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BEFORE THE HEARING EXAMINER
THE CITY OF SEATTLE

In the Matter of the Appeals of the
**FOSS MARITIME COMPANY AND
PORT OF SEATTLE,**

Hearing Examiner File:
S-15-001 and S-15-002

(Director's Interpretation: 15-001)

from an Interpretation Issued by the Director,
DEPARTMENT OF PLANNING AND
DEVELOPMENT.

**PORT OF SEATTLE'S OPPOSITION
TO DPD'S MOTION TO CHANGE
THE DATE OF DEPOSITION OF
BENJAMIN PERKOWSKI AND FOR A
PROTECTIVE ORDER QUASHING
THE DEPOSITION**

I. INTRODUCTION

DPD moves the Hearing Examiner for an order (1) delaying the deposition of Ben Perkowski until after the Hearing Examiner rules on DPD's motion to dismiss the Port's Issue No. 2, and (2) quashing the deposition on the grounds that the subject matter of the deposition is an issue over which the Hearing Examiner does not have jurisdiction.

For the reasons explained below, (1) a delay of the deposition is unwarranted because the Appellants must make their record for judicial appeal regardless of whether the Hearing Examiner accepts jurisdiction over Issue 2 in the Port's appeal; and (2) the Hearing Examiner does have jurisdiction over the subject matter of the deposition.

PORT OF SEATTLE'S OPPOSITION TO DPD'S MOTION TO
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THE DEPOSITION - 1

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II. ARGUMENT

A. The Port is required to make its record for all the issues raised in its appeal

In its effort to prevent the Port and Foss from learning facts within DPD's control, DPD asserts that the pending deposition of Ben Perkowski is only relevant to an issue over which DPD asserts the Hearing Examiner does not have jurisdiction. DPD characterizes this as a "Nykreim estoppel claim." As demonstrated briefly in Section B below, and as will be further discussed in the Port's response to DPD's motion to dismiss, *Chelan County v. Nykreim*, 146 Wn.2d 904, 52 P.3d 1 (2002), is not an estoppel case, and the Port's appeal does not ask the Hearing Examiner to make any decision sounding in equity. In addition, Mr. Perkowski has knowledge that may lead to the discovery of admissible evidence on multiple issues raised by the Port, since he has knowledge about DPD's prior decisions regarding other cargo terminals, not just Terminal 5.

Even if DPD's motion accurately characterized the Port's appeal, however, and even if the Hearing Examiner should decide that she does not have jurisdiction over one or more issues raised by the Port or Foss, the Port and Foss still would be entitled to depose Mr. Perkowski to learn facts relevant to those issues because the Port and Foss are *required* to make their record for judicial appeal at the upcoming hearing before the Hearing Examiner:

Mr. Harrington relies on *Prisk* for the proposition that only the courts can decide a constitutional claim. But *Prisk* addresses the exhaustion requirement in the context of a challenge to the facial constitutionality of a law. *Prisk v. City of Poulsbo*, 46 Wn. App. 793, 798, 732 P.2d 1013 (1987). Mr. Harrington is correct that administrative agencies may not pass on the facial constitutionality of the statutes they administer. *Id.* But here, Mr. Harrington does not challenge the facial constitutionality of the shoreline act. He is challenging the County's compliance with the Act and its constitutionality *as applied to him*. Administrative review is, therefore, required to develop the facts necessary to adjudicate this "as applied" constitutional challenge. *Presbytery of Seattle v. King County*, 114 Wn.2d 320, 337-38, 787 P.2d 907 (1990).

Harrington v. Spokane County, 128 Wn. App. 202, 210, 114 P.3d 1233 (2005) (emphasis in original).

1 The Port and Foss are therefore required to present the facts necessary to adjudicate all of
2 their issues, including any issues over which the Hearing Examiner decides she does not have
3 jurisdiction, because a superior court reviewing the Interpretation (if it is affirmed by the Hearing
4 Examiner) will have jurisdiction to decide these issues. The Land Use Petition Act, in
5 RCW 36.70C.120(1), similarly directs the Port to make its factual record before the Hearing
6 Examiner:

7 When the land use decision being reviewed was made by a quasi-judicial body or
8 officer who made factual determinations in support of the decision and the parties
9 to the quasi-judicial proceeding had an opportunity consistent with due process to
10 make a record on the factual issues, judicial review of factual issues and the
11 conclusions drawn from the factual issues shall be confined to the record created
12 by the quasi-judicial body or officer, except as provided in subsections (2)
13 through (4) of this section.

14 If the Hearing Examiner were to grant DPD's motion and prevent discovery relevant to
15 the issues that the Port has raised – that is, if the Hearing Examiner were to deny the Port an
16 opportunity “consistent with due process to make a record on the factual issues” – then LUPA
17 provides for relief in subsections (2) through (4) of RCW 36.70C.120(1). However, that relief
18 will entail discovery and an evidentiary hearing before the superior court, which would be more
19 burdensome for all the parties and further delay ultimate resolution of this appeal. And
20 preventing the Port and Foss from conducting discovery will prevent them from even making an
21 appropriate offer of proof to the Hearing Examiner.

22 If, after learning the facts through discovery, the Port offers evidence at the hearing that
23 DPD believes is irrelevant or should be excluded for other reasons, the Hearing Examiner can
24 make an appropriate ruling at that time. But there is no basis in the law for granting DPD's
25 motion to prevent the Port and Foss from learning the facts in the first place.

26 **B. DPD's motion incorrectly characterizes the Port's Issue No. 2 as an estoppel argument**

As discussed above, even if the Hearing Examiner decides that she does not have
jurisdiction over one or more issues raised by the Port, DPD's motion for a protective order must

1 be denied because the Port is required to make its record for judicial review, and therefore the
2 Port is entitled to conduct discovery that is reasonably calculated to lead to the discovery of
3 admissible evidence. *See* CR 26(b)(1).

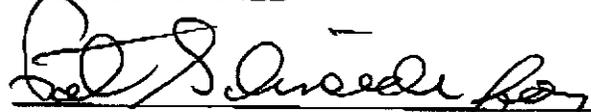
4 However, the Port also notes that DPD mischaracterizes the meaning and effect of
5 *Nykreim* (and therefore the Port's appeal Issue No. 2) by repeatedly asserting that the case and
6 the issue are about estoppel. The Supreme Court in *Nykreim* based its decision on the meaning
7 and effect of LUPA, Chapter 36.70C RCW. *Nykreim*, 146 Wn.2d 904. The Supreme Court
8 made no mention of estoppel, except in a quote from the trial court decision that the Supreme
9 Court reversed. *See id.* at 915 n.32. The decision is one of statutory construction, and the case
10 sounds in law not in equity. By asserting that the Hearing Examiner has no jurisdiction to decide
11 whether DPD is bound by its failure to rescind or appeal the shoreline exemption that it granted
12 to the Port, DPD is simply asserting that the City is not bound by State law. This is not correct,
13 as will be discussed at greater length in the Port's response to DPD's motion to dismiss.

14 III. CONCLUSION

15 For the reasons set forth above, DPD's motion is without merit and should be denied.

16 RESPECTFULLY SUBMITTED this 24th day of June, 2015.

17 PORT OF SEATTLE

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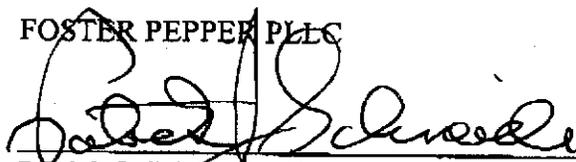
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DECLARATION OF SERVICE

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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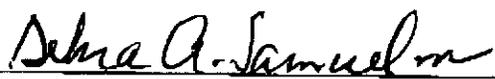
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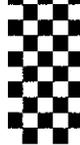
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11 DATED this 24th day of June, 2015.

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 13 _____
 14 Debra A. Samuelson

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 PORT OF SEATTLE'S OPPOSITION TO DPD'S MOTION TO
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 THE DEPOSITION - DECLARATION OF SERVICE

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FACSIMILE TRANSMITTAL SHEET

June 24, 2015

TO: Seattle Office of the Hearing Examiner **FAX NUMBER:** (206) 684-0536 **VOICE CONTACT:** _____ **VOICE CONFIRM:** _____

From: Debra Samuelson on behalf of Adrian Winder

Attachments: Port's Opposition to DPD's Motion to Change Perkowski Deposition and for a Protective Order Quashing the Deposition

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