BEFORE THE HEARING EXAMINER
FOR THE CITY OF SEATTLE

In the Matter of the Appeals of **FOSS MARITIME COMPANY AND PORT OF SEATTLE** from an interpretation issued by the Director, Department of Planning and Development	Hearing Examiner File Nos. S-15-001; S-15-002 (Director's Interpretation: 15-001) FOSS MARITIME'S OPPOSITION TO MOTION TO CHANGE THE DATE OF DEPOSITION OF BEN PERKOWSKI AND FOR A PROTECTIVE ORDER QUASHING THE DEPOSITION

I. INTRODUCTION

Foss Maritime Company ("Foss") respectfully requests that the Hearing Examiner deny the Motion to Change the Date of Deposition of Benjamin Perkowski and for a Protective Order Quashing the Deposition ("Motion") filed by the Department of Planning and Development ("Respondent" or "DPD"). DPD does not even attempt to meet its legal burden to show that it satisfies the requirements for issuance of a protective order under CR 26, and instead simply relies on a straw man argument in contending that the testimony of Mr. Perkowski is not "relevant." In so doing, DPD effectively would turn CR 26 on its head by placing the burden on Foss to justify the discovery it seeks – when, to the contrary, it is the

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responsibility of the party seeking to resist discovery to demonstrate why the discovery should not be had. Foss also hereby joins in the opposition to the Motion filed separately by the Port of Seattle ("Port").

II.
ARGUMENT AND AUTHORITY

A. DPD Has Not Met Its "Heavy Burden" To Demonstrate That It Is Entitled To A Protective Order.

As an initial matter, DPD fails entirely to make the legal showing that is required to obtain a protective order. A party's objection that the discovery sought is irrelevant does not entitle that party to withhold discovery or to the issuance of a protective order. Instead, under Washington law, a party seeking a protective order to prevent or restrict discovery bears the "heavy burden" of demonstrating "good cause" justifying issuance of the order. *Cedell v. Farmers Ins. Co. of Wash.*, 176 Wn.2d 686, 696, 295 P.3d 239 (2013) (citing *Blankenship v. Hearst Corp.*, 519 F.2d 418, 429 (9th Cir. 1975). To establish good cause, the party "must show that specific prejudice or harm will result if no protective order is granted." *McCallum v. Allstate Property and Cas. Ins. Co.*, 149 Wn. App. 412, 423 (2009) (citing cases) (emphasis added). "Unsubstantiated allegations of harm" or conclusory statements that some generalized harm will occur are insufficient as a matter of law. *Id.* Instead, a party must provide specific factual allegations and "concrete examples" of the potential harm that will be suffered in absence of an order. *Id.* In deciding a motion for a protective order, courts must weigh the potential harm against the non-moving party's interest in obtaining full discovery. *Id.*

Here, DPD does not even attempt to meet its burden to show good cause. The Motion merely cites the text of CR 26, but does not describe or even suggest any harm that would result from proceeding with the deposition as noted. Nor could DPD make such a showing. DPD's counsel will have every opportunity during Mr. Perkowski's routine deposition to state any objections for the record as may be warranted. *See* CR 30(c). DPD also will have the opportunity to challenge the admissibility of deposition testimony or any other evidence offered

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by Foss (or any other party) at the hearing. *See* HER 2.17. DPD thus has failed to meet its "heavy burden" – or any burden at all – of showing good cause, and the Motion must be denied as a matter of law on this basis alone.

B. DPD Fails To Show That The Discovery Sought Is Not Relevant.

Even if DPD had shown some manner of potential harm that conceivably could justify a protective order – which it has not – the Hearing Examiner still should deny the Motion because DPD has not shown that the discovery sought is not "relevant to the subject matter involved in the pending action." CR 26(b)(1).

Public policy in Washington weighs heavily in favor of full and open discovery. *See, e.g., Fellows v. Moynihan*, 175 Wn.2d 641, 649, 285 P.3d 864 (2012) (privileges restricting discovery are in derogation of policy favoring discovery and must be strictly construed); *N.K. v. Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints*, 175 Wn. App. 517, 538, 307 P.3d 730 (2013) (reversing trial court's denial of motion to compel on relevance grounds and noting that parties in Washington "have a broad right of discovery").[1] Accordingly, it is well-settled that the rules of discovery should be read liberally to ensure that parties are able to fully investigate their claims and defenses before trial. *See, e.g., Herbert v. Lando*, 441 U.S. 153, 177 (1979) ([T]he deposition-discovery rules are to be accorded a broad and liberal treatment to effect their purpose of adequately informing the litigants in civil trials."); *Senear v. Daily Journal American*, 27 Wn. App. 454, 618 P.2d 536 (1980) (CR 26 is to be given "broad and liberal construction"). Indeed, one prominent Washington commentator has noted that in the context of discovery, the requirement of relevance is "nominal," and that the provisions of CR 26 were "deliberately drafted broadly, to allow discovery beyond what

[1] This perhaps is nowhere more evident than where the information sought is held by public agencies or officials. *See Neighborhood Alliance of Spokane County v. County of Spokane*, 172 Wn.2d 702, 715, 261 P.3d 119 (2011) (noting policy, reflected in the Public Records Act, that "free and open examination of public records is in the public interest, even if examination may cause inconvenience or embarrassment."). Indeed, "full access to information concerning the conduct of government on every level must be assured as a fundamental and necessary precondition to the sound governance of a free society." *Id.* (internal quotations omitted).

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would be considered relevant at trial." Tegland, 14 WASH. PRAC. § 13:2; *see also Bennett v. Smith Bundy Berman Britton, PS*, 176 Wn.2d 303, 312, 291 P.3d 886 (2013) ("[Washington has] very liberal rules of discovery. In reality, parties are required to produce many more records than are ultimately relevant to the specific issues before the court."). And as DPD concedes, parties may seek discovery of inadmissible information so long as it is reasonably calculated to lead to the discovery of admissible evidence. CR 26(b)(1).

DPD's argument that Mr. Perkowski's testimony is not relevant is based upon a straw man of its own creation, and should be rejected. As DPD acknowledges, Mr. Perkowski granted an exemption from applying for a shoreline development permit to the Port for the replacement of certain bollards at Terminal 5. In connection with the granting of the exemption, Mr. Perkowski and DPD requested and received information about the use that would be occurring at Terminal 5 – the very use that is now the subject of this appeal. In granting the exemption, DPD necessarily determined that the use was a cargo terminal use. That decision was never appealed, and the time for doing so has long since passed. DPD conclusorily alleges that these facts are relevant only to "estoppel" arguments that the Hearing Examiner may not consider, but DPD is mistaken. Although such facts might indeed support an estoppel theory, Foss has not advanced such a position. Rather, as will be explained in greater detail in Foss's forthcoming opposition to DPD's motion to dismiss, Foss contends that these facts establish, among other things:

- That DPD is barred by the statute of limitations from issuing the Interpretation, which is contrary to its past decision regarding the same use, *Chelan County v. Nykriem*, 146 Wn.2d 904, 52 P.3d 1 (2002);[2]
- That DPD's Interpretation is not entitled to the deference normally afforded under SMC 23.88.020.G.5 because it represents a shift from its past

[2] DPD mischaracterizes *Nykriem* as an equitable estoppel case, but it is not: the *Nykriem* court's decision was based upon the applicable statute of limitations for land use decisions. 146 Wn.2d at 932-33.

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interpretation and enforcement, *Sleasman v. Lacey*, 159 Wn.2d 639, 647, 151 P.3d 990 (2007); and

- That previous uses conducted at Terminal 5, approved by DPD, are evidence of legislative intent, which is a key consideration in statutory interpretation.

The Motion fails to address any of these issues, and its attempt to dismiss the import of Mr. Perkowski's testimony as merely an "estoppel" argument is not well-taken.

DPD's reliance on *Morgan v. Peacehealth, Inc.*, 101 Wn. App. 750, 14 P.3d 773 (2000) similarly is misplaced, as *Morgan* addressed an entirely different legal standard and does not even mention CR 26. In *Morgan*, the defendant hospital moved for summary judgment against the plaintiff physician. 101 Wn. App. at 753. The physician moved to continue the motion, arguing (among other things) that, under CR 56(f), he should be given additional time to conduct discovery prior to responding to the summary judgment motion. *Id.* at 786. The *Morgan* court ruled that the trial court's refusal to grant the physician this additional discovery was not an abuse of discretion. *Id.* at 787. Under CR 56(f), the party seeking the additional discovery bears the burden of showing what evidence he or she expects to obtain that will raise a genuine issue of material fact precluding summary judgment, and the physician had failed to do so. *Id.* at 787. Thus, in addition to applying an inapposite legal standard, *Morgan* presents the polar opposite of the parties' posture here, where the burden is on the party resisting discovery and not on the one seeking it. Accordingly, *Morgan* does not support DPD's position and provides no guidance here.

C. There Is No Good Cause To Delay The Deposition.

Presumably as an alternative to a protective order that would quash Mr. Perkowski's deposition outright, DPD requests that the Hearing Examiner delay the deposition until July 6, 2015. That request should be denied. The hearing in this matter is only some four weeks away, and the parties simply cannot afford to delay their preparations or waste the available time in any way. Perhaps most importantly, for the reasons stated above, there is no

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justification for delaying the deposition, and accordingly it should proceed as noted.

III.
CONCLUSION

DPD has not even attempted to meet its heavy burden to establish proper grounds for the issuance of a protective order that would deny Foss the discovery it needs to proceed to a full and fair hearing of its appeal. Such grounds do not in fact exist, as the discovery Foss seeks is relevant and not privileged. The Motion should be denied.

DATED this 24th day of June, 2015.

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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 24, 2015, I caused to be served the foregoing document, FOSS MARITIME'S OPPOSITION TO MOTION TO CHANGE THE DATE OF DEPOSITION OF BEN PERKOWSKI AND FOR A PROTECTIVE ORDER QUASHING THE DEPOSITION, on the person(s) identified below in the manner shown:

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Dated at Seattle, Washington, this 24th day of June, 2015.

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