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Ms. Margaret Glowacki
City of Seattle
Department of Planning and Development
700 Fifth Avenue, Suite 2000
P.O. Box 34019
Seattle, Washington 98124-4019

via e-mail to margaret.glowacki@seattle.gov

Re: Proposed Amendments to City of Seattle Shoreline Master Program Regulations

Dear Ms. Glowacki:

We have been engaged by Seattle resident Mike Sherlock to provide these comments to the proposed amendments to the City of Seattle Shoreline Master Program Regulations. Mr. Sherlock owns and lives aboard a vessel that may be impacted by the regulations, and also constructs vessels designed to facilitate live-aboard use that may likewise be impacted by the amended regulations.

As an initial matter, we would like to express our appreciation for the opportunity to present these comments, and in particular, the extension of the comment period to December 23, 2011. We believe these actions reflect the careful consideration with which the proposed amendments are being crafted. As you are undoubtedly aware, the proposed revisions to Seattle's SMP regulations are sweeping and will have a significant impact on many who live and work in Seattle's marine environment. This is particularly true for individuals who live-aboard vessels in the Seattle area. Conventional wisdom tells us that a person's home is typically the most significant investment he or she will make in a lifetime, and this is no less the case for those who live aboard vessels, house barges, or floating homes. Accordingly, we ask that as you review and revise the proposed SMP amendments, significant consideration be given to the likely impact that the proposals will have on the homes of Seattle's live-aboard community and the underlying investments those vessels and homes represent.

Our primary concern with the proposed SMP regulations amendments, insofar as they apply to vessels, house barges, and floating homes, is the ambiguity created by expanding the definition of "house barge" to include those watercraft defined as vessels in the current regulations. Section 23.60.916 ("Definitions – H") of the proposed SMP amendment defines a "house barge" as "a vessel, with or without means of self propulsion and steering equipment or capability, that is principally designed as a place of residence." This change is a substantial deviation from the current SMP's navigation-based distinction between vessels and house barges, and makes evaluation of what constitutes a house barge largely subjective. We believe that this provision is most likely unconstitutionally vague and unenforceable.

Under the Fourteenth Amendment of the United States Constitution, any statute or ordinance must provide “fair warning of proscribed conduct.” Rose v. Locke, 423 U.S. 48, 49 (1975). Accordingly, an ordinance that (a) does not define the offence with sufficient definiteness that ordinary people can understand what conduct is proscribed, or (b) does not provide ascertainable standards of guilt to protect against arbitrary enforcement, is unconstitutionally vague and therefore unenforceable. More specifically, an ordinance is unconstitutionally vague if it proscribes conduct by resort to “inherently subjective terms.” State v. Maciolek, 101 Wn.2d 259, 267 (1984).

The proposed definition of “house barge” discards the objective navigation-based standard of the current SMP regulations and instead invites a case-by-case evaluation of design intent that is inherently subjective. The proposed revisions to the SMP classify all vessels as house barges (thereby subjecting them to a series of onerous restrictions) if they are “principally designed as a place of residence.” This language, given its plain meaning, and construed in its ordinary sense, requires a subjective evaluation of a vessel’s design to determine whether or not it qualifies as a house barge. In stark contrast to current regulations, this determination is entirely divorced from the actual or potential use of a vessel. As such, it provides little to no guidance to those stakeholders whose vessel may or may not qualify as residential house barges, and is therefore unconstitutionally vague and cannot be enforced as currently drafted.

The modified SMP does not define a “place of residence.” Instead, “Residential use” is defined to include multi-family residences, single-family dwelling units, and congregate (*i.e.*, communal) residences. What constitutes “residential use” is also indirectly informed by the definition of “live-aboard vessel” – any vessel “used as a dwelling unit for more than a total of thirty days in any forty-five day period or more than a total of ninety days in any three hundred sixty-five day period; or the occupant or occupants identify the vessel or the facility where it is moored as their residence for voting, mail, tax, or similar purposes.” All of these definitions apply to a wide range of recreational and commercial vessels, however, and ultimately provide little objective guidance as to what constitutes a house barge under the revised SMP regulations.

By their nature, most recreational vessels and many commercial vessels are “principally designed as a place of residence,” as contemplated by the SMP amendment. With rare exception, vessels don’t operate themselves and must contain accommodations for their human operators. Vessels designed for anything other than day use accordingly provide all of the residential accommodations that are typically associated with residential use. On smaller recreational vessels, these accommodations are configured for single or multi family use (*e.g.*, bunks or stateroom(s), head, galley, storage, etc.). On larger recreational and commercial vessels, these accommodations are more in the nature of congregate residences (*e.g.*, bunk rooms, communal bathrooms, galley, mess room, storage, etc.). Accordingly, any vessel that is principally (*i.e.*, mainly, or for the most part) designed for the purpose of providing residential accommodation to its operators could, but for the unfettered discretion of the DPD, qualify as a house barge under the proposed modifications to the SMP.

The SMP's focus on design, as opposed to use, introduces an additional element of vagueness to the regulations. Construed according to the plain meaning of the proposed definitions, a decommissioned minesweeper, fishing vessel, ferry, or tugboat could be permanently moored (with engine and navigation systems removed) and used as a place of residence without qualifying as a house barge (since none of the foregoing was principally designed as a place of residence). Conversely, a cruise ship or long-range mega yacht would be preemptively barred from mooring in the City of Seattle because they are vessels principally designed for residential use, and therefore "house barges." Of even greater concern, however, is the large number of live-aboard vessels that fall in between the wide range of potentially extreme interpretations – any recreational vessel designed for overnight use could be construed as "principally designed as a place of residence" at the whim of the DPD official dispensing permits (or notices of violation) on any given day. Given that the actual "live-aboard" and "residential use" definitions in the proposed SMP focus on actual use, as opposed to design, the reliance on DPD's subjective interpretation of *vessel design* to discern whether or not a vessel is a "house barge" gives too much enforcement discretion to city officials, at the same time providing insufficient compliance guidance to vessel owners. Accordingly, application of the revised SMP to ban many "house barges" will likely be unconstitutional due to vagueness.

Given the potential vagueness created by the new definition of "house barge," the current SMP's distinction between vessels and house barges based on navigability is more objectively compelling and should be retained. In almost every other context, a vessel is defined not by its design, but by its actual or potential use. The United States Code defines a vessel as "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." 1 U.S.C. § 3. As the U.S. Supreme Court has stated, "a watercraft is not 'capable of being used' for maritime transport in any meaningful sense if it has been permanently moored or otherwise rendered practically incapable of transportation or movement." Stewart v. Dutra Constr. Co., 543 U.S. 481, 945 (2005). This logic is reflected in the current SMP, which distinguishes vessels from house barges based on navigability – a house barge is a vessel "without a means of self propulsion and steering equipment or capability." Incorporation of navigable vessels into the SMP's house barge definition strays from this commonly-accepted and much interpreted distinction, introducing an untested concept into the vessel / house barge analysis. The resulting vagueness is unnecessary – the better standard is the one currently reflected in the SMP – live-aboard vessels should be distinguished from house barges on the basis of their navigability, and subjective evaluation of vessel design should not be a criterion in the analysis.

We are also very concerned about the potential for retroactive application of the new SMP regulations. As drafted, the SMP amendments retroactively ban the introduction of house barges to Seattle waters after January 1, 2011. At the same time, the SMP amendment expands the definition of what constitutes a house barge to include a number of vessels lawfully moored and/or under construction in Seattle after January 1, 2011, but prior to notice of the proposed ban. The net effect of these two changes, then, is to severely undermine lawful and reasonable investment backed expectations and property rights of vessel owners, likely effecting an unconstitutional "taking" of their property.

Seattle residents that have acquired or constructed vessels for residential use in accordance with current SMP requirements risk losing the right to use those vessels under the proposed SMP amendments. The outright prohibition on new house barges after January 1, 2011, effects a total deprivation of the economic value of these vessels, which were designed to be operated and moored in the internal waters of the Seattle area. Moreover, those Seattle residents that have undertaken vessel construction projects subsequent to January 1, 2011, stand to lose the beneficial use of those vessels before they are launched. The regulations contain no clear justification for retroactive application (which, as a matter of law, is subject to a higher degree of scrutiny – *see, e.g., Rhod-A-Zalea & 35th Inc. v. Snohomish County*, 136 Wn.2d 1, 3 (1998)). Nor can the introduction of the January 2011 “control date” after the fact in October of 2011 be considered sufficient notice to potential stakeholders in any reasonable sense. The combination of these factors – (a) the high potential that stakeholders will experience significant losses of reasonable investment expectations, and (b) the lack of reasonable advance notice of this potential – strongly compels the inclusion of a “grandfather” provision to the SMP for vessels launched or under construction as of the SMP amendment date.

Obviously, any attempt to grandfather vessel owners based on current investment should not open the door to speculative construction between now and the implementation of the SMP amendments. Accordingly, we propose that a grandfather provision apply only to those vessels that would otherwise qualify as house barges under the amended SMP: (a) utilized for live-aboard use in the City of Seattle prior to the date the Seattle City Council adopts the SMP amendments, or (b) designed for live-aboard use in the City of Seattle and for which construction has commenced to a significant degree prior to the date that the Seattle City Council adopts the proposed SMP amendment. Such a grandfather provision will protect the reasonable investment backed expectations of stakeholders, prevent retroactive application of the regulations to a degree that could constitute a Fifth Amendment “taking”, and permit the prospective application of the SMP, in furtherance of its stated objectives.

Our client and many similarly situated individuals with whom we have discussed these regulations have expressed great consternation at the DPD’s intense focus on the newly-identified subset of vessels discussed above. If the objective of the SMP is to preserve access to the water and protect those uses that are traditionally water-dependent, then a vessel should be treated as a vessel, regardless of whether it is designed for residential use or not (especially given that, as discussed above, vessels designed for non-residential use are being used for live aboard use all over Lake Union and Lake Washington). Further, if (as stated) the objective of the SMP amendments is to curb the discharge of grey water and promote the environmental health of our shorelines and waterways, the distinction between vessels based on design and not use is illogical and arbitrary -- but for the fact that there is no infrastructure capable of accepting and funneling grey water discharge into Seattle sewers, these regulations should simply regulate all live aboard vessels and/or establish a zero-tolerance standard for grey water discharge. The fact that the proposed regulations do not attempt to comprehensively address these issues, but instead call-out and retroactively prohibit a subset of vessels designed for live-aboard use in compliance

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with current regulations telegraphs a sub-agenda that diverges from SMA purposes. This is neither the time nor the forum to pursue that sub-agenda.

For the foregoing reasons, we respectfully request that the proposed SMP regulation amendments be modified to revert to a navigational-based definition of vessel that will provide objective guidance to the regulators and regulated alike, and abandon any attempt to retroactively apply the proposed vessel / house barge distinction as well as grandfather those individuals who have complied with the SMP regulations to date, as discussed above. Thank you for your consideration of these comments, and please don't hesitate to contact me with any questions that you may have.

Regards,

A handwritten signature in black ink, appearing to read 'R. Shawn Griggs', is written over the typed name.

R. Shawn Griggs

RSG