BEFORE THE HEARING EXAMINER
THE CITY OF SEATTLE

In the Matter of the Appeals of the **FOSS MARITIME COMPANY AND PORT OF SEATTLE,** from an Interpretation Issued by the Director, DEPARTMENT OF PLANNING AND DEVELOPMENT.	Hearing Examiner File: S-15-001 and S-15-002 (Director's Interpretation: 15-001) **PORT OF SEATTLE'S OPPOSITION TO DPD'S MOTION FOR A PROTECTIVE ORDER CONCERNING THE DEPOSITION OF ANDREW McKIM**

I. INTRODUCTION

Appellant Foss Maritime has noted the deposition of Andy McKim, the author of the Interpretation at issue in this appeal, and DPD has moved for a protective order:

> . . . 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.

The Port of Seattle intends to actively participate in the deposition of Mr. McKim, and the Port joins in Foss Maritime's response to DPD's motion. The Port submits the following response to provide additional explanation for why DPD's motion is without merit and should be denied.

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II. ARGUMENT

A. DPD's Issue 1: The facts DPD seeks to suppress are directly relevant to the lawfulness of the Interpretation

Issue 6 in the Port's appeal asserts that the Interpretation is arbitrary and irrational in a constitutional sense, and the Port's response to DPD's motion to dismiss, to be timely filed tomorrow, will demonstrate that the Hearing Examiner has jurisdiction over this issue.[1] In addition, any decision that is arbitrary is also "clearly erroneous," and that is the standard of review that the Hearing Examiner is to apply to the Interpretation. It is also one of the standards that a reviewing court will apply to the Hearing Examiner's decision, as discussed in Section B below.

DPD seeks to suppress all evidence about the politics that led to the Interpretation. The Port does not know what this evidence will show, but in light of the statements of City elected officials reported in the media, this evidence may show that DPD was directed to produce an Interpretation that determined that moorage of vessels operated by Shell Oil is unlawful. Any evidence to this effect is relevant and admissible because it will tend to demonstrate whether the Interpretation is arbitrary and capricious in a constitutional sense. For example, in the pre-LUPA case of *Maranatha Mining, Inc. v. Pierce County*, 59 Wn. App. 795, 801 P.2d 985 (1990), the State Supreme Court reversed a denial by the Pierce County Council of a conditional use permit for a gravel mine because the Council's decision was based upon citizen opposition to a politically unpopular project rather than on the facts and the law:

> To the extent that the Council's decision was an exercise of police power, reviewable under the arbitrary and capricious standard, the Council's denial of the permit presents a textbook example of arbitrary and capricious action: without consideration and in disregard of the facts. *State ex rel. Myhre v. City of Spokane*, 70 Wn.2d 207, 210, 422 P.2d 790 (1967). A decision of this sort must be

[1] The Port's Response to DPD's motion to dismiss will demonstrate that both DPD and the Hearing Examiner must interpret the law in a constitutional manner. The most recent authority for this basic principle is *Tyko Johnson v. City of Seattle*, 184 Wn. App. 8, 335 P.3d 1027 (2014), where the City violated a citizen's right to procedural due process, and thus incurred liability under 42 U.S.C. § 1983, by preventing the citizen from asserting nonconforming use rights as a defense to a code enforcement action.

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> controlled by adequate standards. *State ex rel. Standard Mining & Dev. Corp. v. City of Auburn*, 82 Wn.2d 321, 327, 510 P.2d 647 (1973). Here, although the County claims that it has established "specific standards and criteria" to guide the discretion of both the hearing examiner and the Council in making these decisions, it does not tell us what they are, and our examination of the record and the pertinent Code provisions reveals none.
>
> It is apparent that the Council gave little consideration to the merits of Maranatha's application, and that it disregarded the facts set forth in the examiner's findings. The Council seems to have heard clearly the citizen complaints and the comments of one of its own members while disregarding the record. We cannot escape the conclusion, in view of the evidence in support of Maranatha's application, that the council based its decision on community displeasure and not on reasons backed by policies and standards as the law requires.

Id. at 804-05.[2]

Similarly here, if the Interpretation was the product of political direction, and if its conclusion was politically determined before it was written, the Interpretation would be "a textbook example of arbitrary and capricious action: without consideration and in disregard of the facts." *Id.* at 804.

The Interpretation affects the property and contract rights of the Port and Foss, and to the extent that the Interpretation is the product of politics rather than of facts and law, it is indefensible:

> Nor do we accept the suggestion of the Court of Appeals that the City's actions in this instance were simply part of the "political process." Municipal liability for the flagrant abuse of power by officials who intentionally interfere with the development rights of property owners cannot be avoided simply by labeling such actions "political."

Pleas v. City of Seattle, 112 Wn.2d 794, 806-07, 774 P.2d 1158 (1989) (internal cites omitted).

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[2] *Maranatha* was decided before LUPA, and one of the issues before the Court was whether the Pierce County decision was arbitrary and capricious or merely clearly erroneous. The Court found it did not need to decide that issue because a decision made without consideration and in disregard of the facts was both arbitrary and capricious and clearly erroneous. By analogy, if the facts that DPD is attempting to suppress demonstrate that the Interpretation was prepared at the direction of one or more of the City's elected officials to further a political agenda, this evidence will be relevant to whether the DPD decision is clearly erroneous as well as arbitrary and capricious.

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The Port and Foss do not know what facts DPD is attempting to suppress, and the facts may demonstrate that no political direction was given, despite what has been reported in the media. But the Port and Foss are entitled to know these facts because they are "reasonably calculated to lead to the discovery of admissible evidence." CR 26(b)(1).

DPD's motion also seeks to use CR 26 to limit access to information otherwise available pursuant to the Public Records Act, Chapter 42.56 RCW. Without question, the Port and Foss are entitled to obtain non-exempt records from DPD pursuant to the PRA regarding the basis for its Interpretation. Since there is limited time before the hearing, and the PRA does not impose specific time limits on DPD to fulfill requests, the Port and Foss also are seeking to obtain information by discovery, so that there will be no need to request a delay in the hearing. DPD should not be allowed to frustrate these efforts to timely prepare for the hearing.

B. DPD's Issues 2 and 3: the Supreme Court has repeatedly stated that the evidence that DPD seeks to suppress is relevant

DPD also seeks to suppress all evidence about:

> (2) DPD past approvals of activities on other sites; and (3) DPD enforcement or lack of enforcement of activities on other sites.

DPD's motion must be denied because the evidence that DPD seeks to suppress will determine whether the Interpretation, and the Hearing Examiner's decision on this appeal, are entitled to deference.

The Hearing Examiner will make the City's final decision on the Interpretation:

> Appeals shall be considered de novo, and the decision of the Hearing Examiner shall be made upon the same basis as was required by the Director. *The interpretation of the Director shall be given substantial weight, and the burden of establishing the contrary shall be upon the appellant. . . .*

SMC 23.88.020.G(5).

DPD's motion neither quotes nor discusses the italicized sentence, but the Hearing Examiner has long recognized that the "substantial weight" requirement is equivalent to the "clearly erroneous" standard of review:

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> To overcome substantial weight, the burden is on an appellant to show that the lead agency's decision is "clearly erroneous." *Brown v. City of Tacoma*, 30 Wn. App. 762, 637 P.2d 1005 (1981). Under this standard of review, the Director's decision can be reversed if the Hearing Examiner is left with the definite and firm conviction that a mistake has been made. *Cougar Mtn. Assoc. v. King County*, 111 Wn.2d 742, 747, 765 P.2d 264 (1988).

In re Uncola and Friends of Olmsted Parks from a Determination of Nonsignificance by the Director of the Department of Management and Planning regarding Off-Leash Exercise Area Program, Hearing Examiner File W-97-004, W-97-005, Conclusion 2, December 31, 1997.

The "clearly erroneous" standard entails applying the law to the facts:

> The clearly erroneous standard (d) test involves applying the law to the facts. Under that test, we determine whether we are left with a definite and firm conviction that a mistake has been committed. Again, we defer to factual determinations made by the highest forum below that exercised fact-finding authority.

Cingular Wireless, LLC v. Thurston County, 131 Wn. App. 756, 768, 129 P.3d 300 (2006) (citing *Citizens to Preserve Pioneer Park LLC v. City of Mercer Island*, 106 Wn. App. 461, 473, 24 P.3d 1079 (2001)).

The Hearing Examiner will be the "highest forum" that exercises fact-finding authority for the Interpretation, but DPD's motion asks the Hearing Examiner to suppress the facts that she needs to find—not only the facts that the Hearing Examiner will need to know in order to apply the "clearly erroneous" standard to DPD's Interpretation, but also facts that a reviewing court will need to know to apply both the "clearly erroneous" standard in RCW 36.70C.130(1)(d), and also the "error of law" standard in RCW 36.70C.130(1)(b): whether the Interpretation is "an erroneous interpretation of the law, after allowing for such deference as is due." The question of what deference is due is fact-specific, just as is application of the "clearly erroneous" standard:

> The statute does not require a court to show complete deference, but rather, "such deference as is due." *Id.* Thus, deference is not always due—in fact, even a local entity's interpretation of an ambiguous local ordinance may be rejected. *See Sleasman v. City of Lacey*, 159 Wn.2d 639, 646, 151 P.3d 990 (2007). Instead, the interpreting local entity "bears the burden to show its interpretation was a matter of preexisting policy." *Id.* at 647 (citing *Cowiche Canyon Conservancy v.*

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> *Bosley*, 118 Wn.2d 801, 815, 828 P.2d 549 (1992)). No deference is due a local entity's interpretation that "was not part of a pattern of past enforcement, but a by-product of current litigation." *Id.* at 646. A local entity's interpretation need not "be memorialized as a formal rule" but the entity must "prove an established practice of enforcement." *Id.* (citing *Cowiche,* 118 Wn.2d at 815).

Ellensburg Cement Prods., Inc. v. Kittitas County, 179 Wn.2d 737, 753, 317 P.3d 1037 (2014).

In the *Ellensburg Cement Products* case, and in the two cases cited in the quote from this case (*Cowiche Canyon Conservancy* and *Sleasman*) a unanimous Supreme Court held that a local government's interpretation of an ordinance is not entitled to deference unless the local government can establish that its interpretation is a matter of pre-existing policy. The facts that are relevant to this issue – whether the Interpretation is a one-off decision about specific vessels or a reflection of existing policy – are the very facts that DPD's motion seeks to suppress.

Deference is built into both the City's Code – SMC 23. 88.020.G(5) – and into LUPA in both RCW 36.70C.130(1)(b) and (d). The burden is on the Port to present facts to overcome this deference under the Code and under RCW 36.70C.130(1)(d), and the burden is on the City to present facts that demonstrate whether deference "is due" to the Interpretation under RCW 36.70C.130(1)(b). DPD's motion thus seeks to suppress not only evidence that the Port and Foss need to meet their burden before the Hearing Examiner, but also evidence that the Hearing Examiner needs to include in the record for subsequent judicial appeal.

III. CONCLUSION

DPD's motion seeks to prevent discovery of facts that are demonstratively relevant to the pending appeal, as discussed above. But the test for discovery is not whether the facts will be admissible, but whether "the information sought appears reasonably calculated to lead to the discovery of admissible evidence." Pursuant to CR 26(b)(1), a court may limit discovery of such information only if:

> (A) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;

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(B) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or

(C) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under section (c).

DPD has not articulated any such basis for suppressing the facts sought in the deposition of Mr. McKim. DPD's motion to prevent Foss and the Port from learning relevant information is without merit and must be denied.

RESPECTFULLY SUBMITTED this 24th day of June, 2015.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned a resident of the State of Washington, over the age of eighteen years, not a party to the above-entitled action, and competent to be a witness herein.

On June 24, 2015, I caused the foregoing document to be served as follows:

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DATED this 24th day of June, 2015.

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