

BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the matter of the appeal of

NOEL POVlsen and LYNN REED

from a decision by the Director, Seattle
Department of Construction and Inspections

Matter No. FOW 25-001

APPELLANTS' REPLY IN
SUPPORT OF THEIR MOTION
FOR SUMMARY JUDGMENT

Prior to 2010, LITTLE BLUE was a floating home situated in a floating home moorage at 2420 Westlake Avenue North in Seattle, Washington. Povlsen Declaration ¶2. By 2012, however, LITTLE BLUE had relocated to commercial moorage at 1609 Fairview Avenue East. Povlsen Declaration ¶3. The relocation of LITTLE BLUE was authorized by Shoreline Substantial Development Permit No. 3012170, which was submitted on March 15, 2012, and approved on March 11, 2014. Griggs Declaration, Ex. C. Permit No. 3012170 established LITTLE BLUE as a workshop and office for proposed marine sales and service use at 1609 Fairview Avenue East. Griggs Declaration, Ex. D, p. 2. Povlsen Associates Limited, doing business as Liberty Dock Service, used LITTLE BLUE for this purpose until 2021. Second Povlsen Declaration ¶¶3—4. During this same period, however, LITTLE BLUE was also used as a residence by multiple individuals. Povlsen Declaration ¶¶7—10; Second Povlsen Declaration ¶¶6—7. LITTLE BLUE is therefore eligible for verification as a floating on-water residence.

1 The City bears the burden of establishing – based on a preponderance of the evidence
2 – that LITTLE BLUE is not eligible for verification as a floating on-water residence. SMC
3 23.60A.203.D.4. The sole objection articulated by the City is the assertion that LITTLE
4 BLUE is a floating home and therefore ineligible for verification. In turn, the sole basis for
5 this assertion is the floating home registration number that was issued to LITTLE BLUE on
6 December 8, 2015.

7 It is uncontested that Permit No. 3012170 terminated LITTLE BLUE’s status as a
8 floating home and legally established it as a floating office and workshop for marine sales and
9 service use. Consequently, on July 1, 2014 (the qualification date for FOWR status), LITTLE
10 BLUE was not a floating home. Likewise, it was not a floating home on June 15, 2015 (the
11 effective date of the current SMP). None-the-less, the City asserts that the erroneous
12 registration of LITTLE BLUE as a floating home on December 8, 2015, dispositively
13 establishes it is a floating home. Moreover, the City asserts that registration of LITTLE
14 BLUE is a land use decision that can no longer be appealed under Washington’s Land Use
15 Petition Act (LUPA), and is therefore immune from collateral attack via the floating on-water
16 verification process. This assertion fails, however, because issuance of registration numbers
17 to floating homes does not qualify as a land use decision under LUPA. Specifically, floating
18 homes are not real property¹ and Seattle’s Shoreline Master Program provides that registration
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20 ¹ Floating homes and floating on-water residences are deemed real property for purposes of
21 real estate excise and sales tax. *See* RCW 82.45.032(1); RCW 82.08.034. But for all
22 other purposes, they are personal property. *See e.g.*, King County Dept. Assessments,
23 Floating Homes and Condos; Commercial Revalue for 2021 Assessment Role , p. 7,
¶¶3—4 (available online at [https://kingcounty.gov/-/media/king-](https://kingcounty.gov/-/media/king-county/depts/assessor/buildings-property/reports/area-reports/2021/commercial/730.pdf)
[county/depts/assessor/buildings-property/reports/area-reports/2021/commercial/730.pdf](https://kingcounty.gov/-/media/king-county/depts/assessor/buildings-property/reports/area-reports/2021/commercial/730.pdf)).

1 has no bearing on whether a floating home can be improved, developed, modified,
2 maintained, sold, transferred, or used. See SMC 23.60A.202.G.2; SMC 23.60A.202.D.5.²
3 Consequently, the registration decision is not a land use decision under RCW 36.70C.020 (2),
4 and LUPA's statute of limitations is inapplicable.

5 Nor does res judicata bar reconsideration of whether LITTLE BLUE is a floating on-
6 water residence. Res judicata applies to quasi-judicial permitting decisions. *Hilltop Terrace*
7 *Homeowner's Association, et al. v. Island County, et al.*, 121 Wn.2d 22, 31, 891 P.2d 29
8 (1995). But res judicata (which includes both claim preclusion and issue preclusion) does not
9 apply to ministerial decisions. *Chelan County v. Nykreim*, 105 Wn.App. 339, 20 P.3d 416,
10 425 (2001) (reversed by *Chelan County v. Nykreim*, 146 Wn.2d 904, 52 P.3d 1 (2002)).³ A
11 ministerial decision is one in which the applicant is entitled to issuance of a permit upon
12 satisfaction of relevant criteria. *Mission Springs, Inc. v. Spokane*, 134 Wn.2d 250, 256, 954
13 P.2d 250 (1998). Consequently, and because the issuance of a floating home registration
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16 ² This directly contrasts with comparable provisions of the Shoreline Master Program
17 applicable to floating on-water residences, which must be verified before any work to
18 expand, rebuild, or replace can be commenced. SMC 23.60A.203.C.2.a But the
19 distinctions is logical, given that floating homes are established by Shoreline Substantial
Development Permits and are subject to building permit requirements, whereas floating
on-water residences are not.

20 ³ The 2001 *Nykreim* opinion of the Washington Court of Appeals determined that LUPA
21 did not apply to ministerial land use decisions and that ministerial land use decisions were
22 not subject to res judicata. In 2022, the Washington Supreme Court overruled the first
23 conclusion, holding that LUPA applied to all land use decisions, regardless of whether
they are quasi-judicial or ministerial. That ruling is not implicated by this case because
registration of floating homes is not a land use decision subject to LUPA. Consequently,
the res judicata analysis of the Court of Appeals is instructive.

1 number to LITTLE BLUE on December 8, 2015, was plainly ministerial, it is not given
2 preclusive effect.

3 The 2015 registration of LITTLE BLUE as a floating home was a ministerial action by
4 the City, not quasi-judicial. Only two criteria were considered in the registration decision –
5 whether LITTLE BLUE was issued a KCA number, and whether it was located in an
6 established floating home moorage. Consequently, LITTLE BLUE was registered
7 notwithstanding the fact that the application indicated that it was ineligible (because it was not
8 located in a floating home moorage), with no apparent scrutiny (the unsigned application was
9 received on December 7, 2015, and the registration number was issued on December 8, 2015),
10 and in plain contravention of Permit No. 3012170, which terminated its status as a floating
11 home in 2014. *See* Groesbeck Declaration, Ex. B (approved registration application); Griggs
12 Declaration, Ex. C—D (SSDP Permit No. 3012170). No consideration was given to prior
13 permitting (*i.e.*, Permit No. 3012170), actual location (which was 1609 Fairview Avenue East,
14 as indicated on the materials submitted with the registration application), connectivity to
15 public utilities, or any other requirement imposed on floating homes pursuant to SMC
16 23.60A.202. Moreover under the SMP, registration has no bearing on whether a floating
17 home may be improved, developed, modified, maintained, sold, transferred, or used. *See*
18 SMC 23.60A.202.G.2; SMC 23.60A.202.D.5. Registration was therefore – as its name
19 suggests – a method of establishing an inventory of previously established floating homes and
20 not a verification of whether they were legally established. That is exactly how appellants
21 perceived it at the time. Second Povlsen Declaration ¶10.

1 Even if the 2015 registration decision is given preclusive effect, it still does not
2 prohibit LITTLE BLUE from being verified as a floating on-water residence. Res judicata
3 applies when there is concurrence of identity in four respects: (1) subject matter; (2) cause of
4 action; (3) persons and parties; and (4) the quality of the persons for or against whom the
5 claim is made. *Schoeman v. New York Life Ins. Co.*, 106 Wn.2d 855, 860, 726 P.2d 1 (1986).
6 Whether or not a cause of action is the same as one previously litigated turns on “(1) whether
7 rights or interests established in the prior judgment would be destroyed or impaired by the
8 prosecution of the second action; (2) whether substantially the same evidence is presented in
9 the two actions; (3) whether the two actions involve infringement of the same right; and (4)
10 whether the two actions arise out of the same transactional nucleus of facts.” *Littlejohn v.*
11 *United States*, 321 F.3d 915, 920 (9th Cir. 2023). In this case, there is no identity of claims,
12 and therefore no res judicata, because verification of a floating on-water residence per SMC
13 23.60A.203.D differs entirely from registration of a floating home per SMC 23.60A.202.G.
14 The scope of evidence considered in connection with each claim is equally different, further
15 emphasizing the difference in the claims. And the two claims arise from completely different
16 facts (registration being related to LITTLE BLUE’s status as a floating home prior to 2012,
17 and verification being related to its subsequent use). Res judicata does not apply.

18 Nor does collateral estoppel bar verification of LITTLE BLUE as a floating on-water
19 residence. Collateral estoppel – also referred to as issue preclusion – prohibits relitigation of
20 an issue if the claimants had a full and fair opportunity to present their case. *Hanson v. City*
21 *of Snohomish*, 121 Wn.2d 552, 561, 852 P.2d 295 (1993). Collateral estoppel applies when
22 (1) the issue decided in the prior adjudication is identical to that raised in the current
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1 litigation, (2) the prior adjudication ended in a final judgment on the merits, (3) the party
2 estopped was a party to or in privity with a party to the prior adjudication, and (4) application
3 of collateral estoppel must not work an injustice. *Id.* at 562. The 2015 registration process
4 was not a full and fair adjudication of whether LITTLE BLUE was a legally established
5 floating home. The scope of inquiry excluded significant relevant information, such as the
6 use established by Permit No. 3012170, LITTLE BLUE's relocation to commercial moorage,
7 and LITTLE BLUE's lack of connectivity to utilities. Nor was there any indication to
8 appellants that the registration process would void Permit No. 2012170, which took two years
9 and considerable expense to obtain. Even now, the assertion that the superficial review
10 contemplated by SMC 23.60A.202.G has the same legal effect as the Shoreline Substantial
11 Development permitting process associated with Permit No. 3012170, is implausible.
12 Appellants therefore did not fully and fairly address the issue of whether LITTLE BLUE is a
13 floating home as part of the 2015 registration process, and giving that registration preclusive
14 effect now via collateral estoppel would therefore work substantial injustice in this case.

15 LITTLE BLUE has not functioned as a floating home since its relocation to 1609
16 Fairview Avenue East in 2012. In 2014, Permit No. 3012170 formalized that change of use.
17 Consequently, on July 1, 2014 (the floating on-water residence qualification date per RCW
18 90.58.270(6)), LITTLE BLUE was not a floating home. Nor was it a floating home on June
19 15, 2015 (the effective date of Seattle's current Shoreline Master Program). The issuance of a
20 floating home registration number to LITTLE BLUE on December 8, 2015, does not alter
21 these facts. Nor does it preclude appellants' current application for verification of LITTLE
22 BLUE as a floating on-water residence. The registration process detailed by SMC
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23.60A.202.G cannot legally establish a floating home. It is not the equivalent of a Shoreline Substantial Development Permit. It is not a land use decision. And is it not otherwise given preclusive effect under the doctrine of res judicata. And because that registration is the City's sole objection to verification of LITTLE BLUE as a floating on-water residence, the decision of the director should be reversed and this matter remanded to the City for verification of LITTLE BLUE as a floating on-water residence.

RESPECTFULLY SUBMITTED this 16th day of June, 2025.

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of June, 2025 a true and correct copy of the foregoing was sent via e-mail to:

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