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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 Response to Appellant's Motion for
10 Inspection.) Summary Judgment
)
11 _____)

I. FACTS & INTRODUCTION

For purposes of this response and the City's Motion for Summary Judgment, the City does not dispute the facts provided in the Appellant's Motion for Summary Judgment: Mr. Schmautz bought a vessel with a broken motor that has been moored in Seattle since at least 2013 and the Seattle Department of Construction and Inspections (SDCI) denied his application requesting the vessel be verified as a floating on-water residence (FOWR).

The issue in this matter, is whether a vessel with a broken motor is entitled to be verified as a FOWR. As described in the City's Motion for Summary Judgment, regulations to allow FOWRs were adopted to allow the preservation of existing floating structures that were being used as residences that would otherwise be illegal, with a clear intention of prohibiting *new* residential

1 structures from being allowed.¹ Non-water dependent uses, which includes residential use, are
2 disfavored under the State's Shoreline Management Act (SMA, RCW 90.58) and the City's
3 Shoreline Master Program (SMP, SMC 23.60A). Allowing any inoperable vessel to be considered
4 a FOWR is contrary to the definition of a FOWR, would fly in the face of the State and City's
5 intent to limit this type of non-water dependent use and would provide a path for unscrupulous
6 vessel owners to skirt a system intended to preserve the City's valuable shoreline resources.²

7 II. AUTHORITY AND ARGUMENT

8 A. The threshold question in determining if something is a FOWR, is whether it 9 is a structure; if it is not a structure, then no additional analysis is required.

10 Mr. Schmautz describes a "basic four part test to determine whether something qualifies as
11 a floating on-water residence."³ But that test fails to include a crucial component of the definition
12 of a "floating on-water residence" – a FOWR must be a **structure**.⁴ Although it is correct that a
13 FOWR must (1) be designed or used primarily as a dwelling unit; (2) have detachable utilities; (3)
14 be the subject of a lease or ownership interest in a marina in the City as of July 1, 2014; and (4) be
15 used as a dwelling unit within the City of Seattle prior to July 1, 2014, those four criteria are only
16 relevant if the thing proposed to be verified as a FOWR is a structure.⁵ In the present case, Mr.
17 Schmautz's vessel is not a structure and so the "four part test" is irrelevant.
18

19 ¹ See City's Motion for Summary Judgment (City's Motion), at p. 2, and WAC 173-26-241(2)(j) (setting out the use
20 provisions that must be included in local master programs).

² See City's Motion.

³ Appellant's Motion for Summary Judgment (Appellant's Motion), p. 3.

⁴ SMC 23.60A.912 ("Floating on-water residence" means any floating **structure**, other than a floating home, that is
21 designed or used primarily as a residence, has detachable utilities, and is the subject of a lease or sublease at a marina,
22 or whose owner or predecessor in interest had an ownership interest in a marina, as of July 1, 2014. See RCW
90.58.270. For the purpose of this definition, a structure will be considered "designed primarily as a residence" if it
contains a dwelling unit) and RCW 90.58.270(6)(b).

⁵ This is true under both the City and State definition of "floating on-water residence" (see SMC 23.60A.912 and
23 RCW 90.58.270(6)(b)).

1 **1. Mr. Schmautz's vessel is not a structure and so cannot be verified as a**
2 **FOWR.**

3 As provided in the City's Motion for Summary Judgment, a "structure" is defined as:

4 ... a permanent or temporary edifice or building, or any piece of work
5 ... whether installed on, above, or below the surface of the ground or water,
6 including fences, walls, signs, piers, floats and drydocks, **but not including**
7 ... vessels.⁶

8 Mr. Schmautz repeatedly admits that his vessel is a vessel.⁷ Thus, it cannot be a structure
9 and cannot be a FOWR.⁸

10 **2. Both the SMA and the SMP, as well as the associated legislative history,**
11 **support the City's position that a vessel, even one with a broken motor,**
12 **cannot be a FOWR.**

13 Mr. Schmautz's own Motion states that, based on the distinction between structures and
14 vessels in the City's SMP,⁹ "a vessel cannot be a structure and vice versa. And by that logic, a
15 vessel cannot be a [FOWR]."¹⁰ On that count, Mr. Schmautz is exactly correct.

16 As described in the City's Motion for Summary Judgment, management of the State's
17 shorelines are governed by the SMA, with direction to local jurisdictions to develop their own
18 master programs to implement the policies and provisions of the SMA.¹¹ Thus, the provisions in

19 ⁶ SMC 23.60A.936 and WAC 173-27-030(15).

20 ⁷ Declaration of Michael Schmautz (Schmautz Declaration), at no.2 and 10, Exhibit G to Schmautz Declaration
21 (Application). and Appellant's Motion for Summary Judgment, p. 1, lines 12-13 (referring to the Washington
22 Registration Number for Mr. Schmautz's vessel), p. 10, lines 7-8 (stating that Mr. Schmautz's vessel was "originally
23 designed for navigation"), lines 11-12 (describing Mr. Schmautz's vessel as a "live aboard vessel") and line 22
24 (referring to Mr. Schmautz's vessel as a "non-self propelled vessel). In addition, Mr. Schmautz's vessel was moored
25 at Shilshole Marina, which specifically excludes "houseboats" and requires moored vessels to be fully operational and
26 navigable. *See* Schmautz Declaration at no. 5 and Declaration of Megan Mueller (Mueller Declaration), at no. 7, and
27 Exhibit B (Shilshole Moorage Application).

28 ⁸ Additional support for this proposition is included in the City's Motion, Section III.A.

29 ⁹ SMC 23.60A.936.

30 ¹⁰ Appellant's Motion for Summary Judgment, at p. 8, lines 1-9 (emphasis added).

31 ¹¹ RCW 90.58.080 and WAC 173-26-030.

1 the SMA and SMP governing FOWRS are essentially identical and both require FOWRS to be
2 structures.¹²

3 There is no support for Mr. Schmautz's contention that the term "structure" as used in the
4 State SMA is intended to constitute a broader category of floating things that includes vessels or
5 that there is any inconsistency between the SMA and SMP provisions governing FOWRS. In fact,
6 the definition of "structure" in WAC Chapter 173-27, which implements the requirements of the
7 SMA, specifically excludes vessels:

8 ... "Structure" means a permanent or temporary edifice or building,
9 or any piece of work artificially built or composed of parts joined
10 together in some definite manner, whether installed on, above, or
11 below the surface of the ground or water, **except for vessels**;¹³

12 This explicit exclusion of vessels from the definition of a structure is mirrored in the SMP.¹⁴

13 Despite these clear definitions, Mr. Schmautz claims that "the term 'structure' may none-
14 the-less include vessels." But the code provisions and legislative history he cites to support that
15 position¹⁵ actually illustrate the contrary and support the City's position that a vessel cannot be a
16 structure and thus, cannot be a FOWR.

17 For example, Mr. Schmautz erroneously points to the language of the bill that was
18 originally introduced to add provisions related to FOWRS to the SMA. That original bill did refer
19 to FOWRS as vessels, as did the Senate Bill Report on that bill, but that language was *amended*
20 prior to adoption and enactment into law, to explicitly define FOWRS as structures.¹⁶ The only

21 ¹² See RCW 90.58.270(6) and SMC 23.60A.912.

22 ¹³ WAC 173-27-030(15) (emphasis added). Mr. Schmautz states that the SMA does not define "structure" but fails to
23 identify this relevant WAC provision.

¹⁴ See SMC 23.60A.936.

¹⁵ See Schmautz Motion, footnotes 1 and 2.

¹⁶ Declaration of Erin Ferguson in Support of the City's Response to Appellant's Motion for Summary Judgment,
Exhibit A (SB 6450 (original bill), which was referred to in footnote 2 of Appellant's Motion, but not attached) and
Engrossed Substitute Senate Bill 6450 (effective in June 2014, codified at RCW 90.58.370(6)), attached to the
Declaration of Erin Ferguson in Support of the City's Motion, as Exhibit B. Also, any reliance on the Senate Bill

1 conclusion that can be drawn from the legislative history here, is that the State legislature amended
2 the original bill that referred to FOWRs as vessels specifically to clarify that FOWRs must be
3 structures and *not* vessels.

4 Mr. Schmautz also argues that to the extent the SMP excludes vessels from the definition
5 of FOWRs, that is somehow in conflict with and preempted by the SMA.¹⁷ But, as described above,
6 the SMA and SMP *both* exclude vessels from the definition of FOWRs and the two regimes are
7 consistent. For example, footnote 2 of Mr. Schmautz's Motion points to the definition of "vessel"
8 at SMC 23.60A.942, and claims that because that definition includes "house barges" that do not
9 otherwise fulfill that definition, somehow that indicates that other structures can be vessels too.
10 But that is an absurd interpretation. House barges are included in the SMP definition of vessel to
11 expressly identify a category of things that is included.¹⁸ In fact, the legislative history illustrates
12 that only a very narrow category of things defined as house barges can be considered vessels,
13 supporting the concept that things are either a vessel or a structure and cannot be both.

14 Likewise, the fact that SMC 23.60A.204 provides that "floating structures" other than
15 house barges and FOWRs will be regulated as floating homes in no way demonstrates that a vessel
16 can be a structure, as Mr. Schmautz alleges. In fact, it simply says that other "floating structures"
17 that do not neatly fit into the category of house barge or FOWR must be regulated as the most
18 strictly regulated category of residences allowed in structures over water, a floating home.

19 In ALL of the examples cited by Mr. Schmautz for the misguided proposition that vessels
20 are a subset of "floating structures" and thus eligible for verification as a FOWR, the "floating

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22 report as legislative history is incorrect, because that report states that its analysis is "not a part of the legislation nor
does it constitute a statement of legislative intent." Senate Bill Report on SB 6450, bottom of p. 1.

23 ¹⁷ Appellant's Motion, footnote 2, p. 9, line 21-23.

¹⁸ Declaration of Erin Ferguson in Support of the City's Motion for Summary Judgment, Exhibit A, p. 1 (Director's
Report for Ordinance 116051) and SMC 23.60A.204 (*see also* Ordinance 116051 and Ordinance 116328).

1 structures” that are not house barges or FOWRs are regulated as floating homes, the most highly
2 regulated category of residences allowed over the water. Nothing in the provisions cited by Mr.
3 Schmautz contradict the definition of a “structure” to the exclusion of vessels.

4 And lastly, the SMP is entirely consistent with the SMA. In addition to being required by
5 the SMA, the consistency of the two schemes is confirmed through State review and approval of
6 local SMPs. Here, the State *approved the City’s SMP*, including those provisions requiring
7 FOWRs to be structures, not vessels. If the State disagreed with the City’s approach, it had the
8 opportunity to require amendments, but did not.¹⁹ Instead, the Department of Ecology approved
9 the City’s SMP on June 1, 2015.²⁰ The City’s definition of FOWRs, which excludes vessels, is
10 consistent with the SMA and must be applied here.

11 **3. A broken motor does not transform a vessel into something else.**

12 Mr. Schmautz alleges that his vessel is eligible for verification as a FOWR because it has
13 a broken motor.²¹ But a broken motor does not transform a vessel into something else. “Vessel”
14 means:

15 ...ships, boats, barges or any other floating craft that are designed
16 and used for navigation and do not interfere with the normal public
17 use of the water, including historic ships that do not have means of
self-propulsion and steering equipment and house barges.²²

18 In addition, SMC 24.60A.214 defines vessels that can be used as a dwelling units, including
19 seven categories of “conventional recreational vessels.” Conventional recreational vessels include
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21 ¹⁹ See WAC 173-26-120.

22 ²⁰ Declaration of Erin Ferguson in Support of City’s Response to Appellant’s Motion for Summary Judgment, Exhibit
B.

23 ²¹ See, e.g., Appellant’s Motion, footnote 2, p. 9, lines 22-24 and p. 10.

²² 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).

1 trawler yachts like Mr. Schmautz's,²³ Mr. Schmautz does not disagree that his vessel is a trawler
2 yacht and even states that "[t]here is little question [Mr. Schmautz's vessel] was originally
3 designed for navigation,"²⁴ but instead argues that his vessel is not a vessel because it has a broken
4 motor and has not engaged in navigation since 2013.²⁵ But any vessel in City waters has the
5 potential to break down or suffer engine failure. The solution is to repair the motor, not declare
6 any boat in need of repair as a FOWR. As described further in the City's Motion for Summary
7 Judgment, such an interpretation would be absurd and contrary to legislative intent.²⁶

8 But even based on Mr. Schmautz's description of "navigation" which he states is
9 "generally understood to entail 'conducting a ship from one place to another'" citing *Pollock v.*
10 *Cleveland Ship Building Co.*, 56, Ohio St. 655, 668, 47.N.E. 582 (1897), which is an old and non-
11 precedential decision here, the fact that his vessel has moved twice since 2013, can be interpreted
12 as navigation.

13 In looking at whether something is "used for navigation," all that is required is "that vessels
14 must sometimes be used for travel over water,"²⁷ consistent with the City Attorney's position in
15 2003. Nothing about that definition indicates that traveling over the water twice in the last 3 years
16 is insufficient to satisfy the definition of "used for navigation." The City is not engaged in
17 monitoring the movement of conventional recreational vessels;²⁸ there is a de facto presumption
18 of navigability based on their design as narrowly defined by the SMP. And Mr. Schmautz admits
19 his vessel is designed as such.

21 ²³ SMC 23.60A.214(B)(1)(a)(3). Conventional recreational vessels are not subject to the same registration and
verification requirements of other types of over-water residences.

22 ²⁴ Appellant's Motion, p. 10, line 7-8.

23 ²⁵ Appellant's Motion, p. 10, line 5-6.

²⁶ See City's Motion.

²⁷ Appellant's Motion, p. 10, line 3-4, citing *Brown v. City of Seattle*, 117 Wn. App. 781, 786 (2003).

²⁸ SMC 23.60A.018 (providing that the regulations of the SMP do not apply to the operation of vessels).

1 Mr. Schmautz's final argument is that as a "non-self propelled vessel," his vessel must be
2 regulated as a house barge, FOWR, or floating home, but this is incorrect. As described above,
3 Mr. Schmautz's vessel can be regulated as a "conventional recreational vessel," upon which
4 residential use is allowed.²⁹ All of the documentation Mr. Schmautz has provided regarding his
5 vessel, including registration with the Washington Department of Licensing and associated
6 description of the vessel containing a diesel fuel propelled inboard engine, support the idea that it
7 is most appropriately regulated as a conventional recreational vessel.³⁰ A vessel with an engine in
8 need of repair is not equivalent to a structure lacking a means of self-propulsion; a vessel with a
9 broken motor cannot be a FOWR.

10 **B. Verifying Mr. Schmautz's vessel as a FOWR would be contrary to the purpose**
11 **of the SMA and SMP.**

12 As pointed out in the City's Motion for Summary Judgment, Mr. Schmautz's vessel does
13 not need to be verified as a FOWR for him to continue to live on his vessel.³¹ Mr. Schmautz's
14 vessel and all vessels are a water-dependent use, a use that is preferred within the Shoreline
15 District. To re-classify a vessel into the category of a FOWR, which is a residential use, a use that
16 is not preferred under the SMA, is contrary to the intent of the SMA. The SMA and SMP
17 contemplate allowing people to live on vessels, but new overwater residential uses are clearly
18 intended to be prohibited due to the fact that residential use is not a water-dependent use and can
19 have negative environmental impacts to the shoreline environment.³² The provisions allowing
20 FOWRs, like house barges, were a targeted response to assist residents on the water who otherwise
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22 ²⁹ SMC 23.60A.214(B)(1)(a)(3).

23 ³⁰ Schmautz Declaration at no. 2, as well as Exhibit A and Exhibit G.

³¹ City's Motion, at Section B.

³² WAC 173-26-241(2)(j) (emphasis added) and *see* the City's Motion, Section I.

1 would be illegal uses, *not* to expand residential uses over water.³³ The purpose of the SMA and
2 the SMP would be thwarted if vessels with broken motors were entitled to verification as FOWRs
3 and this absurd result must be rejected.³⁴

4 **III. CONCLUSION**

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

7 DATED this 8th day of December, 2016.

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³³ See City's Motion, particularly Section I.
³⁴ City's Motion, Section I and Section III.A.4.

