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BEFORE THE HEARING EXAMINER  
THE 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:  
S-15-001 and S-15-002

(Director's Interpretation: 15-001)

**PORT OF SEATTLE'S OPPOSITION  
TO DPD'S MOTION TO DISMISS  
CLAIMS**

**I. INTRODUCTION**

DPD moves to dismiss multiple issues in this appeal pursuant to Rule 3.02 of the Hearing Examiner Rules of Practice and Procedure:

**3.02 DISMISSAL**

(a) An appeal may be dismissed without a hearing if the Hearing Examiner determines that it fails to state a claim for which the Hearing Examiner has jurisdiction to grant relief or is without merit on its face, frivolous, or brought merely to secure delay.

(b) Any party may request dismissal of all or part of an appeal by motion pursuant to HER 2.16. ...

DPD's motion does not seek to dismiss the Port's "appeal" as provided in this Rule. The specific "issues" that DPD moves to dismiss are not discrete appeals or individual causes of action; they are multiple grounds or reasons that the DPD Interpretation is unlawful and must be

1 reversed. The Hearing Examiner's Rule allows an "appeal" or parts of an appeal to be dismissed  
2 before a hearing, but not arguments or reasons in support of an appeal.

3 Even if subsection (b) of the Rule is read to allow arguments and issues to be dismissed,  
4 the rule lacks standards, unless those in subsection (a) are implicit in subsection (b). If not, then  
5 because DPD's motion is brought before the hearing, and is unsupported by declaration or other  
6 facts, it must be treated as a CR 12(b)(6) motion, which requires the Hearing Examiner to  
7 "accept as true the allegations of the [appeal] and the reasonable inferences that must be drawn  
8 therefrom. Dismissal is appropriate only if it appears beyond a reasonable doubt that no facts  
9 exist to justify recovery." *Howell v. Alaska Airlines, Inc.*, 99 Wn. App. 646, 648-49, 994 P.2d  
10 901 (2000). The relevant facts are not agreed upon, and evidence that Appellants believe will be  
11 relevant is not yet entirely known because DPD is actively opposing Foss's discovery requests.  
12 A motion to dismiss cannot be granted based upon one party's assertions about the scope and  
13 character of relevant facts before the other parties have had an opportunity to even conduct  
14 discovery to learn the potentially relevant facts.

15 Despite DPD's assertion that it is moving to dismiss the Port's issues on the ground that  
16 the Hearing Examiner does not have jurisdiction, at least five of the issues that DPD moves to  
17 dismiss – 4, 5, 7, 8, and 11 – are issues that DPD does not even attempt to show are beyond the  
18 Hearing Examiner's jurisdiction. DPD simply tries to prematurely argue these issues on their  
19 merits, before discovery has been completed and before the parties have presented the relevant  
20 facts to the Hearing Examiner and properly briefed the issues in light of those facts.

21 As discussed in the Port of Seattle's Opposition to DPD's Motion to Change the Date of  
22 Deposition of Benjamin Perkowski and for a Protective Order Quashing the Deposition, the Port  
23 is required to make its factual record on all its issues at the upcoming hearing, and even if the  
24 Hearing Examiner should decide not to consider one or more of these issues, the Port and Foss  
25 must still be allowed to make their factual record. *Harrington v. Spokane County*, 128 Wn. App.  
26 202, 210, 114 P.3d 1233 (2005); RCW 36.70C.120(1).

1 The Hearing Examiner should deny DPD's motion for the many reasons discussed below.

2 **II. PORT'S RESPONSE ARGUMENT REGARDING "JURISDICTIONAL" ISSUES**  
3 **Port Issues 1, 2, 3, 6, 9, 12, 13, 14, and 15**

4 **A. Constitutional Issues – Issues 6 and 12**

5 In its motion, DPD asserts that the Hearing Examiner does not have jurisdiction to decide  
6 Port Issue 6 (the Interpretation is unconstitutionally arbitrary and irrational) and Issue 12 (the  
7 Interpretation is inconsistent with Article XV, § 2 of the State Constitution) because they are  
8 constitutional issues.

9 DPD is mistaken. The Hearing Examiner does not have jurisdiction to decide whether a  
10 code provision is constitutional, but the Hearing Examiner has both the authority and the  
11 obligation to interpret and apply the code in a constitutional manner. DPD's argument to the  
12 contrary is tantamount to asserting that the City and its public officials are not subject to the  
13 federal and state constitutions.

14 As Justice Brennan famously said: "After all, a policeman must know the Constitution,  
15 then why not a planner?" *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 661,  
16 n.26, 101 S. Ct. 1287, 67 L. Ed. 2d 551 (1981) (dissenting opinion). Yet DPD is essentially  
17 saying that a Seattle Police detective is unconstrained by the Fourth Amendment's prohibition on  
18 unreasonable searches and seizures, and is free to break into a citizen's home without a warrant.  
19 The Bill of Rights applies to all state and local officials through the Fourteenth Amendment, and  
20 just as the Fourth Amendment constrains the police, so does the Fifth Amendment (and other  
21 federal and state constitutional provisions) constrain DPD and the Hearing Examiner. This was  
22 demonstrated most recently by *Tyko Johnson v. City of Seattle*, 184 Wn. App. 8, 335 P.3d 1027  
23 (2014), where the City violated a citizen's right to procedural due process (and incurred liability  
24 under 42 U.S.C. § 1983) by preventing the citizen from asserting nonconforming use rights as a  
25 defense to a code enforcement action.

1 Both DPD and the Hearing Examiner must act in a constitutional manner, as the Hearing  
2 Examiner has previously recognized. In *In the Matter of the Appeal of Duffy Investments, LLC*,  
3 Hearing Examiner File MUP-04-027(DR), December 22, 2004, the Hearing Examiner  
4 considered, although she did not agree with, the appellant's constitutional arguments (*see*  
5 Finding 42 where the Hearing Examiner discusses Washington's threshold inquiry for an  
6 unconstitutional taking, and Conclusion 15 where the Hearing Examiner applies this test to the  
7 facts before her).

8 Similarly, in *In the Matter of the Appeal of Squire Park Committee*, Hearing Examiner  
9 File S-98-003, August 13, 1993, the Hearing Examiner considered a challenge to a DPD  
10 Interpretation regarding a church's homeless shelter. In Conclusion 5, the Hearing Examiner  
11 stated:

12 Considerable argument was proffered by parties as to the nature and extent of the  
13 City's authority (or lack of same) to regulate the shelter with regard to its being a  
14 constitutionally protected element of religious activity/expression for the  
15 parishioners. This is not an issue to be decided here. The Director's  
16 Interpretation includes some examination of constitutional issues, but the  
17 conclusion of the Interpretation is predicated on DCLU's determination that the  
18 shelter is "customarily incidental", not on any constitutional analyses. Although  
19 it was not the deciding factor of the Interpretation, *it would not have been  
responsible or prudent for the Director to turn a blind eye to relevant case law  
and other reliable sources and chance a slavish or uninformed application of the  
Code potentially violative of constitutional rights. It is not a mistake for the  
Director to be cognizant of what courts have said regarding the application of  
land use regulations to religious institutions.*

20 (Emphasis added.)

21 The *Tyko Johnson* case is simply the latest of many cases in which land use decisions,  
22 including those of the City of Seattle, have been found to be unconstitutional, and DPD should  
23 not be heard to argue to the Hearing Examiner that she does not have the authority and the  
24 responsibility to act in a constitutional manner. The Hearing Examiner has jurisdiction to  
25 consider Port Issues 6 and 12 in light of the evidence and argument to be presented at the  
26 hearing.

1 **B. Compliance with State Law – Issues 2, 3, 9, 13, and 15**

2 DPD also asserts that the Hearing Examiner does not have jurisdiction over five of the  
3 Port's issues (2, 3, 9, 13, and 15) because the Hearing Examiner does not have jurisdiction to  
4 interpret state law. In effect, DPD argues that both DPD and the Hearing Examiner are not  
5 subject to state law. The City has made this argument to the courts in the past, but never  
6 successfully:

7 Seattle next argues the plain language of its ordinance requires filing a claim with  
8 the City before commencing any action in which "monetary damages" are  
9 claimed. Because RCW 64.40.020 is an action for monetary damages, Seattle  
10 argues the statute falls squarely within the plain language of the ordinance.

11 Seattle has the argument backward. The question is not whether the statute falls  
12 within the plain language of the ordinance, but whether the ordinance is  
13 authorized by the plain language of the statute. A municipal corporation is  
14 limited in its powers to those necessarily or fairly implied in or incident to the  
15 powers expressly granted by the State; if there is any doubt about whether the  
16 power is granted, it must be denied.

17 *Wilson v. City of Seattle*, 122 Wn.2d 814, 822, 863 P.2d 1336 (1993) (citing *Employco Pers.*  
18 *Servs. v. City of Seattle*, 117 Wn.2d 606, 617, 817 P.2d 1373 (1991)).

19 The City must act in conformance with state law, and when the Hearing Examiner makes  
20 the City's final decision, it is the Hearing Examiner's decision that must conform to state law.  
21 The issues that DPD asks the Hearing Examiner to dismiss are issues of state law that DPD's  
22 Interpretation is inconsistent with, and the Port's appeal asks the Hearing Examiner to make a  
23 final Interpretation for the City that is consistent with state law. The Hearing Examiner  
24 necessarily has the jurisdiction to do so, and DPD is just as wrong about the City's obligation to  
25 comply with state statutory and common law as it is about the City's obligation to comply with  
26 state and federal constitutional limitations.

Specifically:

- Issues 2 and 3 are based on the City's failure to appeal the shoreline exemption that DPD issued to the Port, and on the City's failure to appeal the Port's

1 determination that its lease with Foss was categorically exempt from SEPA  
2 review. DPD asserts that Issues 2 and 3 ask the Hearing Examiner to find that  
3 DPD is estopped, but that is not correct. Issue 2 is based on a state statute, the  
4 Land Use Petition Act (ch. 36.70C RCW), as interpreted by the Supreme Court in  
5 *Chelan County v. Nykreim*, 146 Wn.2d 904, 52 P.3d 1 (2002). Issue 3 is based on  
6 the City's failure to bring a timely appeal in conformance with long-standing state  
7 law regarding writs of certiorari. *E.g., Vance v. City of Seattle*, 18 Wn. App. 418,  
8 569 P.2d 1194 (1977); *Oden Inv. Co. v. City of Seattle*, 28 Wn. App. 161, 166,  
9 622 P.2d 882, *review denied*, 95 Wn.2d 1015 (1981). Neither issue is based on  
10 estoppel, and the Port's appeal does not ask the Hearing Examiner to make any  
11 decision sounding in equity.

- 12 • Issue 9 involves the public trust doctrine, which is the common law foundation for  
13 the Shoreline Management Act. This issue simply asks the Hearing Examiner to  
14 interpret the City's Shoreline Master Program in conformance with this state  
15 doctrine, since one of the purposes of the SMA is to "ensure that development  
16 along state shorelines and waters does not adversely affect the general public trust  
17 rights of 'navigation and corollary rights incidental thereto.'" *Orion Corp. v.*  
18 *State*, 109 Wn.2d 621, 661, 747 P.2d 1062 (1987).
- 19 • Issue 13 asks the Hearing Examiner to conform the Interpretation to a state  
20 statute, RCW 79.90.475.
- 21 • Issue 15 also involves a state statute, SEPA (ch. 43.21C RCW), and asks the  
22 Hearing Examiner to determine that the Interpretation is an action under SEPA  
23 that requires a threshold determination.

24 **C. Statutory Construction (Issues 1 and 14)**

25 DPD moves to dismiss Port Issue 1 (in part) and Issue 14 on the grounds that the Hearing  
26 Examiner does not have jurisdiction to consider the Port's nonconforming use rights. DPD

1 misconstrues these two arguments, which do not ask the Hearing Examiner to make such a  
2 determination, and the Hearing Examiner has jurisdiction to consider the issues that the Port  
3 actually raised:

- 4 • Issue 1 asserts that the Interpretation is not supported by substantial evidence, and  
5 by way of example asserts that the evidence will show that the current use of  
6 Terminal 5 by Foss is consistent with the historical use of Terminal 5. This issue  
7 does not ask the Hearing Examiner to determine the Port's nonconforming use  
8 rights, but asks the Hearing Examiner to consider these facts when deciding  
9 whether the Interpretation is consistent with the SMP. There is no basis for the  
10 Hearing Examiner to rule on the relevance of evidence that has not been offered.
- 11 • Issue 14 asks the Hearing Examiner to recognize that the SMP was not intended  
12 to make unlawful the uses that have been occurring at Terminal 5 since at least  
13 1916. The Hearing Examiner has the jurisdiction to consider the intent of the  
14 SMP when interpreting the SMP in light of the facts to be presented at the  
15 hearing.

### 16 **III. RESPONSE ARGUMENT REGARDING PORT ISSUES 4, 5, 7, 8, AND 11**

17 Despite DPD's assertion at the beginning of its motion that it is moving to dismiss issues  
18 over which the Hearing Examiner does not have jurisdiction, DPD makes arguments, some of  
19 them perfunctory, regarding the merits of Issues 4, 5, 7 (in part), 8, and 11. Such arguments in a  
20 pre-trial motion are not within the scope of Hearing Examiner Rule 3.02, and DPD fails to show,  
21 or even argue, that these issues are "without merit on [their] face, frivolous, or brought merely to  
22 secure delay." HER 3.02(a). In fact, DPD's motion demonstrates the contrary: that the issues  
23 have merit and need to be decided together in the context of the factual record that will be  
24 created at the hearing. Similarly, these arguments, made in the absence of a factual record, fail  
25 to satisfy the requirements of CR 12(b)(6).

1 **A. Port Issue 4**

2 The Interpretation requires a use permit for certain kinds of vessels to moor at cargo  
3 terminals, and Port Issue No. 4 states in pertinent part:

4 The SMP expressly acknowledges that uses, such as moorage, that are consistent  
5 with the SMP are permitted without any shoreline permit so long as no substantial  
6 development is proposed, as is the case here. SMC 23.60A.020.A.2.b.

7 DPD's motion argues, at page 12, that a use permit is required by SMC 23.40.002, which  
8 is not part of the SMP and which reads in pertinent part:

9 A. The establishment or change of use of any structures, buildings or premises, or  
10 any part thereof, requires approval according to the procedures set forth in  
11 Chapter 23.76, Procedures for Master Use Permits and Council Land Use  
12 Decisions . . . .

13 DPD's motion ignores the fact that the navigable waters of Elliot Bay, where moorage occurs,  
14 are not "structures, buildings or premises," and both the SMA and the SMP exempt moorage  
15 from the requirement for a shoreline permit. A permit is required only for development as  
16 defined in the SMA at RCW 90.58.030(3)(a):

17 "Development" means a use consisting of the construction or exterior alteration of  
18 structures; dredging; drilling; dumping; filling; removal of any sand, gravel, or  
19 minerals; bulkheading; driving of piling; placing of obstructions; or any project of  
20 a permanent or temporary nature which interferes with the normal public use of  
21 the surface of the waters overlying lands subject to this chapter at any state of  
22 water level[.]

23 A "use" is therefore considered "development," and therefore requires a permit, only if  
24 the use is a "project" that "interferes with the normal public use of the surface of the waters."  
25 But moorage is not a project and does not interfere with the normal public use of the surface of  
26 waters because moorage is an essential aspect of ship navigation and therefore part of the normal  
27 public use of the surface of the waters.

28 The very genesis of the SMA was concern for the preservation of navigational  
29 values expressed through the public trust doctrine. *See Wilbur v. Gallagher*, 77  
30 Wn.2d 306, 462 P.2d 232 (1969); *Orion Corp. v. State*, 109 Wn.2d 621, 747 P.2d  
31 1062 (1987). . . . There is in the Act a built-in pro-navigational bias, serving as  
32 the backdrop for all planning and use conflict decisions.



1 *Sperry Ocean Dock v. City of Tacoma*, SHB Nos. 89-4 & 89-7, Final Findings of Fact,  
2 Conclusions of Law, and Order, March 1, 1990, Conclusion of Law IX.

3         DPD's motion to dismiss on this issue is without merit. The SMA exempts moorage  
4 from permitting requirements, and SMC 23.40.002 is not to the contrary because it applies only  
5 to uses in "structures, buildings or premises." Moreover, even if SMC 23.40.002 did apply, it  
6 would be preempted by state law: the SMA.

7         If the Hearing Examiner does choose to resolve any issue in this case before the hearing,  
8 she should resolve this issue in the Port's favor and conclude that the Interpretation is invalid for  
9 requiring a permit for a use that is exempted from such permitting requirements by state law.  
10 Such a ruling will resolve this appeal without the need for discovery or a hearing.

11 **B. Port Issue 5**

12         This issue challenges the Interpretation for its failure to recognize that moorage (a use of  
13 the water that does not require a shoreline permit) is inherent in cargo terminal use (a use and  
14 development of the uplands). DPD in effect admits that the Interpretation is improper when it  
15 states that "The City's use regulations for types of moorage are based on the use of the shoreline  
16 and do not regulate the 'operation of vessels.'" Motion p. 12, lines 11-12. The City's SMP  
17 regulates the development and use of the uplands, and the Interpretation does not find that there  
18 will be an inconsistent use of the uplands by "a drilling rig and the accompanying tugboats," or  
19 by any other vessels at Terminal 5. The facts to be presented at the hearing will demonstrate that  
20 the use of the uplands by Foss and its tenants is entirely consistent with cargo terminal use.

21 **C. Port Issue 7**

22         This issue challenges the Interpretation for its conclusion that moorage of vessels at a  
23 cargo terminal is permitted as an accessory use only for "vessels otherwise used for transporting  
24 goods in the stream of commerce," thereby making a vessel's right to moor dependent on the use  
25 of the vessel when it is not moored, without regard to whether the vessel is using the cargo  
26 terminal in a manner that is consistent with cargo terminal use. The Interpretation further makes

1 a vessel's right to moor dependent upon what happens to the cargo the vessel will be transporting  
2 after the vessel leaves the terminal. The reasoning of the Interpretation has no bearing on  
3 whether the vessel is using the terminal in a manner consistent with the cargo terminal use, or on  
4 what the land use impacts might be from the vessel's use of the terminal. DPD's motion simply  
5 ignores the substance of this issue. In addition, DPD's discussion ignores the fact that the  
6 question of whether a use is "incidental" or "intrinsic" or both is ultimately a factual issue that  
7 cannot be resolved as a matter of law by prehearing motion, particularly when one of the issues  
8 in the appeal is whether the Interpretation is supported by substantial evidence.

9 **D. Port Issue 8**

10 This issue challenges the Interpretation for failing to recognize that moorage also is  
11 allowed as an accessory use because it is allowed as a principal use. DPD's argument regarding  
12 Port Issue 8 stems from its legal interpretation of the definition of accessory use raised in its  
13 challenge to Port Issue 7. As discussed above, DPD's legal construction fails. In addition,  
14 DPD's motion asks the Hearing Examiner to make a factual determination in a vacuum and  
15 decide that moorage of certain kinds of vessels at a cargo terminal is not accessory to the use of  
16 the cargo terminal, even though the facts that will be presented at the hearing will demonstrate  
17 that these vessels use the cargo terminal in a manner that is entirely consistent with cargo  
18 terminal use.

19 **E. Port Issue 11**

20 This issue challenges the Interpretation for being contrary to the shoreline policies in the  
21 City's Comprehensive Plan, and DPD's motion simply makes conclusory assertions that it is  
22 consistent. This is without question an issue over which the Hearing Examiner has jurisdiction,  
23 as the Shorelines Hearings Board stated in *Richter v. City of Des Moines*, SHB No. 10-013,  
24 Order on Partial Summary Judgment, pages 7-8, December 7, 2010:

25 Here, the Petitioner argues for a ruling from the Board that the King County  
26 Goals, Policies, Objectives section of its shoreline master program cannot be  
applied as regulations. The Board agrees that the Goals, Policies, Objectives

1 cannot be applied in a regulatory fashion to a shoreline permit, separate and apart  
2 from the shoreline master program regulations. However, the Goals, Policies,  
3 Objectives, which are a part of the KCSMP, are still statements of law, and can  
4 and should be used when interpreting and applying the development regulations  
5 to a particular permit decision.

6 DPD's brief, conclusory assertions, made in the absence of a factual record, do not begin  
7 to meet its burden under Hearing Examiner Rule 3.02 to demonstrate that this issue is "without  
8 merit on its face, frivolous, or brought merely to secure delay."

#### 9 IV. CONCLUSION

10 DPD's motion should be denied for all the reasons discussed above. If the Hearing  
11 Examiner does decide any of the Port's issues on their merits before the hearing, she should  
12 decide Issue 4 in the Port's favor because the entire premise of the Interpretation is flawed: it  
13 requires a permit for a use of navigable waters, *i.e.*, moorage, that is exempted from such a  
14 permitting requirement by the Shoreline Management Act.

15 RESPECTFULLY SUBMITTED this 25th day of June, 2015.

16 PORT OF SEATTLE



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1 **DECLARATION OF SERVICE**

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

6 On June 25, 2015, I caused the foregoing document to be served as follows:

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DATED this 25th day of June, 2015.

  
\_\_\_\_\_  
Debra A. Samuelson