

BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeal of:) Hearing Examiner File:
) **S-15-001 and S-15-002**
)
 FOSS MARITIME COMPANY) DPD REPLY ON MOTION FOR
) PROTECTIVE ORDER CONCERNING
) THE DPEOSITION OF ANDREW
 from an interpretation by the Director,) MCKIM
 Department of Planning and Development.)
)

DPD incorporates its argument in DPD's Reply on Motion to Change the Date of Deposition of Ben Perkowski and for a Protective Order Quashing the Deposition. Foss and the Port again claim that Mr. McKim's testimony would support appellants' contentions that DPD's interpretation is not entitled to "substantial weight." But these claims are based on case law criteria applied by courts and set out in the Land Use Petition Act (RCW Ch. 36.70C), rather than the standard set out for the Hearing Examiner in SMC 23.88.020.G.5. Also, the cases cited by appellants are appeals of permit approvals or enforcement actions – not an appeal of a formal interpretation, itself. If the topics raised by appellants are necessary for a court to review the Hearing Examiner's decision under LUPA standards, then appellants may apply to take Mr. McKim's deposition in that action.

1 Similarly, the Port claims Mr. McKim's testimony might show that DPD's decision was
2 "arbitrary and capricious in a constitutional sense."¹ This is not the scope of the Hearing
3 Examiner's review. The Hearing Examiner will determine the meaning of the terms "cargo
4 terminal" and accessory use" as a matter of law, and hear the facts de novo, thus supplanting
5 DPD's review with the Hearing Examiner's own judgment. Those topics are outside the Hearing
6 Examiner's jurisdiction and not within the scope of the Hearing Examiner's standard of review.

7 Finally, the Port contends the City is using the discovery process to preclude obtaining
8 information that would be available under the Public Records Act.² The Port may obtain
9 appropriate records under that statute by submitting a request, as Foss has done. But the Public
10 Records Act does not apply to depositions, and in this appeal to the Hearing Examiner the Port
11 may only obtain such discovery as is within the Hearing Examiner's jurisdiction.

12 The Hearing Examiner should grant the City's Motion to limit Mr. McKim's testimony.

13 DATED this 25th day of June, 2015.

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¹ Port Opposition, p. 2, line 15.

² Port Opposition, p. 4, line 5.

1 **CERTIFICATE OF SERVICE**

2 I certify that on this date, I electronically filed a copy of the **DPD Reply on Motion for**
3 **Protective Order Concerning the Deposition of Andrew McKim** with the Seattle Hearing
4 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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13 Dated this 25th day of June, 2015, at Seattle, Washington.

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