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 T-5 INTERVENORS' MOTION FOR RECONSIDERATION/CLARIFICATION (Code Interpretation No. 15-001)

I. INTRODUCTION

Pursuant to HER 3.20, the T-5 Intervenors respectfully request the Hearing Examiner reconsider and clarify her June 23, 2015 Order On Motion To Intervene (the "T-5 Intervention Order") because, as written, it creates confusion regarding conduct and participation at the upcoming hearing and is inconsistent with long-standing Washington law. In the T-5 Intervention Order, the Examiner concluded:

Veris Law Group PLLC
1809 Seventh Avenue, Suite 1400
Seattle, Washington 98101
tel 206.829.9590 fax 206.829.9245

> The motion to intervene is granted but limited to intervention for the purpose of ***preserving the right to appeal*** the Hearing Examiner's [ultimate] decision [in this matter], and to ***providing prehearing and any post-hearing written statements***.[1]

It is unclear from this language ***how*** the T-5 Intervenors can "preserve [their] right to appeal" if they are not permitted to ***meaningfully*** participate in the hearing (e.g., calling at least one (1) witness, eliciting direct testimony on their issues from other witnesses, making objections, making offers of proof, etc.). This language further exacerbates this issue because Washington law "require[s] issues to be first raised at the administrative level ***and encourage[s] parties to fully participate in the administrative process,***"[2] while also requiring "[i]n order for an issue to be properly raised before an administrative agency, ***there must be more than simply a hint or a slight reference to the issue in the record.***"[3] Without being allowed to participate at the hearing, the T-5 Intervenors will be unable to properly ***create*** and ***preserve*** their record on appeal.

The simple and fair solution is to permit the T-5 Intervenors to do exactly what was discussed at the pre-hearing conference and what the Examiner is permitting the environmental intervenors to do: Namely, to call at least one (1) witness at the hearing; to conduct limited direct and cross examination of other witnesses, make appropriate objections and offers of proof. Unlike the environmental intervenors who have not made clear how or whether they will they work with the City to present a coordinated and efficient case at hearing, the T-5 Intervenors committed at the pre-hearing conference to work with the Port and Foss to present an efficient and coordinated case and reaffirm that commitment below. Denying the T-5 Intervenors any ability to participate in the evidentiary hearing while permitting the environmental intervenors full participation rights is patently unfair and is inconsistent with the Washington law discussed below.

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[1] T-5 Intervention Order, page 2, paragraph 6 (emphasis added)
[2] *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wash. 2d 861, 869, 947 P.2d 1208, 1213 (1997)(Citations omitted; emphasis added)
[3] *Boehm v. City of Vancouver*, 111 Wash. App. 711, 722, 47 P.3d 137, 143-44 (2002)(Citations omitted; emphasis added).

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II. ARGUMENT

A. The T-5 Intervenors Must Be Permitted To *Meaningfully* Participate In The Hearing.

Hearing Examiner Rules of Procedure ("HER") 3.20 states, in pertinent part:

> (a) The Hearing Examiner may grant a party's motion for reconsideration of a hearing Examiner decision if one or more of the following is shown:
>
> (1) Irregularity in the proceeding by which the moving party was prevented from having a fair hearing;
>
> ***
>
> (4) Clear mistake as to a material fact.

Under Washington law, a trial court will reverse a decision denying a motion for reconsideration where the decision is based "upon untenable grounds or reasons," including an error of law.[4]

Unless the T-5 Intervenors are permitted to participate, they will not receive a fair hearing. It is axiomatic that a "party must generally exhaust all available administrative remedies prior to seeking relief in superior court."[5] Issues not raised before a hearing examiner will not be reviewed by the appellate court.[6] One of the few exceptions to this rule is where a party was not provided a ***meaningful opportunity*** to raise its issues before the administrative tribunal, in which case a new hearing or further evidentiary proceedings at the appellate level

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[4] *See Wagner Dev., Inc. v. Fid. & Deposit Co. of Maryland*, 95 Wash. App. 896, 906, 977 P.2d 639, 645 (1999); *see also* CR 59(a)(1)("Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having a fair trial") and CR 59(a)(8)("Error in law occurring at the trial and objected to at the time by the party making the application.").

[5] *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wash. 2d 861, 866-67, 947 P.2d 1208, 1211 (1997)(The exhaustion requirement is founded on five fundamental principles, including: "(1) insur[ing] against premature interruption of the administrative process; (2) ***allow[ing] the agency to develop the necessary factual background on which to base a decision***; (3) allow[ing] exercise of agency expertise in its area; (4) ***provid[ing] for a more efficient process***; and (5) protect[ing] the administrative agency's autonomy by allowing it to correct its own errors and insuring that individuals [are] not encouraged to ignore its procedures by resorting to the courts.")(Emphasis added).

[6] *Westside Bus. Park, LLC v. Pierce Cnty*., 100 Wash. App. 599, 608, 5 P.3d 713, 718 (2000).

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1809 Seventh Avenue, Suite 1400
Seattle, Washington 98101
tel 206.829.9590 fax 206.829.9245

could be required.[7] "Our state and federal case law holds that the fundamental requirement of procedural due process '***is the opportunity to be heard at a meaningful time and in a meaningful manner***.'"[8] In *City of Bonney Lake,* the Court concluded these fundamental requirements of procedural due process were met with regard to the City's levying of daily fines for building code/permit violations because the administrative appeal process permitted ***all*** parties to the proceedings to fully participate and to call witnesses; the Court, however, questioned whether such due process requirements were met regarding the City's decision regarding the adequacy of the corrective measures taken by Mr. Kannay where it was unclear whether he was afforded a meaningful opportunity to be heard in a meaningful manner on this issue.[9]

In order to properly exhaust its administrative remedies and pursuant to Washington's fundamental principles of due process, the T-5 Intervenors must be permitted to participate in the hearing in a ***meaningful manner*** and to properly preserve its issues on appeal. Limiting the T-5 Intervenors to only written pre- and post-hearing submissions robs it of meaningful participation because the T-5 Intervenors cannot call any witnesses, cannot directly present evidence, cannot make timely and appropriate objections, cannot cross examine witnesses, and cannot make timely offers of proof. Lacking such meaningful participation, the T-5 Intervenors cannot create the robust record required on appeal, nor can it withstand a later challenge that it failed to properly create such a record.

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[7] *Pac. Land Partners, LLC v. State, Dep't of Ecology* 150 Wash. App. 740, 754, 208 P.3d 586, 593 (2009)("We cannot review an issue that was not raised before the Board unless; (2) ***Mr. Bernsen did not have an opportunity to raise the issue before the Board***;….")(Citations omitted; emphasis added)

[8] *City of Bonney Lake v. Kanany*, 185 Wash. App. 309, 315, 340 P.3d 965, 968 (2014)(Emphasis added).

[9] *Id*. at 319.

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B. The T-5 Intervenors' Interests Are Not Adequately Represented By The Appellants.

The Examiner's T-5 Intervention Order is premised on a "clear mistake as to a material fact:" Namely, the Port and Foss do not adequately represent the T-5 Intervenors' interests since its interests are broader in scope and nature. As the environmental intervenors noted and argued in obtaining full intervention status,[10] Washington case law requires that the "intervenor need make only a ***minimal showing that its interests may not be adequately represented***."[11] To quote and paraphrase the Court in *Columbia Gorge Audubon Soc'y:*

> The relevant questions are: Will the [Port and Foss] ***undoubtedly*** make ***all*** the [T-5 Intervenors'] arguments? That is, [are] the [Port and Foss] able and willing to make those arguments? ***Will the [T-5 Intervenors] more effectively articulate any aspect of its interest[s]***? It is not necessary that the [T-5 Intervenors'] interest be in direct conflict with those of the existing parties. ***It is only necessary that the interest may not be adequately articulated and addressed***. ***When in doubt, intervention should be granted***.[12]

The T-5 Intervenors easily meet this generous intervention standard. The Examiner granted full intervention status to the environmental groups based on their argument that the City does not adequately represent their interests because their "specific environmental focus is narrower than the City's broader permitting considerations."[13] Similarly but conversely, the T-5 Intervenors' interests are more "varied and broad" than those of Foss and the Port[14] because the T-5 Intervenors represent a cross-section of Seattle's ***entire*** maritime/industrial industry. The T-5 Intervenors' issues to be adjudicated at the hearing reach beyond the "Operations" at Terminal 5 and encompass the impact and import of the Interpretation on this entire industry, including on maritime vessel and fishing boat owners/operators, unions whose members actually work at port facilities throughout Seattle, boat building/manufacturers in Seattle, the remaining fixed-fueling

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[10] Environmental intervenors' Motion for Intervention, page 10, line 23; page 11, lines 1-5.
[11] *Columbia Gorge Audubon Soc'y v. Klickitat Cnty.*, 98 Wash. App. 618, 629, 989 P.2d 1260, 1266 (1999)(Emphasis added).
[12] *Id.* at 630 (Emphasis in original and added).
[13] Environmental intervenors' Motion for Intervention, page 11, lines 7-8.
[14] Environmental intervenors' Motion for Intervention, page 11, line 7.

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facilities in Washington, and on local/national policy advocacy groups. This "broader" and more varied nature of the T-5 Intervenors' interests makes it difficult if not impossible to conclude that the Port and Foss will "***undoubtedly make all"*** of the T-5 Intervenors' arguments at the hearing.[15] This difference in narrow-versus-broad interest focus was sufficient to warrant full intervention for the environmental groups and thus it is sufficient to warrant granting the T-5 Intervenors ***meaningful*** participation.

III. AGREEMENT TO BE EFFICIENT

The T-5 Intervenors anticipate the City will continue to object to its ***meaningful*** participation claiming, *inter alia*, that doing so will unduly confuse or somehow extend the hearing by adding another party/lawyer to the process. Such a claim is meritless because the T-5 Intervenors already committed at the pre-hearing conference to call no more than one (1) witness in its case-in-chief and to work efficiently with the Port and Foss to present a streamlined and efficient appeal by coordinating witnesses, evidence, etc. Permitting the T-5 Intervenors to conduct direct and cross-examination, make objections and offers of proof will not create confusion nor delay. On balance, the due process and procedural requirements of permitting the T-5 Intervenors to ***meaningfully participate*** and to create its record at the hearing far out weigh any perceived confusion or concerns about added time. As the Court stated in *Columbia Gorge Audubon Soc'y*, "When in doubt, intervention should be granted."[16]

IV. CONCLUSION

For the reasons articulated above, the T-5 Intervenors respectfully request the Examiner reconsider and/or clarify her T-5 Intervention Order to permit the T-5 Intervenors to

[15] *Columbia Gorge Audubon Soc'y, supra,* at 630.
[16] *Id.*

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meaningfully participate at the hearing in order for it to properly create its record to preserve its issues on appeal.

DATED this 2nd day of July, 2015.

VERIS LAW GROUP PLLC

By *__/s/ Joshua Brower__*
Joshua C. Allen Brower, WSBA #25092
Molly K.D. Barker, WSBA #46587
Attorneys for T-5 Intervenors

Veris Law Group PLLC
1809 Seventh Avenue, Suite 1400
Seattle, Washington 98101
tel 206.829.9590 fax 206.829.9245

DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that on this date I caused the foregoing document to be served on the following persons via the methods indicated:

Foss Maritime Company John C. McCullough McCullough Hill Leary jack@mhseattle.com	☐ Overnight Delivery via Fed Ex ☐ First Class Mail via USPS ☐ Hand-Delivered via ABC Legal Messenger ☐ Facsimile ☒ E-mail
David R. West Garvey Shubert Barer DrWest@gsblaw.com	☐ Overnight Delivery via Fed Ex ☐ First Class Mail via USPS ☐ Hand-Delivered via ABC Legal Messenger ☐ Facsimile ☒ E-mail
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City of Seattle, Department of Planning and Development Eleanore Baxendale Eleanore.Baxendale@seattle.gov	☐ Overnight Delivery via Fed Ex ☐ First Class Mail via USPS ☐ Hand-Delivered via ABC Legal Messenger ☐ Facsimile ☒ E-mail
Earthjustice, Intervenors Patti Goldman and Matthew Baca pgoldman@earthjustice.org mbaca@earthjustice.org	☐ Overnight Delivery via Fed Ex ☐ First Class Mail via USPS ☐ Hand-Delivered via ABC Legal Messenger ☐ Facsimile ☒ E-mail

Dated at Seattle, Washington, this 2nd day of July, 2015.

/s/ Whitney Jackson
Whitney Jackson
Legal Assistant

Veris Law Group PLLC
1809 Seventh Avenue, Suite 1400
Seattle, Washington 98101
tel 206.829.9590 fax 206.829.9245