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HEARING EXAMINER

BEFORE THE HEARING EXAMINER
FOR THE CITY OF SEATTLE

FOSS MARITIME COMPANY, a Washington
Corporation,

Foss,

vs.

CITY OF SEATTLE, DEPARTMENT OF
PLANNING AND DEVELOPMENT, a
Municipal Corporation,

Respondent,

Hearing Examiner File No. 5-15-007

NOTICE OF APPEAL

I. APPELLANT INFORMATION

A. Foss

Appellant is Foss Maritime Company ("Foss"). Foss's address is 1151 Fairview Avenue, Seattle, WA 98109; 206-281-3800 (telephone); email: pstevens@foss.com.

B. Respondent

Respondent City of Seattle, Department of Planning and Development, is the municipal corporation and department that made the decision that is subject to this appeal.

1 **C. Authorized Representatives**

2 Foss's authorized representatives are John C. McCullough, McCullough Hill Leary P.S.,
3 701 Fifth Avenue, Suite 6600, Seattle, WA 98104, 206-812-3388 (telephone), 206-812-3389
4 (facsimile), jack@mhseattle.com; and David R. West, Garvey Schubert Barer, 1191 2nd Avenue,
5 18th Floor, Seattle, WA 98101, 206-464-3939 (telephone), 206-464-0125 (facsimile),
6 DrWest@gsblaw.com.

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9 **II. DECISION BEING APPEALED**

10 The decision being appealed is the issuance of an interpretation by the Director
11 ("Director") of the Department of Planning and Development ("DPD" or "Department") "in
12 response to general questions it has received regarding a proposal to moor an exploratory drilling
13 rig and two accompanying tugboats at the Port of Seattle's (Port's) Terminal 5 facility" (DPD
14 Interpretation No. 15-001, herein the "Interpretation"). The Interpretation purports to interpret
15 certain rights of use under Projects 9404118 and 9404124 (among others) issued to the Port of
16 Seattle, as applicant, for the property located at Terminal 5 (2701 26th Avenue SW) in Seattle
17 (the "Permit"). The Interpretation is attached as Exhibit 1.
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21 **III. APPEAL INFORMATION**

22 **A. Foss's Interest in Interpretation**

23 Foss is a company engaged in maritime logistics and transportation, including movement
24 of cargo, in Puget Sound, the west coast of the United States, Alaska and Hawaii, the United
25 States east and Gulf coasts, and nations on the Pacific Rim. Foss is headquartered in Seattle. On
26
27

28 **MCCULLOUGH HILL LEARY, P.S.**

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1 February 9, 2015, Foss entered into a lease with the Port of Seattle to utilize Terminal 5 as a
2 marine cargo terminal (the "Lease"). The Lease is in effect; Foss is currently occupying
3 Terminal 5 and is paying rent to the Port in accordance with the Lease. Pursuant to the Lease,
4 Foss intends to provide a variety of services (the "Operations") to affiliates of and contractors to
5 Royal Dutch Shell plc in support of Shell's Arctic drilling operations. Those services will
6 include receiving and storing goods, cargo, equipment, supplies, stores, provisions and other
7 materials at Terminal 5; loading and unloading goods, cargo, equipment, supplies, stores,
8 provisions and other materials on to and off of vessels associated with the Operations, for those
9 vessels to use and to transport to other locations; temporary moorage of vessels; and related
10 activities. In reliance on the Lease, Foss has invested substantial amounts of money in
11 improvements to Terminal 5; has incurred substantial costs to prepare for the Operations; and has
12 contracted with third parties (including labor unions) to provide support. The Interpretation
13 adversely affects Foss because it is intended to interfere with Foss's use of Terminal 5 for the
14 Operations and pursuant to the rights of Foss under its Lease and established uses at Terminal 5
15 and because Foss will suffer substantial economic losses if it is prevented from performing the
16 Operations. Foss is therefore significantly affected by and interested in the matter appealed.

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20 **B. Factual Background**

21 Certain factual allegations are set forth in the Interpretation. Foss contends many of those
22 allegations are inaccurate, incomplete and/or misleading, and disputes them. Foss will present
23 testimony and evidence in the appeal regarding the actual facts associated with the matters that
24 are the subject of this appeal.
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1 **C. Objections to Interpretation**

2 The Interpretation erroneously concludes that certain uses of Terminal 5 do not constitute
3 permissible “cargo terminal uses” under the Land Use Code. Specific objections to the
4 Interpretation include but are not limited to the following:
5

- 6 • The Interpretation misconstrues the allowable scope of principal and accessory uses
7 associated with a “cargo terminal,” as that term is defined in SMC 23.84A.046, SMC
8 23.60.906 and SMC 23.60A.906.
- 9 • The Operations, properly defined, fall within the definition of “cargo terminal,” as
10 that term is defined in SMC 23.84A.046, SMC 23.60.906 and SMC 23.60A.906.
- 11 • The Interpretation misconstrues the allowable scope of principal and accessory uses
12 associated with a “cargo terminal,” as that term has been enforced by the Department
13 in the past. Among other things, the Interpretation fails to acknowledge that the
14 Operations will necessarily involve the storage of quantities of goods without
15 undergoing any manufacturing process, followed by the transfer of those goods to
16 carriers in order to transfer them to other locations.
- 17 • The Interpretation misconstrues the allowable scope and nature of accessory uses
18 under SMC 23.84A.040, SMC 23.60.940 and SMC 23.42.020, as well as the Code
19 generally.
- 20 • The Interpretation fails to recognize that the City previously approved by permit the
21 use under which the Operations will be conducted, which permits were not timely
22 appealed or reversed. To the extent the Interpretation seeks to modify rights granted
23 under such permits, the Interpretation is barred as untimely.
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- 1 • The Operations constitute a legally permissible non-conforming use under Chapter
2 23.42 SMC.
- 3 • The right to proceed with the Operations is a right vested under the Land Use Code
4 and state law.
- 5 • The Interpretation is based on a set of factual assumptions that are variously
6 inaccurate and/or incomplete.
- 7 • The Department failed to comply with the procedural requirements of law, including
8 the requirements of SMC 23.88.020, in issuing the Interpretation.
- 9 • The Interpretation is limited in its application insofar as it is based only on the set of
10 facts assumed in the Interpretation. The Director lacks authority under SMC
11 23.88.020 to construe the Interpretation so that it is applicable to a set of facts
12 materially different from those assumed in the Interpretation.
- 13 • Since the issuance of the Interpretation, the Director has issued further amendments
14 and/or modifications of the Interpretation without complying with the procedural
15 requirements of SMC 23.88.020.
- 16 • Upon information and belief, the Department intends to expand the scope or meaning
17 of the Interpretation to cover uses and activities at Terminal 5 not addressed in the
18 Interpretation, without the issuance of a new interpretation. The Interpretation is
19 limited to its express terms. Any effort by the Department to expand *ex post facto* the
20 scope of the Interpretation is improper and illegal.
- 21 • The Interpretation improperly determines that the Operations do not, in the
22 alternative, constitute an allowable accessory use at Terminal 5.
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- 1 • The Interpretation erroneously determines that the Director does not have authority to
- 2 interpret or define unlisted principal and accessory uses under the Shoreline Master
- 3 Program, Chapter 23.60 SMC.
- 4
- 5 • The Interpretation represents a case of selective, discriminatory and inconsistent
- 6 interpretation and enforcement of the Land Use Code.
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- 8 • The Interpretation is improper and illegal in that it was based not merely on the Land
- 9 Use Code and applicable facts, but also on policy considerations lying outside the
- 10 Land Use Code. Such policy considerations lie properly within the legislative process
- 11 conducted by City elected officials, but are improper considerations for the
- 12 Interpretation.
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14 **IV. RELIEF REQUESTED**

15 Foss requests that the Hearing Examiner provide the following relief:

- 16 a. Reverse the Interpretation and determine that the Operations are a permitted
- 17 principal and/or accessory use under the Land Use Code and existing permit approvals at
- 18 Terminal 5;
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- 20 b. Require that modifications or amendments to the Interpretation comply with the
- 21 procedural requirements of SMC 23.88.020;
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- 23 c. In the alternative, remand the Interpretation with direction to the Department to
- 24 reconsider the Interpretation in light of proven facts relating to the Operations;
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1 d. In the alternative, remand the Interpretation with direction to the Department to
2 reconsider the Interpretation based solely on the Code and the applicable facts, and without
3 reference to improper policy or other considerations not relevant under SMC 23.88.020;

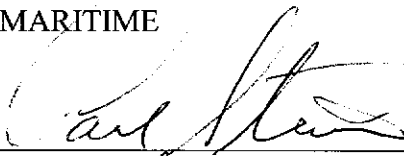
4 e. In the alternative, remand the Interpretation for the purpose of issuing a new
5 interpretation in a manner consistent with the procedural requirements of SMC 23.88.020;

6 f. Permit discovery regarding the issues in this appeal; and

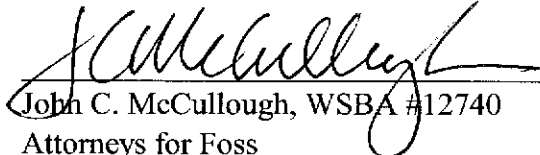
7 g. Grant such other relief as the Hearing Examiner deems just and proper.
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1 DATED this 18 day of May, 2015.

2 FOSS MARITIME

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4 By: 
5 Paul Stevens

6 MCCULLOUGH HILL LEARY, P.S.

7
8 By: 
9 John C. McCullough, WSBA #12740
10 Attorneys for Foss

11 GARVEY SCHUBERT BARER

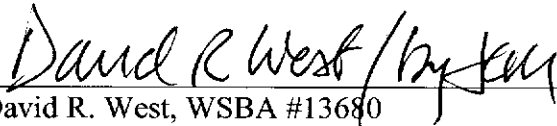
12
13 By: 
14 David R. West, WSBA #13680
15 Donald B. Scaramastra, WSBA #21416
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17 Attorneys for Foss Maritime Company
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EXHIBIT 1

Interpretation of the Director Under Seattle Municipal Code Title 23

Regarding the Use of the

Property at

2701 - 26th Avenue SW (Terminal 5)

DPD Interpretation No. 15-001
(DPD Project No. 3020324)

Background

This interpretation was generated by the Department of Planning and Development (DPD) in response to general questions it has received regarding a proposal to moor an exploratory drilling rig and two accompanying tugboats at the Port of Seattle's (Port's) Terminal 5 facility for periods of approximately six months per year when the drilling rig is not in use in the Arctic. The central issue is whether this proposed moorage is consistent with the legally established use of the property as a cargo terminal or whether a permit must be obtained to establish a different or additional use. The Port and its lessee, Foss Maritime (Foss), have been cooperative in providing information about proposed activities at Terminal 5.

Media reports indicate that two drilling rigs are destined for Seattle: the Polar Pioneer and the Noble Discoverer. The information provided by the Port indicates that only one of these, Polar Pioneer, would moor at Terminal 5. This interpretation is based on the Port's representations.

Findings of Fact

1. The Port's Terminal 5 facility is at the north end of the Duwamish River, near Harbor Island, and located in an IG1 U/85 (General Industrial-1) zone and a UI (Urban Industrial) shoreline environment.
2. Seattle Municipal Code (SMC) Section 23.40.002 requires a permit in order to establish or change the use of a property. The recognized existing use of the Terminal 5 facility, as reflected in decisions including Projects 9404118 and 9404124, is as a cargo terminal.
3. Foss entered into a two-year lease of Terminal 5 with the Port on February 9, 2015. By the terms of the lease, Foss is to use the facility as a marine cargo terminal. In an April 8 letter to DPD, Foss expressed its intent to load and unload its own vessels as well as those

of other customers at Terminal 5 during the lease. The Foss representative said Foss intended to receive and move goods, cargo, equipment, supplies, stores, provisions and other materials into the vessels associated with the drilling rig, for transportation to other locations. The letter indicates that the services they intend to provide for Shell Offshore would be a fraction of the activity they hope to conduct at Terminal 5.

4. As reported in the Seattle P-I, the Polar Pioneer is a 400-foot tall, 292-foot drilling rig. The Peninsula Daily News describes it as a 400-foot-long, 355-foot-tall rig. Based on the media reports, the Polar Pioneer was delivered to Port Angeles aboard a heavy-lift ship, to be unloaded and towed to Seattle. Based on information provided by the Port and Foss, the drilling rig and two tugboats would be moored at Terminal 5 for several months out of the year.
5. The Port has indicated that a variety of types of vessels use its facilities. The Port documented that its fee schedules include specific fees for "lay berthing" of vessels that are not actively being loaded or unloaded. The Port has asserted that this is common and necessary, as much cargo activity is seasonal, and some vessels used to transport cargo sit idle during the off-season.
6. Seattle's current Shoreline Master Program is codified at SMC Chapter 23.60, which is a part of Subtitle III, Division 3 of Title 23. An updated shoreline master program has been approved by the City and is awaiting final approval by the Washington State Department of Ecology. DPD anticipates that the new provisions will take effect later in May.
7. "Cargo terminal" is defined at SMC 23.60.906 as:
 - [A] transportation facility in which quantities of goods or container cargo are stored without undergoing any manufacturing processes, transferred to other carriers or stored outdoors in order to transfer them to other locations. Cargo terminals may include accessory warehouses, railroad yards, storage yards, and offices.
8. The definition of "cargo terminal" under the new provisions, to be codified at SMC 23.60A.906, remains the same as the current definition, apart from minor punctuation changes, such as addition of a comma after "carriers."
9. SMC 23.42.010 provides in part:

Principal uses not listed in the respective zones of Subtitle III, Division 2 of SMC Title 23, Land Use Code shall be prohibited in those zones. If a use is not listed, the Director may determine that a proposed use is substantially similar to other uses permitted or prohibited in the respective zones, therefore, and should also be permitted or prohibited.

10. SMC 23.42.020.A provides in part:

Any accessory use not permitted by Title 23, either expressly or by the Director, shall be prohibited. The Director shall determine whether any accessory use on the lot is incidental to the principal use on the same lot, and shall also determine whether uses not listed as accessory uses are customarily incidental to a principal use.

11. For purposes of the Land Use Code generally, “accessory use” is defined at SMC 23.84A.040 as “a use that is incidental to a principal use.” A more specific and limiting definition of “accessory use” is provided for purposes of the current shoreline code at SMC 23.60.940: “a use which is incidental and intrinsic to the function of a principal use and is not a separate business establishment unless a home occupation.” This definition remains the same under the new shoreline provisions, at SMC 23.60A.940.

12. “Good” is defined, in relevant part, by Webster’s New Collegiate Dictionary (based on Webster’s third new international dictionary) as:

3 . . . **b pl** : personal property having intrinsic value but usu. excluding money, securities and negotiable instruments . . . **d pl** : WARES, COMMODITIES, MERCHANDISE <canned ~s>

Conclusions

1. The activity that is the subject of this interpretation is the proposed moorage of an oil-drilling rig and two accompanying tugboats that would be located at the Port’s Terminal 5 facility during winter months when this equipment is not being used for exploratory drilling in the Arctic. In recent years permits for this property have characterized the use as a “cargo terminal.”
2. The question raised is whether the proposed activity requires a permit to legally establish a use that allows this moorage. The analysis may be broken down into two sub-questions:
 - Is the proposed activity properly characterized as a “cargo terminal” use based on the definitions in the current code, and in the updated shoreline master program the City is in the process of adopting; and
 - If the proposed activity does not specifically match the activities described in the cargo terminal definition, may the proposed activity nevertheless be allowed as an accessory use, without obtaining a separate use permit?

Consistency with current and future use definitions

3. Under the current and the proposed new shoreline standards, a cargo terminal is a **transportation facility in which quantities of goods or container cargo are stored without undergoing any manufacturing processes, transferred to other carriers or**

stored outdoors in order to transfer them to other locations. (The proposed new definition adds a comma after “carriers.”)

4. **Is Terminal 5, if used for the proposed activity, a “transportation facility”?** This term is not defined within the shoreline code, but is generally defined in the Land Use Code, at Section 23.84A.038 as “a use that supports or provides the means of transporting people and/or goods from one location to another.” One of the subcategories in the general definition is parking and moorage. The proposed activity would support the transportation of the equipment to and from the Arctic, and falls within the range of uses listed under the broad category of “transportation facility.”
5. **Does the proposed activity involve “quantities of goods or container cargo”?** Neither the drilling rig nor the tugboats would carry container cargo. The definition of cargo terminal is broad enough to include transportation of many different types of goods, in greatly differing quantities. The exploratory drilling equipment affixed to the drilling rig, however, would not fall under the definition of “goods” as it is used under the code, nor could the drilling rig itself be considered “quantities of goods or container cargo.”
6. **If the equipment on the drilling rig could be considered goods, would they be “stored without undergoing any manufacturing processes, transferred to other carriers, or stored outdoors in order to transfer them to other locations”?** This provides three options for activities that might occur at a cargo terminal: storage without manufacturing, transfer to other carriers, or outdoor storage. The unifying theme is that the goods are at the cargo terminal **in order to be transferred to other locations**. The drilling rig would be at Terminal 5 only for purposes of seasonal storage. Terminal 5 would not serve as stop where the rig or the equipment on it would be stored or transferred in the course of transit from a starting location to an ultimate destination.
7. The two tugboats that would accompany the drilling rig with the equipment likewise would not bear quantities of goods in the process of being transferred to other locations, apart from provisioning that might be anticipated for vessels at moorages generally.
8. It has been argued that even if the proposed use does not meet the definition of cargo terminal, it should be regulated as a cargo terminal use, as this is the most similar use category regulated under the code. In general, under SMC 23.42.010, if a principal use does not fit in any of the regulated use categories, as defined, there is authority to regulate that use according to the standards for the most similar defined use. That provision, however, specifically extends to the standards in Subtitle III, Division 2 of the Land Use Code. Seattle’s Shoreline Master Program, which includes the use regulations specific to the Shoreline Overlay District, is in Subtitle III, Division 3 of the code, and is outside of the scope of Section 23.42.010. The authority to regulate an undefined use according to the standards for the most similar defined use does not extend to the use provisions in the shoreline code.

Moorage as an accessory use

9. Even if we were to determine that the proposed seasonal moorage of the drilling rig and tugboats did not meet the definition of cargo terminal, it might be permissible if that sort of moorage activity is accessory to a cargo terminal. The definition of cargo terminal says that cargo terminals may include accessory warehouses, railroad yards, storage yards, and offices. It does not state that other accessory uses are not allowed. We do not conclude that other accessory uses are precluded merely because they are not specifically listed.
10. Based on information received from the Port, "lay berthing," or moorage of vessels that are not actively loading or unloading materials, is a normal, customary and essential practice at marine cargo terminals. The Port has specific dockage fees for lay berthing in the fee schedule for its facilities. According to the Port, lay berthing occurs at marine cargo terminals throughout the coastal and inland waterways of the country and the world, specifically at marine cargo terminals in Seattle, Bellingham, Everett, Port Angeles, Tacoma, Olympia, San Diego, Los Angeles, Long Beach, Sacramento, San Francisco, Oakland and Portland. According to the Port, temporary, seasonal and sometimes indefinite berthing of vessels must be provided by ports until duty calls those vessels back to the sea. The Port indicates that cargo, emergency response, military, and research vessels, as well as barges and tugboats, commonly lay berth at the Port of Seattle's cargo terminals.
11. For purposes of the shoreline code, "accessory use" is defined as "a use which is incidental **and intrinsic to the function** of a principal use, and is not a separate business establishment unless a home occupation." SMC 23.60.940. This differs, and is more stringent than, the definition that generally applies under the Land Use Code: "a use that is incidental to a principal use." SMC 23.84A.040. We accept that lay berthing of vessels otherwise used for transporting goods in the stream of commerce may be regarded as incidental and intrinsic to the function of a cargo terminal. This recognizes that shipment of some sorts of goods is seasonal, and that vessels involved in that sort of trade are necessarily idle for periods during the year. We do not, however, find that provision of moorage to other vessels and equipment, not used for transfer of goods to other locations, is intrinsic to the function of a cargo terminal. Such moorage would be regarded as a separate principal use, defined as "any use, whether a separate business establishment or not, which has a separate and distinct purpose and function from other uses on the lot." SMC 23.60.940.
12. Even if we were to agree that moorage of the drilling rig and tugboats could be allowed as an accessory use at a cargo terminal, some question also is raised as to whether sufficient levels of activity relating to the principal cargo terminal use, transfer of quantities of goods or container cargo, would continue while the drilling rig and tugboats are moored there. The factual component of that question is unresolved. On the one hand, the drilling rig and tugboats would occupy much of the site's frontage available for moorage along the Duwamish, and upgrades and repairs to that frontage are also contemplated which would possibly limit its use for loading and unloading of cargo

during the same period. On the other hand, both the Port and Foss have advised us that it is their intent that other cargo terminal use of the property will continue.

13. The legal component of that question obviates the factual question because, even if cargo terminal activity is the predominant use, moorage of vessels not used for transport of cargo in the process of being transferred to other locations is not intrinsic to the function as a cargo terminal, and thus would not qualify as a legitimate accessory use.

Conclusion

An additional use permit is required for the proposed seasonal moorage at the Port of Seattle's Terminal 5 facility of a drilling rig and accompanying tugboats.

Entered May 7, 2015



Andrew S. McKim

Land Use Planner – Supervisor