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BEFORE THE HEARING EXAMINER  
CITY OF SEATTLE

In the Matter of the Appeal of: ) Hearing Examiner File:  
 ) **S-15-001 and S-15-002**  
 )  
 **FOSS MARITIME COMPANY** ) DEPARTMENT OF PLANNING AND  
 ) DEVELOPMENT'S MOTION TO  
 ) CHANGE THE DATE OF DEPOSITION  
 from an interpretation by the Director, ) OF BENJAMIN PERKOSKI AND FOR A  
 Department of Planning and Development. ) PROTECTIVE ORDER QUASHING THE  
 ) DEPOSITION  
 )

**I. RELIEF REQUESTED**

The Department of Planning and Development (DPD) moves for an Protective Order (1) moving the July 1 deposition date for Benjamin Perkowski, a senior land use planner at DPD, noticed by Foss Maritime Company (Foss)<sup>1</sup> to July 6 so that the Hearing Examiner has an opportunity to rule on this motion and (2) quashing the deposition.

**II. FACTS**

On February 5, 2015, Mr. Perkowski granted the Port of Seattle's request for an exemption from applying for a shoreline substantial development permit (SSDP) to "replace 21 existing light service bollards at Terminal 5 with heavy-capacity bollards identical in capacity to previous heavy-

<sup>1</sup> Exhibit 1.

1 capacity bollards.”<sup>2</sup> The decision does not address what vessels will use the bollards; the bollards  
2 are simply restored to their earlier, larger size. This decision also states, “No change of use at  
3 Terminal 5 is approved as part of this exemption.”<sup>3</sup>

4 On February 9, 2015, Foss Maritime Company and the Port entered into a lease of Terminal  
5 5, authorizing Foss to use the terminal as a marine cargo terminal (Foss Amended Notice of Appeal,  
6 p. 3, lines 1-3).

7 The decision on appeal to the Hearing Examiner is DPD’s May 7 Interpretation determining  
8 whether the activities authorized at a “cargo terminal” at Terminal 5 include mooring an oil rig and  
9 accompanying vessels, either as part of the cargo terminal use or as an accessory use to a cargo  
10 terminal under the Shoreline Master Program regulations. DPD concluded an additional use permit  
11 is needed, and Foss and the Port appealed.

12 In this appeal both Foss and the Port contend DPD’s February 5 SSDP exemption  
13 “necessarily determined” that mooring an oil rig and accompanying vessels at Terminal 5 is part of  
14 the cargo terminal activity and, because DPD did not appeal that exemption, DPD is now estopped  
15 from issuing an interpretation that determines such mooring is not within the scope of the use  
16 “cargo terminal” or accessory to it under the SMP (Port Appeal, issue 2, p. 5, line 15; Foss Amended  
17 Notice of Appeal, p. 6, line 23 to p. 7, line 5).

18 Foss’s counsel, David West, asked me whether Mr. Perkowski would be available for  
19 deposition on certain dates and also sent DPD discovery requests, including a request for the  
20 documents relating to the SSDP exemption.<sup>4</sup> At the prehearing conference on June 3, I stated DPD

21  
22 <sup>2</sup> Exhibit 2, p. 1.

<sup>3</sup> *Id.*, p. 3, bullet 3.

23 <sup>4</sup> Without waiving its objection to this deposition, DPD will not object to responding to that request because the documents are few and have been requested in a public records request, so this discovery request is not burdensome, although it too is outside the ambit of CR 26, as explained below.

1 would file a motion to dismiss several claims and might need to file a motion objecting to some  
2 discovery and motions in limine on certain issues. After exchanging several phone messages on  
3 June 11, I talked with Mr. West about the discovery requests, the appropriateness/relevance of Mr.  
4 Perkowski's deposition (and part of Andy McKim's), and Mr. West's proposed date for Mr.  
5 Perkowski's deposition, which is likely to be before the Hearing Examiner could rule on motions to  
6 dismiss, or for protective orders or in limine. In our discussion, I contended Mr. Perkowski's  
7 deposition should be cancelled for the reasons set out in this motion, below. Mr. West said he  
8 would send formal notices for deposition, and the parties could continue to work out timing, but he  
9 did not agree to forego taking Mr. Perkowski's deposition.

10 The Notices of Deposition set July 1 as the date for Mr. Perkowski's deposition and July 6  
11 as the date for Mr. McKim's.

### 12 III. ISSUES

- 13 1. Should the date of Mr. Perkowski's deposition be changed to a date after the  
14 Hearing Examiner has ruled on this motion?
- 15 2. If the basis for the deposition is a matter over which the Hearing Examiner has no  
16 jurisdiction and is not likely to lead to the discovery of admissible evidence on  
17 issues within the Hearing Examiner's jurisdiction, should the deposition be quashed?

### 18 IV. ARGUMENT AND AUTHORITY

#### 19 A. Date Change

20 Changing the date of Mr. Perkowski's deposition would allow the Hearing Examiner to rule  
21 on this motion first. Changing the date would not interfere with the case schedule, because other  
22 dates appear to be available prior to filing the prehearing briefs, scheduled for July 21.

1           **B. Depositions on matters outside the scope of the Hearing Examiner's**  
2           **jurisdiction and not calculated to lead to admissible evidence are**  
3           **unauthorized and burdensome.**

4           CR 26(b)(1) allows broad discovery, but not unlimited discovery:

5           Parties may obtain discovery regarding any matter, not privileged,  
6           which is relevant to the subject matter involved in the pending  
7           action, whether it relates to the claim or defense of the party  
8           seeking discovery or to the claim or defense of any other party,  
9           including the existence, description, nature, custody, condition and  
10          location of any books, documents, or other tangible things and the  
11          identity and location of persons having knowledge of any  
12          discoverable matter. It is not ground for objection that the  
13          information sought will be inadmissible at the trial if the  
14          information sought appears reasonably calculated to lead to the  
15          discovery of admissible evidence. (Emphasis added.)

16          CR 26(c) provides:

17          Protective Orders. Upon motion by a party or by the person from  
18          whom discovery is sought, and for good cause shown, the court in  
19          which the action is pending or alternatively, on matters relating to  
20          a deposition, the court in the county where the deposition is to be  
21          taken may make any order which justice requires to protect a part  
22          or person from annoyance, embarrassment, oppression, or undue  
23          burden or expense.

          Appellants contend in their appeals that the City cannot issue an interpretation in May that  
limits the scope of the definition of cargo terminal in a manner inconsistent with the alleged  
determination made in Mr. Perkowski's February SSDP exemption, because the City did not appeal  
that exemption determination under the Land Use Petition Act.<sup>5</sup> This is a *Nykriem* estoppel claim.<sup>6</sup>

          The Hearing Examiner has no jurisdiction to hear estoppel claims. The Hearing Examiner's  
jurisdiction is limited to the scope of review specifically set out in the Seattle Municipal Code  
(SMC).<sup>7</sup> In this case, the scope of the Hearing Examiner's review is the same as the scope of the

<sup>5</sup> Foss issue 7 (Amended Appeal p. 6 last bullet), and Port issue 2.

<sup>6</sup> *Chelan County v. Nykreim*, 146 Wn.2d 904, 933 and 938-40, 52 P.3d 1 (2002).

<sup>7</sup> *Chausee v. Snohomish County Council*, 38 Wn. App. 630, 636, 689 P.2d 1084 (1984). DPD's pending Motion to Dismiss, seeks to dismiss this issue.

1 DPD Director's authority to interpret the SMC<sup>8</sup> and does not include authority to make decisions  
2 in equity.

3 The SSDP exemption is not the matter on appeal to the Hearing Examiner. Mr. Perkowski's  
4 testimony on whether he actually made a determination that mooring the oil rig and accompanying  
5 vessels is within a cargo terminal use as part of his SSDP exemption decision only relates to  
6 appellant's estoppel argument. It would be inadmissible.

7 This deposition could be within the scope of discovery, if it were "reasonably calculated to  
8 lead to the discovery of admissible evidence," but it is not. Mr. Perkowski's current opinion  
9 about the scope of the cargo terminal definition is inadmissible, because that is a question of law  
10 for the Hearing Examiner to determine, and Mr. Perkowski's opinion is irrelevant.

11 Nor can the deposition be taken to ask Mr. Perkowski about other instances where similar  
12 moorage has taken place on other properties or was ignored by DPD, because that is  
13 inadmissible, as well, for two reasons: These, too, are matters of estoppel, which the Hearing  
14 Examiner lacks jurisdiction to hear.<sup>9</sup> And, even if jurisdiction existed, prior applications of the  
15 Code to other sites does not prevent correctly applying the definition to this site, due to the public's  
16 interest in zoning,<sup>10</sup> and failure to enforce in other situations does not bar correct application here.<sup>11</sup>

17 If the information that may be obtained from the deposition will not be admissible/relevant  
18 at trial, a court may properly bar discovery. In *Morgan v. Peacehealth, Inc.*,<sup>12</sup> a doctor brought suit  
19 against a healthcare organization claiming it wrongly cut off his privileges because he would not  
20 take a test. As part of his claim, the doctor sought discovery about how the defendant treated other

21 <sup>8</sup> SMC 23.88.020.A and G.5.

22 <sup>9</sup> *Chausee*, 38 Wn. App. at 636.

23 <sup>10</sup> *Buechel v. State Dept. of Ecology*, 125 Wn.2d. 196, 211, 884 P.2d 910 (1994).

<sup>11</sup> *Mercer Island v. Steinman*, 9 Wn. App. 479, 483, 513 P.2d 80 (1973). *Dykstra v. Skagit County*, 97 Wn. App.670,  
677, 985 P.2d 424 (1999), rev. denied 140 Wn.2d 1016 (2000).

<sup>12</sup> 101 Wn. App. 750, 14 P.3d 773 (2000).

1 doctors. The court sustained the trial court's denial of plaintiff's motion to compel that discovery  
2 because the standard for liability was whether the organization met the standards for reviewing this  
3 doctor, and how that review compared to review of other doctors was irrelevant.<sup>13</sup>

4 This is just what appellants are seeking to do here, when in fact, the issue before the  
5 Examiner is what the activities are correctly within the definition of cargo terminal under the SMP  
6 and the Land Use Code.

7 **V. CONCLUSION**

8 Because the deposition will not result in any admissible evidence or information that  
9 "appears reasonably calculated to lead to the discovery of admissible evidence," the Hearing  
10 Examiner should quash the deposition of Mr. Perkowski.

11 DATED this 17<sup>th</sup> day of June, 2015.

12 PETER S. HOLMES  
13 Seattle City Attorney

14 By: s/Eleanore S. Baxendale, WSBA #20452  
15 Assistant City Attorney  
16 [eleanore.baxendale@seattle.gov](mailto:eleanore.baxendale@seattle.gov)  
17 Seattle City Attorney's Office  
18 701 Fifth Ave., Suite 2050  
19 Seattle, WA 98104-7097  
20 Ph: (206) 684-8232  
21 Fax: (206) 684-8284  
22 *Attorneys for Respondent*  
23 *Department of Planning and Development*

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<sup>13</sup> *Morgan*, 101 Wn. App. at 775.

1 CERTIFICATE OF SERVICE

2 I certify that on this date, I electronically filed a copy of **Department of Planning and**  
3 **Development's Motion to Change the Date of Deposition of Benjamin Perkoski and for A**  
4 **Protective Order Quashing the Deposition** with the Seattle Hearing Examiner using its e-filing  
5 system.

6 I also certify that on this date, a copy of the same document was sent to the following  
7 parties listed below in the manner indicated:

8 John C. McCullough (X) email @ [jack@mhseattle.com](mailto:jack@mhseattle.com)  
9 McCullough Hill Leary P.S.  
10 701 Fifth Avenue, Suite 6600  
11 Seattle, WA 98104-7006  
12 *Attorneys for Appellant*  
13 *Foss Maritime Co.*

11 David R. West (X) email @ [drwest@gsblaw.com](mailto:drwest@gsblaw.com)  
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13 Daniel J. Vecchino (X) email @ [dvecchio@gsblaw.com](mailto:dvecchio@gsblaw.com)  
14 Garvey Schuber Barer  
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18 *Foss Maritime Co.*

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17 Port of Seattle  
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19 Seattle, WA 98111-1209  
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21 *Port of Seattle*

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23 *Attorneys for Appellant*  
*Port of Seattle*

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Seattle, WA 98104-1711  
*Attorneys for Intervenors*  
*Puget Soundkeeper Alliance, Seattle*  
*Audubon Society, Sierra Club, and*  
*Washington Environmental Council*

the foregoing being the last known address of the above-named parties.

Dated this 17<sup>th</sup> day of June, 2015, at Seattle, Washington.

  
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ROSIE LEE HAILEY



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7 BEFORE THE HEARING EXAMINER  
8 FOR THE CITY OF SEATTLE

9 FOSS MARITIME COMPANY, a  
10 Washington corporation,

11 Appellant,

12 v.

13 CITY OF SEATTLE, DEPARTMENT OF  
14 PLANNING AND DEVELOPMENT, a  
15 Municipal Corporation,

16 Respondent.

Hearing Examiner File No. S-15-001  
(DPD Project No. 3020324)

NOTICE OF DEPOSITION OF BEN  
PERKOWSKI

17 TO: RESPONDENT

18 AND TO: Eleanore S. Baxendale, its counsel of record

19 PLEASE TAKE NOTICE that pursuant to CR 30, made applicable to these proceedings  
20 by Hearing Examiner Rule of Practice and Procedure 3.11, Appellant Foss Maritime Company  
21 will take the deposition upon oral examination of Ben Perkowski in the above-captioned action  
22 at Garvey Schubert Barer, 1191 Second Avenue, Suite 1800, Seattle, Washington 98101, on  
23 Wednesday, July 1, 2015, at 9:00 AM.

24 If the deposition is not completed on the above-referenced date, it shall continue from  
25 day to day thereafter, excluding Saturdays, Sundays, and holidays, at the same place and  
26

NOTICE OF DEPOSITION OF BEN PERKOWSKI - 1

GARVEY SCHUBERT BARER  
A PARTNERSHIP OF PROFESSIONAL CORPORATIONS  
eighteenth floor  
1191 second avenue  
seattle, washington 98101-2939  
(206) 464-3939

**Exhibit 1**

1 commencing at the same time, until completed, unless otherwise agreed by counsel. The  
2 deposition shall be taken stenographically and shall be conducted under the supervision of an  
3 officer who is authorized to administer an oath for use at hearing or otherwise.

4 DATED this 12th day of June, 2015.

5 GARVEY SCHUBERT BARER

6  
7 By /s David R. West

8 David R. West, WSBA #13680

9 Daniel J. Vecchio, WSBA #44632

10 Attorneys for Foss Maritime Company  
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**CERTIFICATE OF SERVICE**

I, Dominique Barrientes, certify under penalty of perjury under the laws of the State of Washington that on June 12, 2015, I caused to be served the foregoing document, NOTICE OF DEPOSITION OF BEN PERKOWSKI, on the person(s) identified below in the manner shown:

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Amanda Goodin  
Matthew Baca  
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- By Email

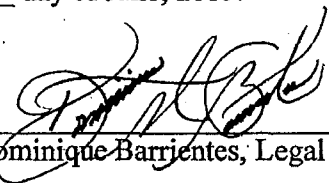
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- United States Mail, First Class
- By Legal Messenger
- By Facsimile
- By Email

Dated at Seattle, Washington, this 12<sup>th</sup> day of June, 2015.

  
\_\_\_\_\_  
Dominique Barrientes, Legal Assistant

GSB:7121032.1



700 Fifth Avenue, Suite 2000  
 P. O. Box 34019  
 Seattle, WA 98124-4019

**EXEMPTION FROM SHORELINE MANAGEMENT ACT SUBSTANTIAL DEVELOPMENT PERMIT REQUIREMENT**

Name: George Blomberg, Port of Seattle

Address: PO Box 1209

City: Seattle State: WA Zip Code: 98111

The proposal by: (Same) to undertake the following development (be specific):

replace 21 existing light service bollards at Terminal 5 with heavy-capacity bollards identical in capacity to previous heavy-capacity bollards at pier, per plans. A total of approximately 840 cubic yards of existing asphalt, pavement ballast and concrete will be removed and re-formed in order to restore heavy-capacity bollard service at Terminal 5 cargo pier, per plans. No change in pier area, perimeter dimensions, or pier height is proposed. No in-water repair or maintenance activities are proposed. Best Management Practices to be used during construction are contained in application along with more details of project plans.

upon the following property (street address): 3443 West Marginal Way SW

within (name of water area): Elliott Bay

and/or its associated wetlands is exempt from the requirement of a substantial development Permit because the development (identify exemptions as outline in WAC 173-27-040 and include Corps. of Engineers Public Notice Number, if available):

is within the scope of normal maintenance and repair of existing structures (WAC 173-27-040-2-b)

**Project conditions:**

- All conditions of this exemption approval shall be noted on any applicable building permit set of plans.
- Project is subject to zoning review and approval for consistency with applicable development standards.
- See attached for further conditions.

The proposed development is consistent or inconsistent with (check one):

**Policies of the Shoreline Management Act  
 The Master Program**

Consistent

Inconsistent

Other: Port of Seattle lead agency on SEPA

Ben Perkowski, City of Seattle

2/5/15  
 (Date)

**SCANNED**

FEB 11 2015

**Project Name:** Bollard Replacement  
**Project Address:** 3443 West Marginal Way

**Date:** Feb. 5, 2015  
**Project #:** 6456125

Per the City of Seattle's Shoreline Master Program and Seattle Municipal Code (SMP 23.60.020.B.5), conditions may be attached to the approval of exemptions as necessary to assure consistency of the project with the Shoreline Management Act (SMA) and the City's SMP.

The SMA declares that the interest of all people shall be paramount in the management of shorelines of state-wide significance. The department, in adopting guidelines for shorelines of state-wide significance, and local governments, in developing master programs for shorelines of state-wide significance, shall give preference to uses in the following order of preference which:

1. Recognize and protect the state-wide interest over local interest;
2. Preserve the natural character of the shoreline;
3. Result in long term over short term benefit;
4. Protect the resources and ecology of the shoreline;
5. Increase public access to publicly owned areas of the shorelines;
6. Increase recreational opportunities for the public in the shoreline;
7. Provide for any other element as defined in RCW 90.58.100 that deemed appropriate or necessary.

Additionally, per SMC 23.60.020.C.1, normal maintenance or repair of existing structures or developments, including damage by accident, fire or elements, are exempt from the requirement of obtaining a shoreline substantial development permit. "Normal maintenance" means those usual acts to prevent a decline, lapse or cessation from a lawfully established condition. "Normal repair" means to restore a development to a state comparable to its original condition, including but not limited to its size, shape, configuration, location and external appearance, within a reasonable period after decay or partial destruction, **except where repair causes substantial adverse effects to shoreline resources or environment.** Replacement of a structure or development may be authorized as repair, when replacement is the common method of repair for the type of structure or development, and the replacement structure or development is comparable to the original structure or development including but not limited to its size, shape, configuration, location and external appearance, **and the replacement does not cause substantial adverse effects to shoreline resources or environment.**

Furthermore, the SMA states that permitted uses in the shorelines of the State shall be designed and conducted in a manner to minimize, insofar as practical, any resultant damage to the ecology and environment of the shoreline area and any interference with the public's use of the water.

Therefore, in order to implement the afore-mentioned mandates, the following conditions, including applicable Best Management Practices and Conservation Measures as stated below, are required under this shoreline exemption approval.

**Project Name: Bollard Replacement**  
**Project Address: 3443 West Marginal Way**

**Date: Feb. 5, 2015**  
**Project #: 6456125**

**Shoreline Conditions:**

- All conditions of this exemption approval shall be noted on applicable building permit set of plans.
- Proposal is subject to zoning review approval for compliance with applicable development standards.
- No change of use at Terminal 5 is approved as part of this exemption. Appropriate best management practices (BMPs), including those described in application, shall be employed to prevent deleterious material from entering Elliott Bay during the proposed work and during operations at this project location.
- Appropriate BMPs, including those described in application, shall be employed to minimize the amount of erosion at the shoreline caused by construction material storage and staging and the proposed construction work as well as operations associated with this project at Terminal 5.
- Debris that enters the water during construction shall be collected and disposed of at the appropriate upland facility
- If toxic material such as any petroleum product enters the water, this material shall be reported to the Department of Ecology, and shall be immediately contained using the appropriate equipment and material.
- Appropriate equipment and material for hazardous material clean up shall be kept at the site during construction and during operations at this location.