are extremely slim because of very competitive and deep pricing discounts amongst the several dozen boating companies all trying to attract a reduced number of tourist passengers. The large boat operators can substantially reduce the ticket prices of their excursions in order to undercut the market in an attempt to get the most bodies on their boat -- this is especially true of the dozen or so large power catamaran operators with 149 passenger capacity.

Seabird's vessel has a COI of 49 passengers but in reality can carry only 36 to 38 passengers on a snorkel excursion. We are further limited to only a maximum one snorkel excursion per day (assuming ticket demand is there for that trip) because of the weather, wind and sea conditions operating from Ma'alaea Harbor. Our operations are also complicated by the fact that as a VME permittee, we do not have an in-harbor slip and are

EXHIBIT A

moored in the Lahaina roadstead for safety and insurance purposes. Thus, we are faced with longer operational run time and operating expenses.

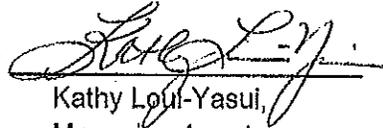
Principally because of the depressed economic climate and tourism industry, as well as the additional factors outlined above, Seabird has been unable to generate sustained operations which could produce the minimum revenue of \$85,000 per year for the VME permit. Consequently, Seabird requests a waiver of the revenue minimum on its VME permit until the economy and local Maui tourism industry returns to normal numbers and operations; or for at least for this current year 2010. Under current economic conditions many boating companies have failed during the last two years; however, Seabird continues its operations, admittedly at reduced levels, but, nonetheless as a viable boating company contributing its fair share of harbors tax for its combined Maui operations and its GET revenues to the State of Hawaii. We appreciate your favorable consideration of this request and waiver.

If you have any questions, please do not hesitate to contact me.

Very truly yours,

SEABIRD CRUISES, INC.

By:


Kathy Loui-Yasui,
Managing Agent

Cc: Stacy Masuda, Maalaea Harbor Agent
Miles Lopez, Maalaea Harbor Agent