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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 FOR A  
 ) PROTECTIVE ORDER CONCERNING  
from an interpretation by the Director, ) THE DEPOSITION OF ANDREW  
Department of Planning and Development. ) MCKIM  
 )

**I. RELIEF REQUESTED**

The Department of Planning and Development (DPD) moves for a Protective Order in the deposition of Andrew McKim, set for July 6,<sup>1</sup> barring questions on three issues: (1) political motivation or opposition to the activity of the oil rig in Alaska; (2) DPD past approvals of activities on other sites; and (3) DPD enforcement or lack of enforcement of activities on other sites. The Hearing Examiner has no jurisdiction to hear these issues, plus they are irrelevant.

**II. FACTS**

On May 7, 2015, Mr. McKim, a Land Use Planner-Supervisor at DPD, issued an Interpretation determining whether the activities authorized at a "cargo terminal" at Terminal 5 include mooring an oil rig and accompanying vessels, either as part of the cargo terminal use or as

<sup>1</sup> Exhibit 1.

1 an accessory use to a cargo terminal under the City's Shoreline Master Program (SMP) regulations,  
2 Seattle Municipal Code (SMC) Ch. 23.60 (now Ch. 23.60A). This is the interpretation at issue in  
3 this appeal.

4 In this appeal both Foss Maritime Company (Foss) and the Port of Seattle (Port) contend the  
5 interpretation is erroneous because it is "arbitrary." According to the Port, DPD is arbitrary because  
6 the basis for the Interpretation is "DPD does not approve of the use that the vessel may be put to  
7 once the vessel is under navigation elsewhere, or because DPD does not approve of what it believes  
8 will be the destination, or the use of the vessel's cargo in another jurisdiction."<sup>2</sup> According to Foss,  
9 the Interpretation is erroneous because "it is based not on the Land Use Code and applicable fact,  
10 but on political and policy considerations lying outside the Land Use Code" and represents arbitrary  
11 and discriminatory treatment.<sup>3</sup>

12 In addition, Foss contends DPD has interpreted or enforced the code differently,  
13 historically.<sup>4</sup>

14 DPD has filed a motion to dismiss these claims as outside the Hearing Examiner's  
15 jurisdiction and irrelevant, for reasons also discussed below.

16 Foss's counsel, David West, asked me whether Mr. McKim would be available for  
17 deposition on certain dates. At the prehearing conference on June 3, I stated DPD would file a  
18 motion to dismiss several claims and might need to file a motion objecting to some discovery and  
19 motions in limine on certain issues. After exchanging several phone messages, on June 11, I talked  
20 with Mr. West about the discovery requests, the appropriateness/relevance of part of Mr. McKim's  
21 deposition on these particular issues. In our discussion, I contended Mr. McKim's deposition

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22 <sup>2</sup> Appeal of Port of Seattle, Issue 6 (part), p. 5, lines 19-23.

23 <sup>3</sup> Notice of Appeal, p. 8, last bullet, lines 22-24; p. 8, 3<sup>rd</sup> bullet, lines 14-20.

<sup>4</sup> Notice of Appeal, p. 6, 2<sup>nd</sup> bullet, lines 3-13, and p. 8, 3<sup>rd</sup> bullet, lines 14-20.

1 should be limited for the reasons set out in this motion, below. Mr. West said he would send a  
2 formal notice for the deposition, as a starting point for filing objections, and did not agree to limiting  
3 the scope of Mr. McKim's deposition.

### 4 III. ISSUES

- 5 1. If the Hearing Examiner has no jurisdiction over whether DPD's Interpretation was  
6 arbitrary or politically motivated, should questions relating to those claims be barred  
7 at Mr. McKim's deposition?
- 8 2. If the Hearing Examiner has no jurisdiction over how DPD has treated similar  
9 activities on other properties either through permitting or enforcement, should  
10 questions relating to those claims be barred at Mr. McKim's deposition?

### 11 IV. ARGUMENT AND AUTHORITY

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

14 CR 26(b)(1) requires discovery be limited to the subject matter involved in the pending  
15 action and to matters calculated to lead to admissible evidence:

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

22 CR 26(c) provides:

23 Protective Orders. Upon motion by a party or by the person from  
whom discovery is sought, and for good cause shown, the court in

1 which the action is pending or alternatively, on matters relating to  
2 a deposition, the court in the county where the deposition is to be  
3 taken may make any order which justice requires to protect a part  
or person from annoyance, embarrassment, oppression, or undue  
burden or expense.

4 Appellants contend in their appeals that DPD's Interpretation is arbitrary and based on  
5 political motivation. The Hearing Examiner has no jurisdiction to hear such claims and they are  
6 irrelevant.

7 The Hearing Examiner's jurisdiction is limited to the scope of review specifically set out in  
8 the Seattle Municipal Code (SMC).<sup>5</sup> In this case, the scope of the Hearing Examiner's review is the  
9 same as the scope of the DPD Director's authority: to interpret the SMC. For interpretations the  
10 relevant code section states, "Appeals shall be considered de novo, and the decision of the Hearing  
11 Examiner shall be made upon the same basis as was required of the Director."<sup>6</sup> The basis for the  
12 Director's interpretation is set out in SMC 23.88.020.A:

13 Interpretations generally. A decision by the Director as to the meaning, application or  
14 intent of any development regulation in Title 23 or in Chapter 25.09, Regulations for  
15 Environmentally Critical Areas, as it relates to a specific property, or a decision by the  
Director upon review of a determination of consistency of a proposed project with a  
planned action ordinance, is known as an "interpretation." . . .

16 Therefore, the Hearing Examiner jurisdiction is limited to development regulations in  
17 Title 23. In this case the matters before the Hearing Examiner are: (1) what activities are  
18 allowed at an SMP "cargo terminal," as a matter of law; (2) what activities are being carried out  
19 on/by the oil rig and accompanying vessels at the cargo terminal, as a matter of fact de novo; (3)  
20 whether mooring the oil rig and its accompanying vessels at the cargo terminal is within the  
21

22  
23 <sup>5</sup> *Chausee v. Snohomish County Council*, 38 Wn. App. 630, 636, 689 P.2d 1084 (1984).

<sup>6</sup> SMC 23.88.020.G.5 (emphasis added).

1 definition of “cargo terminal,” as a matter of law; and (4) if not, whether such activities are  
2 “accessory” to a cargo terminal under the SMP definition of “accessory use,” as a matter of law.<sup>7</sup>

3 Hearing Examiner review does not include whether DPD was arbitrary or politically  
4 motivated in issuing the Interpretation, because the Hearing Examiner’s review is de novo, as well  
5 as turning on questions of law.

6 Deposition examination on this topic could be within the scope of discovery, if it were  
7 “reasonably calculated to lead to the discovery of admissible evidence,” but it is not. Leaving  
8 aside the complicated question of resolving whether DPD was, in fact, politically motivated,  
9 including, for example, whose motivations would be relevant and how they would be manifested,  
10 no bias by DPD would be determinative on matters necessary for resolving this appeal. The  
11 Hearing Examiner review cures it. The Hearing Examiner will receive evidence de novo on the  
12 factual issues concerning the activities at Terminal 5 with respect to the oil rig and accompanying  
13 vessels.

14 Nor can the deposition be taken to ask Mr. McKim about other instances where similar  
15 moorage has taken place on other properties or was not the subject of enforcement by DPD,  
16 because those topics are inadmissible, as well, for two reasons: They, too, are matters of  
17 estoppel, which the Hearing Examiner lacks jurisdiction to hear.<sup>8</sup> And, even if jurisdiction existed,  
18 prior applications of the Code to other sites does not prevent correctly applying the definition to this  
19 site, due to the public’s interest in zoning,<sup>9</sup> and failure to enforce in other situations does not bar  
20 correct application here.<sup>10</sup>

21  
22 <sup>7</sup> *Clamshacks v. Skagit County*, 45 Wn. App. 346, 351, 725 P.2d 459 (1986).

<sup>8</sup> *Chausee*, 38 Wn. App. at 636.

<sup>9</sup> *Buechel v. State Dept. of Ecology*, 125 Wn.2d. 196, 211, 884 P.2d 910 (1994).

23 <sup>10</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).

1 If the information that may be obtained from the deposition will not be admissible/relevant  
2 at trial, a court may properly bar its discovery. In *Morgan v. Peacehealth, Inc.*,<sup>11</sup> a doctor brought  
3 suit against a healthcare organization claiming it wrongly cut off his privileges because he would  
4 not take a test. As part of his claim, the doctor sought discovery about how the defendant treated  
5 other doctors. The court sustained the trial court's denial of plaintiff's motion to compel that  
6 discovery because the standard for liability was whether the organization met the standards for  
7 reviewing this doctor, and how that review compared to review of other doctors was irrelevant.<sup>12</sup>

8 This is just what appellants are seeking here, when in fact, the issue before the Examiner is  
9 what activities are correctly within the definition of cargo terminal under the SMP and the Land Use  
10 Code.

11 **V. CONCLUSION**

12 Because the deposition on these three topics will not result in any admissible evidence or  
13 information that "appears reasonably calculated to lead to the discovery of admissible evidence,"  
14 the Hearing Examiner should bar questions on them at the deposition of Mr. McKim.

15 DATED this 17<sup>th</sup> day of May, 2015.

16 PETER S. HOLMES  
Seattle City Attorney

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*Department of Planning and Development*

23 <sup>11</sup> 101 Wn. App. 750, 14 P.3d 773 (2000).  
<sup>12</sup> *Morgan*, 101 Wn. App. at 775.

1 **CERTIFICATE OF SERVICE**

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

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

7 John C. McCullough (X) email: [jack@mhseattle.com](mailto:jack@mhseattle.com)  
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9 *Washington Environmental Council*

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

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

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11 ROSIE LEE HAILEY



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BEFORE THE HEARING EXAMINER  
FOR THE CITY OF SEATTLE

FOSS MARITIME COMPANY, a  
Washington corporation,  
  
Appellant,  
  
v.  
  
CITY OF SEATTLE, DEPARTMENT OF  
PLANNING AND DEVELOPMENT, a  
Municipal Corporation,  
  
Respondent.

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

NOTICE OF DEPOSITION OF ANDY  
MCKIM

TO: RESPONDENT

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

PLEASE TAKE NOTICE that pursuant to CR 30 made applicable to these proceedings  
by Hearing Examiner Rule of Practice and Procedure 3.11, Appellant Foss Maritime Company  
will take the deposition upon oral examination of Andy McKim in the above-captioned action  
at Garvey Schubert Barer, 1191 Second Avenue, Suite 1800, Seattle, Washington 98101, on  
Monday, July 6, 2015, at 9:00 AM.

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

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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1 **CERTIFICATE OF SERVICE**

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

5 Patti Goldman  
6 Amanda Goodin  
7 Matthew Baca  
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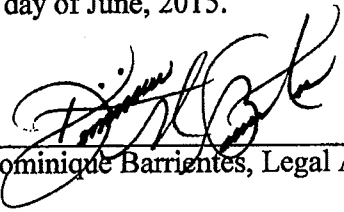
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Dated at Seattle, Washington, this 12th day of June, 2015.

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

GSB:7121601.1