BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeal of: MICHAEL SCHMAUTZ From an Interpretation by the Director, Seattle Department of Construction and Inspections	No. S-16-005 **APPELLANT'S OPPOSITION TO THE CITY'S MOTION FOR SUMMARY JUDGMENT**

Appellant Michael Schmautz, through the undersigned counsel of record, hereby submits the following in opposition to the motion for summary judgment filed by the City of Seattle on November 21, 2016.

A. Under Washington law, a vessel may qualify as a FOWR, and to the extent that the SMP or SDCI suggest otherwise, they do so in contravention of state law.

The creation and protection of FOWRs is mandated by RCW § 90.58.270(6), which amended the SMA in 2014. Seattle's authority to adopt and implement the SMP derives from and is limited by the provisions of the SMA. To the extent, then, that the SMP or SDCI seek to constrict the class of structures that qualify for protection as FOWRs under the provisions of RCW § 90.58.270(6), they are in contravention of and preempted by state law. The provisions of RCW § 90.58.270(6) should therefore dictate whether or not a vessel may qualify as a FOWR.

The plain language of RCW § 90.58.270(6) supports inclusion of vessels as FOWRs. The SMA defines a floating on-water residence as "any floating structure other than a floating home … that: (i) [i]s designed or used primarily as a residence on

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the water and has detachable utilities; and (ii) whose owner or primary occupant has held an ownership interest in space in a marina, or has held a lease or sublease to use space in a marina, since a date prior to July 1, 2014." Unlike the SMP, the SMA does not define the term "structure," but the ordinary meaning of that term is "something (as a building) that is constructed." "Structure." *Merriam-Webster.com*. Merriam-Webster, n.d. Web. 8 Dec. 2016. The plain language of RCW § 90.58.270(6)(b), then, includes vessels, as they – like all other man-made things that float on the water – are constructed and therefore fall within the ordinary use of the term "structure." Moreover, the exclusion of floating homes from the FOWR definition confirms that vessels are supposed to fall within the FOWR classification – not only does the legislature's failure to include an express exclusion of vessels (as it did with floating homes) signal that "structures" that qualify as FOWRs can include vessels, but the cross-exclusion of floating homes in the FOWR definition mandates that most FOWRs will be vessels under state law.[1]

The legislative history of RCW § 90.58.270(6)(b) similarly supports inclusion of vessels as FOWRs. Engrossed Substitute Senate Bill 6450 (2014) – the legislation from

[1] RCW § 90.58.270(6)(b) defines a floating home as "a single-family dwelling unit constructed on a float, that is moored, anchored, or otherwise secured in waters, and is not a vessel, even though it may be capable of being towed." RCW § 90.58.270(5)(b)(ii) (emphasis supplied); *see also* SMC § 23.60A.912 (the term float "means those elements that provide the buoyancy necessary to keep the floating home above the water"). Likewise, a floating on-water residence is a dwelling unit, floats, and is moored. *See* RCW § 90.58.270(6)(b). But under their respective definitions, a floating on-water residence can't be a floating home. And a floating home can't be a vessel. Logically then, the only major distinction between floating homes and floating on-water residences is that the later are considered vessels under the SMA.

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which RCW § 90.58.270(6)(b) originated – was originally proposed as Senate Bill 6450, which defined a floating on-water residence as "a vessel that is registered under chapter 88.02 RCW and: (A) [i]s used as a residence on the water and has detachable utilities; (B) whose owner or primary occupant has held a lease or sublease to use space in a marina as their primary residence since a date prior to July 1, 2014; and (C) is either capable of propulsion and steering or is without a means of self-propulsion and steering equipment or capability, but is capable of being towed." S-3907.1 (2014). After being referred to the Senate Natural Resources and Parks Committee, the legislation was modified to include a revised definition of floating on-water residences: "any floating structure other than a floating home, as defined under subsection (5) of this section, that: (i) [i]s designed or used primarily as a residence on the water and has detachable utilities; and (ii) whose owner or primary occupant has held a lease or sublease to use space in a marina as their primary residence since a date prior to July 1, 2014." S-4210.2 (2014). As the Senate Bill Report for SB6450 reflects, the modification was intended to expand the scope of the original legislation from registered vessels to all structures, including vessels, that met the revised requirements. S. REP. SB6450 (Senate Committee on Natural Resources and Parks, February 4, 2014) (summarizing support for the legislation because it "would see that protection extended to those who live within structures classified as vessels"); *see also* H. REP. ESSB 6450 (March 5, 2014) (summarizing both support and opposition for the legislation's inclusion of "liveaboard vessels" and "houseboats").

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Likewise, multiple provisions in the SMP indicate that the terms "structure" and "vessel" are not, in fact, mutually exclusive. SMC § 23.60A is peppered with provisions that indicate that the term "structure" may none-the-less include vessels. For example, SMC § 23.60A.942 defines the term "vessel" to include house barges, even though house barges are regulated as structures per SMC § 23.60A.204. Similarly, SMC § 23.60A.204(A)(1) provides that "[f]loating structures, including vessels that do not have a means of self-propulsion and steering equipment and that are designed or used as a place of residence, with the exception of house barges authorized under subsection 23.60A.204.B and floating on-water residences authorized under Section 23.60A.203, shall be regulated as floating homes pursuant to this Chapter 23.60.A", indicating that vessels are a subset of a broader category of "structures" regulated by the SMP. Similarly, SMC § 23.60A.203(A) provides that "[f]loating structures that contain dwelling units and vessels that contain dwelling units shall be regulated as floating homes pursuant to Section 23.60A.202, with the exception of floating on-water residences that comply with this Section 23.60A.203, house barges that comply with Section 23.60A.204, residences allowed under Section 23.60A.206, and vessels that comply with Section 23.60A.214" further demonstrating vessels to be a subset of the broader category of "floating structures."

The plain language of the SMA permits verification of vessels as FOWRs, and that should be the end of the inquiry. However, even the language of the SMP indicates that in many circumstances where the term "structure" is used, "vessels" are contemplated to be included as a subset of the structures regulated. Accordingly, even

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the language of the SMP does not foreclose verification of vessels as FOWRs, which, in light of the unambiguous provisions of RCW 90.58.270(6), is the correct result.

II. The plain language of the SMP dictates that the PROSPERITY is not a Vessel – as defined by SMC § 23.60A.942 – and should therefore be verified as a FOWR.

The source of conflict in this case is SMC § 23.60A.936, which generally defines "structures" to exclude Vessels. As noted above, the SMA uses the term "structure" in its ordinary and broader sense, which includes vessels. However, this conflict need not be resolved in this case because the SMP has similarly construed the term "Vessel" more narrowly than state and federal law. And because the PROSPERITY does not fall within this narrowed definition of the term "Vessel," it is classified as a structure under the SMP and is therefore eligible for verification as a FOWR under the unambiguous language of the SMP as well.

The City's assertion that "it is absurd to say that a broken motor makes a vessel a fowr" is a specious characterization of a more substantive issue. SMC § 23.60A.942 defines what is considered a Vessel for the purposes of the SMP, and this definition is decidedly more narrow than what state and federal law consider a vessel to be.[2] SMC § 23.60A.942 requires that a Vessel be both designed and actually used for navigation. This later standard is one that SDCI has strictly construed and zealously enforced for decades – in most cases determining that unless a structure is regularly used to transport

[2] *Compare* RCW § 88.02.310(5) ("'Vessel' means every watercraft used or capable of being used as a means of transportation on the water, other than a seaplane."); *see also* 1 U.S.C. § 3 ("The word 'vessel' includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.").

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people or goods over water, it is not used for navigation and therefore is not a Vessel under the SMP. Whether or not the PROSPERITY is a Vessel under SMC § 23.60A.942 is therefore not merely a function of whether or not its engine works, but whether or not it is regularly used in navigation. The absence of a working engine is informative, as navigation is practically impossible without one, but the real question is whether or not the failure of the PROSPERITY to navigation with any regularity renders it a structure, as opposed to a Vessel, under the SMP.

The PROSPERITY does not qualify as a "Vessel" under SMC § 23.60A.942 because it has been neither capable of nor has engaged in navigation since at least 2013. There is little question that the PROSPERITY was originally designed for navigation. *Schmautz Decl. ¶3.* However, since at least 2013, it has been a dead ship due to substantial damage that rendered its engine permanently inoperable. *Schmautz Decl. ¶¶ 9—11; see also* Ex D to *Schmautz Decl.* (confirming that the PROSPERITY was continuously moored as a live aboard vessel at Shilshole Bay Marina between September 1, 2010 and October 31, 2011). During this period, the PROSPERITY has remained moored, moving only twice to relocate its moorage, and in each case under tow. *Schmautz Decl. ¶¶10—11.* In this time, the PROSPERTY has not been used for travel over water and therefore has not been used for navigation, causing it to fail the definition of what qualifies as a Vessel per the terms of SMC § 23.60A.942. This was the case well before the July 1, 2014 floating on-water residence qualification date – for at least a year prior to the floating on-water residence qualification deadline, and at all times since, the PROSPERITY has not engaged in navigation and has been incapable of

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doing so. Id. As classified by the Seattle Shoreline Master Plan, then, the PROSPERITY is a non-self propelled Vessel which – under applicable code provisions – is regulated as either a house barge, floating on-water residence, or floating home. *See* SMC § 23.60A.204(A)(1).

A. SDCI's interpretation of the SMA and SMP in this case should be afforded no deference because it contravenes the plain language and intent of both legislative schemes.

The City suggests that it should be given deference in determining what qualifies as a FOWR, but that is not the case when the statutory language is unambiguous – as is the case here – or when the interpretation advanced by the City runs contrary to the legislative intent of RCW 90.58.270(6). The primary duty in interpreting any statute is to determine and give effect to the intent of the legislature. Nat'l Elec. Contractors Ass'n v. Riveland, 138 Wn.2d 9, 19 (1999). The initial point of inquiry is the plain language of the legislation and its ordinary meaning. Id. If there is no ambiguity in the language, the legislation will not be construed otherwise. Washington Water Power Co. v. Washington State Human Rights Commission, 91 Wn.2d 62, 68-69 (1978); Sleasman v. City of Lacey, 159 Wn.2d 639, 643 (2007) (citing Kitsap County v. Mattress Outlet, 153 Wn.2d 506, 509 (2005)); Food Servs. Of Am. v. Royal Heights, Inc., 123 Wn.2d 779, 784-85 (1994)); Kilian v. Atkinson, 147 Wn.2d 16, 20 (2002) ("If a statute is clear on its face, its meaning is to be derived from the language of the statute alone."). Even when agency interpretation is wholly rational and consistent with underlying legislative intent, if there is no ambiguity in the ordinance itself, the statutory language alone controls its interpretation. Cerrillo v. Esparza, 158 Wn.2d 194,

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205-06 (2006) (*quoting* Agrilink Foods, Inc. v. Dep't of Revenue, 153 Wn.2d 392, 396 (2005)) ("Where statutory language is plain and unambiguous, courts will not construe the statute but will glean the legislative intent from the words of the statute itself, regardless of contrary interpretation by an administrative agency.").

In the event that legislation is ambiguous, or that ambiguity is created by the conflict of two otherwise unambiguous provisions, various canons of statutory construction are employed to discern and give effect to the legislative intent. Many of these are recited in the first paragraph of Section III.A.2 of the City's motion. One notable omission from this litany, however, is the axiom that the specific statute supersedes a general statute when both apply. *See e.g.*, State v. Shriner, 101 Wn.2d 576, 580 (1984); Hartig v. Seattle, 53 Wash. 432, 437 (1909); 2A C. Sands, Statutory Construction § 51.05 (4th ed. 1973); *see also* State v. J.P., 149 Wn.2d 444 (2003) (more recent and specific provision of law prevails).

SDCI's interpretation should be given no deference because verification of the PROSPERITY as a FOWR does not contravene the intent of the SMA, as articulated in the unambiguous language of RCW § 90.58.270(6). Under the SMA, a vessel (presumably, as defined under state or federal law) can be a FOWR. Accordingly, no deference is given to SDCI to craft a narrower interpretation. Moreover, RCW § 90.58.270(6) designates FOWRs as a conforming use and preserves the right of owners to maintain, repair, replace, and remodel their FOWRs. This specific provision post-dates those general provisions of the SMA cited by the City for the purpose of establishing a bias against the establishment of "[n]ew over-water residences" and

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therefore is controlling in the present case. Accordingly, all structures – including vessels –that meet the criteria of RCW § 90.58.270(6)(b) are protected as FOWRs under the SMA, and any the City's attempts to narrow the standard to exclude otherwise qualified FOWRs contravenes the SMA.

Similarly, SDCI's interpretation should be given no deference because verification of the PROSPERITY as a FOWR is consistent with the intent of the SMP. If the SMP is properly read so that Vessels (as more narrowly defined by SMC § 23.60A.942) cannot be FOWRs, verification of the PROSPERITY as a FOWR none-the-less comports with the legislative intent of the SMP because – as discussed above and in appellant's cross-motion for summary judgment – the SMP does not consider the PROSPERITY a Vessel. Indeed, SDCI's position in this case contravenes its long-established pattern of enforcement with respect to the SMP's definition of the term Vessel and should be given absolutely no deference as a matter of law. *See e.g.*, Sleasman v. City of Lacey, 159 Wn.2d 639, 646 (2007) (To be afforded deference, an agency must establish that its interpretation was adopted as a "matter of agency policy" – "it cannot merely 'bootstrap a legal argument into the place of agency interpretation' but must prove an established practice of enforcement").

The City's primary policy objection to verification of the PROSPERITY is based on unsubstantiated generalizations and circular logic. The City asserts that "FOWRs traditionally come with greater square footage and height, and contain fixtures more traditional to residential structures than vessels, such as bathrooms, kitchens, laundry facilities, and others that create more wastewater/greywater and have the potential to

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create greater environmental degradation to shorelines" but provides no empirical substantiation of these assertions other than the recitation of these conclusory statements by the City employee tasked with denying the PROSPERITY application. The circular nature of this statement is self-evident, however; because the FOWR designation was created solely for the purposes of RCW § 90.58.270(6) and that term has no independent significance elsewhere in state of federal law, the "typical" characteristics of a FOWR depend entirely on how the term "FOWR" is used. Read in context, it is apparent that each time Ms. Mueller refers to the "typical" characteristics of FOWRs, she has equated the term FOWR with houseboats and non-permitted floating homes. In doing so, she implies that liveaboard vessels lack bathrooms, kitchens, laundry facilities, etc., which is – as the configuration of the PROSPERITY evidences – plainly not the case. Moreover, Ms. Mueller's statement deceives insofar as it suggests that a houseboat may discharge more wastewater or greywater than a vessel used as a liveaboard; discharge of wastewater is strictly regulated for all per state and federal law (*e.g.*, RCW § 96.48.080), and no evidence of explanation is offered for the proposition that taking a shower or engaging in similar activity on board a houseboat generates any more or less greywater than the same activity conducted on board a liveaboard vessel. Instead, it is the size, configuration, and use of the vessel or houseboat that determines its impact on the environment, not whether or not it has been legally designated as a FOWR.

The City's suggestion that verification of the PROSPERITY as a FOWR will result in an explosion of overwater residences in Seattle is similarly without merit. The City suggests that allowing liveaboard vessels to become FOWRs will somehow increase

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the environmental impact of those vessels. But the City offers no explanation of how a FOWR designation would alter existing liveaboard uses or their impact on the shoreline environment. Indeed, regulation of liveaboards as FOWRs would – as the City admits – "draw[] many vessels into a framework of regulation" that is intended to minimize those impacts (via imposition of best management practices (*e.g.* SMC § 23.60A.203(E)), limiting moorage of FOWRs to permitted marinas, restricting expansion of overwater coverage (*e.g.*, SMC § 23.60A.203(C)), etc.). Nor would permitting vessels to become FOWRs increase the number of potential overwater residences in Seattle – as the City admits, vessels may already be used as overwater residences under the current SMP, so the universe of potential overwater residences will not be expanded. Similarly, the July 1, 2014, FOWR qualification date articulated in both the SMA and SMP limits the number of potential FOWRs – only those structures, vessels, etc., that were situated in Seattle and used as a place of residence prior to that date are eligible. Accordingly, allowing vessels to be verified as FOWRs could in no way expand the universe of potential on-water residences. There is no theoretical or actual scenario under which verification of vessels as FOWRs under the SMA or SMP results in an increase (let alone proliferation) of over water residences.

Finally, it is necessary to address the City's contention that the PROSPERITY need not be verified as a FOWR to protect Mr. Schmautz's liveaboard right. Under current regulations, a conventional recreational vessel may be used as a liveaboard and would be subject to fewer regulations than a FOWR would be. But, as the introduction to the City's motion details, the past decades have seen dramatic changes in the regulation

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of residences on the water and those structures, vessels, etc., that are eligible for use as a residence. The purpose of RCW 90.58.270(6) was to provide certainty to liveaboards in place as of July 1, 2014, and cement their place as a conforming use under the SMA with rights to maintain, repair, replace, and remodel. Denying the PROSPERITY FOWR status deprives Mr. Schmautz of the certainty promised by RCW 90.58.270(6) and subjects him and the PROSPERITY to the continued uncertainty of future regulation and interpretation by SDCI under the SMP. Accordingly, denying verification of the PROSPERITY as a FOWR would contravene the intent of RCW 90.58.270(6).

For the foregoing conclusions, appellant requests that the Hearing Examiner reject the policy considerations advanced by the City's motion for summary judgment and apply the SMA and SMP as written. Under the SMA – which should control in all cases – the PROSPERITY is eligible for verification as a FOWR, even if it qualifies as a vessel. Moreover, under the more narrowly crafted provisions of the SMP, the PROSPERITY does not qualify as a Vessel and is likewise eligible for verification as a FOWR. The City has offered no factual or legal argument to the contrary, and instead relies on broad policy concerns that contravene the plain language of both the SMA and SMP as well as the stated legislative intent to RCW § 90.58.270(6). Accordingly, the City has failed to meet its burden of proof, the policy considerations advanced in the City's motion are inapposite, and the PROSPERITY should be deemed eligible for verification as a FOWR pursuant to RCW § 90.58.270(6) and SMC § 23.60A.203(D).

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RESPECTFULLY SUBMITTED this 8th day of December, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of December, 2016 a true and correct copy of the foregoing along with the declaration of Michael Schmautz filed herewith was sent via e-mail pursuant to the parties' prior written agreement to:

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