

**FINDINGS AND DECISION
OF THE HEARING EXAMINER FOR THE CITY OF SEATTLE**

In the Matter of the Appeal of

MICHAEL SCHMAUTZ

from an Interpretation issued by the Director,
Department of Construction and Inspections

Hearing Examiner File:
S-16-005

Department Reference:
3023142

Introduction

Pursuant to the City's Shoreline Master Program Regulations, Chapter 23.60A SMC, the Director of the Department of Construction and Inspections issued an interpretation decision that Michael Schmautz's "Jensen trawler" was a "conventional recreational vessel," not a "floating on-water residence". Mr. Schmautz appealed the decision.

Mr. Schmautz ("Appellant") was represented by R. Shawn Griggs, attorney-at-law. The Director of the Department of Construction and Inspections ("Director" or "Department"), was represented by Erin E. Ferguson, Assistant City Attorney. The parties submitted the case on cross motions for summary judgment and waived the right to a hearing.

For purposes of this decision, all section numbers refer to the Seattle Municipal Code ("SMC" or "Code") unless otherwise indicated. Having considered the evidence in the record and the parties' legal briefs, the Examiner enters the following findings of fact, conclusions, and decision on the appeal.

Findings of Fact

1. The Appellant is the owner of a 47-foot Jensen trawler with a current vessel registration from the Washington Department of Licensing. The Appellant states that the trawler was designed and built as a pleasure craft.¹ It includes features that would make it suitable as a live-aboard, such as bathrooms, a shower, bedrooms, and a full kitchen.² It has been the Appellant's primary residence since he purchased it.³

2. The trawler appears to be designed for navigation⁴ and was more likely than not used for navigation before the Appellant acquired it. The trawler is equipped with an engine that became nonfunctional before he purchased it is beyond repair. It must be replaced before the trawler will again have self-propulsion.⁵ The trawler has been moored within the City since at least January

¹ Declaration of Michael Schmautz at 1.

² *Id.*

³ *Id.* at 3.

⁴ *See id.*, exhibit B.

⁵ *Id.* at 2-3.

of 2014.⁶ After the Appellant purchased it in November of 2014, it was towed from one marina to another.⁷

3. In response to an amendment to the state's Shoreline Management Act⁸ and direction from the Department of Ecology, the City Council amended the City's Shoreline Master Plan Regulations, Chapter 23.60A SMC ("SMP"), in 2015. The amendments allowed "floating on-water residences" that had been legally established as of July 1, 2014 to remain but prohibited new ones, as these are not water-dependent uses.⁹

4. A floating on-water residence, or "FOWR," is defined as

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

SMC 23.60A.912 "F" (emphasis added).

5. A "dwelling unit" is defined as

a room or rooms, located within a structure or vessel, designed, arranged, occupied, or intended to be occupied as living accommodations independent from any other household. The existence of a food preparation area within the room or rooms shall be evidence of the existence of a dwelling unit.

SMC 23.60A.908 "D".

6. A "structure" is defined as

a permanent or temporary edifice or building, or any piece of work artificially built, or composed of parts artificially joined together in some definite manner, whether installed on, above, or below the surface of the ground or water, including fences, walls, signs, piers, floats and drydocks, but not including poles, flower-bed frames and other minor incidental improvements, or vessels.

SMC 23.60A.936 "S" (emphasis added).

7. A "vessel" is defined as

ships, boats, barges, or any other floating craft, that are designed and used for

⁶ *Id.*, Exhibits E and G.

⁷ *Id.* at 3.

⁸ Chapter 90.58 RCW.

⁹ *See* SMC 23.60A.002.B.

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

SMC 23.60A.942 “V” (emphasis added).

8. The SMP provides a process for verification of a FOWR whereby an applicant may receive verification from the Director that a FOWR meets the FOWR definition. This enables the applicant to transfer the FOWR’s legal status to a subsequent owner.¹⁰

9. On December 3, 2015, the Appellant filed an application for FOWR verification for the trawler.¹¹ The application was ultimately denied. The Department explained that the trawler was considered a “conventional recreational vessel” (SMC 23.60A.214)” and that “[r]emoval or otherwise disabling the propulsion mechanisms of a conventional recreational vessel does not qualify it for verification as a floating on-water residence.”¹²

Conclusions

1. The Hearing Examiner has jurisdiction over this appeal pursuant to SMC 23.60A.071.B and Chapter 23.88 SMC. Appeals of interpretations are “considered de novo, and the Examiner’s decision is to be made upon the same basis as was required of the Director.” However, the Director’s interpretation is to be given substantial weight, and “the burden of establishing the contrary shall be upon the appellant.” SMC 23.88.020.G.5.

2. Quasi-judicial bodies, like the Hearing Examiner, may dispose of an issue summarily where there is no genuine issue of material fact. *ASARCO Inc. v. Air Quality Coalition*, 92 Wn.2d 685, 695-698, 601 P.2d 501 (1979). Rule 1.03 of the Hearing Examiner Rules of Practice (HERs) states that for questions of practice and procedure not covered by the HERs, the Examiner “may look to the Superior Court Civil Rules for guidance.” Civil Rule 56(c) provides that a motion for summary judgment is properly granted where “there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law.”

3. The Appellant alleges that the SMP’s treatment of FOWRs is inconsistent with the requirements of the SMA. However, the Department of Ecology has approved the SMP. Its consistency with the SMA is therefore presumed,¹³ and the Appellant has not produced evidence sufficient to rebut that presumption.

4. The parties have extensively briefed the legislative history of the SMA amendments that were designed to address the FOWR issue, among others, but an examination of legislative history is unnecessary in this case because the plain language of the SMP is controlling.¹⁴

¹⁰ See SMC 23.60A.203.D.

¹¹ Declaration of Michael Schmautz, Exhibit G.

¹² Department decision dated August 5, 2016.

¹³ See WAC172-26-120(7).

¹⁴ *Griffin v. Thurston County*, 165 Wn.2d 50, 55, 196 P.3d 141 (2008).

5. The evidence in the record shows that the Appellant's trawler was designed, and at one time used, for navigation. It therefore met the SMP's definition of "vessel". But at some point prior to July of 2014, the trawler's engine failed, and it cannot be, and has not been, used for navigation since that time.

6. Under the SMP, a vessel must be both designed and used for navigation. This is clear from the plain language of the definition of vessel, which makes an exception only for "historic ships that do not have a means of self-propulsion and steering equipment."¹⁵ The trawler lacks a means of self-propulsion and cannot be used for navigation. Thus, it cannot be considered a vessel.

7. Citing familiar case law¹⁶, the Department argues that the rules of statutory construction require a reviewing body to give deference to the interpretation of an agency charged with enforcing a statute or regulation. As noted, the requirement for deference is repeated in SMC 23.88.020.G.5. But where a statute or regulation is clear on its face, there is nothing to interpret or construe.¹⁷ And, in any event, the Department's interpretation here is inconsistent with its longstanding interpretation of the SMP as requiring that a vessel be both designed for and used for navigation.¹⁸

8. Because the Appellant's trawler does not meet the definition of vessel, it is not excluded on that ground from qualifying as a structure under the SMP's definition of that term, and thus, might be able to qualify as a FOWR.¹⁹ The Department contends that this result is contrary to the intent of the SMA and SMP, which is to prohibit new non-water-dependent uses, including new residential uses, and to minimize environmental impacts. However, the residential use of the Appellant's trawler was not shown to be new, nor was there any showing of its impacts on the environment.

9. The Department also argues that a determination that the Appellant's trawler is not a vessel under the SMP as written would result in the potential for every vessel in the City that was used as a residence prior to July 1, 2014 to be entitled to verification as a FOWR if, at some point, the vessel became inoperable. This could occur over the long-term. Nonetheless, the phrase "and used for navigation" cannot be read out of the SMP's definition of vessel. "Full effect must be given to the legislature's language, with no part rendered meaningless or superfluous."²⁰ And if, as the Department suggests, the phrase "used for navigation" should encompass a situation in which a boat without a means of propulsion is towed from one marina to another, then that

¹⁵ SMC 23.60A.942 "V".

¹⁶ *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn. 2d 568, 612, 90 P.3d 659 (2004); *Public Utility Dist. No. 1 v. Pollution Control Hearings Bd.*, 137 Wn. App. 150, 157, 151 P.3d 1067 (2007).

¹⁷ *Agrilink Foods, Inc. v. Department of Revenue*, 153 Wn. 2d 392, 396, 103 P.3d 1226 (2005). ("The court's fundamental objective is to ascertain and carry out the intent of the legislative body. If the statute's meaning is plain on its face, the court must give effect to that plain meaning as an expression of legislative intent.")

¹⁸ As recently as June of this year, the Department argued before the Examiner that both design and use for navigation were required for a floating craft to qualify as a vessel. *In the Matter of the Appeal of Anne Prezyrna*, S-16-004 (July 16, 2016). See *Sleasmen v. City of Lacey*, 159 Wn.2d 639, 646 (2007) (For an agency interpretation to be afforded deference, it must show that the interpretation was an "established practice of enforcement").

¹⁹ This is a determination for the Department to make on remand. It is not clear from this record whether the trawler meets all the requirements for a FOWR.

²⁰ *Agrilink Foods, Inc. v. Department of Revenue*, *supra* (citations omitted).

concept should be expressed within a definition. It is not inferred from the existing language in the SMA.

10. There is no genuine issue of any material fact in this appeal. The SMP's definition of the term "vessel" is dispositive, and the Appellant's trawler does not meet that definition. The Appellant is therefore entitled to judgment as a matter of law.

Decision

The Director's decision is **REVERSED**, and the matter is **REMANDED** to the Department for further review and decision.

Entered this 20th day of December, 2016.



Sue A. Tanner
Hearing Examiner

Concerning Further Review

NOTE: It is the responsibility of the person seeking to appeal a Hearing Examiner decision to consult Code sections and other appropriate sources, to determine applicable rights and responsibilities.

The decision of the Hearing Examiner in this case is the final decision for the City of Seattle. In accordance with RCW 36.70C.040, a request for judicial review of the decision must be commenced within twenty-one (21) days of the date the decision is issued unless a motion for reconsideration is filed, in which case a request for judicial review of the decision must be commenced within twenty-one (21) days of the date the order on the motion for reconsideration is issued.

The person seeking review must arrange for and initially bear the cost of preparing a verbatim transcript of the hearing. Instructions for preparation of the transcript are available from the Office of Hearing Examiner. Please direct all mail to: PO Box 94729, Seattle, Washington 98124-4729. Office address: 700 Fifth Avenue, Suite 4000. Telephone: (206) 684-0521.

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**BEFORE THE HEARING EXAMINER
CITY OF SEATTLE**

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this date I sent true and correct copies of the attached **Findings and Decision** to each person listed below, or on the attached mailing list, in the matter of **Michael Schmautz**, Hearing Examiner File: **S-16-005**, in the manner indicated.

Party	Method of Service
Michael Schmautz c/o Shawn Griggs shawn@griggs-law.com	<input type="checkbox"/> U.S. First Class Mail, postage prepaid <input type="checkbox"/> Inter-office Mail <input checked="" type="checkbox"/> E-mail <input type="checkbox"/> Fax <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Legal Messenger
Erin Ferguson Assistant City Attorney Erin.Ferguson@seattle.gov Alicia Reise Alicia.Reise@seattle.gov	<input type="checkbox"/> U.S. First Class Mail, postage prepaid <input type="checkbox"/> Inter-office Mail <input checked="" type="checkbox"/> E-mail <input type="checkbox"/> Fax <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Legal Messenger

Dated: December 20, 2016

TK

Tiffany Ku
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