

ALASKA ABANDONED/DERELICT VESSEL TASK FORCE

VESSEL IMPOUNDMENT RESOURCES



DEALING WITH DERELICT VESSELS



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INTRODUCTION

The following is a brief synopsis of the impoundment of derelict and abandoned vessels under Alaska law. In addition to this synopsis, we have also prepared demonstrative forms regarding the impoundment process. These forms are intended only to demonstrate a typical course of action that comports with the requirements of state and federal law. These forms do not incorporate local laws, which often expand on the requirements under state and federal law. Every municipality facing the impoundment process should ensure that all notices and orders issued by it comply with all relevant laws and should consult with the municipal attorney, if practicable. This collection of resources is intended only to provide an overview of the impoundment process; it does not constitute legal advice or counsel as to any particular entity or situation.

ABOUT THE AUTHORS

The State of Alaska Abandoned and Derelict Vessel Task Force includes representatives from federal, state, and local agencies, and works to promote optimal response to derelict and abandoned vessels in Alaska waters.

Birch, Horton, Bittner, and Cherot is an Anchorage law firm assisting the Derelict Vessel Task Force with legal issues that arise surrounding the impoundment of derelict and abandoned vessels. Our firm has represented several communities in matters involving port and harbor operations, impoundment and sale of abandoned and derelict vessels, and revisions to local maritime laws.

IMPOUNDMENT AND REMOVAL OF VESSELS

Alaska is home to thousands of small vessels along its coast, both commercial and private. These vessels are often moored in the boat harbors of small coastal communities organized under municipal codes. The municipal codes typically contain provisions empowering the community to seize and dispose of vessels that have been abandoned by their owners or present a risk to the public because of their condition. Many of these communities, however, have not adopted relevant municipal code provisions. Fortunately, the State of Alaska has adopted the State of Alaska Abandoned and Derelict Vessel Act ("Act"), which was recently amended to permit all municipalities to impound and dispose of derelict and abandoned vessels so long as certain conditions are met and procedures followed. See Chapter 30.30 of the Alaska Statutes.

Municipal codes usually differentiate between "abandoned vessels," which are vessels that are simply left unattended and unclaimed, and "nuisance vessels" or derelict vessels. Vessels posing a nuisance or declared "derelict" are generally not adequately maintained and in some cases may even present an imminent danger to the public. Many municipalities also identify vessels where the moorage fees for the vessel are delinquent as either derelicts or nuisances.

Regardless of the label given a particular vessel, the condition of the vessel and the imminence of the harm it poses directly impacts the impoundment process required under state and federal laws. This is also true of most municipal laws. The following is a very basic summary of the impoundment process as outlined under Alaska's

Abandoned and Derelict Vessel Act. Municipalities often supplement the impoundment and sale processes under the Act with greater notice and more opportunity for hearings. Consequently, this summary may not reflect the full process adopted in any given municipality. If, however, the process adopted provides less notice or fewer hearings than raised here, it may be helpful to review the Act and confirm that the municipal code remains in compliance.

Summary of the Impoundment Process

A common case of an abandoned vessel encountered by municipal harbors is a boat moored at the harbor for which the owner has failed to pay moorage fees or other related costs. At first, the municipality will typically deliver notices of overdue moorage without taking action. Eventually, the municipality will send notice to the owner that if the owner does not pay all overdue fees or remove the vessel within a set number of days, the municipality will take measures to impound the vessel. The number of days given to the owner will depend on harbor policy.

Once the deadline set by the letter passes, a new period of thirty days begins. State law provides that if a vessel is left in a municipal harbor without the permission of the municipality for more than 30 days then the municipality may begin the impoundment process.

At the end of 30 days the municipality prepares a "Notice of Impoundment." This Notice contains a brief description of the vessel, the location of the vessel, the last known owner, the Coast Guard Vessel Registry number, and what the municipality intends to do with the vessel in 20 days following the impoundment. State law requires

a minimum period of 20 days between the Notice of Impoundment and the vessel's disposal. The fate of an impounded vessel is discussed below.

The municipality posts a copy of the Notice of Impoundment on the vessel. That same day, the municipality mails the Notice to the last known owner at his or her last known address via certified mail. The municipality also mails copies to any known lienholders. In some municipalities, the code also requires that the municipality place copies of the Notice in public places. Code provisions requiring additional postings of notices are generally adopted to ensure compliance with due process requirements under the State of Alaska and United States constitutions.

The due process provisions of the United States and Alaska constitutions require that a vessel owner be given notice of impoundment and an opportunity for a hearing. See 14th Amendment of the U.S. Constitution; art. 1, Section 7 of the Alaska Constitution; See also *Nolt v. Isadore, et. al.*, 590 F.Supp. 518 (D.Alaska 1984). Not only do state and federal law require adequate notice of the impoundment, they also require that the municipality give the vessel owner an opportunity to request a hearing.

A municipality may need to quickly remove a vessel because it poses an immediate clear and present danger to the community. See generally *Nolt*, 590 F.Supp. 518, 522-523. Here again an opportunity for a hearing is constitutionally required. However, the urgency of the situation permits the municipality to impound the vessel first, and offer the vessel owner a post-impoundment hearing after doing so. Whatever the circumstances, the owner must timely request the hearing after receiving the Notice of Impoundment; otherwise the right to a hearing is waived.

If a hearing is requested, a hearing officer appointed under the code will review the evidence presented by the municipality and the owner (both written and oral) and then make a written decision on whether to proceed with impoundment. If the hearing officer determines that the municipality has probable cause to impound, then he or she will issue a "Certificate of Probable Cause to Impound Vessel." The municipality cannot dispose of the vessel without this Certificate.

What happens next depends on the code and the value of the vessel. State law requires that a municipality must sell the vessel at auction if an independent appraiser (who must be hired by the municipality) determines that the vessel is worth more than \$100. The auction itself will follow a procedure described in the code, which often includes advance notice to the public through newspaper advertisement.

Nuisance vessels are a special case. State law calls them "derelict" vessels. They are vessels left unattended for more than 24 hours and are sinking, in immediate danger of sinking, are obstructing the waterway, or are endangering life or property. Municipalities may impound these vessels immediately. The municipality attaches to the vessel an Order of Impoundment. The municipality also attaches a Notice of Impoundment to the vessel and mails a copy of the Notice to the owner and all lienholders. The Notice is also published in the local newspaper. As discussed above, this Notice entitles the owner to a post-impoundment hearing.

The municipality can dispose of a nuisance vessel however necessary immediately upon impoundment, including destruction of the vessel. If the owner requests a hearing and the hearing officer finds that the vessel was wrongly destroyed, the owner will be reimbursed his or her loss under the code.

APPENDIX

SAMPLE

NOTICE OF IMPOUNDMENT (ABANDONED OR DERELICT VESSEL)

TO: Joe Hornblower
45 Seaside Lane
Mattaposett, MA 02739

NAME OF VESSEL: M/V Rubber Ducky
Official No. 702581

DESCRIPTION OF VESSEL: (type, propulsion, length, color, manufacturer)

VESSEL LOCATION: (Name of Municipal Harbor)

LAST KNOWN
ADDRESS OF OWNER: 45 Seaside Lane
Mattaposett, MA 02739

The vessel *Rubber Ducky* will be impounded by (the Harbormaster) on _____ as a
derelict and/or abandoned vessel for the following reasons:

In the event that the owner of the *Rubber Ducky* does not take possession of the vessel within
thirty (30) days of this Notice, the *Rubber Ducky* will be disposed of by the City as follows:

As the owner of the vessel you are entitled to a pre-impoundment administrative hearing before a
hearing officer to determine whether there is probable cause to impound the vessel. To request such a
hearing, you must submit a written demand to the City within ten (10) days after: (a) you learned that your
vessel would be impounded, or (b) the return of the certified mail receipt, whichever occurs first. If you fail
to timely request or attend a scheduled pre-impoundment hearing, you will waive your right to such
hearing. To request a hearing, fill out the enclosed form and file it with the City Clerk at (City address),

If timely requested, the hearing must be held within forty-eight (48) hours after the filing of your
written demand, not including Saturdays, Sundays, and City holidays. In the event the hearing officer
determines there is probable cause to impound the vessel, the hearing officer will prepare and date a
Certificate of Probable Cause, copies of which will be given to you and to the Harbormaster. Upon receipt
of such a Certificate, the Harbormaster may proceed with impoundment and disposition of the vessel by
removal, sale, or destruction as authorized by the City Code.

This Notice has been posted on the *Rubber Ducky* at the Harbor, in the Harbormaster's office, at
the City Clerk's office, and on the bulletin board at the entrance to the U.S. Post Office. It has been
delivered by certified mail to the last known owner of the *Rubber Ducky*, and all known lienholders.

DATED at (City), Alaska, this _____ day of _____, 20__.

CITY OF

SAMPLE

By: _____
Its: City Manager

SAMPLE

REQUEST FOR POST-IMPOUNDMENT HEARING RE:
[insert name of Vessel and Registration Number]

TO: City Manager
City
Street
City, AK 99____

I hereby request a post-impoundment hearing in order to present evidence on whether the City of ("City") had sufficient factual and legal basis to impound the vessel _____. I understand the City must receive this demand on a business day prior to _____, 20____. I understand a hearing will be conducted within **48 hours** (not including Saturdays, Sundays, and City holidays) of the City's receipt of this demand (if it is timely) unless I waive the right to a speedy hearing.

_____ I do not waive my right to a speedy hearing.

_____ I waive my right to a speedy hearing. I request that the hearing be held _____, 20____. Specify a date not more than five days after _____, 20____.

Signature: _____

Print the following information:

Name: _____

Company: _____

Address: _____

Telephone: _____

Date: _____

For City Use Only:

Date Received: _____

Time Received: _____

Initials: _____

SAMPLE

SAMPLE

CITY OF _____
HEARING ON IMPOUNDMENT OF VESSEL

Hearing Officer's Script

1. CALL TO ORDER

This is the time for the hearing on the impoundment of the vessel _____. I am _____, _____ for the City of _____. The City Manager has appointed me to act as hearing officer for this hearing. Also present with me is _____, the City Clerk, who will administer oaths to those who testify, and make a recording of the hearing.

I have before me a copy of the Notice of Impoundment dated _____, and a request for a pre-impoundment hearing from (the vessel owner).

2. PRESENTATION OF EVIDENCE

Will the parties attending the hearing please identify themselves for the record?

All parties identify themselves.

The purpose of this hearing is to determine whether there is/was probable cause to impound the vessel _____. The Harbormaster bears the burden of proving that there is/was probable cause to impound. (The owner) has the burden of proving that he has the right to possession of the vessel. The Harbormaster will first present his case for probable cause to impound. (The Owner) will then have an opportunity to respond and present evidence of his right to possession of the vessel.

(Harbormaster), please present your evidence in support of impoundment.

The Harbormaster's witnesses are sworn and each gives a brief statement. The Harbormaster submits to the Hearing Officer any documents or other materials he wishes to present as evidence.

(Vessel owner), please present your evidence in opposition to impoundment, and regarding your right to possession of the vessel.

The vessel owner's witnesses are sworn and each gives a brief statement. The vessel owner submits to the Hearing Officer any documents or other materials he wishes to present as evidence.

Does either party have anything further to present at this time?

3. ADJOURNMENT

This concludes the hearing. As provided in City Code _____, I will prepare and distribute to the parties my written decision.

SAMPLE

SAMPLE

CERTIFICATE OF PROBABLE CAUSE TO IMPOUND VESSEL

The undersigned Hearing Officer certifies as follows pursuant to City Code

_____;

1. I have been duly designated by the City Manager of the City of _____ ("City") as hearing officer with regard to the impoundment of the vessel _____ ("Vessel") under (applicable city code).

2. By Notice of Impoundment dated _____, the City notified _____, the owner of the Vessel, of the City's intent to impound the Vessel on _____ for the following reasons:

_____.

3. At (the owner's) request, a hearing to determine whether there is probable cause to impound the vessel was convened at _____, 20____, at _____. The City was represented at the hearing by _____. (The owner) appeared telephonically on his own behalf.

4. At the hearing, I observed the following: (brief description)

_____.

5. Based on the foregoing, I conclude that there is probable cause for the City to impound the Vessel under _____. The City may proceed with the impoundment and disposition of the Vessel as provided in _____.

6. This is the final decision of the Hearing Officer in this matter. An appeal may be taken directly to the Superior Court for the State of Alaska by any party to this matter and shall be filed within thirty days of the date of distribution of this decision. The notice of appeal shall conform to the applicable requirements of the Rules of Appellate Procedure promulgated by the Alaska Supreme Court.

DATED this _____, 20____.

_____, Hearing Officer

SAMPLE

SAMPLE

CERTIFICATE OF DISTRIBUTION

I certify that a copy of this Decision was sent by first class mail to (the Owner and the Harbormaster) on _____, 20____.

_____, City Clerk

SAMPLE

SAMPLE

ORDER OF IMPOUNDMENT OF NUISANCE VESSEL

Pursuant to City Code _____, the Harbormaster of the Port and Harbor of _____ has determined that the vessel _____ is a nuisance that poses a clear and present danger to the public health, safety, or general welfare of the City. The vessel is a nuisance because

Attached to this Order of Impoundment is a Notice of Impoundment of Nuisance Vessel, which has been sent, together with a copy of this Order, to the vessel's owner of record.

CITY OF _____
PORT AND HARBOR

Date

City Harbormaster

SAMPLE

SAMPLE

NOTICE OF IMPOUNDMENT (NUISANCE VESSEL)

TO: Joe Hornblower
45 Seaside Lane
Mattaposett, MA 02739

NAME OF VESSEL: M/V Rubber Ducky
Official No. 702581

DESCRIPTION OF VESSEL: (type, propulsion, length, color, manufacturer)

VESSEL LOCATION: (Name of Municipal Harbor)

**LAST KNOWN
ADDRESS OF OWNER:** 45 Seaside Lane
Mattaposett, MA 02739

The vessel *Rubber Ducky* has been impounded by the City and Borough of _____, because it is a nuisance under (City Code). The vessel is deemed a public nuisance for the following reasons:

The current disposition of the vessel is _____.

As the owner of the vessel you are entitled to a post-impoundment administrative hearing before a hearing officer to determine whether there was probable cause for the City to impound the vessel. To request such a hearing, you must submit a written demand to the City within ten (10) days after the date of mailing of this notice, pursuant to (City Code). If you fail to timely request or attend a scheduled post-impoundment hearing, you will waive your right to such hearing. See (City Code). To request a hearing, fill out the enclosed form and file it with the Municipal Clerk at (City), (address), between 8:00 a.m. and 5:00 p.m. on any day other than Saturday, Sunday, and City holidays.

If timely requested, the hearing must be held within forty-eight (48) hours after the filing of your written demand, not including Saturdays, Sundays, and City holidays unless you waive your right to a speedy hearing. In the event the hearing officer determines there was probable cause to impound the vessel, the hearing officer will prepare and date a Certificate of Probable Cause, copies of which will be given to you and to the Harbormaster.

This Notice has been posted on the vessel, in the Harbormaster's office, in the (Newspaper), the Municipal Clerk's office, and on the bulletin board at the entrance to the U.S. Post Office. It has been delivered by certified mail to the last known address of the *Rubber Ducky*, and all known lienholders.

DATED at City, Alaska, this _____ day of _____, 20__.

CITY AND BOROUGH OF _____

SAMPLE

By: _____
Its: City Administrator

SAMPLE

REQUEST FOR PRE-IMPOUNDMENT HEARING RE:
[insert name of Vessel and Registration Number]

TO: City Manager
City
Street
City, AK 99____

I hereby request a pre-impoundment hearing in order to present evidence on whether the City of ("City") has sufficient factual and legal basis to impound the vessel _____. I understand the City must receive this demand on a business day prior to _____, 20____. I understand a hearing will be conducted within **48 hours** (not including Saturdays, Sundays, and City holidays) of the City's receipt of this demand (if it is timely) unless I waive the right to a speedy hearing.

_____ I do not waive my right to a speedy hearing.

_____ I waive my right to a speedy hearing. I request that the hearing be held _____, 20____. Specify a date not more than five days after _____, 20____.

Signature: _____

Print the following information:

Name: _____

Company: _____

Address: _____

Telephone: _____

Date: _____

For City Use Only:

Date Received: _____

Time Received: _____

Initials: _____

SAMPLE

Alaska Statutes

Article 02. DERELICT VESSELS

Sec. 30.30.090. Derelict vessel. A vessel that has been left unattended for more than 24 consecutive hours is a derelict if

(1) the vessel is sunk or in immediate danger of sinking, is obstructing a waterway, or is endangering life or property; or

(2) the vessel has been moored or otherwise left in the waters of the state or on public property contrary to law or regulations adopted by a state agency or municipality or the vessel has been left on private property without authorization of the owner or occupant of the property, and if

(A) the vessel's certificate of number or marine document has expired and the registered owner no longer resides at the address listed in the vessel registration or marine document records of a state agency or the United States Coast Guard;

(B) the last registered owner of record disclaims ownership and the current owner's name or address cannot be determined;

(C) the vessel identification numbers and other means of identification have been obliterated or removed in a manner that nullifies or precludes efforts to locate or identify the owner; or

(D) the vessel registration records of a state agency and the marine document records of the United States Coast Guard contain no record that the vessel ever has been registered or documented, and the owner's name or address cannot be determined.

Sec. 30.30.100. Disposition of derelict vessel. (a) A state agency, municipality, or peace officer may take or cause a derelict vessel to be taken into custody immediately. Upon taking custody of a derelict vessel, the state agency or municipality shall concurrently

(1) publish a notice of intended disposition once in a newspaper of general circulation;

(2) when possible, post a notice of intended disposition on the vessel; and

(3) serve a duplicate of the notice of intended disposition by certified mail, with a return receipt, on

(A) the registered owner of the vessel, if known, at the registered owner's last known address or the address on record with a state agency or the United States Coast Guard; and

(B) all lienholders who have filed a financing statement indexed in the name of the registered owner or who are shown on the records of a

state agency or the United States Coast Guard.

(b) If the vessel is not repossessed within 20 days after the publication or mailing of the notice, whichever occurs later, the vessel may be disposed of by negotiated sale except that when two or more prospective purchasers indicate an interest in purchasing the vessel the vessel will be sold at public auction to the highest bidder in the same manner prescribed under AS 30.30.050.

(c) If no prospective purchaser indicates a desire to purchase the vessel, the vessel may be disposed of as junk, donated to a governmental agency, or destroyed.

Article 03. VESSELS ABANDONED ON BUSINESS PREMISES OF PERSONS ENGAGED IN REPAIR BUSINESS

Sec. 30.30.110. Disposition of vessels by persons in vessel repair business. When a person abandons a vessel on the premises of a vessel repair business, the owner of the business or the business owner's authorized representative may sell or dispose of the vessel under AS 30.30.110 - 30.30.150.

Sec. 30.30.120. When vessel abandoned. A vessel is abandoned on the premises of a vessel repair business when all of the following conditions have been satisfied:

- (1) the service requested or required by a person whose vessel is towed or brought to a vessel repair business, including but not limited to towing and rendering estimates of the cost of repairs, has been performed;
- (2) no authorization is given to perform any further service with respect to the vessel, but the vessel is left on the repair business premises;
- (3) the owner of the repair business or the business owner's authorized representative has given notice by registered or certified mail, with a return receipt, to the registered owner of the vessel at the address on record at the vessel repair business and the address on record in a state agency or the United States Coast Guard, and to any person with a recorded interest in the vessel, stating that, if the vessel is not repossessed within 30 days after the mailing of the notice, it will be sold or disposed of; the notice also must contain a description of the vessel and its location, and it need not be sent to an owner or a person with an unrecorded interest in the vessel whose name or address cannot be determined; and
- (4) the vessel is not repossessed within the 30-day period specified in (3) of this section.

Sec. 30.30.130. Sale or disposition of vessel. When a vessel is abandoned, the owner of the vessel repair business, or the business owner's authorized representative, after one public advertisement in a newspaper of general circulation in the state, may negotiate a sale of the vessel or dispose of it. However, the vessel may not be sold or disposed of within less than five days after publication of the advertisement.

Sec. 30.30.140. Disposition of proceeds. The authorized seller of the abandoned vessel is entitled to the proceeds of the sale to the extent that compensation is due to the seller for services rendered with respect to the vessel, including reasonable and customary charges for towing, handling, storage, and the cost of notices and advertising required by AS 30.30.130. A lienholder shall receive priority of payment from the balance of the proceeds to the extent of the lien. Any remaining balance shall be forwarded to the registered owner of the vessel, if the registered owner can be found. If the registered owner cannot be found, the balance shall be deposited with the commissioner of administration and shall be paid out to the registered owner of the vessel if a proper claim is filed for it within one year from the execution of the sale agreement. If no claim is made within that year, the money shall escheat to the state.

Sec. 30.30.150. Effect of transfer of title. The transfer of title and interest by sale under AS 30.30.140 is a transfer by operation of law. However, a bill of sale executed by an authorized seller is satisfactory evidence authorizing the transfer of the title or interest.

Article 04. MISCELLANEOUS

Sec. 30.30.170. Definitions. In this chapter,

- (1) "municipality" has the meaning given in AS 29.71.800;
- (2) "state agency" means a state department or agency in the executive branch; "state agency" does not include an agency of the legislative or judicial branch, the University of Alaska, or a public corporation;
- (3) "vessel" means every description of watercraft or other artificial contrivance, other than a seaplane on the water, used or capable of being used as a means of transportation on or through the water;
- (4) "waters of the state" means the navigable waters within the territorial limits of the state, and the marginal sea adjacent to the state, as defined in AS 44.03.

590 F.Supp. 518

(Cite as: 590 F.Supp. 518)

C

United States District Court,
D. Alaska.

Gary Paul NOLT, Plaintiff,
v.
Jack ISADORE, T.H. Whalen, and the City and
Borough of Juneau, Alaska, Defendants.

No. A81-423 CIV.
May 31, 1984.

Vessel owner brought action against city, its harbormaster and assistant harbormaster for deprivation under color of law of owner's constitutional right based upon city's seizure and **impoundment** of vessel. The District Court, von der Heydt, Chief Judge, held that: (1) **impoundment** procedures violated owner's constitutional rights to due process; (2) availability of state tort action against city and borough for conversion did not afford owner adequate due process; (3) substantial issue of material fact existed as to whether prompt **hearing** after seizure would have had any effect on outcome of case; and (4) substantial issue of material fact existed on conversion claim as to whether owner had in fact or apparently abandoned his property prior to city's taking possession of it, precluding summary judgment.

Order accordingly.

West Headnotes

[1] Federal Civil Procedure 170A ⚙️2470

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment

170AXVII(C)1 In General
170Ak2465 Matters Affecting Right to
Judgment

170Ak2470 k. Absence of genuine
issue of fact in general. Most Cited Cases

Federal Civil Procedure 170A ⚙️2470.4

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)1 In General
170Ak2465 Matters Affecting Right to
Judgment

170Ak2470.4 k. Right to judgment as
matter of law. Most Cited Cases

Summary judgment may be granted if it appears from record, after viewing all evidence and factual inferences in light most favorable to nonmoving party, that there are no genuine issues of material fact and moving party is entitled to prevail as matter of law.

[2] Federal Civil Procedure 170A ⚙️2544

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)3 Proceedings
170Ak2542 Evidence
170Ak2544 k. Burden of proof. Most
Cited Cases

Party seeking summary judgment has burden of showing that no genuine issue of material fact exists.

[3] Constitutional Law 92 ⚙️4460

92 Constitutional Law

590 F.Supp. 518

(Cite as: 590 F.Supp. 518)

92XXVII Due Process

92XXVII(G) Particular Issues and Applications

92XXVII(G)23 Search, Seizure, and Confiscation

92k4460 k. In general. Most Cited Cases
(Formerly 92k319.5(1))

Procedural due process demands that notice and opportunity for some kind of hearing appropriate to case be afforded to individual whose property is seized. U.S.C.A. Const.Amend. 14.

[4] Constitutional Law 92 🔑3912

92 Constitutional Law

92XXVII Due Process

92XXVII(B) Protections Provided and Deprivations Prohibited in General

92k3912 k. Duration and timing of deprivation; pre- or post-deprivation remedies. Most Cited Cases

(Formerly 92k278(1.1))

Unless there is need for quick action or facts which make it impractical, hearing prior to deprivation of property is required by due process clause. U.S.C.A. Const.Amend. 14.

[5] Constitutional Law 92 🔑4460

92 Constitutional Law

92XXVII Due Process

92XXVII(G) Particular Issues and Applications

92XXVII(G)23 Search, Seizure, and Confiscation

92k4460 k. In general. Most Cited Cases
(Formerly 92k319.5(1))

Where there is need for quick action or impracticality prior to seizure, availability of some mean-

ingful means to assess propriety of state's action after initial taking can satisfy due process requirements; however, opportunity must be granted at meaningful time and in meaningful manner. U.S.C.A. Const.Amend. 14.

[6] Federal Civil Procedure 170A 🔑2512

170A Federal Civil Procedure

170AXVII Judgment

170AXVII(C) Summary Judgment

170AXVII(C)2 Particular Cases

170Ak2512 k. Shipping and seamen, cases involving. Most Cited Cases

In action brought by shipowner against city for lost vessel, substantial issues of material fact existed as to whether there was need for quick action resulting from vessel's unseaworthy condition and as to whether failure of boat owner to register his boat rendered preseizure hearing impractical, precluding summary judgment.

[7] Searches and Seizures 349 🔑12

349 Searches and Seizures

349I In General

349k12 k. Constitutional and statutory provisions. Most Cited Cases
(Formerly 349k2)

Impoundment statute which authorized **impoundment** of vessel was constitutionally defective in that there was no provision for meaningful **hearing** even after seizure. U.S.C.A. Const.Amend. 14.

[8] Constitutional Law 92 🔑4104

92 Constitutional Law

92XXVII Due Process

92XXVII(G) Particular Issues and Applica-

590 F.Supp. 518

(Cite as: 590 F.Supp. 518)

tions

92XXVII(G)4 Government Property, Facilities, and Funds

92k4103 Transportation

92k4104 k. In general. Most Cited

Cases

(Formerly 92k291.6, 92k291.5)

Availability of state tort action against city and borough for conversion of vessel did not afford vessel owner adequate due process, where harbor master's acts in impounding vessel were neither random nor unauthorized but, on the contrary, in reliance upon established procedures of city and borough. U.S.C.A. Const.Amend. 14.

[9] Civil Rights 78 ⚡1032

78 Civil Rights

78I Rights Protected and Discrimination Prohibited in General

78k1030 Acts or Conduct Causing Deprivation

78k1032 k. Particular cases and contexts.

Most Cited Cases

(Formerly 78k110.1, 78k110, 78k13.4(1))

If procedural due process would have had no effect on outcome had it been granted, recovery for actual damages resulting from denial of due process may be denied.

[10] Federal Civil Procedure 170A ⚡2512

170A Federal Civil Procedure

170AXVII Judgment

170AXVII(C) Summary Judgment

170AXVII(C)2 Particular Cases

170Ak2512 k. Shipping and seamen, cases involving. Most Cited Cases

In action brought by boat owner against city and borough for denial of procedural due process based on

failure of city to give boat owner opportunity for **hearing** to determine whether there was probable cause to warrant continued **impoundment** of **vessel**, substantial issues of material fact existed as to whether prompt **hearing** after seizure would have had effect on outcome of case, including whether boat owner would have been able and willing to recover possession of **vessel** and value of **vessel** at time of deprivation of civil rights precluding summary judgment. U.S.C.A. Const.Amend. 14.

[11] Conversion and Civil Theft 97C ⚡100

97C Conversion and Civil Theft

97CI Acts Constituting and Liability Therefor

97Ck100 k. In general; nature and elements.

Most Cited Cases

(Formerly 389k1 Trover and Conversion)

Tort of conversion is intentional exercise of dominion or control over chattel which so seriously interferes with right of another to control it that actor may justly be required to pay other full value of chattel.

[12] Federal Civil Procedure 170A ⚡2515

170A Federal Civil Procedure

170AXVII Judgment

170AXVII(C) Summary Judgment

170AXVII(C)2 Particular Cases

170Ak2515 k. Tort cases in general.

Most Cited Cases

Condition of boat owner's vessel at time of city's interference with boat owner's use was not relevant to city and borough's liability but rather to value of chattel at time of conversion; thus, issue of value of vessel did not preclude partial summary judgment in boat owner's conversion action brought against city and borough.

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[13] Wharves 408  **18**

408 Wharves

408k15 Wharfage

408k18 k. Lien. Most Cited Cases

Although city and borough's lien may have been valid, their retention of possession over vessel became wrongful and inconsistent with boat owner's possessory rights when city failed to provide postseizure hearing when boat was seized as result of unpaid moorage fees.

[14] Federal Civil Procedure 170A  **2512**

170A Federal Civil Procedure

170AXVII Judgment

170AXVII(C) Summary Judgment

170AXVII(C)2 Particular Cases

170Ak2512 k. Shipping and seamen, cases involving. Most Cited Cases

Where neither boat owner's father's claim for unpaid amounts on loan for purchase of vessel nor lien claim by third party implicated boat owner's title or right to possession of vessel, claims by father and third party did not raise fact issue in boat owner's conversion action against city and borough as to whether boat owner had requisite possessory interest in vessel at time of impoundment.

[15] Federal Civil Procedure 170A  **2515**

170A Federal Civil Procedure

170AXVII Judgment

170AXVII(C) Summary Judgment

170AXVII(C)2 Particular Cases

170Ak2515 k. Tort cases in general. Most Cited Cases

In conversion action brought by vessel owner

against city and borough which had impounded vessel, substantial issues of material fact existed as to whether boat owner had in fact or apparently abandoned his property prior to city and borough's taking possession of it, precluding summary judgment.

***520** Michael H. Woodell, Bradbury, Bliss & Riordan, Anchorage, Alaska, for plaintiff.

Stanley B. Malos, Robertson, Monagle, Eastaugh & Bradley, Juneau, Alaska, for defendants.

MEMORANDUM AND ORDER

VON DER HEYDT, Chief Judge.

[1][2] THIS CAUSE comes before the court on cross motions for summary judgment. Summary judgment may be granted if it appears from the record, after viewing all evidence and factual inferences in the light most favorable to the non-moving party, that there are no genuine issues of material fact and that the moving party is entitled to prevail as a matter of law. *International Ladies Garment Workers Union v. Sureck*, 681 F.2d 624, 629 (9th Cir.1982). The moving party has the burden of showing that no genuine issue of material fact exists. *Ron Tonkin Gran Turismo, Inc. v. Fiat Distributors, Inc.*, 637 F.2d 1376, 1381 (9th Cir.), *cert. denied*, 454 U.S. 831, 102 S.Ct. 128, 70 L.Ed.2d 109 (1981).

Defendant City and Borough of Juneau (Juneau) seeks judgment as a matter of law dismissing plaintiff's complaint on the grounds that the harbormaster was under a duty to impound plaintiff's vessel since the vessel had been abandoned and that the harbor-master cannot be liable for the destruction of the vessel since an owner agrees upon mooring a vessel to accept the risk of impoundment should the owner fail to "live up to his responsibilities."

Plaintiff Nolt moves for partial summary judgment seeking a declaration as a matter of law that the ordinances relied upon by defendants to impound his

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fishing vessel, the Will Do Too, are unconstitutional facially and as applied in denying plaintiff procedural due process prior to and after impoundment. This issue is dispositive of defendants' motion as well, inasmuch as it challenges defendants entitlement to judgment as a matter of law. Accordingly, the court addresses it at the outset.

a. Factual Background

Plaintiff owned a 28 foot wooden hull fishing vessel which he purchased in April, 1979 for \$18,000. In the spring of 1980, plaintiff leased the vessel to one Don Baker. Baker moored the vessel at Harris Harbor, a small boat harbor owned by the City and Borough of Juneau. Moorage fees for the use of Harris Harbor were unpaid. The parties disagree as to whether plaintiff or Don Baker was responsible for moorage fees and as to whether plaintiff was properly billed.

In July plaintiff and Baker terminated the lease and plaintiff regained possession of the vessel. Plaintiff moved the vessel to another small boat harbor, City Float, a transient dock facility with no permanent mooring facility. Genuine issues of material fact have been raised and the court assumes for the purposes of plaintiff's summary judgment motion that plaintiff failed to properly register the Will Do Too for transient moorage at City Float as required by Juneau City and Borough Code (hereafter C.B.J.) § 5.25.010. Plaintiff also failed to pay moorage fees which accrued against the Will Do Too during the time it was moored at City Float. The harbormaster for the City and Borough of Juneau prepared one or more notices of back due moorage fees which were sent to Mr. Nolt at a Ketchikan mailing address plaintiff had given the harbormaster. Those notices were returned unclaimed.

A notice of intent to impound was tagged onto plaintiff's vessel on January 12, 1981. The tag stated: "Please move the vehicle before 0800 am on 1-26, 1981 to prevent it's [sic] being cited and impounded."

The notice indicated a violation of C.B.J. 85.25.080 which prohibits the failure of a boat owner to perform duties. The tag remained visible on the Will Do Too for four or five days until it was torn off. Whalen dep. at 45, Exhibit 3 Pl. Motion for Summary Judgment. A Juneau attorney, Mary Alice McKeen, contacted the harbormaster on Nolt's behalf during this time period. Isadore Aff. at ¶ 8. The parties dispute whether attorney McKeen supplied the harbormaster with Nolt's then current address *521 at Lemon Creek Correctional Facility and what information and representations were exchanged between McKeen and the harbormaster. On January 28, 1981 after the boat was tagged and before it was towed and impounded, one Karen Williams Dohle moved on board the Will Do Too at the request of McKeen.

During the time the Will Do Too had been moored nearby, one David Matelski had performed caretaking service on the Will Do Too by charging on board batteries. The batteries were being used to power a pump which drained water leaking into the vessel. Isadore Aff. at ¶s 10, 11. Matelski informed the harbormaster in late January that he would not be available to care for the vessel in the near future. *Id.*

The harbormaster contacted one Joe Kinch to have the vessel moved from City Float to Harris Harbor for impoundment. Some time during the night of January 31 the Will Do Too sank after it had been towed to Harris Harbor.

After several days and in any event no earlier than February 2, 1981 the vessel was refloated. The City made efforts to keep the vessel afloat at Harris Harbor for about one month until moving the vessel to an abandoned grid elsewhere in Harris Harbor. The vessel sank again there and was allowed to fill and empty with the tide. In September of 1981 the City floated the vessel for the last time for the purpose of moving it to a "bone yard" where it was crushed and rendered a total loss.

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b. Discussion

Plaintiff brings this action against Juneau, its harbormaster and assistant harbormaster pursuant to 42 U.S.C. § 1983 for deprivation under color of law of plaintiff's constitutional rights. Plaintiff alleges that the city's seizure and impoundment of the Will Do Too deprived him of property without due process of law in violation of rights guaranteed under the 14th Amendment.

1. Is any process due.

The Fourteenth Amendment's procedural due process protections attach to any significant deprivation of private property. The defendants have not disputed and the court concludes that the City's impoundment of the Will Do Too constitutes a significant interference with plaintiff's possessory interests in the vessel. *Cf. Stypmann v. City and Cty. of San Francisco*, 557 F.2d 1338, 1342 (9th Cir.1977) (loss of use and enjoyment of car by impoundment deprives owner of property interest cognizable under Due Process Clause).

(ii) What process is due.

[3] Procedural due process demands that notice and an opportunity for some kind of hearing appropriate to the case be afforded to the individual whose property is seized. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 656, 94 L.Ed. 865 (1950).

[4][5] Unless there is a need for quick action or facts which make it impractical, a hearing prior to deprivation of property is required by the due process clause. *See Fuentes v. Shevin*, 407 U.S. 67, 81–82, 92 S.Ct. 1983, 1994–1995, 32 L.Ed.2d 556 (1972). *See also Parratt v. Taylor*, 451 U.S. 527, 539, 101 S.Ct. 1908, 1914, 68 L.Ed.2d 420 (1981) (summarizing cases). Where there is a need for quick action or impracticality prior to seizure, the availability of some

meaningful means to assess the propriety of the state's action after the initial taking can satisfy due process requirements. *Parratt v. Taylor*, 451 U.S. at 539, 101 S.Ct. at 1914. The opportunity must be granted at a meaningful time and in a meaningful manner. *Id.* at 540, 101 S.Ct. at 1915.

[6] Defendants argue that fact questions have been raised with respect to whether a pre-deprivation hearing was required in this case either because (1) there was a need for quick action resulting from the vessel's unseaworthy condition or because (2) the failure of the boat owner to register his boat rendered a pre-seizure hearing impractical since there were no means to afford the owner notice.

*522 On the record before the court, the evidence that there was a need for quick action is not persuasive. Defendants' delayed **impoundment** over two weeks after posting notice of their intent to **impound**.^{FN1} On summary judgment, however, it is not the court's obligation to evaluate the persuasiveness of evidence, but merely the existence of a question of fact, taking the facts in a light favorable to the opposing party. Accordingly, triable questions of fact have been raised with respect to whether there was a need to quickly remove the vessel from City Float sufficient to excuse a **hearing** prior to **impoundment**.

FN1. There may be evidence to suggest that a need for quick action arose in the interim as a result of the boat's caretaker's departure.

Similarly, questions of fact have been raised regarding whether plaintiff failed to register the Will Do Too and whether that failure rendered a pre-seizure hearing impractical. It again appears from the record that had a pre-seizure hearing procedure been in place, the harbormaster may have had actual knowledge or the means to obtain actual knowledge of plaintiff's whereabouts. Defendants have submitted defendant Isadore's affidavit alleging, to the contrary, that he had

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no knowledge prior to impoundment the plaintiff was incarcerated at the Lemon Creek Correctional Facility. *See* Isadore Aff. ¶ 16b.^{FN2} These allegations again are sufficient to raise a question of fact with respect to whether notice and hearing prior to seizure were for that reason impractical.

FN2. Defendant Isadore's affidavit contains two paragraphs 16. For convenience they will be referred to as 16a and 16b.

Even though fact questions have been raised with regard to the need for a pre-seizure hearing in this case, there are no fact questions regarding the need for a hearing after the initial taking. Defendants learned of plaintiff's address no later than February 2nd, 1981, two days after impoundment and sinking. *See* Defendants' Exhibit C at 2. Moreover, plaintiff has established, as a matter of law, that the ordinances are constitutionally deficient as a result of their failure to provide even for a post-seizure hearing.

[7] The **impoundment** statute challenged here is constitutionally defective in that there is no provision for a meaningful **hearing** even after seizure. *See Stypmann v. City and County of San Francisco*, 557 F.2d 1338, 1344; *Graff v. Nicholl*, 370 F.Supp. 974 (N.D.Ill.1974). Like the ordinance in *Stypmann* the ordinance in question here provided no opportunity for the owner of an **impounded** boat to obtain its release by posting bond and establishes no procedure to assure reliability of the determination that **impoundment** was justified. The only procedure by which an owner may recover his **vessel** is set out in C.B.J. § 82.25.180(c): "At any time prior to the start of the [public] auction, the owner, master, operator or managing agent may redeem the boat by a cash payment of all city and borough charges against the boat." Presumably, as in *Stypmann*, an owner who recovers a **vessel** by paying all charges assessed by the City and Borough may thereafter obtain judicial process through the pursuit of collateral civil remedies such as damages for conversion. *See, e.g. Stypmann v. City*

and County of San Francisco, 557 F.2d at 1343 n. 19. In *Stypmann*, however, the Ninth Circuit Court of Appeals found that such a remedy was insufficient in light of the nature of the private interest at stake and the government's sole interest in avoiding the inconvenience and expense of a reasonably prompt **hearing** to establish probable cause for **impoundment**. *Id.* at 1342–43. Similar private interests are at stake when a **vessel** moored in one of Juneau's boat harbors is **impounded**. A **vessel** moored there is not significantly less likely than an automobile parked on the street in San Francisco County to be essential to an individual's access to employment and necessities. Furthermore, while the City and Borough of Juneau has a significant interest in **pre-hearing** seizures in emergency situations to alleviate dangerous conditions in its harbors, *523 that interest is not at stake in considering whether a post-seizure **hearing** is required.

The government interest which is at stake appears no greater than that argued in *Stypmann*, namely, to avoid the inconvenience and expense of a prompt **hearing** to establish probable cause for the continued **impoundment** of **vessels**. *See Stypmann*, 557 F.2d at 1343. That burden, however, does not outweigh the private interests involved.^{FN3}

FN3. Defendants have offered no evidence on the severity of the burden imposed by a prompt, post-seizure hearing. The court notes, however, that during the progress of this litigation, the City and Borough has amended its impoundment ordinance to establish *pre* -impoundment hearing procedures.

[8] The defendants argue that the availability of a state tort action against the City and Borough for conversion affords the plaintiff adequate due process.

In *Parratt v. Taylor*, 451 U.S. 527, 543, 101 S.Ct. 1908, 1916, 68 L.Ed.2d 420 (1981) the Supreme Court

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held that the availability of a tort claims procedure against the state of Nebraska satisfied procedural due process requirements for a hearing at a meaningful time when the deprivation of plaintiff's property was a random and unauthorized act which did not occur as a result of some established state procedure. In the case sub judice the harbormaster asserts that his acts were neither random nor unauthorized but, on the contrary, in reliance upon established procedures of the City and Borough of Juneau. *Isadore Aff.* at ¶ 15, 16b, 17. To uphold the constitutionality of such an intentional deprivation of property on the basis of an available state tort remedy goes far beyond the holding in *Parratt*. Cf. *Keniston v. Roberts*, 717 F.2d 1295, 1301 (9th Cir.1983) (distinguishing *Parratt* from intentional deprivations of property).

Moreover, *Goichman v. Rheuban Motors, Inc.*, 682 F.2d 1320 (9th Cir.1982) offers no support for defendants' assertion that a state tort remedy for conversion against Juneau is an adequate post-seizure **hearing**. In *Goichman*, the court of appeals tested the adequacy of Cal. Vehicle Code § 22852's provision for a post-seizure **hearing** within forty-eight hours of a request to determine the validity of a storage. The court of appeals concluded after balancing the interests that a post-seizure **hearing** within forty-eight hours was adequate. The court of appeals went on to conclude that the failure of California law to provide for an early opportunity to challenge the reasonableness of a garagemen's lien was not violative of the due process clause since the over-charged car owner had an action for wrongful deprivation to test the excessiveness of the tow charge. That latter aspect of the *Goichman* decision has little relevance to these facts. The private interests implicated for that issue were not, as here, the uninterrupted use of a vehicle but only the burden of paying an excessive charge to obtain its release. Moreover, the adequacy of the state tort remedy to challenge the reasonableness of a towing fee in *Goichman* must be measured in light of the existing opportunity in California to test, within forty-eight hours, the validity of the government official's

decision to **impound** the vehicle. No such opportunity was available to an owner whose boat was moored at a Juneau boat harbor in 1981. Accordingly, plaintiff is entitled to partial summary judgment as a matter of law that plaintiff was deprived of property without due process of law as a result of defendants' failure to provide an opportunity for a **hearing** to determine whether there was probable cause to warrant the continued **impoundment** of the vessel. Further, for the reasons set out above, defendants' motion for summary judgment is denied.

Extent of Liability and Remedy

[9][10] As plaintiff points out, the denial of procedural due process rights does not give rise to a recovery for actual damages unless the plaintiff can meet a "but for" test. *See Carey v. Piphus*, 435 U.S. 247, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978). If procedural due process would have had no effect on the outcome had it been granted, *524 recovery for actual damages resulting from the denial of due process may be denied. *Id.* Defendants have raised triable questions of fact concerning whether a prompt hearing after seizure would have had any effect on the outcome of this case. Those questions include whether, assuming the propriety of moorage fees and charges, plaintiff would have been able and willing to recover possession of the vessel and the value of plaintiff's vessel at the time of the deprivation of civil rights.^{FN4}

FN4. During the course of this lawsuit, defendants amended the pertinent provisions of C.B.J.'s vessel impoundment statute. In light of the amended statute, plaintiff has withdrawn his summary motion for a permanent injunction and that aspect of the remedy is not in issue.

Claim for Conversion

[11][12] The third cause of action stated in plaintiff's second amended complaint states a claim for conversion resulting from defendants' seizure of the Will Do Too and its subsequent sinking and destruc-

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tion. This court has pendent subject matter jurisdiction of this state law claim. *See Blake v. Town of Delaware City*, 441 F.Supp. 1189, 1204 (D.Del.1977). The tort of conversion is defined as an intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel. *McKibben v. Mohawk Oil Co.*, 667 P.2d 1223, 1228 (Alaska 1983). There is no disputing that defendants intentionally exercised dominion and control over the Will Do Too on January 31 and thereafter until the vessel was crushed. Defendants argue, however, that a genuine issue of material fact exists to preclude summary judgment. The fact issue identified is whether the vessel sank as a result of a hole in her stern and whether that condition was known to the plaintiff when the vessel was moored at City Float. *Cf. Blake v. Town of Delaware*, 441 F.Supp. at 1205 (summary judgment denied to try an issue of fact regarding inability to return seized cars). The condition of plaintiff's property at the time of the City's interference is not relevant to defendants liability but rather to the value of the chattel at the time of conversion. Defendants misread *Blake v. Town of Delaware* in concluding the case supports their position. In that case, the district court denied summary judgment in order to try the issue of which defendants, the city officials or the private towing company, was liable "for the inability to return" plaintiff's chattel. *Blake v. Town of Delaware*, 441 F.Supp. at 1205, 1205 n. 66. While the value of the vessel is at issue, that issues goes to damages and need not preclude a partial summary judgment.

[13] Defendants also argue that plaintiff is not entitled to judgment as a matter of law since the exercise of control over the vessel was not inconsistent with plaintiff's right to control the vessel. More specifically, defendants argue that a lien in favor of the City and against the vessel had arisen as a result of unpaid moorage fees. Since the City was therefore authorized by statute to seize and sell the vessel to satisfy its lien, it is argued that the exercise of author-

ity was not inconsistent with plaintiff's rights to control the vessel. Although the defendants' lien may have been valid, defendants' retention of possession over the chattel becomes wrongful and therefore inconsistent with plaintiff's possessory rights when the City failed to provide a post-seizure hearing. *See Blake v. Town of Delaware*, 441 F.Supp. at 1205; *see also Tulloch v. Cockrum*, 115 Or. 601, 236 P. 1045 (1925) (improper foreclosure of lien precludes reliance on lien as a defense to conversion) *cited with approval Rich v. Runyon*, 52 Or.App. 107, 112, 627 P.2d 1265, 1268 (1981).

[14] Defendants have also argued that a question of fact exists with respect to whether plaintiff had the requisite possessory interests in the vessel at the time of impoundment. Defendants cite claims by plaintiff's father for amounts unpaid on a loan for the purchase of the vessel and a lien claim by Don Baker. Neither fact issue is relevant, however, since the claims *525 do not implicate plaintiff's title or right to possession.

[15] Summary judgment on the issue of liability for conversion must be denied, however, since questions of fact have been raised regarding whether plaintiff had in fact or *apparently* abandoned his property prior to defendant taking possession of it and thereafter following the sinking and refloating of the vessel. *See generally Rinden v. Hicks*, 119 N.H. 811, 408 A.2d 417, 419 (1979). *See Affidavit of Isadore at ¶ 5, 6, 10, 11, Isadore Dep. p. 60; Def.Ex. A at 8.*

Good Faith Immunity for Individual Defendants

Defendants Jack Isadore and Tom Whalen have alleged their actions were taken under color of law and asserted a good faith immunity defense to the civil rights claim. They claim they neither knew nor reasonably should have known that their actions in **impounding the vessel** and thereafter in failing to provide plaintiff an opportunity for a **hearing** violated plaintiff's constitutional rights. The plaintiff asserts that harbormasters are not entitled to qualified immunity since the operation of a dock is a proprietary

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function to which no immunity applied at common law. The court has been unable to locate any decisions addressing this issue and declines to rule on the question at this juncture. The court instead requests further briefing by the parties within 45 days on the questions whether the harbormaster and assistant harbormaster of the City and Borough of Juneau are entitled as a matter of law to raise a qualified immunity defense and whether any fact questions have been raised with respect to whether the individual defendants knew or should have known their acts were unconstitutional. The court directs counsels' attention to *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982).

Conclusion

Plaintiff is entitled to partial summary judgment holding that the impoundment procedures in place and applied by the City of Juneau violated plaintiff's constitutional right to due process in that plaintiff was deprived of property without any meaningful hearing, even after seizure. Factual questions have been raised with respect to the extent of defendants' liability, viz, whether plaintiff is entitled to recover his actual damages as a result of the deprivation of property. Factual questions also persist regarding the extent of damages. Plaintiff's claim for summary judgment on the issue of conversion is denied in light of factual questions regarding defendants' defense of apparent abandonment. The court withholds decision on the individual defendant's defense of good faith immunity pending further briefing.

In accordance with the memorandum above,

IT IS SO ORDERED.

D.C.Alaska,1984.

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