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BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeal of)
)
8 **Michael Schmautz**)
) No. S-16-005
9 From an Interpretation by the Director,)
Seattle Department of Construction and) City's Motion for Summary Judgment
10 Inspection.)
)
11)

I. INTRODUCTION

The State Shoreline Management Act (SMA, RCW 90.58), enacted in 1972, established several important policies, including a strong preference for uses in the shoreline that protect the environment or are water-dependent, which are uses that cannot exist except for on the State's shoreline.¹ The SMA requires local governments to develop their own master program that meet the State's Shoreline Master Program Guidelines (WAC 173-26) for regulating uses of the shoreline of the state, to implement the policies and provisions of the SMA.² The City of Seattle's Shoreline Master Program (SMP) is codified in Chapter 23.60A.³

¹ See RCW 90.58.010 and WAC 197-26-176(3)(a) (stating that a general policy goal of the SMA is to "The utilization of shorelines for economically productive uses that are particularly dependent on shoreline location or use.").
² RCW 90.58.080 and WAC 173-26-030.
³ See SMC 23.60A.004(B).

1 Consistent with the SMA, the purpose of the SMP is:

2 ...to implement the policy and provisions of the Shoreline
3 Management Act and the Shoreline Goals and Policies of the Seattle
4 Comprehensive Plan, as well as the City's interest in the public
5 health, safety and welfare, by regulating development, uses and
6 shoreline modifications of the shorelines of the City in order to:

- 7 1. Protect the ecological functions of the shoreline areas;
- 8 2. Encourage water-dependent uses;
- 9 3. Provide for maximum public access to, and enjoyment of the
10 shorelines of the City; and
- 11 4. Preserve, enhance, and increase views of the water.⁴

12 Under both the SMA and SMP, preference for uses is given first for water-dependent uses,
13 then for water-related uses and water-enjoyment uses.⁵ A “water-dependent use” means a use that
14 *cannot exist* in other than a waterfront location and is dependent on the water by reason of the
15 intrinsic nature of its operations.⁶ **Residential use is not a water dependent use.**⁷

16 The Washington Administrative Code chapter adopted to implement the SMA, WAC Ch.
17 173-26, is explicit that:

18 **New over-water residences, including floating homes, are not a**
19 **preferred use and should be prohibited.** It is recognized that certain
20 existing communities of floating and/or over-water homes exist and should
21 be reasonably accommodated to allow improvements associated with life
22 safety matters and property rights to be addressed provided that any
23 expansion of existing communities is the minimum necessary to assure
consistency with constitutional and other legal limitations that protect
private property.⁸

⁴ SMC 23.60A.002(B).

⁵ WAC 197-26-241(2)(a)(iii).

⁶ SMC 23.60A.944 (defining “water-dependent use”)(emphasis added).

⁷ *Id.*

⁸ WAC 173-26-241(2)(j) (emphasis added).

1 In the aquatic environment, in particular, the purpose of the SMA is to “protect, restore,
2 and manage the unique characteristics and resources of the areas waterward of the ordinary high
3 water mark”⁹ and the SMA directs local governments to “allow new over-water structures **only**
4 **for water-dependent uses**, public access, or ecological restoration,” and that “the size of over-
5 water structures should be limited to the minimum necessary to support structures intended use.”¹⁰

6 For decades, the City of Seattle (City), as well as the State, has been seeking a workable
7 solution to balance the desire of people to live on the water and the need to limit non-water-
8 dependent uses to protect that water, consistent with the SMA and SMP. First, came legislation to
9 regulate “Floating Homes,” requiring that they be moored in designated, limited locations,
10 constructed in accordance with limited development standards, and comply with best management
11 practices, to limit their impact.¹¹ Next, came legislation allowing existing “house barges,”
12 intending to allow existing floating structures that had been used as residences to continue to be
13 used and maintained, but to prohibit the proliferation of any new ones.¹² The house barge
14 regulations required all existing house barges to be registered and imposed strict regulation of
15 wastewater.¹³ Those regulations allowed approximately 32 identified house barges to remain, that
16 would otherwise have been prohibited.¹⁴

17 However, despite the restrictions on over-water residences, more and more floating
18 structures appeared on the water that were being used as residences that did not fit within any of
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21 ⁹ WAC 173-26-211(5)(C)(i).

22 ¹⁰ WAC 173-26-211(5)(C)(ii).

23 ¹¹ SMC 23.60A.202.

¹² SMC 23.60A.204 (*see* Ordinance 116051 and Ordinance 116328).

¹³ *Id.*

¹⁴ Declaration of Erin Ferguson, Exhibit A, p. 1 (Director’s Report for Ordinance 116051).

1 the allowed categories.¹⁵ Some attached motors, steering equipment and other features common to
2 vessels, to avoid or defend against enforcement action by the City to prohibit continued residential
3 use of those structures, since living on vessels was unrestricted under the previous SMP.¹⁶

4 In response to the continued confusion about these floating structures and as specifically
5 directed by the State, the City adopted new regulations to allow “floating on-water residences”
6 (FOWRs) that were legally established as of July 1, 2014, which would preserve those existing
7 non-water dependent uses, but prohibit new ones.¹⁷ The City also adopted development standards
8 that allow existing FOWRs to be maintained, repaired, remodeled, relocated, expanded, rebuilt,
9 and replaced.¹⁸

10 In the City’s 2013 update to the SMP, prior to the amendments to address FOWRs required
11 by the State, amendments were also made to clarify the status of traditional live-aboard vessels.¹⁹
12 Living on a vessel has traditionally been allowed, with a focus on limiting the impacts through the
13 use of best management practices, distinct from the requirements imposed on non-water dependent
14 uses like floating homes and house barges. The SMP now specifically identifies certain
15 “conventional recreational vessels,” including cabin cruisers, trawlers, and sailboats, that do not
16 require any authorization to be lived on.²⁰ If a vessel does not fit within one of the categories
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18 ¹⁵ These floating structures were the subject of citizen concerns during the most recent updates to the SMP, as
19 described on p. 24 of Attachment A to Exhibit C attached to the Declaration of Erin Ferguson. Approximately 222
20 were identified in a survey done by the City in 2015 (*see* Declaration of Megan Mueller at no. 8 and Exhibit B).

¹⁶ SMC 23.60A.942 (defining “vessels” as “ships, boats, barges, or any other floating craft that are designed and used
21 for navigation and do not interfere with the normal public use of the water...”).

¹⁷ *See* Exhibit B (ESSB 6450) and Exhibit C (Letter from Washington State Department of Ecology and excerpts of
22 attachments) to the Declaration of Erin Ferguson. The City’s original update to the City’s SMP in 2013, Ordinance
23 124105, did not address “floating on-water residences” but amendments were added in response to direction from the
State through Ordinance 124707 in 2015.

¹⁸ SMC 23.60A.203 (emphasis added). The City also adopted standards for moorages that allow using vessels as
dwelling units, to satisfy the State requirement that the impacts to the shoreline be addressed and to protect ecological
function.

¹⁹ *See* Ordinance 124105 and the relevant sections codified at SMC 23.60A.206 and 23.60A.214.

²⁰ SMC 23.60A.214(B).

1 identified in SMC 23.60A.214(B), the SMP also provides a process for obtaining verification as a
2 vessel with a dwelling unit and be allowed under certain circumstances.²¹

3 II. FACTS

4 In the present case, Michael Schmautz, the Appellant, submitted an application to the
5 Seattle Department of Construction and Inspections (SDCI), requesting verification of his vessel
6 as a FOWR. The application described a 47 foot long, 13 feet wide, 16 feet tall “Jensen Trawler,”
7 and included photographs showing the commercially manufactured vessel, a trawler boat.²² Mr.
8 Schmautz repeatedly refers to his vessel as a vessel²³ and acknowledges that it is “more probable
9 than not that [his vessel] was originally designed for navigation, as contemplated by SMC
10 23.60A.942.”²⁴ Mr. Schmautz’s vessel was previously moored at Shilshole Bay Marina, which
11 only allows the moorage of “vessels being used as a means of transportation, recreational boating,
12 yachting, or commercial fishing which are designed for and capable of navigation on open waters.
13 Houseboats are not allowed.”²⁵ Mr. Schmautz alleges that the vessel’s motor is non-functional.²⁶
14 The application and Mr. Schmautz’s declaration both represent that the vessel is a registered vessel
15 with the Washington State Department of Licensing and the registration information indicates that
16 the vessel includes an inboard “propulsion type” or motor and is used primarily for “pleasure.”²⁷

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²¹ SMC 23.60A.214(D).

21 ²² Declaration of Michael Schmautz (Schmautz Declaration), Exhibit G (Application for Floating on Water Residence
Verification) and Exhibit B (Exterior photos).

22 ²³ Schmautz Declaration, Exhibit G (Application).

23 ²⁴ Schmautz Declaration at no. 3.

²⁵ *Id.* at no. 5 and Declaration of Megan Mueller (Mueller Declaration), at no. 7, and Exhibit B (Shilshole Moorage
Application).

²⁶ *Id.* at no. 9.

²⁷ *Id.* at no. 2, as well as Exhibit A and Exhibit G.

1 Mr. Schmautz has declared that the vessel was moored in a marina as of July 2014, although no
2 lease has been provided or alleged.²⁸

3 SDCI denied the Appellant's application because his vessel is a conventional recreational
4 vessel that does not need to be verified, not a FOWR.²⁹ As a conventional recreational vessel, his
5 boat can already be used as a live-aboard without any need for verification.³⁰ That decision denying
6 Mr. Schmautz's request to verify his vessel as a FOWR is the issue now on appeal. The City
7 respectfully requests that the Hearing Examiner grant this motion for summary judgment, uphold the
8 City's decision denying Mr. Schmautz's application, and dismiss this lawsuit.

9 III. ARGUMENT

10 Pursuant to the Washington Superior Court Rules, which provide guidance to the
11 Examiner, summary judgment is appropriate when there is no genuine issue as to any material fact
12 and the moving party is entitled to a judgment as a matter of law.³¹ The Hearing Examiner should
13 grant a motion for summary judgment if, after considering all the evidence presented, reasonable
14 minds could reach only one conclusion.³² As explained further below, there is no genuine issue
15 of material fact and the City is entitled to judgment as a matter of law.

16 A. A vessel cannot be a FOWR.

17 Despite the fact that Mr. Schmautz repeatedly refers to his vessel as a vessel³³ and has
18 acknowledged that his vessel was originally commercially manufactured for the purpose of being
19 a navigable vessel, he appears to allege that the vessel should nonetheless be verified as a FOWR

21 ²⁸ *Id.*, Exhibit G (Application).

22 ²⁹ Mueller Declaration at no. 10.

23 ³⁰ SMC 23.60A.214(B).

³¹ CR 56(c).

³² *Vallandigham v. Clover Park School Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005).

³³ See Schmautz Declaration at nos. 2, 9, and 10, as well as throughout Exhibit G (Application).

1 because the motor is broken.³⁴ This interpretation is an absurd result that is not supported by either
2 the rules of statutory interpretation or the legislative intent.

3 **1. The clear definitions of vessel and FOWR are mutually exclusive.**

4 Vessels, floating homes, house barges, and floating on-water residences are all defined in
5 the City's Shoreline Code and, by definition, a vessel cannot be a FOWR.

6 A vessel means:

7 ...ships, boats, barges or any other floating craft that are designed
8 and used for navigation and do not interfere with the normal public
9 use of the water, including historic ships that do not have means of
self-propulsion and steering equipment and house barges.³⁵

10 A floating on-water residence (FOWR) means:

11 ... any floating **structure**, other than a floating home, that is
12 designed or used primarily as a residence, has detachable utilities,
13 and is the subject of a lease or sublease at a marina, or whose owner
14 or predecessor in interest had an ownership interest in a marina, as
of July 1, 2014. See RCW 90.58.270. For the purposes of this
definition, a structure will be considered "designed primarily as a
residence" if it contains a dwelling unit.³⁶

15 The City's definition of a FOWR is essentially identical to the State's definition.³⁷ Both
16 definitions define a FOWR as a floating **structure**. A structure means:

17 ... a permanent or temporary edifice or building, or any piece of work
18 ... whether installed on, above, or below the surface of the ground or water,
including fences, walls, signs, piers, floats and drydocks, **but not including**
... **vessels**.³⁸

19 Therefore, a vessel cannot be a FOWR, because a vessel is not a structure.

21 ³⁴ Schmautz Declaration, Exhibit G (Specifically the email from Mr. Schmautz dated January 14, 2016).

22 ³⁵ SMC 23.60A.942. This definition is identical to the definition of "vessel" in WAC 197-11-030(18), with the addition
of the provisions regarding historic ships, which was approved by the State Department of Ecology (DOE).

23 ³⁶ SMC 23,60A.912.

³⁷ See RCW 90.58.270(6).

³⁸ SMC 23.60A.936 and WAC 173-27-030(15).

1 **2. The rules of statutory interpretation demand the determination that**
2 **Mr. Schmautz's vessel is not a FOWR.**

3 Laws are interpreted to align as closely as possible with legislative intent and avoid strained
4 or unlikely consequences of a particular interpretation.³⁹ Related statutory provisions must be
5 harmonized to effectuate a consistent statutory scheme that maintains the integrity of the respective
6 statute.⁴⁰ When an agency is charged with administering a law, such as the regulations governing
7 FOWRs, that agency's interpretation is entitled to deference.⁴¹ To sustain that interpretation, the
8 court need only find that the agency's interpretation was sufficiently rational to preclude the court
9 from substituting its judgment for that of the agency.⁴² Here, deference must be given to SDCI in
10 interpreting what is and is not a FOWR.

11 Moreover, the SMA explicitly states that it is "exempted from the rule of strict
12 construction, and it shall be liberally construed to give full effect to the objectives and purposes of
13 RCW 90.58, the Shoreline Management Act. The standard in [the SMA] that is most restrictive
14 applies."⁴³ In adopting amendments to the SMA to address FOWRs and directing local
15 governments to do the same, the legislature explicitly stated that it intended to "... respect the well-

18 ³⁹ *Friends of Columbia Gorge, Inc. v. Washington State Forest Practices Appeals Bd*, 129 Wn. App. 35, 47, 118 P.3d
19 354, 359-60 (2005) (quoting *Muckleshoot Indian Tribe v. Washington Department of Ecology*, 112 Wn. App. 712, at
20 721, 50 P.3d 668).

21 ⁴⁰ *Protect the Peninsula's Future v. Growth Management Hearings Board*, 185 Wn. App. 959, 970, 344 P.3d 705
22 (2015) and *Muckleshoot Indian Tribe v. Washington Department of Ecology*, 112 Wn. App. 712, at 721, 50 P.3d 668
23 (2002).

⁴¹ *Port of Seattle v. Pollution Control Hearings Board*, 151 Wn.2d 568, 612, 90 P.3d 659 (2004) and *Public Utility
District No. 1 of Clark County v. Pollution Control Hearings Board*, 137 Wn. App. 150, 157, 151 P.3d 1067, 1070
(2007) (holding that where the Legislature designated Ecology to regulate Washington's water code, the court gives
Ecology's interpretation of statutes and regulations dealing with water resources great weight).

⁴² *Chemical Manufacturers Association v. Natural Resources Defense Council, Inc.*, 470 U.S. 116, 125, 105 S.Ct.
1102 and *Skamania County v. Columbia River Gorge Commission*, 144 Wn.2d 30, 42-43, 26 P.3d 241, 247 (2001).

⁴³ SMC 23.60A.014.

1 established authority of local governments to determine compliance with regulatory requirements
2 applicable to their jurisdiction.”⁴⁴

3 Because the definitions of vessel and FOWR are mutually exclusive, they must be read to
4 harmonize and effectuate the intent of the statute to disfavor non-water dependent uses, including
5 residential uses, and because SDCI is entitled to deference, Mr. Schmartz’s vessel cannot be a
6 FOWR.

7 **3. Allowing Mr. Schmartz’s vessel to be verified as a FOWR would be
8 contrary to the intent of the SMA and SMP.**

9 As described throughout this brief, the intent of the SMA is to protect the shoreline and
10 that code shows a strong preference for water-dependent uses.⁴⁵ In the aquatic environment, new
11 over-water structures may be allowed *only* for water-dependent uses, public access or ecological
12 restoration.⁴⁶ Similarly, “[n]ew over-water residences, including floating homes, are **not** a
13 preferred use and **should be prohibited**.”⁴⁷ The State provided that FOWRs should be considered
14 conforming uses to the extent they were legally established prior to July 1, 2014,⁴⁸ limiting that
15 non-water-dependent disfavored use to those *structures* that were existing. The legislature
16 described its intent to “preserve the existence and vitality of current, floating on-water residential
17 uses; [and] establish greater clarity and regulatory uniformity for these uses...”⁴⁹ But it in no way
18 indicated that those amendments were not to be construed consistently with the purpose and
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21 ⁴⁴ Findings to RCW 90.58.270, *see* Declaration of Erin Ferguson, Exhibit B (Engrosses Substitute Senate Bill 6450,
22 Sec. 1)

23 ⁴⁵ RCW 90.58.020.

⁴⁶ WAC 173-26-211(5)(C)(ii).

⁴⁷ WAC 173-26-241(3)(j) (emphasis added). This language existed prior to adoption of the amendments to address
FOWRs and was not modified in light of those changes, indicating that policy has not changed.

⁴⁸ RCW 90.58.270.

⁴⁹ Declaration of Erin Ferguson, Exhibit B.

1 policies of the SMA as a whole, which is to protect the State's shorelines through a preference for
2 uses that are water-dependent and to minimize environmental impact.⁵⁰

3 It would be completely contrary to the intent of the SMA to let a vessel be verified as a
4 FOWR, a use that is not preferred and explicitly intended to be limited, just by having an
5 inoperable motor. Mr. Schmautz's vessel cannot be a FOWR.

6 **4. It is absurd to say that a broken motor makes a vessel a FOWR.**

7 In addition to contradicting the mutually exclusive definitions of a vessel and a FOWR and
8 being clearly contrary to the intent of the SMA and SMP to limit non-water-dependent uses, it is
9 simply absurd to conclude that a broken motor makes a vessel a FOWR. FOWRs traditionally
10 come with greater square footage and height, and contain fixtures more traditional to residential
11 structures than vessels, such as bathrooms, kitchens, laundry facilities, and others that create more
12 wastewater/greywater and have the potential to create greater environmental degradation to the
13 shorelines.⁵¹ If Mr. Schmautz's interpretation were played out, every vessel in the City (or State)
14 that was used as a residence on July 1, 2014 would ostensibly be entitled to verification as a FOWR
15 and the allowed development standards, and associated impacts to the shoreline, that come with
16 that status, if at any time it was determined to be inoperable.⁵²

17 Similarly, classifying broken vessels as FOWRs would have the unintended consequence
18 of drawing many vessels into a framework of regulation that are currently not subject to such
19 regulation. Although the City has the authority to regulate the moorage of vessels and uses on
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22 ⁵⁰ SMC 23.60A.002(B).

⁵¹ Mueller Declaration at no. 9 and reflected throughout SMA and SMP provisions disfavoring non-water-dependent uses, including residential use.

23 ⁵² For reference, there are thousands of vessels in the City of Seattle, 1,411 berths at Shilshole Bay Marina alone, including 300 live-aboard slips.

1 vessels that are unrelated to navigation,⁵³ many types of vessels do not need to be verified to be
2 used as a live-aboard. Mr. Schmautz's interpretation that a vessel becomes a FOWR just because
3 it has a broken motor leads to absurd results and must be rejected.

4 **B. There is no reason why Mr. Schmautz's vessel needs to be verified as a FOWR**
5 **for him to continue using his vessel as a residence.**

6 A vessel may be used to live on, as a live-aboard, if it is a conventional recreational vessel,
7 such as a trawler.⁵⁴ Mr. Schmautz could replace his commercial recreational vessel with a larger
8 commercial recreational vessel without any problem under the SMP, as long as it was moored
9 legally; he just cannot replace the vessel with a bigger, taller, more "house-like" structure that is
10 not water-dependent and will have greater impacts on the shoreline.⁵⁵

11 As a FOWR, however, an owner may maintain, repair, remodel, relocate and even *expand*,
12 *rebuild or replace* the existing FOWR.⁵⁶ But the legislative intent in creating FOWRs was clearly
13 to allow the continuation of existing non-water dependent uses, not the proliferation of new ones.
14 There is no reason Mr. Schmautz is entitled to verification of his vessel as a FOWR, contrary
15 to the intent of the SMA and SMP, particularly when he already has an existing use that allows
16 him to use his vessel as a live-aboard.

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19 ⁵³ See 23.60A.018 (stating that "the regulations of this Chapter 23.60 do not apply to the operation of boats, ships and
20 other vessels designed and used for navigation, other than moorage of vessels and uses on vessels unrelated to
21 navigation").

22 ⁵⁴ SMC 23.60A.214(B)(1)(a)(3). If the vessel does not fit within the definition of a "conventional recreational vessel,
23 the code provides the option of applying for verification as a "vessel with a dwelling unit." See SMC 23.60A.214.

⁵⁵ The rationale here being that the City does not regulate traditional, navigable vessels and the types identified are
easily identifiable as such (SMC 23.60A.018). If this were a vessel with a dwelling unit, that vessel would be
prohibited from expanding and there are some restrictions on replacement, but they are nonetheless allowed (SMC
23.60A.214).

⁵⁶ SMC 23.60A.203 (emphasis added). The City also adopted standards for moorages that allow using vessels as
dwelling units, to satisfy the State requirement that the impacts to the shoreline be addressed and to protect ecological
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IV. CONCLUSION

Because Mr. Schmautz's vessel is not a floating on-water residence, SDCI's decision to deny his verification application should be upheld and this appeal must be dismissed.

DATED this 21st day of November, 2016.

PETER S. HOLMES
Seattle City Attorney

By:


ERIN E. FERGUSON, WSBA #39535
Assistant City Attorney

Attorney for City
The City of Seattle
701 5th Avenue, Suite 2050
Seattle, WA 98104-7097
Phone: (206) 684-8615

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that, on this day,
I sent a copy of the following documents:

City's Motion for Summary Judgment

Declaration of Erin Ferguson

Declaration of Megan Mueller

Via e-mail by agreement to the following party:

R. Shawn Griggs

shawn@griggs-law.com

Attorneys for Petitioner Michael Schmautz

DATED this 21st day of November, 2016, at Seattle, Washington.


ALICIA REISE, Legal Assistant