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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 REPLY TO THE  
CITY’S OPPOSITION TO  
MOTION FOR SUMMARY  
JUDGMENT**

By way of reply to the City’s opposition, Appellant renews and reiterates the arguments made the earlier filed motion for summary judgment and opposition to the City’s motion for summary judgment. Instead of repeating that argument here, however, Appellant instead offers the following observations and clarifications:

1. Throughout its briefing, the City has mischaracterized the purpose of RCW 90.58.270(6). The City has repeatedly stated that the purpose of this provision was to “allow the preservation of existing floating structures that were being used as residences that would otherwise be illegal.” In truth, it was broader than that. As the findings annotated to the statute confirm, implementation of this amendment to the SMA was intended to “Preserve the existence and vitality of current, floating on-water residential uses; [and] establish greater clarity and regulatory uniformity for these uses.” This latter element reflects the uncertainty regarding the difference between “vessels” and “structures” that predated the FOWR amendment. Prior to 2015, a significant number of watercraft entered Seattle and were used as residences. The City asserted that these were “structures” and unlawful. The owners asserted that these were “vessels” per

1. SMC § 23.60.942. The City fought the proliferation of these vessels by strictly  
2. construing the provisions of SMC 23.60.942 – and specifically the requirements that a  
3. Vessel be both designed and regularly used in navigation to qualify under the City’s  
4. definition of that term. RCW § 90.58.270(6) was intended to address this conflict and  
5. moot the question of whether watercraft were structures or vessels by grandfathering  
6. them all as of July 1, 2014. This is reflected in the two legislative committee reports  
7. referenced in Appellants prior briefing; when the term “vessel” was removed from the  
8. original draft of RCW § 90.58.270(6) and replaced with the term “structure” -- public  
9. testimony and legislative staff comments both reflect that intention behind this change  
10. was that the term “structure” be broadly construed so as to include “vessels.” That  
11. interpretation is consistent with the common usage of the term structure.

12. Of course, the City notes that both the WAC and SMC contain definitions of  
13. “structure” that contradict this legislative intent. Both definitions predate implementation  
14. of RCW § 90.58.270(6), however, and therefore cannot be considered administrative  
15. interpretations of the 2014 SMA amendment.<sup>1</sup> Moreover, to the extent that these  
16. definitions contradict the stated legislative intent and plain language of RCW §  
17. 90.58.270(6), they are entitled to no deference.

18. The plain language of RCW § 90.58.270(6) permits vessels to be FOWRs. The  
19. legislative history confirms this was the intention of RCW § 90.58.270(6). Accordingly,  
20.

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21. <sup>1</sup> WAC § 173-27-030, which contains the Department of Ecology’s definition of  
22. “structure” was last amended in 2003; SMC § 23.60A.936 carried over the City’s pre-  
23. SMP amendment definition of “structure” (SMC § 23.60.936) and predated adoption of  
24. RCW § 90.58.270(6) by years; neither provision can be considered a deliberate  
interpretation by either the Department of Ecology or the City of Seattle that vessels  
cannot be FOWRs.

1. the SMP should be read to conform to state law, and to the extent it contradicts this  
2. provisions, if must be preempted.

3.           2.       The question presented by this case is far more than whether or not a  
4. broken motor qualifies a vessel for verification as a FOWR. For more than thirty years,  
5. the City has vehemently asserted that to qualify as a “Vessel” under the SMP (as opposed  
6. to under state or federal law), a watercraft must be both designed for navigation and used  
7. for navigation on a regular basis. In the present case, however, the City has abandoned  
8. this latter requirement and focused solely on the original design of a structure to  
9. determine whether or not it is a Vessel per SMC § 23.60A.942. It is appellant’s position  
10. that if a vessel (as defined by state or federal law) was not regularly used for navigation  
11. as of July 1, 2014, and otherwise meets the qualifications of a FOWR, it is treated as a  
12. structure under the SMP and is eligible for verification as a FOWR. Whether something  
13. was regularly used in navigation is a question of fact. But in this case, there is no dispute  
14. of this factual issue – because the PROSPERITY’s engine was non-functional for at least  
15. a year prior to the July 1, 2014 deadline (and likely even longer) and because the  
16. uncontroverted testimony confirms that transported neither persons nor goods overwater  
17. during that period (or since), it plainly fails the “used for navigation” requirement of  
18. SMC § 23.60A.942 (as well as the predecessor standard of SMC § 23.60.942) and does  
19. not qualify as a Vessel under the SMP.<sup>2</sup> Regardless of its original design and current  
20.

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21. \_\_\_\_\_  
22. <sup>2</sup> The City has failed to introduce any evidence of navigation to controvert the testimony  
23. of Appellant. Given that the burden of proof falls on the City to establish  
24. nonconformance with the FOWR requirements, this case may be resolved on this point  
alone without addressing the more complicated policy and legislative history/intent issues  
raised by the parties.

1. appearance, then, the PROSPERITY is treated as a “structure” under the current SMP  
2. and is eligible for verification as a FOWR.

3.           3.       Finally, Appellant would like to address the City’s repeated statements  
4. that approval of this application will result in a proliferation of overwater residences in  
5. contravention of the SMA and SMP. RCW § 90.58.270(6) was intended to grandfather  
6. floating things that had been used as residences prior to July 1, 2014. Under no  
7. interpretation of this statute advanced by either party can something that was not used as  
8. a residence on or before July 1, 2014 qualify as a FOWR. Approval of the  
9. PROSPERITY verification – and those similarly situated – will only confirm those craft  
10. already used as residences; no new overwater residences are introduced to the shoreline  
11. environment. Moreover, regulation of these craft as FOWRs will subject them to stricter  
12. environmental regulations than would otherwise be applicable to vessels (on which  
13. liveaboard use is presently permitted under the SMP). Regulation of vessels (as defined  
14. by state and federal law, but not per SMC § 23.60A.942) such as the PROSPERITY as  
15. FOWRs will do far more to advance the stated objectives of both the SMA and SMP than  
16. their exclusion will. The implicit “parade or horrible” argument advanced by the City is  
17. according without merit and does not compel denial of appellant’s verification.

18.           Ultimately, this case turns on the plain language of the SMP and SMA. At all  
19. times relevant to its verification as a FOWR, the PROSPERITY was not a Vessel per  
20. SMC § 23.60A.942. Accordingly, it qualifies for verification as a FOWR. And  
21. regardless of whether it qualifies as a vessel under the SMP, RCW § 90.58.270(6)  
22. protects the PROSPERITY as a FOWR; both the plain language and legislative history of  
23. this provision confirm that it was within the intended scope of protected watercraft. The  
24.

1. plain language of the SMP and SMA is the beginning and end of the inquiry in this case,  
2. and for the reasons stated above and in the prior briefing submitted by Appellant, the  
3. FOWR application submitted by Appellant should be verified.  
4.

5. RESPECTFULLY SUBMITTED this 15th day of November, 2016.

6. /s/ R. Shawn Griggs

7. R. Shawn Griggs, WSBA #30710  
8. Attorney for appellant Michael Schmautz  
9. 1818 Westlake Avenue North, Suite 404  
10. Seattle, Washington 98109  
11. Telephone: (206) 745-3805  
12. Facsimile: (206) 745-3806  
13. E-mail: [shawn@griggs-law.com](mailto:shawn@griggs-law.com)

11. **CERTIFICATE OF SERVICE**

12. I hereby certify that on this 15th day  
13. of December, 2016 a true and correct copy of  
14. the foregoing was sent via e-mail pursuant to the parties'  
15. prior written agreement to:

15. Erin E. Ferguson, Assistant City Attorney  
16. Seattle City Attorney's Office  
17. 701 Fifth Avenue, Suite 2050  
18. Seattle, WA 98124-4769  
19. Phone: 206-684-8615  
20. FAX: 206-684-8284  
21. [Erin.Ferguson@seattle.gov](mailto:Erin.Ferguson@seattle.gov)

19. /s/ R. Shawn Griggs

20. R. Shawn Griggs, WSBA No. 30710  
21. 1818 Westlake Avenue, Suite 404  
22. Seattle, Washington 98109  
23. P: (206) 745-3805  
24. F: (206) 745-3806  
25. e-mail: [shawn@griggs-law.com](mailto:shawn@griggs-law.com)

25. APPELLANT'S REPLY - 5  
26. Case No. S-16-005

**R. SHAWN GRIGGS**  
ATTORNEY AT LAW  
1818 WESTLAKE AVENUE NORTH, SUITE 404  
SEATTLE, WASHINGTON 98109  
TELEPHONE (206) 745-3805  
FACSIMILE (206) 745-3806