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BEFORE THE HEARING EXAMINER
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

FOSS RESPONSE TO CITY OF
SEATTLE’S MOTION TO DISMISS

(Code Interpretation No. 15-001)

In its motion to dismiss, the City of Seattle (“City” or “DPD”) misconstrues the claims made by Appellants Foss Maritime Company (“Foss”), creating “straw man” claims not actually at issue here, and argues for a scope of review so narrow as to render the Hearing Examiner powerless to consider well-established canons of statutory interpretation in this Code Interpretation appeal. The Hearing Examiner must reject the City’s claims and deny the motion to dismiss.

In this appeal of the City’s Interpretation Number 15-001 (“Interpretation”), Appellants Foss and the Port of Seattle (“Port”) challenge the City’s Interpretation that purports to interpret certain rights of use under legally established cargo terminal use permits issued to the Port of

1 Seattle, as applicant, for the property located at Terminal 5 (2701 26th Avenue SW) in Seattle
2 (the "Permit"). The City's motion seeks to dismiss a number of the issues raised by Foss and the
3 Port on the grounds that they are either outside the jurisdiction of the Hearing Examiner or
4 should be resolved as a matter of law in favor of the City. The City is incorrect. The Hearing
5 Examiner has jurisdiction to construe the meaning, application or intent of the Seattle Municipal
6 Code ("SMC" or "Code") and its Shorelines Management Program ("SMP") utilizing well-
7 established canons of statutory construction. The facts and issues that the City seeks to dismiss
8 are not only relevant to the Examiner's interpretation of the Code under these canons, but also
9 dictate the level of deference that should be afforded to the City's Interpretation.
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11 Accordingly, the Hearing Examiner must reject the City's motion.
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13 I. FACTS

14 Facts related to the City's Interpretation are included in Foss's Amended Notice of
15 Appeal and the Port's Notice of Appeal. Key facts relevant to this response are also outlined
16 below:
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18 Pursuant to the lease between Foss and the Port, Foss intends to provide a variety of
19 services to Shell Offshore, Inc., ("Shell") and its contractors in support of Shell's Arctic Drilling
20 Program.

21 The operations to be conducted under this lease and that are the subject of DPD's
22 Interpretation include receiving and storing goods, cargo, equipment, supplies, stores, provisions
23 and other materials at Terminal 5; loading and unloading goods, cargo, equipment, supplies,
24 stores, provisions and other materials on to and off of vessels associated with the operations, for
25 those vessels to use and to transport to other locations; temporary moorage of vessels; and other
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1 related activities, including standard routine “run and maintain” activities (collectively, the
2 “Operations”).

3 The City has historically shared the same interpretation of the scope of a cargo terminal
4 use with the Port, as reflected in permitting decisions on Port projects presented in the Port’s
5 appeal of the Interpretation. The intended Operations are entirely consistent with the City’s
6 historical interpretation and implementation of a “cargo terminal” use.
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8 In addition to its historical implementation of the “Cargo Terminal” use, DPD previously
9 agreed that the specific intended Operations are consistent with the permitted use in the context
10 of a land use decision. To prepare the site for the Operations, the Port was required to replace
11 bollards to which vessels used in the Operations would be moored. The Port applied for a
12 shoreline exemption for that bollard work. As part of the City’s consideration of that request, the
13 City investigated the proposed use. The Port provided information describing the intended
14 activities (i.e., the Operations) and the City approved the shoreline exemption.
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16 In the Interpretation, DPD improperly limited its inquiry to a fraction of the activities
17 occurring pursuant to the lease on Terminal 5—namely, the proposed moorage of an oil-drilling
18 rig and two accompanying tugboats – rather than considering the full scope of Operations. For
19 this reason, among others, DPD erroneously concluded that the Operations do not constitute a
20 cargo terminal use or accessory use.
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22 This appeal followed.
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24 **II. EVIDENCE RELIED UPON**

25 This response relies on Foss’s Amended Notice of Appeal, the Port’s Notice of Appeal,
26 and the pleadings and other documents on file with the Hearing Examiner.
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III. ARGUMENT

The City argues that Foss Issues 1 (part), 3, 5, 7, 8, 9, 11, 12, 13, 14, 15, 16, 17, 18, and 19 should be dismissed either because the Hearing Examiner lacks jurisdiction to hear these issues or because the City is entitled to judgment as a matter of law.¹ The City is incorrect. The issues raised by Foss are central to the Hearing Examiner’s interpretation of the Code and, accordingly, the Hearing Examiner has jurisdiction to consider them. In this response to the City’s motion to dismiss, Foss will only address the issues associated with the Foss Amended Notice of Appeal. Foss incorporates the Port’s response to the City’s motion to dismiss.

A. Foss Issue 1: Foss’s reference to the “cargo terminal” definition set forth in SMC 23.84A.038 is proper

In its Amended Notice of Appeal, Foss argues that the Interpretation misconstrues the allowable scope of principal and accessory uses associated with “cargo terminal,” as that term is defined in SMC 23.84A.038, SMC 23.60.906 and SMC 23.60A.906. Foss Amended Appeal, p. 5. The City argues that Foss’s citation to the definition of cargo terminal found in SMC 23.84A.038² should be dismissed because the definition found in the SMP controls. However, the City misconstrues the guidance of SMC 23.60.900 in seeking to dismiss Foss’s citation to Chapter 23.84A. SMC 23.60.900 provides that, “[i]n the event that a definition in this chapter differs from a definition of the same term in Chapter 23.84A, the definition in this chapter shall apply in the Shoreline District.”

The City’s motion implies that the two definitions *differ* (the critical element in SMC 23.60.900). The City neglects to advise the Examiner that they do not. Here, the definition of

27 ¹ Foss agrees that Foss Issue 11 is no longer relevant.

28 ² In its Amended Notice of Appeal, Foss inadvertently cited to 23.84A.046 for the definition of “cargo terminal.” This was incorrect. “Cargo Terminal” is defined in SMC 23.84A.038.

1 cargo terminal remains the same in both the SMP and Chapter 23.84A.³ Accordingly, the
2 citation to 23.84A.038 is proper and should remain as part of Foss' claim. The Hearing
3 Examiner should deny the City's motion to dismiss Foss's Issue 1.

4 **B. Foss Issue 3: The Hearing Examiner has jurisdiction to consider the history of the**
5 **City's enforcement and interpretation of a "cargo terminal" use.**

6 Foss Issue 3 claims that the Interpretation misconstrues the allowable scope of principal
7 and accessory uses associated with a "cargo terminal," as that term has been implemented and
8 enforced by DPD in the past. Foss Amended Appeal, p. 6. The City argues that the Hearing
9 Examiner should dismiss Foss's Issue 3 because it raises an estoppel claim and the City's
10 Interpretation need not be consistent with the City's past practices. The City is mistaken.

11 Contrary to the City's contentions, Foss Issue 3 does not raise an estoppel issue. Foss
12 does not, as the City suggests, contend that the City is precluded by the doctrine of estoppel from
13 issuing its Interpretation because the City has historically interpreted cargo terminal use to
14 include the Operations. Contrary to the City's claims, the City's historic interpretation is a
15 relevant and important factor for the Hearing Examiner to consider for several reasons.

16 First, the question of whether the City's Interpretation is consistent with its historical
17 implementation of its code determines the extent to which this Examiner should defer to DPD's
18 Interpretation. Typically, the Hearing Examiner's decision is made *de novo*, and the
19 interpretation of the Director is given substantial weight. SMC 23.88.020.G.5. However, in
20 situations where a code interpretation is inconsistent with past interpretation and enforcement, as
21 is the case here, it is well established that the agency's interpretation is *not* entitled to deference.
22 *Sleasman v. Lacey*, 159 Wn.2d 639, 647, 151 P.3d 990, 994 (2007) (the City of Lacey "bears the
23 burden to show its interpretation was a matter of preexisting policy"); *see also Ellensburg*

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28 ³ The definitions have immaterial variations in format, but cannot be said to differ in any material way.

1 *Cement Prods., Inc. v. Kittitas Cnty.*, 179 Wn.2d 737, 753-54, 317 P.3d 1037, 1046 (2014)
2 (holding that the City’s interpretation was not entitled to deference because the county could not
3 show there was any preexisting policy supporting its interpretation).
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5 In *Sleasman*, the Court held that the City was not entitled to deference to its code
6 interpretation because it failed to show a preexisting enforcement policy that its tree removal
7 ordinance applied to single-family residences; without such a policy, the plaintiffs had no notice
8 the ordinance applied to them. *Sleasman*, 159 Wn.2d at 647. The situation here is strikingly
9 similar to that described in *Sleasman*. Until the issuance of this Interpretation, the City had
10 consistently interpreted a cargo terminal use to include the activities involved in the Operations.
11 As a result, neither Foss nor the Port were on notice that the Operations would not be considered
12 a cargo terminal use at Terminal 5. Accordingly, the City’s interpretation is not entitled to
13 deference under *Sleasman*.
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16 Second, the City’s past practice is relevant to the fundamental issues raised in the
17 Interpretation because it informs the Examiner’s evaluation of the correct interpretation of the
18 Code. Evidence that the Interpretation under review is inconsistent with the City’s past
19 implementation of the definition of “cargo terminal” demonstrates that the Interpretation under
20 review is arbitrary and erroneous. Similarly, evidence that DPD’s past practices are consistent
21 with the legal position advanced by the Port and Foss support Foss and the Port’s appeal.
22 Indeed, even the City attempts to use evidence of its historical practice at T-91 to support its
23 legal position on page 13 of its motion (without acknowledging its hypocritical approach). *See*
24 City’s Motion at 13, lines 10-14. While Foss disagrees with the City’s characterization of that
25 specific evidence on page 13 of its motion, the City’s reliance on evidence of its past practices to
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1 support its legal position is telling and concedes that DPD's past practice is relevant to the
2 Examiner's consideration of the underlying issues.

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4 Moreover, as Foss will demonstrate at the hearing, the Operations clearly qualify as a
5 cargo terminal under the plain language of the Code and SMP. Certainly, where the Code's
6 "meaning is plain on its face, then the [reviewing body] must give effect to that plain meaning as
7 an expression of legislative intent." *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1,
8 9, 43 P.3d 4 (2002). However, if the Hearing Examiner determines the definition of cargo
9 terminal remains susceptible to more than one reasonable meaning, she may then examine the
10 well accepted canons of statutory interpretation, including historic practices. *Id.*, at 12. Indeed,
11 the evidence of DPD's historic practices is evidence of legislative intent, a key element in
12 determining the scope of the interpretation of the Code and the SMP. By analogy to the
13 legislature's presumed awareness of an interpretation of a statute by the courts, the City Council
14 is presumed to know how DPD has interpreted the Code. If the City Council has declined to
15 amend the Code, under a well-established canon of statutory interpretation, this indicates
16 agreement with the historic interpretation. *See Broom v. Morgan Stanley D.W., Inc.*, 169 Wn.2d
17 231, 238, 236 P.3d 182 (2010) ("[t]he Legislature is presumed to be aware of judicial
18 interpretation of its enactments,' and where statutory language remains unchanged after a court
19 decision the court will not overrule clear precedent interpreting the same statutory language.");
20 *City of Federal Way v Koenig*, 167 Wn.2d 341, 348, 217 P.3d 1172 (2009) ("This court
21 presumes that the legislature is aware of judicial interpretations of its enactments and takes its
22 failure to amend a statute following a judicial decision interpreting that statute to indicate
23 legislative acquiescence in that decision.")
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1 Unbelievably, the City further argues that the issue of the City's prior interpretation of
2 "cargo terminal" use is immaterial to the new Interpretation because the City has the authority to
3 issue code interpretations that *directly conflict* with its prior interpretations and past enforcement.
4 In the City's convoluted view, such prior interpretations are irrelevant either because each case is
5 "unique" and has no relation to any other incident of enforcement, or because the prior
6 interpretation was a mistake. The City characterizes its prior applications of the Code to other
7 sites as "incorrect." *See* City's Motion, at 5, line 12). In addition to undermining the integrity of
8 its own process, the City's position essentially enshrines arbitrary action as a defense. The City
9 paints a picture of a Code interpretation process either subject to error or utterly dismissive of
10 precedent. Such action is "willful and unreasoning action in disregard of facts and
11 circumstances"; it is, by definition, arbitrary and capricious behavior.⁴ *Buechel v. Dep't of*
12 *Ecology*, 125 Wn.2d 196, 202, 884 P.2d 910, 915 (1994) (citation omitted).

15 The City is required by law to be responsible for the consistency of its actions in Code
16 interpretation, and it cannot plead prior mistakes as a defense. Whether the action by the
17 Director in this case was arbitrary and capricious or clearly erroneous is the issue before the
18 Hearing Examiner. The City should not be insulated from claims regarding these issues, and so
19 the Hearing Examiner should reject the City's motion to dismiss Foss's Issue 3.
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25 ⁴ Further straining credulity, the City actually contends that the Hearing Examiner lacks authority to review the
26 Director's decision here for "arbitrary action." Motion to Dismiss at 9. In the City's befuddled jurisprudence, since
27 the Director does not have "jurisdiction" to act arbitrarily, the Hearing Examiner lacks jurisdiction to consider the
28 possibility of such arbitrary action. *Id.* Obviously, review for arbitrary action lies squarely within the role of the
Hearing Examiner in this case. *See Brown v. Tacoma*, 30 Wn. App. 762, 637 P.2d 1005 (1981) (holding that, to
overcome the substantial weight standard, the burden is on the appellant to show the agency's action was clearly
erroneous).

1 **C. Foss Issue 5: Foss’s references to the “accessory use” definition set forth in SMC**
2 **23.84A.040 and 23.42.020 are proper**

3 In Issue 5, Foss claims that the Interpretation misconstrues the allowable scope and
4 nature of accessory uses under SMC 23.84A.040, SMC 23.60.940 and SMC 23.42.020, as well
5 as the Code generally. The City argues that Foss improperly cited to the definition of accessory
6 use and the Director’s authority to determine accessory and incidental uses set forth in SMC
7 23.84A.040 and 23.42.020, respectively. The City is incorrect.

8 The City’s sole reliance on the definition of accessory uses set forth in the SMP at
9 23.60.014.A and 23.60.016.B is misplaced. As discussed previously, SMC 23.60.900 states that
10 the definitions of Chapter 23.60 apply when they differ from the definitions in the rest of the
11 Land Use Code. Here, while the words in the definitions are not identical, the City has failed to
12 demonstrate that the meanings of accessory use differ when the use is also in the shoreline
13 environment.⁵

14 Tellingly, in a prior code interpretation matter before the Hearing Examiner that
15 determined whether a pier was considered accessory to a residential use in a shoreline
16 environment, the Hearing Examiner interpreted the definitions of accessory use found in
17 23.84A.040 and 23.42.020, instead of the definition found in 23.60.⁶ *See Findings and Decision*
18 *of the Hearing Examiner for the City of Seattle in re Leslie & Tom Newell, et. al*, Hearing
19 Examiner File Number S-02-001 (October 8, 2002). Based on the City’s failure to demonstrate
20 that the definitions of accessory use differ, the citations to the Code are proper and the Hearing
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24 ⁵ To the extent that the SMP and the Code definitions of accessory use differ in meaning, the City’s interpretation of
25 the SMP definition of accessory use is contrary to the rules of statutory construction. City’s Motion to Dismiss, p.
26 14. Indeed, the City completely reads out the incidental nature of an accessory use when it is in the shoreline
27 environment by focusing on only the intrinsic nature. By the plain language of the statute, the terms must be read
28 together to be understood. *See Campbell & Gwinn, LLC*, 146 Wn.2d at 9-12.

⁶ The definition of accessory use found in the shoreline code was included as part of Ordinance 113466 (1987). This
definition has not been altered since that time and was in effect at the time of the Hearing Examiner’s decision in *in*
re Leslie & Tom Newell.

1 Examiner should consider the entirety of the Code in issuing its interpretation. *Am. Legion Post*
2 *No. 149 v. Dep't of Health*, 164 Wn.2d 570, 585, 192 P.3d 306 (2008) (“The ‘goal is to avoid
3 interpreting statutes to create conflicts between different provisions so that we achieve a
4 harmonious statutory scheme.’”)

5 The Hearing Examiner should deny the City’s request to dismiss Foss Issue 5.
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7 **D. Foss Issue 7: The Hearing Examiner has jurisdiction to consider the history of the**
8 **City’s enforcement and interpretation of a “cargo terminal” use.**

9 Foss Issue 7 claims that the Interpretation fails to recognize that the City previously
10 approved by permit the use under which the Operations will be conducted, which permits were
11 not timely appealed or reversed. The City seeks to dismiss this issue because, as the City argues,
12 the Hearing Examiner lacks jurisdiction to consider the history of the City’s enforcement and
13 interpretation of “cargo terminal.” With its objection to Foss Issue 7, the City focuses on
14 evidence of permitting decisions associated with the specific use at Terminal 5 that prompted this
15 code interpretation, specifically. Once again, the City attempts to divert attention away from its
16 past decisions—this time by misconstruing *Chelan County v. Nykriem* as an equitable estoppel
17 case. 146 Wn.2d 904, 52 P.3d 1 (2002). And once again, the City misses the mark.
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19 *Nykriem* certainly applies to this appeal, but not for the proposition the City sets forth. In
20 *Nykriem*, the court concluded that a local jurisdiction was precluded from revoking a land use
21 decision when it had failed to challenge the decision within the established statute of limitations.
22 *Id.*, at 932-933 (“Leaving land use decisions open to reconsideration long after the decisions are
23 finalized places property owners in a precarious position and undermines the Legislature's intent
24 to provide expedited appeal procedures in a consistent, predictable and timely manner.”) Thus,
25 contrary to the City’s claim, the basis of the decision in *Nykriem* was the applicable statute of
26 limitations and the strong Washington state policy favoring finality in land use decisions, not the
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1 doctrine of equitable estoppel. Here, the City's issuance of a shoreline exemption permitting the
2 Port to replace bollards necessary to support the Operations is evidence that the Operations fell
3 within the City's view of a cargo terminal use. Indeed, SMC 23.60.020.B.2 requires the City to
4 determine that the use is consistent with the Shorelines Management Act and the SMP prior to
5 issuing a shoreline exemption. As the evidence will show at the hearing, the City did, in fact, ask
6 questions of the Port in the context of that request for an exemption to help the City evaluate
7 whether the proposed use was consistent with the established use at the site.⁷ After the Port
8 responded with an explanation of the Operations, the City issued the exemption based on its
9 conclusion that the Operations were consistent with the established use. Under *Nykreim*, the City
10 is now time-barred from reaching a different conclusion in the form of this subsequent code
11 interpretation. Any party disagreeing with that decision, including the City itself, was required to
12 file a Land Use Petition Act ("LUPA") appeal within 21 days. RCW 36.70C.040. Under
13 *Nykreim*, this time limitation and requirement to honor finality in land use decisions is binding
14 on the City, not just third parties. The City did not file such an appeal. Accordingly, the City is
15 barred by the statute of limitations from issuing an Interpretation contrary to its past decision
16 regarding the Operations. *Id.*

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20 Further, the Hearing Examiner has authority to consider this jurisdictional issue.
21 Evidence that the Interpretation under review is inconsistent with the City's issuance of this
22 shoreline exemption demonstrates that the Interpretation under review is arbitrary and erroneous.
23 As discussed in Section B, *supra*, such evidence is both relevant to the issue of agency deference
24 and to the Examiner's interpretation of the Code under canons of statutory interpretation.
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27 ⁷ In its motion, the City disputes that the City's issuance of a shoreline exemption confirmed that the Operations fall
28 within a cargo terminal use. However, the City cannot summarily raise, without support, a factual dispute in its
motion to dismiss Foss Issue 7 as a matter of law. Foss Issue 7 raises issues of fact that survive this dispositive
motion. Accordingly, Foss and the Port have a right to present evidence supporting their claims at the hearing.

1 The City's prior permitting actions, especially those at T-5 that are the subject of Foss
2 Issue 7, are directly relevant to this appeal under *Nykreim*. Indeed, the City's failure to appeal its
3 past permitting actions for the proposal is determinative of this case. The Hearing Examiner
4 must reject the City's motion to dismiss Foss's Issue 7.

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6 **E. Foss Issue 8: The Operations constitute a legally permissible nonconforming use.**

7 Foss claims that, in the alternative, the Operations are a legally permissible non-
8 conforming use under Chapter 23.42 of the SMC. The City argues that the Hearing Examiner
9 lacks jurisdiction to consider whether the activities conducted on the site prior to the adoption of
10 the SMP are sufficient to establish a legally permissible nonconforming use. The City posits that
11 this determination may only be considered if the applicant seeks to establish a use for the record,
12 and that the Hearing Examiner has no jurisdiction to undertake that determination prior to DPD.
13 What the City forgets, however, is that the Interpretation specifically states that the Port must
14 obtain a new permit for a new use, effectively precluding the Port's ability to establish a
15 nonconforming use for the record. The City opened the door to an appeal regarding whether its
16 proclamation that a new permit is required is correct. So the City seeks to have it both ways:
17 Foss is required to seek a new permit, but is precluded from arguing that a new permit is
18 unnecessary. Accordingly, the Hearing Examiner has jurisdiction to consider whether this is a
19 legally permissible nonconforming use in that context.

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22 **F. Foss Issue 9: The right to proceed with the Operations is a right vested under the
23 Code and state law under prior permits issued relating to Terminal 5.**

24 Foss Issue 9 relates to the fact that the City has already permitted the Operations at issue
25 in the Interpretation. For the same reasons set forth in Sections B and D, *supra*, the City's past
26 decisions permitting the Operations at Terminal 5 are entirely relevant to the issue of agency
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1 deference and will assist the Hearing Examiner in conducting her statutory interpretation. *See*
2 *Nykriem, supra; see also Sleasman, supra.*

3 **G. Foss Issue 11: The City must comply with the procedural requirements of SMC**
4 **23.88.020.**

5 In Issue 11, Foss initially raised procedural concerns because it was unclear whether the
6 City had provided the requisite notice of the Washington State Department of Ecology, as
7 required by SMC 23.88.020.E. The City, in its motion to dismiss, has provided documentation
8 that Ecology was notified. Accordingly, Foss is no longer raising Issue 11 in this appeal.

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10 **H. Foss Issues 12, 13, and 14: The validity of the Interpretation, as limited by the facts**
11 **set forth in the Interpretation, must be considered in the Hearing Examiner’s**
interpretation of the Code and SMP.

12 Foss Issues 12, 13, and 14 address the rickety factual foundation supporting the
13 Interpretation, which assumes a hypothetical set of “facts.” The reality of the Operations
14 authorized by the lease, however, is much different from that assumed in the Interpretation. Foss
15 Issue 12 argues that the validity of the Interpretation is limited to the facts assumed by the City;
16 and accordingly, would not apply to the Operations. In seeking to dismiss Issues 12, 13, and 14,
17 the City misunderstands the claims as ones only relating to future application of the
18 Interpretation. Foss’s claims, however, relate to the applicability of the Interpretation based on
19 irrelevant and inaccurate facts. Accordingly, However, to the extent the City intends to apply its
20 Interpretation—based on the facts assumed in the Interpretation—to all activities related to the
21 Operations at the site, the issues raised in Issues 12, 13, and 14 are key considerations for the
22 Hearing Examiner. In addition, for the same reasons set forth in Sections B and D, *supra*, the
23 history and potential application of the interpretation are relevant to the issue of agency
24 deference and will assist the Hearing Examiner in conducting her statutory interpretation.
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1 **I. Foss Issue 15: The City has the obligation to determine whether a proposed use is**
2 **consistent with the SMP**

3 Foss Issue 15 claims that the Interpretation erroneously determines that the Director does
4 not have authority to interpret or define unlisted principal and accessory uses under the SMP.
5 The City argues that the Director of DPD lacks authority to find that uses not listed as permitted
6 in the Shoreline District are similar to listed uses and permitted. Yet, the City's SMP not only
7 allows, but expressly requires, the Director to determine whether a proposed use is consistent
8 with the SMP. SMC 23.60.05. ("No development shall be undertaken and no use . . . shall be
9 established in the Shoreline District unless the Director has determined that it is consistent with
10 the policy of the Shoreline Management Act and the regulations of this chapter.") In
11 determining whether a development meets applicable criteria, the Director "shall determine that .
12 . . . [T]he proposed use is not prohibited . . ." SMC 23.60.060.C. For the purpose of avoiding this
13 appeal, the City misconstrues the scope of its own authority. The Hearing Examiner should
14 reject the City's motion to dismiss Foss's Issue 15.
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17 **J. Foss Issues 16 and 17: The City's inconsistent, arbitrary, and politically-motivated**
18 **actions regarding the interpretation of its Code are relevant to the proceedings.**

19 Foss Issues 16 and 17 address the City's selective, arbitrary, and inconsistent
20 interpretation and enforcement of the Code, which is based on political and policy considerations
21 outside of the Code. The City seeks to suppress any discussion of the politics that led to the
22 Interpretation. The City contends that the Hearing Examiner should dismiss its claims of
23 arbitrary action and selective interpretation and enforcement by DPD because the Hearing
24 Examiner's review is de novo. However, the City's conflicting interpretations of the scope of a
25 cargo terminal use, depending on the end user, are further evidence that the City's legal
26 interpretation of the SMP contained in the Interpretation is not entitled to any deference.
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1 *Sleasman, supra*. Moreover, if the Interpretation was the product of political direction, as Foss
2 believes that it was, and if its conclusion was politically determined before it was written, the
3 Interpretation would be “without consideration and in disregard of the facts.” *Maranantha*
4 *Mining, Inc. v. Pierce County*, 59 Wn. App. 795, 804-05, 801 P.2d 985 (1990) (reversing the
5 county council’s denial of a permit application because the “council based its decision on
6 community displeasure and not on reasons backed by policies and standards as the law
7 requires”). Foss is entitled to present evidence on this material issue at hearing.

9 In addition, the City’s historic interpretations and practices, inconsistent application, and
10 selective enforcement as a result of political motivations are relevant to the issue of code
11 interpretation. *Broom, supra*, 169 Wn.2d at 238. For the reasons set forth in Sections B and D,
12 *supra*, the City’s motion to dismiss Issues 16 and 17 must be denied.

14 **K. Foss Issue 18: The City’s Interpretation improperly focuses on the uses at sea, not**
15 **the Operations occurring at Terminal 5.**

16 In Issue 18, Foss claims that, to the extent that the Interpretation purports to regulate
17 activities occurring on vessels, the Interpretation exceeds the Department’s authority and
18 jurisdiction. The City asserts its Interpretation is based on uses on the shoreline rather than at
19 sea. This claim is belied by the Interpretation itself. A key factor in the Interpretation is the use
20 of the vessel for oil drilling. The City issued its shoreline exemption with the understanding that
21 the operations that would take place constitute the Operations as described in the lease and in this
22 response. The City opted to change its mind when the words “oil” and “drilling rig” were
23 included, even though the vessel would not be drilling oil at Terminal 5. However, the City may
24 not consider the activity of the vessel at sea when the activity of the vessel moored constitutes a
25 cargo terminal use. SMC 23.60.018; SMC 23.60A.018.

1 In its motion, the City further opines that it can differentiate between types of moorage,
2 such as commercial moorage uses, passenger terminal uses, and recreational marina uses,
3 because the City Council intended to segregate vessels that have varying needs for maneuvering
4 and services. Otherwise, the City argues, it would be powerless to regulate any moorage on the
5 shoreline. Not only does this significant leap in logic make little sense, but it is also irrelevant to
6 the Operations at issue here. The Operations constitute a cargo terminal use;⁸ the City seeks to
7 regulate the vessels that would be moored at Terminal 5 because it does not approve of the
8 vessel's use at sea. If the City Council intended to regulate the specific types of vessels
9 permitted to moor in furtherance of a cargo terminal use, they would have done so.
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12 Moreover, the City's explanation of the differences between vessels is not supported by
13 the Interpretation at issue in this proceeding, legislative history, or state and local law. The City
14 cannot develop unsupported arguments solely in support of the litigation that replace valid past
15 interpretations of its code. *See Sleasman*, 159 Wn.2d at 647 ("While the construction does not
16 have to be memorialized as a formal rule, it cannot merely 'bootstrap a legal argument into the
17 place of agency interpretation' but must prove an established practice of enforcement.") (citation
18 omitted).
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20 For these reasons, the Hearing Examiner should reject the City's motion to dismiss Issue
21 18.
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23 **L. Foss Issue 19: Port's rights and duties.**

24 Foss incorporates by reference the response of the Port on this issue.
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27 ⁸ Utilizing Terminal 91 as an example, the City suggests that a cargo terminal may have several permitted uses.
28 While true, this comparison to activities at Terminal 91 is immaterial to the Interpretation at issue here. At Terminal 5, the Operations constitute a cargo terminal use, and accordingly do not need additional use permits.

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IV. CONCLUSION

For the reasons stated above, Foss respectfully requests that the City's motion to dismiss be denied.

Respectfully submitted this 25th day of June, 2015.


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