

1
2
3
4
5
6 BEFORE THE HEARING EXAMINER
CITY OF SEATTLE
7

8 In the Matter of the Appeal of:) Hearing Examiner File:
9) S-15-001 and S-15-002
10)
11) DPD'S REPLY ON MOTION TO CHANGE
FOSS MARITIME COMPANY) DATE OF DEPOSITION OF BEN
12) PERKOWSKI AND FOR A PROTECTIVE
from an interpretation by the Director,) ORDER QUASHING THE DEPOSITION
13 Department of Planning and Development.)
14)
15)

16
17
18
19
20
21
22
23
I. JURISDICTION AND SCOPE OF DISCOVERY

Hearing Examiner Rule 3.11 provides for discovery and states in part:

In response to a motion, or on the Hearing Examiner's own initiative, the Examiner may compel discovery, or may prohibit or limit discovery where the Examiner determines it to be unduly burdensome, harassing, or unnecessary under the circumstances of the appeal.

It is burdensome, harassing, and unnecessary to take Mr. Perkowski's deposition when the matters on which he will testify are outside the Hearing Examiner's jurisdiction to resolve in this Interpretation appeal. While the scope of discovery is broad, the Hearing Examiner has no authority to allow a deposition on matters outside the Hearing Examiner's jurisdiction.

1 The Port contends, and Foss joins in the Port's contention, that the Hearing Examiner
2 must allow discovery and this deposition on all matters raised in this appeal, regardless of
3 jurisdiction, in order to exhaust administrative remedies. This is incorrect.

4 First, exhaustion is required only where the avenue for review can in fact provide the
5 relief requested.¹ The Hearing Examiner can provide relief on the issues of the correct
6 interpretation of provisions in Title 23 - the SMP definitions of cargo terminal and accessory use
7 - as applied to the de novo factual determinations of what the oil rig and its accompanying
8 vessels actually do at Terminal 5; therefore, an appeal to the Hearing Examiner on this issue is
9 required on this issue to exhaust administrative remedies. But, an appeal to the Hearing
10 Examiner cannot provide relief on issues outside of the Hearing Examiner's limited jurisdiction.
11 Therefore, conducting discovery, including depositions, on such topics and presenting testimony
12 on these topics at the hearing is not necessary for exhaustion.

13 Second, the Port contends the appellants are required to make their record on all the
14 issues, including those where the Hearing Examiner does not have jurisdiction, because a
15 superior court will have authority to decide them on review. To support this claim the Port cites
16 RCW 36.70C.0120(1) from the Land Use Petition Act (LUPA), which bars discovery to
17 supplement the record and ends: "except as provided in subsections (2) through (4)."² The Port
18 fails to inform the Hearing Examiner that subsection (2)(c) addresses this precise situation and
19 allows discovery on "Matters that were outside the jurisdiction of the body or officer that made
20 that decision."

21 If appellants' claims are reviewable under LUPA, that statute does not require the
22 appellants to make a record before the Hearing Examiner on claims for which she has no

23 ¹ *Smoke v. City of Seattle*, 132 Wn.2d 214, 224, 937 P.2d 186 (1997).

² Port Opposition, p. 3 lines 7-10.

1 jurisdiction. Nor could LUPA expand the limited jurisdiction conferred on the Hearing
2 Examiner by City ordinance.

3 **II. MR. PERKOWSKI'S DEPOSITION WILL NOT LEAD TO INFORMATION**
4 **THAT IS RELEVANT**

5 Not only is the area of Mr. Perkowski's testimony outside of the Hearing Examiner's
6 jurisdiction, it also will not lead to information that is relevant. Foss sets out 3 reasons why the
7 facts Mr. Perkowski might establish are within the range of "nominal relevance."³ None of them
8 are sufficient to overcome the fact that they are outside the Hearing Examiner's jurisdiction.

9 First, Foss and the Port contend that their *Nykriem* issue is not an estoppel argument but a
10 legal bar under the statute of limitations set out in LUPA.⁴ That does not bring the issue within
11 the scope of the Hearing Examiner's jurisdiction on the interpretation – the meaning and
12 application of provisions of Title 23 with respect to the facts on the site – Terminal 5. Resolving
13 Foss's and the Port's contention would require the Hearing Examiner to determine the scope of a
14 particular DPD decision not on appeal in this case in order to determine whether LUPA appeal
15 deadlines should apply to bar this interpretation. The Examiner has no authority to determine
16 whether state statutes bar DPD's exercising its authority under the City's Land Use Code.

17 Second, Foss contends that the deposition of Mr. Perkowski would show a shift from past
18 practice and so is not entitled to deference under SMC 23.88.020.G.5. Foss relies on case law in
19 judicial settings that is inapposite for two reasons. First, judicial deference to local
20 administrative construction of local laws is accompanied by a caveat, as set out in case law and
21 codified in LUPA: "The land use decision is an erroneous interpretation of the law, after
22 allowing for such deference as is due the construction of a law by a local jurisdiction with

23 ³ Foss Opposition, p. 3, line 21.

⁴ Foss Opposition, p. 4, lines 20-22.

1 expertise.”⁵ The scope of the Hearing Examiner’s review of the Interpretation does not contain
2 such a constraint.⁶ Second, the procedural setting for *Sleasman* and the case it relies on⁷ are
3 completely opposite of the procedural setting in the appeal. In both *Sleasman* and *Cowiche*
4 *Canyon* the issue before the court was whether to defer to the testimony of the agency with
5 authority to construe statute/code, or whether the testimony did not adequately reflect a correct
6 interpretation because it was not written down and appeared to be *ad hoc* testimony. Here,
7 however, the entire function of an interpretation is to officially state what the terms “cargo
8 terminal” and “accessory use” mean in a written analysis that can be reviewed. Applying the
9 rationale of *Sleasman* would mean DPD could never issue a formal interpretation unless it had
10 done so previously. Prior lack of enforcement, different enforcement, incorrect enforcement, or
11 different approvals cannot estop the correct construction of cargo terminal or accessory use in an
12 interpretation.

13 Foss’s third contention is that previous uses conducted at Terminal 5, about which Mr.
14 Perkowski might testify, are evidence of legislative intent. Foss cites no authority that this
15 would be evidence of legislative intent, and it is incorrect. Legislative intent is to be deduced
16 from what it said. *In Re Sanborn*, 159 Wash. 112, 118, 922 Pac. 259 (1930).

17 //

18 //

19 //

20 //

21 //

22 _____
⁵ RCW 36.70C.130(1)(b) (emphasis added).

23 ⁶ Compare SMC 23.88.020.G.5.

⁷ *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 815, 828 P.2d 549 (1992).

1 **III. RELIEF REQUESTED**

2 The City has demonstrated that the scope of this deposition is outside the jurisdiction of
3 the Hearing Examiner and there is no authority to allow it. Therefore, it should be quashed.

4 DATED this 25th day of June, 2015.

5 PETER S. HOLMES
6 Seattle City Attorney

7 By: s/Eleanore S. Baxendale, WSBA #20452
8 Assistant City Attorney
9 eleanore.baxendale@seattle.gov
10 Seattle City Attorney's Office
11 701 Fifth Ave., Suite 2050
12 Seattle, WA 98104-7097
13 Ph: (206) 684-8232
14 Fax: (206) 684-8284
15 Attorneys for Respondent
16 Department of Planning and Development

1 **CERTIFICATE OF SERVICE**

2 I certify that on this date, I electronically filed a copy of **DPD's Reply on Motion to**
3 **Change Date of Deposition of Ben Perkowski and for A Protective Order Quashing the**
4 **Deposition** 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
McCullough Hill Leary P.S.
8 701 Fifth Avenue, Suite 6600
Seattle, WA 98104-7006
9 *Attorneys for Appellant*
Foss Maritime Co.

10 David R. West (X) email: drwest@gsblaw.com
Donald B. Scaramastra (X) email: dscaramastra@gsblaw.com
11 Daniel J. Vecchino (X) email: dvecchio@gsblaw.com
Garvey Schuber Barer
12 1191 – 2nd Avenue, 18th Floor
Seattle, WA 98101-2939
13 *Attorneys for Appellant*
Foss Maritime Co.

14 Traci Goodwin (X) email: goodwin.t@portseattle.org
Senior Port Counsel
15 Port of Seattle
P. O. Box 1209
16 Seattle, WA 98111-1209
17 *Attorneys for Appellant*
Port of Seattle

18 Patrick J. Schneider (X) email: schnp@foster.com
Foster Pepper PLLC
19 1111 Third Ave., Suite 3400
Seattle, WA 98101-3299
20 *Attorneys for Appellant*
Port of Seattle

1 Patti A. Goldman
2 Matthew R. Baca
3 Earthjustice
4 705 Second Ave., Suite 203
5 Seattle, WA 98104-1711
6 *Attorneys for Intervenors*
7 *Puget Soundkeeper Alliance, Seattle*
8 *Audubon Society, Sierra Club, and*
9 *Washington Environmental Council*

(X) email: pgoldman@earthjustice.org
(X) email: mbaca@earthjustice.org

6 Joshua C. Allen Brower
7 Molly K.D. Barker
8 Veris Law Group PLLC
9 1809 Seventh Avenue, Suite 1400
10 Seattle, WA 98101-1394
11 *Attorneys for T-5 Intervenors*

(X) email: josh@verislawgroup.com
(X) email: molly@verislawgroup.com

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

10 Dated this 25th day of June, 2015, at Seattle, Washington.

11
12 
13 ROSIE LEE HAILEY