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BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeal of)
)
Michael Schmautz)
) No. S-16-005
From an Interpretation by the Director,)
Seattle Department of Construction and) City's Reply to Appellant's Opposition to the
Inspection.) City's Motion for Summary Judgment
)
)
_____)

As reflected in the City's Motion for Summary Judgment and again in the City's Response to the Appellant's Motion for Summary Judgment, the issue to be resolved is whether a vessel with a broken motor is entitled to be verified as a floating on-water residence (FOWR), which is a statutorily created classification intended to clarify the status of "floating-home-like" structures and allow such structures to be maintained, repaired, replaced, and remodeled.¹

The City maintains that there are no disputed issues of material fact and that it is entitled to judgment as a matter of law: Mr. Schmautz's vessel cannot be verified as a FOWR and the Seattle Department of Construction and Inspections (SDCI) properly denied his application. The City's Motion for Summary Judgment should be granted, SDCI's decision should be upheld, and this appeal should be dismissed.

¹ See Engrossed Substitute Senate Bill 6450, Section 1(2) and Section (2), approved March 3, 2014, attached as EXHIBIT B to the Declaration of Erin Ferguson in Support of the City's Motion for Summary Judgment (Ferguson Declaration). This language is mirrored in SMC 23.60A.203.

1 I. AUTHORITY AND ARGUMENT

2 A. The State and local definitions of FOWRs are essentially identical and both
3 require FOWRs to be structures, not vessels.

4 Both the State Shoreline Management Act (SMA) and the City’s Shoreline Master Program
5 (SMP) define a FOWR as a structure that satisfies certain additional criteria, as described further
6 in Section II.A.1 of the City’s Motion for Summary Judgment (City’s Motion) and Section II.A of
7 the City’s Response to Appellant’s Motion for Summary Judgment (City’s Response). Mr.
8 Schmautz’s claim that somehow a vessel is included within the definition of structure, even though
9 both the SMP and SMA definitions of structure clearly exclude vessels, is unfounded. Moreover,
10 both the legislative intent and other provisions of the SMP support the plain language of the
11 regulations that a vessel cannot be a FOWR.

12 1. The State *does* define “structure” and that definition excludes vessels.

13 Contrary to Mr. Schmautz’ assertion, the State *does* define the term “structure” and that
14 definition explicitly excludes vessels, just like the City’s definition:²

15 ... “Structure” means a permanent or temporary edifice or building,
16 or any piece of work artificially built or composed of parts joined
together in some definite manner, whether installed on, above, or
below the surface of the ground or water, **except for vessels.**³

17 There is no discrepancy between the SMA and SMP and the plain language of both provide
18 that a structure cannot be a vessel and a FOWR must be a structure.⁴

21 ² See WAC 173-27-030(15) and SMC 23.60A.936. WAC 173-27-030(15) defines “structure” for the purpose of
22 implementing the SMA, particularly related to permitting and enforcement, which would include enforcement related
to any unpermitted use over the water. Even if there was not an applicable definition, the City would still strongly
disagree with Mr. Schmautz’s assertion that any definition of structure includes vessels in this context.

23 ³ WAC 173-27-030(15) (emphasis added). See also City’s Response, Section II.A(2).

⁴ See the City’s Motion for additional argument why any other interpretation would be absurd and that the rules of
statutory construction require an interpretation that does *not* lead to absurd results.

1 While that statement of intent does not explicitly address the structure v. vessel issue, the
2 fact that the stated purpose was to address residential uses on the water that are *like floating homes*,
3 which are structures, is as telling as the amendment shifting from vessels to structures. Moreover,
4 the legislature could not be clearer that they are leaving regulatory discretion to local governments,
5 like the City, to determine compliance with the new provisions;⁸ that is exactly what the City has
6 done here in determining that Mr. Schmautz's vessel cannot be verified as a FOWR.

7 But Mr. Schmautz does not rely on that genuine statement of legislative intent. Instead, he
8 points to the fact that the original bill proposed to amend RCW 90.58.270(6) referred to FOWRs
9 as "vessels" and was amended to refer to them as "structures" in the final bill that was approved
10 and enacted into law. But, as discussed in Section II.A.2 of the City's Response to Appellant's
11 Motion for Summary Judgment, there is no indication that amendment was intended to do anything
12 but define FOWRs as structures and not vessels, as the plain language of the amendment reflects.
13 The rules of statutory construction require that laws must be interpreted to avoid such a strained
14 interpretation.⁹

15 Mr. Schmautz also improperly relies on portions of the Senate and House Bill Reports
16 associated with the FOWR bill, despite the fact that they are "prepared by non-partisan staff for
17 the use of legislative members in their deliberations" and are "not a part of the legislation nor does
18 it constitute a statement of legislative intent."¹⁰ Moreover, the cited portions of the Reports are
19 pulled from the "Staff Summary of **Public Testimony**," essentially a summary of what comments
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21 ⁸ Section 1(3) of ESSB 6450, attached as EXHIBIT B to the Ferguson Declaration.

22 ⁹ *Friends of Columbia Gorge, Inc. v. Washington State Forest Practices Appeals Bd*, 129 Wn. App. 35, 47, 118 P.3d
354,359-60 (2005) (quoting *Muckleshoot Indian Tribe v. Washington Department of Ecology*, 112 Wn. App. 712, at
721, 50 P.3d 668).

23 ¹⁰ See bottom of page 1 of Senate Bill Report SB 6450 and House Bill Report ESSB 6450, attached as EXHIBIT A
and EXHIBIT B to the Ferguson Declaration on Reply.

1 were made at a public hearing on the bills, *not* something put forth solely by the legislators.¹¹ The
2 whole impetus for SB 6450 was to clarify the status of FOWRs, which had only been defined upon
3 introduction of the bill, so it is no doubt that members of the public used terminology that is
4 confusing and potentially inconsistent throughout the public hearings. Regardless, neither of the
5 cited Reports indicates any legislative intent to use the term structure in any way other than
6 defined, as excluding vessels.

7 **3. Consistent with the SMA, the provisions of the SMP uniformly exclude**
8 **vessels from the definition of structures.**

9 The City addressed this issue briefly in the City's Response,¹² but it is worth emphasizing
10 here: the terms "structure" and "vessel" are mutually exclusive and none of the provisions cited to
11 by Mr. Schmautz illustrate any inconsistency within the SMP.

12 For example, floating homes are excluded from the definition of FOWR because floating
13 homes are regulated differently than FOWRs; FOWRs are structures *other* than floating homes,
14 exactly as the plain language of the code provides. If the intent was to modify the City's definition
15 of structure or to explicitly include vessels in the definition of FOWR, the City Council could have
16 easily written that in, but it did not. Based on the plain language of the code, structure means
17 structure, which excludes vessels.¹³

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21 ¹¹ See Appellant's Opposition at p. 3, lines 14-22, and Senate Bill Report SB 6450 and House Bill Report ESSB 6450,
attached as EXHIBIT A and EXHIBIT B to the Ferguson Declaration on Reply.

22 ¹² See Section II.A.2 of the City's Response.

23 ¹³ In footnote 1 of the Appellant's Opposition, Mr. Schmautz draws the conclusion that the "only major distinction
between floating homes and floating on-water residences is that the latter are considered vessels under the SMA" but
this logic is flawed because FOWRs are defined as "structures" not "vessels." The plain language of the law, as well
as the general rules of statutory construction, as described in the City's Motion, support the City's interpretation.

1 Moreover, all the other provisions Mr. Schmautz points to – SMC 23.60A.942, SMC
2 23.60A.204(A)(1), and SMC 23.60A.203(A) – are all consistent with the mutually exclusive
3 definitions of “vessel” and “structure” and all illustrate that a vessel cannot be a FOWR.¹⁴

4 **B. Mr. Schmautz’s vessel is a vessel, not a FOWR.**

5 As discussed in the City’s Motion and the City’s Response to Appellant’s Motion for
6 Summary Judgment, it is compelling that Mr. Schmautz himself repeatedly describes his vessel as
7 a vessel.¹⁵ A broken motor does not make it something else, particularly when that “something
8 else” would be a non-water dependent use, which are disfavored by the SMA and SMP.

9 **1. The State and City definition of “vessel” are the same.**

10 Like the State definition of “structure,” Mr. Schmautz also fails to identify the appropriate
11 definition of vessel that applies to the SMA. That definition, at WAC 173-27-030(18), defines
12 “vessel” in almost exactly the same way the City does:

13 "Vessel" includes ships, boats, barges, or any other floating craft
14 which are **designed and used for navigation** and do not interfere
15 with the normal public use of the water[.]¹⁶

17 ¹⁴ See City’s Response, p. 5.

18 ¹⁵ Declaration of Michael Schmautz (Schmautz Declaration), at no.2 and 10, Exhibit G to Schmautz Declaration
19 (Application), and Appellant's Motion for Summary Judgment, p. 1, lines 12-13 (referring to the Washington
20 Registration Number for Mr. Schmautz's vessel), p. 10, lines 7-8 (stating that Mr. Schmautz's vessel was "originally
21 designed for navigation"), lines 11-12 (describing Mr. Schmautz's vessel as a "live aboard vessel") and line 22
22 (referring to Mr. Schmautz's vessel as a "non-self propelled vessel). In addition, Mr. Schmautz's vessel was moored
23 at Shilshole Marina, which specifically excludes "houseboats" and requires moored vessels to be fully operational
and navigable. *See* Schmautz Declaration at no. 5 and Declaration of Megan Mueller (Mueller Declaration), at no. 7,
and Exhibit B (Shilshole Moorage Application).

¹⁶ *See* SMC 23.60A.942 (“Vessel” means ships, boats, barges, or any other floating craft that are designed and used
for navigation and do not interfere with the normal public use of the water, including historic ships that do not have
means of self-propulsion and steering equipment and house barges.) The only difference between the SMC and WAC
definitions is that the SMP definition of vessel explicitly includes historic ships and house barges, but certainly does
not define vessel more narrowly, as Mr. Schmautz suggests. The rationale for including “house barges” in the
definition is explained in the Director’s Report to Ordinance 116051, attached as EXHIBIT A to the Ferguson
Declaration.

1 Instead, Mr. Schmautz cites RCW 88.02.310(5) and 1 U.S.C. §3. First of all, only
2 subsection (6) of RCW 88.02.310 defines “vessel,” not subsection (5), and neither of those
3 definitions apply for purposes of the SMA.¹⁷ To the extent Mr. Schmautz’s arguments are based
4 on the wrong definition of “vessel” or any alleged inconsistency between State and City law, they
5 must be disregarded.

6 **2. Mr. Schmautz’s vessel is a vessel.**

7 There is no debate whether Mr. Schmautz’s vessel is *designed* for navigation; it is a
8 commercially manufactured trawler.¹⁸ And contrary to Mr. Schmautz’s claims, nothing in the
9 definition of vessel requires self-propulsion to be *used* for navigation and the definition does not
10 include any measure for how many times or within what time period a thing needs to be used in
11 order to be considered *used* for navigation.¹⁹ Moreover, the lack of self-propulsion in Mr.
12 Schmautz’s vessel is a potentially temporary status – the motor could be repaired, just like other
13 vessels in the City that may be in need of repair.²⁰ Thus, because Mr. Schmautz’s vessel is designed
14 for navigation, has been used for navigation by traveling through the water at least twice since
15 2013,²¹ and he himself describes it as a vessel, it is a vessel. Moreover, as described in the City’s
16 Motion for Summary Judgment, it would be absurd and contrary to the intent of the SMA and SMP
17 to allow a vessel with a broken motor to be considered a vessel.

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20 ¹⁷ RCW Title 88 is related to navigation and harbor improvements and Chapter 88.20 addresses vessel registration,
not the SMA.

21 ¹⁸ See Schmautz Declaration.

22 ¹⁹ Mr. Schmautz’s Declaration even indicates that his vessel may not always be moored, by stating that “When
moored” it is connected to shoreline utilities rather than a statement like “It is always connected.” See Schmautz
Declaration at no. 7.

23 ²⁰ Mr. Schmautz’s also states that although it would be expensive, the vessel could be repaired to have self-propulsion;
the only feature he claims to be deficient for navigation. See Schmautz Declaration at no. 9.

²¹ Schmautz Declaration at no. 10 and 11.

1 **C. The City's interpretation of FOWRs is consistent with the plain language of**
2 **the code and entitled to deference based on the City's well-established**
3 **authority to determine compliance with its own regulatory requirements.**

4 **1. There is no ambiguity in the plain language of the law: a vessel cannot**
5 **be a FOWR.**

6 As described above, the plain language of the code provides that a vessel cannot be a
7 FOWR. Moreover, the "intent" section of ESB 6450, adopting the FOWR provisions of the SMA,
8 explicitly states that "the legislature intends to ... respect the well-established authority of local
9 governments to determine compliance with regulatory requirements applicable to their
10 jurisdiction,"²² so the City's interpretation, consistent with the plain language of the code, is
11 entitled to deference. Here, SDCI has determined that Mr. Schmautz's vessel cannot be a FOWR
12 and that determination must be respected.

13 Mr. Schmautz properly points out that a specific statute supersedes a general statute when
14 both apply, but that rule only comes into play when there is a *conflict* between two statutes. Here,
15 both the SMA and SMP define FOWRs as structures and define structures as excluding vessels;
16 they also both express a preference for water-dependent uses and disfavor non-water dependent
17 uses, including residential uses.²³ In approving the City's SMP, the Department of Ecology
18 explicitly found that the City's SMP, including original amendments and additional amendments
19 in response to Ecology input, were consistent with the purpose and intent of the policy of RCW
20 90.58.020 and the applicable rules.²⁴ Reading all of the provisions of the SMP and SMA together,
21 the City's determination that a vessel with a broken motor cannot be a FOWR is consistent with
22 the plain language of the SMA and SMP and should be upheld.

23 ²² Section 1(3) of ESSB 6450, attached as EXHIBIT B to Ferguson Declaration.

24 ²³ See City's Motion, Section I.

25 ²⁴ See the top of p. 2 of the Ecology Approval Letter, attached as Exhibit B to Ferguson Declaration.

1 **2. The City has consistently maintained the position that a structure**
2 **cannot be a vessel and a vessel cannot be a structure.**

3 Mr. Schmautz states that SDCI's position in this case is different from its pattern of past
4 enforcement, but cites no authority for that proposition. And, to the contrary, the City's position
5 on Mr. Schmautz's vessel is completely consistent with the City's position in prior enforcement
6 actions: a structure cannot be a vessel and a vessel cannot be structure.²⁵

7 The only difference between the current dispute and past disputes, is that the floating thing
8 in dispute is a *vessel* instead of a structure – typically SDCI has been in the position of showing
9 that a *structure* is not a vessel.²⁶ But the idea that they are mutually exclusive and that new over-
10 water residential uses are disfavored remains the same. A vessel cannot be a structure and a
11 structure cannot be a vessel.²⁷ And only structures are entitled to verification as FOWRs.²⁸

12 **D. Mr. Schmautz's desire to be verified as a FOWR cannot trump the strong**
13 **intent of the State and City to disfavor non-water dependent uses on the water.**

14 As described in the City's Motion for Summary Judgment, the SMA and SMP disfavor
15 non-water dependent uses over water, including residential use. A "water-dependent use" means
16 a use that *cannot exist* in other than a waterfront location and is dependent on the water by reason
17 of the intrinsic nature of its operations.²⁹ A vessel is a water-dependent use; a residence is not. Mr.
18 Schmautz has no protectable right to certainty related to the use of his property³⁰ and his desire for

19 ²⁵ In addition to numerous administrative enforcement actions, *see Ventura v. City of Seattle*, 99 F.Supp.2d 1273
(2000) (where the City argued that structures are not "vessels" exempt under the SMP).

20 ²⁶ Since live aboard use of a vessel has historically been permitted, owners of over-water structures attempted to fit
the definition of vessel in order to be able to continue that use.

21 ²⁷ *See* illustrative photos of a verified FOWR, a structure, and Mr. Schmautz's vessel, EXHIBIT C to the Declaration
of Ferguson Declaration on Reply.

22 ²⁸ To the extent there are disputed facts about the City's past policies and practice, that dispute is immaterial to the
issue at hand and do not preclude resolution on summary judgment.

23 ²⁹ SMC 23.60A.944 (defining "water-dependent use") (emphasis added).

³⁰ *Sintra, Inc. v. City of Seattle*, 119 Wn.2d 1, 18, 829 P.2d 765, 774 (1992) (A city may, in the proper exercise of its
police powers, impose limitations on development through regulation. *See Presbytery of Seattle v. King County*, 114
Wash.2d 320, at 336 n. 30, 787 P.2d 907 (1990)).

1 such certainty cannot be the basis for requiring his vessel to be verified as a FOWR, contrary to
2 the plain language and purpose of the SMA and SMP.³¹

3 **II. CONCLUSION**

4 Mr. Schmautz's vessel is a vessel, not a structure, and so it cannot be verified as a FOWR.
5 The City's Motion for Summary Judgment should be granted.

6 DATED this 15th day of December, 2016.

7 PETER S. HOLMES
8 Seattle City Attorney

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23 ³¹ Also, contrary to Mr. Schmautz's assertion, allowing vessels to be FOWRs *would* increase the potential number of FOWRs that could be verified, simply because the number existing vessels *plus* over-water structures being used as residences in July 2014 necessarily exceeds just the number of over-water structures being used.

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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 Reply to Appellant's Opposition to the City's Motion for Summary Judgment

Declaration of Erin Ferguson with Exhibits A, B and C

Via e-mail by agreement to the following party:

R. Shawn Griggs

shawn@griggs-law.com

Attorneys for Petitioner Michael Schmautz

DATED this 15th day of December, 2016, at Seattle, Washington.


ALICIA REISE, Legal Assistant