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6 BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

7 In the Matter of the Appeal of:) Hearing Examiner File:
8) S-15-001 and S-15-002
9)
FOSS MARITIME COMPANY) DEPARTMENT OF PLANNING AND
10) DEVELOPMENT'S OPPOSITION TO T-5
11) INTERVENORS' MOTION TO
from an interpretation by the Director,) INTERVENE
Department of Planning and Development.)
12 _____)

13 I. RELIEF REQUESTED

14 The Department of Planning and Development (DPD) asks the Hearing Examiner to deny
15 the "T-5 Intervenor's" Motion to Intervene or in the alternative to limit and condition intervention to
16 the single interest Intervenor's assertion: whether DPD has the right to interpret the scope of a specific
17 issued use permit to determine what activities the permitted use allows. In suggesting this
18 alternative, DPD does not waive its Motion to Dismiss this claim for lack of jurisdiction. If that
19 motion is granted, then these intervenors have no remaining interest in this appeal and should not be
20 allowed to generally participate on other issues, which are outside their interest.

21 II. FACTS

22 Although Intervenor's style themselves "T-5" Intervenor's, none of them is located at
23 Terminal 5. The facts show all, except the three advocacy groups, use moorage at other locations

1 throughout the City,¹ and the three advocacy groups (a maritime policy group, labor union, and
2 trade association) have no moorage at all.

3 Of these intervenors, two are clearly in the business of operating cargo terminals that are
4 well within the SMA cargo terminal definition and the uses allowed in the Interpretation: SSA and
5 Alaska Marine Lines.²

6 The interpretation determines whether the activities authorized under the definition of a
7 “cargo terminal” at Terminal 5 include mooring an oil rig and accompanying vessels, either as part
8 of the cargo terminal use or as an accessory use to a cargo terminal under the City’s Shoreline
9 Master Program (SMP) regulations, Seattle Municipal Code (SMC) Ch. 23.60 (now Ch. 23.60A). It
10 concludes that an additional permit is needed for that activity.

11 In this appeal both Foss Maritime Company (Foss) and the Port of Seattle (Port) contend the
12 interpretation changes the scope of issued permits, which they claim would be unlawful.³ The
13 City’s Motion to Dismiss seeks to dismiss these claims because they are based on estoppel,⁴ and so
14 outside the jurisdiction of the Hearing Examiner. The Hearing Examiner’s jurisdiction is limited to
15 the scope of review specifically set out in the Seattle Municipal Code (SMC),⁵ in this case the
16 meaning, application or intent of any development regulation in Title 23.⁶

17 Intervenors’ motion contends that they “hold or rely on various landward or water-
18 dependent entitlements or permits from DPD and the City of Seattle,”⁷ but not the permit issued
19 for Terminal 5. In fact, they claim they are interested in Port and other facilities “throughout

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21 ¹ Motion, p. 2, line 18 to p. 3, line 11.

² Exhibit 1 from <http://www.ssamarine.com/locations/pacificnw/terminal18.asp>
and <http://www.lynden.com/aml/>

³ Foss Amended Notice of Appeal, p. 6, line 23 to p. 8 lines 4; Appeal of Port of Seattle, p. 5, issue 2.

⁴ *Chelan County v. Nykreim*, 146 Wn.2d 904, 933 and 9338-40, 52 P.3d 1 (2002).

⁵ *Chausee v. Snohomish County Council*, 38 Wn. App. 630, 636, 689 P.2d 1084 (1984).

⁶ Seattle Municipal Code (SMC) 23.88.020.A and G.5.

⁷ Motion, p. 2, lines 13-14.

1 Seattle, beyond Terminal 5⁸ and “future use” of those facilities.⁹ They assert they have an
2 interest in the reliability of permits.¹⁰

3 In addition Intervenors assert they have an interest in “constitutional rights,” though they
4 do not identify them, and it is impossible to determine whether those rights are the ones asserted
5 by Appellants, or whether Intervenors are seeking to expand the issues in this appeal. The City’s
6 Motion to Dismiss seeks to dismiss constitutional claims as outside the Hearing Examiner’s
7 jurisdiction.¹¹

8 Intervenors assert that the decision would “directly or indirectly impair Intervenors’
9 ability to carry out activities.”¹² They say:

10 If upheld in this Appeal, DPD’s reinterpretation of the permit
could adversely affect all of these operations

- 11 • by directly affecting operations at Terminal 5¹³
- 12 • by indirectly adversely impacting operations at the Port or
maritime facilities throughout Seattle¹⁴
- 13 • by calling into question the validity/viability of permits and land
use entitlements issued to the intervenors or parties with whom
they do business.¹⁵

14 (bullets added). Intervenors do not state how requiring an additional permit at Terminal 5 affects
15 them, and they are not located there.

16 Intervenors also assert that “fishing vessel or freight barges could be barred from docking or
17 mooring for off-season storage and maintenance at port facilities, because DPD changed its
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21 ⁸ Motion, p. 2, lines 16-17.

⁹ *Id.*, line 17.

¹⁰ Motion, p. 4, line 12.

¹¹ *Chausee*, 38 Wn. App. at 636.

¹² Motion, p. 5 lines 2-7.

¹³ Motion, p. 7, lines 24-25.

¹⁴ Motion, p. 8, line 1.

¹⁵ Motion, p. 8, lines 2-3.

1 mind.”¹⁶ However, the Interpretation, Conclusion 12, finds that this activity would be allowed
2 under the “cargo terminal use” at Terminal 5.

3 Intervenor’s assert their participation will not affect the case schedule, but also claim:
4 “Without intervention T-5 Intervenor’s would be deprived of the ability to present relevant
5 information and legal argument to challenge the broad and unintended consequences of DPD’s
6 Interpretation.”¹⁷

7 III. ARGUMENT AND AUTHORITY

8 Under Hearing Examiner Rule 3.09 Intervenor’s must:

- 9 • Show how the person or entity making it is affected by or interested in the matter
10 appealed and
11 • Must demonstrate a substantial interest
12 ○ that is not otherwise adequately represented.

13 The Interpretation interprets, and is limited to, how a provisions of Title 23 (the Shoreline
14 Master Program’s definition of cargo terminal and accessory use in Chapter 23.60/23.60A) apply
15 to Terminal 5 and the proposed activity of mooring an oil rig there.

16 Intervenor’s are not directly affected by the result of the Interpretation of what is allowed
17 at Terminal 5; none of them operate there. They all operate elsewhere. An interpretation is
18 limited to the specific property that is subject to the interpretation:

19 Interpretations generally. A decision by the Director as to the
20 meaning, application or intent of any development regulation in
21 Title 23 or in Chapter 25.09, Regulations for Environmentally
22 Critical Areas, as it relates to a specific property . . . ¹⁸

23 ¹⁶ Motion, p. 8, lines 13-15.

¹⁷ Motion, p. 9, lines 1-2.

¹⁸ SMC 23.88.020.A.

1 The Interpretation does not apply to Intervenor at their locations. They are not affected by
2 the substance of the interpretation. This is different from the intervention granted in *Loveless v.*
3 *Yantis*¹⁹ where the court found intervenors had a direct property interest in the property subject to
4 appeal and would have been bound by decisions affecting their property rights.

5 The matter appealed - whether the Interpretation is correct under Title 23 - cannot affect a
6 “substantial” interest of these Intervenor. Nor is there any question that on this topic Foss and the
7 Port can adequately address this topic, as Intervenor acknowledge: “Appellants are focused on
8 DPD’s Interpretation that the Operations are no longer a cargo use.”²⁰

9 These Intervenor’s focus is on DPD’s authority to make a use interpretation concerning an
10 issued permit. Intervenor’s issue is whether the City is barred from taking this action. This is not
11 “the matter appealed,” which is the “meaning, application or intent” of provisions in Title 23.

12 Intervenor erroneously contend that Appellants Foss and Port cannot adequately represent
13 the Intervenor’s interest on this broader issue, but both Appellants have raised this specific issue in
14 their appeals.²¹ Intervenor’s position here is unlike *Loveless*, where the court found that the county
15 could not represent intervenor’s interests because the county failed to focus on the very issues that
16 were the basis for the court’s decision.²² In addition, the court found the county was focused on the
17 rights of the general public in platting regulations, while the intervenor presented a “more sharply
18 focused and sometimes antagonistic viewpoint to that of the county as a whole.”²³ Here the
19 interest of Foss and the Port are identical to that of the Intervenor’s: the rights of permit holders.

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22 ¹⁹ 82 Wn.2d 754, 513 P.2d 1023 (1973).

23 ²⁰ Motion, p. 8, lines 5-6.

²¹ Foss Amended Notice of Appeal, p. 6, line 23 to p. 8, lines 4; Appeal of Port of Seattle, p. 5, issue 2.

²² *Loveless*, 82 Wash.2d at 759.

²³ *Id.*

1 In addition, Intervenor's participation is likely to affect the trial schedule. They claim they
2 will present testimony on the unintended consequences of interpreting the scope of permits already
3 issued. This is far afield from the substance of the Interpretation, will require additional testimony
4 on indirect effects that are not germane to any of the issues raised by Appellants: it is in essence an
5 argument that allowing such an interpretation is bad public policy. Moreover, Intervenor's admit
6 that this is an "indirect adverse impact,"²⁴ and so not a basis additional testimony.

7 IV. CONCLUSION

8 The motion to intervene should be denied as failing to establish an affected interest in the
9 matter appealed or a substantial interest that cannot be adequately represented by the parties.
10 Alternatively, if intervention is granted, it should be limited to whether DPD is estopped from
11 issuing an interpretation on issued permits.

12 DATED this 18th day of June, 2015.

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²⁴ Motion, p. 8, line 1.

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 Opposition to T-5 Intervenor's Motion to Intervene** with the Seattle
4 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:

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

10 Dated this 18th day of June, 2015, at Seattle, Washington.

11
12 
13 ROSIE LEE HAILEY

/Pacific
NorthwestTerminal 18
Seattle, WA

Other Pacific NW Locations

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Container



Conventional



Cruise

**Contact Information****Eli Bohm**
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Seattle, WA 98134

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Email: eli.bohm@ssamarine.com**Specifications and Services**

Terminal 18 is the largest container facility in the Pacific Northwest. It is a fully automated OCR, RPM and RFID technology facility.

Location: Northeast corner of Harbor Island**Size:** 196 acres**Water Depth:** 50 feet**Berths:** 4**Total Berthing Length:** 4,460 feet**Cranes:** 10

- 7 ZPMC
- 3 MHI

Truck Lanes: 24

- 18 inbound
- 8 outbound

Scales: 16**Rail Services:** Burlington Northern Santa Fe (BNSF) and Union Pacific (UPRR)**Reefer Services:** 1,250 plugs**Highway Access:** 5 minutes to I-5**Driving Directions**

From I-5 north or south, take exit 163 (West Seattle Bridge), proceed west to the Harbor Island/11th Ave. SW exit. After dropping down to street level, the road divides into three lanes westbound. Depending on your destination, proceed as follows:

**Import/Export Load or Empties (Gate #1)
1050 SW Spokane Street**

- Stay in the far right lane (marked Gate #1)
- Loads go to lanes #1-12
- Empties go to lanes #1-14
- Red/green lights indicate if individual lanes are open or closed

Matson Navigation (Gate #2)

- Please follow directional signs
- After passing Gate #1, stay in the right lane westbound to stoplight at SW Spokane Street and Klickitat Avenue SW
- Turn right onto Klickitat Avenue SW, staying in the far right lane (bypass the overpass)
- Klickitat Avenue SW, staying in the far right lane (bypass the overpass)
- Klickitat Avenue SW turns into East Frontage Road
- Gate #2 entrance is approximately 700 feet north of the southwest corner of the terminal

**Matson Navigation (Auto Customers)
2715 11th Ave. SW**

- After passing Gate #1, stay in the right lane westbound to stoplight at SW Spokane Street and Klickitat Avenue SW
- Turn right onto Klickitat Avenue SW, staying in the far right lane (bypass the overpass)
- Klickitat Avenue SW turns into East Frontage Road
- The roadway veers right and turns into SW Florida Street to a stop sign at 13th Avenue SW
- Proceed straight through the stop sign and follow SW Florida Street, which veers right and turns into 11th Avenue SW
- 11th Avenue SW terminates at Gate #3

**Terminal 18 Office (Gate #4)
2400 11th Ave. SW**

- Stay in the center lane (marked Gates #3 & #4) westbound to stoplight at SW Spokane Street and Klickitat Avenue SW
- Turn right onto Klickitat Avenue SW
- Klickitat turns into 16th Avenue SW
- Stay in the left lane and go over the rail overpass
- Follow 16th Avenue SW north
- The road veers right and turns into SW Florida Street headed east
- Proceed straight through the stop sign at 13th Avenue SW towards T18 Gate/Security station
- Admin building is to the left

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