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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)	DEPARTMENT OF PLANNING AND
)	DEVELOPMENT'S REPLY ON MOTION
)	TO DISMISS
from an interpretation by the Director,)	
Department of Planning and Development.)	
)	

This Reply is organized by topic, identifying Appellants' Issues within each one. The Port's repeated contention that DPD's Motion purports to address only jurisdictional issues is wrong: the first, the last page and page 4 expressly state DPD seeks to dismiss both jurisdictional and other types of issues. The topics set out are procedural, jurisdiction, SMP provisions and lastly Port issue 11, the Comprehensive Plan. With some modification, as noted, DPD seeks dismissal of all Issues raised in its motion.

I. ABILITY TO DISMISS ISSUES

The Port's contention that the Hearing Examiner lacks authority to dismiss issues or parts of issues is wrong, and the Port cites no authority to support it. An "issue" is a required part of a petition:

1 (3) A brief statement of the appellant's issues on appeal,
2 noting appellant's specific objections to the decision or action being
3 appealed;¹

4 It is indisputable that HE 3.02 authorizes dismissing issues over which the Hearing
5 Examiner lacks jurisdiction, whether they are issues or parts of issues. The Hearing Examiner
6 has authority to consider dispositive motions on other grounds, as well.² A motion on the
7 grounds that an issue "lacks merit on its face" is the same as one that the Hearing Examiner can
8 resolve as a matter of the law where there are no disputed facts, which the Port acknowledges as
9 a CR 12(b)(6) motion. This would include an issue asserting a Seattle Municipal Code section
10 that is inapplicable as a matter of law to the subject appealed or compliance with the
11 Comprehensive Plan. These are the matters DPD seeks to dismiss. Of course, the Hearing
12 Examiner could not grant DPD's motion on issues where the facts are in dispute, but on these
13 issues, they are not.

14 II. JURISDICITON CONTROLS ISSUES

15 The Hearing Examiner should reject Appellants' arguments to hear issues outside the
16 jurisdiction conferred by the City Council in SMC 23.88.020 – the interpretation of Title 23.
17 These arguments are not supported by the authority Appellants cite, as explained in Sections A
18 and B below. The Hearing Examiner should consider solely whether jurisdiction exists to hear
19 these issues and dismiss them on that ground, as set out in Section C.

20 A. No legal requirement to hear claims outside the Examiner's jurisdiction

21 The Port asserts that if the Hearing Examiner lacks jurisdiction over issues and cannot
22 decide them, Appellants must be allowed to make their case on them, regardless.³ The Port's

23 ¹ HE Rule 3.01(d)(3).

² See, HE Rule 2.16(e).

³ Port Opp. P. 2, lines 22-26.

1 case law authority⁴ is inapposite because it addresses a situation where the state agency did have
2 jurisdiction. In *Harrington*, the plaintiff filed a petition under the Land Use Petition Act and
3 RCW 64.60, a statute allowing damages for certain arbitrary land use actions. The county said
4 *Harrington* lacked standing because he failed to appeal to the shoreline hearing board to exhaust
5 his administrative remedies. *Harrington* claimed exhaustion was not required because the board
6 lacked jurisdiction to hear his claims. The court concluded the shoreline hearing board had
7 jurisdiction, the principle of exhaustion applied, and in that context the court made the statement
8 the Port quotes: "Administrative review is, therefore, required to develop the facts necessary to
9 adjudicate this 'as applied' constitutional challenge." This has no applicability when the Hearing
10 Examiner lacks jurisdiction.

11 Similarly, the Port's cursory citation to RCW 36.70C.120(1) is incomplete and when
12 stated in full is contrary to the Port's position. That subsection states that under the Land Use
13 Petition Act judicial review is "confined to the record created by the quasi-judicial body or
14 officer except as provided in subsections (2) and (4) of this section." Subsection (2)(c), not cited
15 by the Port, creates an exception for "Matters that were outside the jurisdiction of the body or
16 officer that made the land use decision."⁵ This statute does not require the Hearing Examiner to
17 take testimony on issues outside the Examiner's jurisdiction.

18 **B. Neither statutory construction nor case law on deference compel**
19 **consideration of issues outside the Examiner's jurisdiction.**

20 Foss contends that notwithstanding lack of jurisdiction, which Foss neither concedes nor
21 refutes, the Hearing Examiner should not dismiss Foss Issues 3, 7, 9, 16 and 17⁶ because they are
22 necessary for the Hearing Examiner to correctly apply the canons of statutory construction and

23 ⁴*Harrington v. Spokane County*, 128 Wn. App. 202, 210, 114 P.3d 1233 (2005).

⁵ <http://app.leg.wa.gov/rcw/default.aspx?cite=36.70C.120>.

⁶ Historical use, prior permit decisions or enforcement, arbitrary or political motivation.

1 because they affect the deference the Hearing Examiner gives DPD's Interpretations. Both
2 contentions are incorrect. Foss's argument creates new rules of statutory construction beyond
3 recognized authority and proposes constraints on deference that are foreign to the Hearing
4 Examiner's authority from the City Council.

5 1. Statutory construction

6 The Hearing Examiner follows customary rules of statutory construction as set out in
7 numerous Hearing Examiner decisions:

8 In interpreting a statute, or code, the primary objective is to
9 ascertain and carry out the intent of the legislative body that
10 adopted it. *Fraternal Order of Eagles, Tenino Aerie No. 564 v.*
11 *Grand Aerie of Fraternal Order of Eagles*, 148 Wn.2d 224, 239, 59
12 P.3d 655 (2002) (citations omitted). One looks first to the
13 language of the code to determine legislative intent, and if the code
14 is unambiguous, the meaning is derived from the plain language of
15 the code alone. *Id.* Definitions provided in code are controlling,
16 but if undefined, a term should be given its "plain and ordinary
17 meaning by reference to a standard dictionary." *Id.* The words of
18 a statute should not be read in isolation, *Markham Advertising Co.*
19 *v. State*, 73 Wn.2d 405, 439 P.2d 248 (1968), and a code section
20 should be construed so that each part is given effect with every
21 other part. *City of Tacoma v. Cavanaugh*, 45 Wn.2d 500, 275 P.2d
22 933 (1954).⁷

23 The Hearing Examiner appropriately looks uniquely to the legislation itself, for it is well
established law that "the intention of the Legislature is to be deduced from what it said."⁸

Foss cites *Dep't. of Ecology v. Campbell & Gwinn, LLC*,⁹ which concludes that "plain
meaning" should be "derived from what the Legislature has said in its enactments, but that
meaning is discerned from all that the Legislature has said in the statute and related statutes

⁷ *In the Matter of the Appeal of Phinney Ridge Community Council, et al.*, Hearing Examiner File: MUP-07-022(W)/W-06-003, October 29, 2007, Analysis, paragraph 3.

⁸ *In Re Sanborn*, 159 Wash. 112, 118, 922 Pac. 259 (1930).

⁹ 146 Wn.2d.1, 43 P.2d 4 (2002).

1 which disclose legislative intent about the provision in question.”¹⁰ The Court continues, if the
2 legislation remains ambiguous the court would then resort to “aids of construction including
3 legislative history.”¹¹ Legislative history is the record created by the legislature (including its
4 staff and public testimony) during the adoption of legislation.¹²

5 Foss paraphrases that last passage and changes “legislative history” to “historic
6 practices,” a fundamental alteration both in the actor - from legislative (City Council) to
7 administrative (DPD) – and in the action – from contemporaneous legislative history to post-
8 adoption actions.¹³ Having made that unsupported change, Foss then argues this case means that
9 “DPD’s historic practices” are a “key element in determining the scope of the Code and the
10 SMP.”¹⁴ The case does not say that, and the Examiner should reject this unsupported argument.

11 Plus, Hearing Examiner decisions reject such arguments in construing the meaning of a
12 Code section in a formal interpretation. One appellant argued that other piers violate the code, so
13 this should not be found to exceed the size limits; the Examiner rejected this stating:

14 5. That there may be other piers that do not comply with the Code
15 limitations, does not eliminate the possibility that the subject pier
16 extends beyond the Code-permitted maximum. The basis for the
17 Interpretation is the applicable language of the Code, not the
18 presence or absence of other piers that exceed Code limitations.¹⁵

19 The Hearing Examiner has also rejected past DPD permit approvals and unappealed formal
20 interpretations as support for construing code provisions in interpretation appeals.¹⁶ These

21 ¹⁰ *Id.* at 11-12.

22 ¹¹ *Id.*

23 ¹² *Tobin v. Dep’t of Labor & Indus.*, 169 Wn.2d 396, 415, 239 P.3d 544, 553-54 (2010).

¹³ Foss Opp. P. 7, lines 8-13.

¹⁴ *Id.*

¹⁵ *In the Matter of the Appeal of Don Kennedy from Interpretation 95-006*, Hearing Examiner File: S-97-005, June 11, 1997, Conclusions 4 and 5 (emphasis added).

¹⁶ *In the Matter of the Appeals of United Indians of All Tribes Foundation Seattle Community Council Fed. et al. Regarding an Interpretation by the Director, Department of Design, Construction and Land Use*, Hearing Examiner

1 Hearing Examiner decisions are consistent with the Court's rulings in *Buechel v. Dep't. of*
2 *Ecology*,¹⁷ *Dykstra v. Skagit County*¹⁸ and *Mercer Island v. Steinman*.¹⁹ While Foss decries this
3 as "enshrining arbitrary action" and irresponsible inconsistency, well-established law in these
4 cases holds that prior inconsistent actions will not defeat a correct interpretation of the law. As a
5 result, other permits or other instances of enforcement are not relevant to the Hearing Examiner's
6 task of construing the meaning of cargo terminal and accessory use under the SMP. The Hearing
7 Examiner should reject Foss's new "historic practices rule" for legislative construction.

8 Foss then creates another new, unsupported, "rule" of construction: that just as the
9 legislature is presumed to know of judicial construction of statutes and consent to them by not
10 amending statutes, so the City Council is presumed to know of DPD's "interpretation" of the
11 Code, and consent to it by not amending the Code.²⁰ Foss cites no authority for its novel
12 proposition, other than cases citing the rule as it applies to court decisions and the legislature.
13 While it could be reasonable to apply this concept to City Council acquiescence following court
14 decisions or Hearing Examiner decisions, no authority exists or can be imagined to support such
15 a conclusion from what Foss styles "interpretations" – permit decisions or failure to enforce. As
16 established above, the Hearing Examiner should not accept such unsupported extrapolations.

17 Therefore, the Hearing Examiner should dismiss Issues outside her jurisdiction because
18 they are not necessary for proper statutory construction of the definitions at issue in this appeal.
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22 File: S-99-001, S-99-002, September 14, 1999, Conclusion 7 (unappealed formal interpretations) and Conclusion 9
(other discretionary permit approvals).

23 ¹⁷ 125 Wn.2d 196, 211, 884 P. 2d 910 (1994).

¹⁸ 97 Wn. App. 670, 677, 985 P.2d 424 (1999).

¹⁹ 9 Wn. App. 479, 483, 513 P.2d 80 (1973).

²⁰ Foss Opp. p. 7 lines 13-26.

1 **2. Deference is not conditional under 23.88.020**

2 Foss also argues that the Hearing Examiner should consider issues for which she has no
3 jurisdiction because they affect whether DPD’s interpretation is entitled to deference by the
4 Hearing Examiner. This argument has no merit because it is based on different standards for
5 review and because the law it applies is inapposite to formal interpretations under SMC
6 23.88.020.

7 First, the Hearing Examiner’s authority is based solely on the Council’s delegation in the
8 Code.²¹ The City Council directed, “The interpretation of the Director shall be given substantial
9 weight, and the burden of establishing the contrary shall be on the appellant.”²² The Hearing
10 Examiner construes this to mean:

11 To overcome the substantial weight accorded the interpretation, the
12 Appellant has the burden of showing that it is “clearly erroneous.”
13 *Brown v. Tacoma*, 30 Wn. App. 762, 637 P.2d 1005 (1981). Under
14 this standard of review, the interpretation may be reversed only if
the Examiner is left with the definite and firm conviction that a
mistake has been made. *Cougar Mt. Assoc. v. King Cy.*, 111
Wn.2d 742, 747, 765 P.2d 264 (1988).²³

15 The case law Foss cites use a different standard. Under the Land Use Petition Act the
16 standard for judicial deference is “The land use decision is an erroneous interpretation of the law,
17 after allowing for such deference as is due the construction of a law by a local jurisdiction with
18 expertise.”²⁴ The Court construes this phrase to mean, “Thus, deference is not always due – in
19 fact even a local entity’s interpretation of an ambiguous ordinance may be rejected.”²⁵ The City
20 Council did not put such a caveat on the Hearing Examiner’s duty, nor can case law for guiding

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²¹ *Chausee*, 38 Wn. App. 630 at 636.

22 ²² SMC 23.88.020.G.5.

23 ²³ *In the Matter of the Appeal of Clear Channel Outdoor from an Interpretation issued by the Director, Department
of Planning and Development*, Hearing Examiner File: S-07-001, May 1, 2006.

24 ²⁴ RCW 36.70C.130(1)(b) (emphasis added).

25 ²⁵ *Ellensburg Cement Products, Inc. v. Kittitas Cnty.*, 179 Wn.2d 737, 753, 317 P.3d 1037 (2014) (emphasis added).

1 courts or for applying state statutes change the scope of the Council's direction. Case law may
2 guide the Hearing Examiner in construing Code language, such as "substantial weight," but case
3 law cannot alter the Code.

4 Second, the cases cited by Foss, *Sleasman* and *Ellensburg*, are not apposite guides for
5 limiting the scope of the Hearing Examiner's authority to give DPD deference in an interpretation
6 appeal under SMC 23.88.020. In both cases the "interpretations" the courts rejected were made
7 by the local government as it applied local codes in enforcement or permitting decisions, not in a
8 formal interpretation process by a local government, as here. This formal process is required by
9 the state statute for local project review, Chapter 36.70B RCW, set out in RCW
10 36.70B.110(11).²⁶

11 If a history of prior DPD permit or enforcement actions were required as the basis for
12 giving deference to formal DPD interpretations, then few if any interpretations would receive
13 deference, and the Council's directive would be a nullity. The point of issuing formal
14 interpretations is to resolve statutory construction and application questions at a higher level,
15 creating a record of DPD's statutory construction distinct from the daily administrative task of
16 applying the code. An interpretation process is also required by the Washington Department of
17 Ecology as part of shoreline master programs.²⁷ And in fact, the Council has made
18 interpretations an administrative remedy for certain permitting decisions where an administrative
19 decision is questioned.²⁸ Thus, formal interpretations are clearly distinguishable from the types

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22 ²⁶ "Each local government planning under RCW 36.70A.040 shall adopt procedures for administrative interpretation
of its development regulations."

23 ²⁷ WAC 173-26-140.

²⁸ SMC 23.88.020A, penultimate sentence: "A request for an interpretation, and subsequent appeal to the Hearing
Examiner if available, are administrative remedies that must be exhausted before judicial review of a decision
subject to an interpretation may be sought."

1 of less formal code applications at issue in *Sleasman* and *Ellensburg*, and the need to
2 demonstrate prior consistency is inapplicable.

3 Third, the requirements Foss seeks to impose are *dicta* in both *Sleasman* and *Ellensburg*.
4 In both cases the Court found the code unambiguous,²⁹ and stated no deference should be
5 conferred on that ground. The Court then proceeded to state it wouldn't give deference any way
6 because the local government failed to show prior consistent applications. This is *dicta* and not
7 binding. Certainly, it has no application to the formal interpretation process at issue in this
8 appeal.

9 Foss's newly created statutory construction principles and the court cases Foss cites to
10 deny deference to agency interpretations do not provide a basis for hearing issues otherwise
11 outside the Hearing Examiner's authority.

12 C. Specific jurisdictional issues

13 Appellants oppose DPD's Motion to Dismiss specific jurisdictional issues on additional
14 specific grounds addressed below. These issues should be dismissed.

15 1. Foss Issue 3 - past inconsistent interpretation and enforcement of 16 cargo terminal definition

17 Foss's sole argument against dismissing Issue 3 is the one set out and addressed in
18 Section B above and is meritless.

19 2. Foss Issue 7 - *Nykreim*

20 Foss claims DPD's Interpretation cannot assert the definition of "cargo terminal" is
21 different from the definition DPD used in approving earlier permits, particularly the "bollard
22 permit" issued in February. Foss makes 2 arguments: first, the Examiner's statutory construction

23 ²⁹ *Sleasman*, 159 Wn.2d 639 at 646; *Ellensburg*, 171 Wash. App. 691, 706, 287 P.3d 718 (2012); on appeal the
Washington Supreme Court upheld this determination. *Ellensburg* 179 Wn.2d 737 at 755.

1 task and the deference due DPD,³⁰ addressed in Subsection B above. This is meritless. Second,
2 Foss notes *Nykreim* is not based on estoppel, but on a statute of limitations set out in LUPA as
3 applied by the court in *Nykreim*. That characterization, however, does not bring this issue within
4 the Hearing Examiner's jurisdiction. The Examiner would still have to determine the scope and
5 meaning of a DPD decision that is not the subject of this appeal and apply a statute outside Title
6 23 to determine whether DPD was barred by law from issuing the interpretation. Foss admits
7 this is the gravamen of this issue and views it as "determinative of this case."³¹ The Hearing
8 Examiner's jurisdiction is limited to determining the meaning and application of Title 23, not of
9 Ch. 36.70C RCW and case law applying it. This issue should be dismissed for lack of
10 jurisdiction.³²

11 **3. Foss Issue 8 – activity is a preexisting nonconforming use**

12 The Hearing Examiner hears cases concerning uses established for the record when a
13 party has applied to DPD for a determination, DPD has issued one, and that determination is
14 appealed to the Hearing Examiner.³³ Foss offers no argument why the Hearing Examiner has
15 jurisdiction to make a determination on this issue before Foss or the Port have even applied to
16 DPD for a permit to establish the use for the record, much less before DPD has issued a
17 determination on it, except to say that DPD's Interpretation is "effectively precluding" the Port's
18 ability to do so. Foss bases this conclusion on the fact that the Interpretation says a new permit is
19 needed to moor the oil rig and its assisting vessels at Terminal 5. This fails to establish

21 ³⁰ Foss Opp., p. 11, last paragraph.

22 ³¹ Foss Opp., p. 11, lines 17-19 and p. 12 lines 3-5.

23 ³² And the deposition of Ben Perkowski should be quashed.

³³ See, e.g., *In the Matter of the Appeals of Friends of Haller Lake Neighborhoods and Bill Johns and Seattle School District from an Interpretation issued by the Director, Department of Planning and Development*, Hearing Examiner File: S-03-002; S-03-003, November 24, 2003.

1 jurisdiction to consider this question – the new permit could be one to establish the use for the
2 record.

3 Plus this argument is incorrect procedurally. No one disputes the current established use
4 of Terminal 5 is a cargo terminal. The Interpretation determines the SMP defined terms “cargo
5 terminal” and “accessory use” do not allow the oil rig and assisting vessels to moor there.
6 Whether this is correct is the subject of this appeal. The Interpretation does not determine
7 whether another pre-SMP use could be established for the record. The Interpretation does not
8 preclude Foss or the Port (even now while this matter is on appeal) from taking additional steps,
9 including applying for a permit to establish the use for the record. The Hearing Examiner lacks
10 jurisdiction to consider this matter prior to DPD. Issue 8 should be dismissed.

11 **4. Foss Issue 9 -Right to proceed with vested projects**

12 DPD’s Motion argued this issue should be dismissed on the same grounds as Issue 7,
13 Foss’s *Nykreim* issue. Foss’s Opposition agrees this issue presents the same contentions as Issue
14 7, and again cites the same arguments. For the same reasons as discussed in subsection C.4
15 above (*Nyreim*) and section B, the Hearing Examiner should dismiss this issue: the Hearing
16 Examiner lacks jurisdiction over *Nykriem* claims, which is not overcome by Foss’s novel
17 statutory interpretation arguments and its inapposite deference arguments.

18 **5. Foss Issue 11 – Compliance with interpretation procedures**

19 Foss’s Opposition agrees the issue should be dismissed.

20 **6. Foss Issues 12, 13, and 14 – DPD actions outside the Interpretation**

21 DPD’s Motion asked the Hearing Examiner to Dismiss these issues because they address
22 DPD actions or potential actions that are not part of the Interpretation itself (noting part of Issue
23 12 on how DPD will apply the Interpretation in the future, Foss Appeal, p. 7, lines 19-22 and

1 Issue 14, as well as Foss Issue 13 -whether the DPD Director had changed the Interpretation after
2 it was issued); therefore, these issues are not within the Hearing Examiner's jurisdiction under
3 SMC 23.88.020.G.5 and A for reviewing the meaning and application of the Code as set out in
4 the Interpretation. Foss's Opposition states that Issue 12 means the facts set out in the
5 Interpretation are not consistent with the facts describing the Foss's "Operations" and therefore
6 the Interpretation does not apply to the Operations. To the extent Foss wants to present different
7 facts to the Hearing Examiner, that is preserved in Foss Issue 2, to which DPD has no objection,
8 and which is different from the matters in these issues. Foss states that the issues raised are "key
9 considerations" for the Hearing Examiner, but fails to explain why. Foss then states that "the
10 history and potential application of the Interpretation" are relevant under Foss's expanded
11 statutory interpretation arguments and court- based deference argument, but again Foss fails to
12 explain how the history of the Interpretation (not the code text) and future, post-Interpretation,
13 actions have anything to do with statutory interpretation or deference in this appeal. The matters
14 set out in Issues 12, 13, and 14 (except for the presentation of relevant facts about Foss's
15 proposed activities on the oil rig) are outside the scope of this Interpretation appeal and should be
16 dismissed.

17 **7. Foss Issue 16 – Arbitrary action - selective enforcement and**
18 **inconsistent interpretation**

19 DPD's Motion seeks to dismiss this claim because these matters are outside the scope of
20 matters considered by the Hearing Examiner under SMC 23.88.0020. The standard applied by
21 the Hearing Examiner is "clearly erroneous, not "arbitrary and capricious;" Foss asserts in
22 footnote 4 that "obviously review for arbitrary action lies squarely within the role of the Hearing
23

1 Examiner in this case,” but the two standards are different.³⁴ Foss reliance on *Maranantha*
2 *Mining* describing arbitrary and capricious actions is misplaced, because that case was not
3 decided under the clearly erroneous standard. As discussed in the Motion and in Section B,
4 above the Examiner does not consider other enforcement actions or permit applications. Foss’s
5 Opposition again contends these are issues relevant to statutory construction and deference to
6 DPD. However, as explained above in Section B, these arguments are meritless under applicable
7 rules of statutory construction and the applicable standards for review by the Hearing Examiner.

8 **8. Foss Issue 17 – Political Motivation**

9 DPD’s Motion seeks to dismiss political motivation because it is outside the scope of the
10 Hearing Examiner’s review under the standards set out in SMC 23.88.020. Foss’s arguments
11 that alleged political motivation should affect the deference accorded by the Hearing Examiner is
12 not based on the Code standards and relies on inapposite case law, as described in Section B
13 above.

14 **9. Foss Issue 19 – State law and constitution**

15 *See* discussion in Subsections 11 and 12.

16 **10. Port Issue 1 (part) and Port Issue 14 – Nonconforming use**

17 DPD’s Motion seeks to dismiss claims that the Port has a pre-existing use on the site that
18 is consistent with Foss’s proposed use, because this is outside the Hearing Examiner’s
19 jurisdiction, as explained in response to Foss Issue 8.

20 The Port contends it is not asking the Hearing Examiner to determine the Port’s rights, it
21 just wants the Hearing Examiner to “consider” that Foss’s use is consistent with the historic
22

23 _____
³⁴ An action might be politically motivated; suggesting arbitrary action, but the result might not be clearly erroneous.

1 use.³⁵ To do this, the Hearing Examiner would have to determine (1) what that historic use was;
2 (2) where it was located; (3) whether it was lawful at the time; (4) whether it was abandoned (5)
3 whether the use was terminated by other uses established by later permits; and then (6) (under
4 Port Issue 14) whether the City intended to preserve that unlawful or lawful use. The substance
5 of making this determination is the process of establishing the use for the record, which is not
6 within the jurisdiction of the Hearing Examiner on this appeal.³⁶ The Port can file such a request
7 with DPD at any time.

8 While the Port contends there is no basis for ruling on the relevance of evidence that has
9 not been offered,³⁷ the jurisdiction of the Hearing Examiner in this case is to determine the
10 meaning of the terms "cargo terminal" and "accessory use" as defined in the SMP and then apply
11 that to the activities of mooring an oil rig and assisting vessels. Making the determinations
12 requested by the Port is not within the scope of this interpretation appeal, and hence outside of
13 the Hearing Examiner's jurisdiction to resolve this appeal. It is a different question all together.

14 The Port claims Issue 14 concerns the intent of the SMP. DPD does not dispute this is
15 relevant to interpreting code sections within the SMP. However, DPD does not concede the
16 relevance of the contention in Issue 14, because it is based on matters that are outside the scope
17 of this appeal. Port Issues 1 (part) and 14 should be dismissed.

18 **11. Port Issues 2, 3, 9, 13 - State law claims and Issue 15**

19 DPD seeks to dismiss claims that seek relief based on state law because the Hearing
20 Examiner lacks jurisdiction to address these issues under SMC 23.88.020.³⁸ Hearing Examiner
21

22 ³⁵ Port Opposition, p. 7,

23 ³⁶ Such issues are considered under separate interpretations; *see* FN 33.

³⁷ Pot Opp., p. 7.

³⁸ *Chausee v. Snohomish County Council*, 38 Wn. App. 630, 636, 689 P.2d 1084 (1984).

1 decisions recognize the lack of authority to review federal or state law questions.³⁹

2 The Port contends DPD's argument means DPD erroneously believes the Hearing
3 Examiner's decision is "not subject to state law,"⁴⁰ citing *Wilson v. Seattle*.⁴¹ This is not DPD's
4 argument, and *Wilson* is inapposite. In that case the issue was whether the Tort Claims Act,
5 which requires filing a claim with the city before filing an action in tort also requires filing a
6 claim before filing a claim under Chapter 64.40 RCW. The case has nothing to do with Hearing
7 Examiner jurisdiction to rule on matters of state law. The Port makes no other argument to
8 contradict DPD's Motion that the Hearing Examiner lacks jurisdiction over state claims on
9 Issues 9 and 13. These claims should be dismissed.

10 DPD and the Port agree Issues 2 and 3 are *Nykreim* claims based on 36.70C RCW. For
11 the reasons set out in Foss Issue 7 and *Wilson* above, these claims should be dismissed.

12 The Port includes Issue 15 in this part of its Opposition; it claims that DPD failed to
13 comply with SEPA in issuing the Interpretation, which DPD moved to dismiss based on City
14 code provisions. The Port does not dispute DPD's argument; therefore Issue 15 should be
15 dismissed.

16 **12. Port Issues 6, 12 and Foss Issue 19 - Issues under the state constitution**

17 Appellants ask the Hearing Examiner to overturn the Interpretation for alleged violations
18 of the state constitution because the Interpretation is arbitrary and capricious (Port Issue 6),
19 because it fails to preserve tidelands for wharves, docks and other structures for the Port's
20 intended uses (Port Issue 12), and because it is inconsistent with "state law and the Washington
21

22 ³⁹ *In the Matter of the Appeal of Evelyn Balko*, Hearing Examiner File S-92-006, September 4, 1992, Conclusion 5,
declining to consider whether federal and states statutes requiring accommodation of handicapped persons override
the SMC.

23 ⁴⁰ Port Opposition, p. 5, line 4-5.

⁴¹ 122 Wn.2d 814, 863 P.2d 1336 (1993).

1 State Constitution (Foss issue 19). DPD's Motion asserts the Hearing Examiner lacks jurisdiction
2 because constitutional claims are not within the review authority set out in Seattle Municipal
3 Code (SMC) subsections 23.88.020.A and G, as required under *Chausee*.⁴²

4 In opposition the Port⁴³ cites Hearing Examiner cases that are readily distinguishable. In
5 *Duffy*,⁴⁴ which is not an interpretation appeal, the Hearing Examiner's standards for review
6 expressly include consideration of state and federal law: Findings of Fact 19⁴⁵ and 29,
7 identifying the authority in SMC 23.41.014.F.3.d to modify the Design Review Board's
8 recommendation if it "conflicts with the requirements of state or federal law." In *Squire Park*
9 *Committee*⁴⁶ the issue was whether the proposed accessory use of a homeless shelter in a church
10 was "customarily incidental" under SMC 23.42.020A. The Port quotes (but not emphasize) this
11 part of Conclusion 5: "Considerable argument was proffered by parties as to the nature and
12 extent of the City's authority or lack of same to regulate the shelter with regard to its being a
13 constitutionally protected element of religious activity/expression for the parishioners. This is
14 not an issue to be decided here." This is distinguishable from the part of Conclusion 5 the Port
15 emphasizes - determining whether the activity was "customarily incidental." Even in that
16 discussion, the Hearing Examiner specifically notes that the interpretation is predicated on that
17 factor, not constitutional ones.

18 The Appellants have failed to show the Examiner has jurisdiction to hear such
19 contentions,⁴⁷ and the Examiner should dismiss Port Issues 6 and 12 and Foss Issue 19.

20 _____
21 ⁴² *Chausee v. Snohomish County Council*, 38 Wn. App. 630, 636, 689 P.2d 1084 (1984).

22 ⁴³ Foss relies on the arguments of the Port on this issue. Foss Opp., p. 16.

23 ⁴⁴ Hearing Examiner File MUP-04-027(DR), Dec. 22, 2004.

⁴⁵ 19. The Hearing Examiner has jurisdiction to "entertain issues cited in the appeal which relate to compliance with
... the substantive criteria" of Chapter 23.76 SMC.

⁴⁶ Hearing Examiner File S-93-003 August 13, 1993, Conclusions 5 and 6.

⁴⁷ The Port refers to *Johnson v. City of Seattle*, 184 Wn. App. 8, 335 P.3d 1027 (2015) (Port Opp., pp. 3 and 4).
That decision found the City violated the plaintiff's rights by not allowing him to assert a newly acquired use-for-

1 **III. APPLYING SMP PROVISIONS**

2 Several of Appellants' issues rely on inappropriate provisions outside the Shoreline
3 Management Program or misconstrue provisions of the SMP. Applying the appropriate code
4 section and applying it correctly affects the scope of the evidence presented at the Hearing. The
5 Hearing Examiner can rule on these issues as a matter of law.

6 **A. Foss Issue 1**

7 The City agrees the definitions of "cargo terminal" in 23.84 A and the SMP are
8 substantially similar; however, any argument on the meaning of the term in the SMP should be
9 based on the definition in SMC 23.60.038.

10 **B. Foss Issue 5**

11 Foss claims the Hearing Examiner should consider the definition of "accessory use" in
12 SMC 23.84, as well as the definition in 23.60.940. Foss characterizes the definitions as "not
13 identical" when in fact they are fundamentally different, and that difference is a basis for the
14 Interpretation. The SMP definition in SMC 23.60.940 (23.60A.940) says an accessory use must
15 be "incidental and intrinsic" to the principle use (emphasis added), while SMC 23.84A.040 omits
16 "and intrinsic." The SMP definition must be used as required by SMC 23.60.900 (23.60A.900).⁴⁸

17 Issue 5 also contends SMC 23.42.020 applies. This section is a process for allowing
18 accessory uses in the underlying zone that contains standards for applying the definition of
19 "accessory use" in 23.84A.040:

20 A. Any accessory use not permitted by Title 23, either expressly or
21 by the Director, shall be prohibited. The Director shall determine
22 whether any accessory use on the lot is incidental to the principal
23 use on the same lot, and shall also determine whether uses not

the-record permit as a defense to payment of past fines. That case has nothing to do with whether the Hearing
Examiner has jurisdiction over statutory and constitutional claims.

⁴⁸ This difference is identified in the Interpretation, p. 3, Finding 11 and p. 5, Conclusion 11.

1 listed as accessory uses are customarily incidental to a principal
2 use.

3 Unless Title 23 expressly permits an accessory use as a
4 principal use, a use permitted only as an accessory use shall not be
5 permitted as a principal use.

6 Under this standard if a use that is “incidental” is not listed as an accessory use in the zone,⁴⁹ it
7 must not only be “incidental,” but also “customarily incidental, i.e., a stricter standard. It is
8 undisputed Terminal 5 is in an industrial zone; there all permitted uses are allowed as principal
9 and accessory uses. SMC 23.50.012.A. Cargo terminals and boat moorage are permitted uses in
10 Table A for 23.50.012. Therefore, the test for accessory use in the underlying zone is the same
11 as the definition – is the use “incidental” - and the provisions requiring the heightened
12 “customarily incidental” standard in SMC 23.42.020.A is not at issue.

13 In this appeal the use must be accessory under the standards of both the underlying zone
14 and the SMP because it is in the Shoreline District. SMC 23.60.014A. Under the SMP
15 accessory use definition, the use must be “incidental and intrinsic,” a different standard from
16 23.84A and 23.42.020.A. Therefore, the controlling definition is SMC 23.60.940 (23.60A.940),
17 and SMC 23.42.020 does not apply.

18 Foss argues that “tellingly” the Hearing Examiner applied SMC 23.84A.040 and
19 23.42.020 in a shoreline case, rather than the definitions in SMC Ch.23.60. In that case the
20 Examiner found the activity was not incidental. Since the use must be allowed under the
21 standards of both the underlying zone and the SMP, failing the standards of the underlying zone
22 meant the shoreline test was not needed to resolve the appeal. The decision has no precedential
23 value here. This issue should be dismissed.

⁴⁹ See e.g., SMC 23.44.040 et seq. listing accessory uses in the Residential, Single Family zone.

1 **C. Foss Issue 15**

2 This issue states in its entirety:

3 The Interpretation erroneously determines that the Director does
4 not have authority to interpret or define unlisted principal and
 accessory uses under the Shoreline Master Program.

5 The Interpretation addresses unlisted principal uses in Conclusion 8 and concludes the Director
6 cannot apply SMC 23.42.010, allowing unlisted uses if the Director determines they are
7 substantially similar to listed uses, because that section states it does not apply to overlay
8 districts, as explained in both DPD's motion to dismiss and the Interpretation itself. This is a
9 question of law, the Hearing Examiner can decide.

10 Foss's Opposition argues this issue is about whether the Director can determine a
11 proposed use is consistent with the SMP. This is a completely different issue, and while not
12 raised, DPD would agree that the Director has this authority and duty.⁵⁰ Authority to construe
13 the SMP is within Issue 1, and Issue 15 should be dismissed.

14 **D. Port Issue 4**

15 The Port contends that because no Shoreline Substantial Development Permit is needed
16 no additional permit is needed at all, because moorage is a permitted use. The Port's Opposition
17 claims this would resolve this appeal because DPD cannot require a permit. This is incorrect as a
18 matter of law and the Hearing Examiner should dismiss this issue.

19 DPD's Motion agrees that no SSDP is needed to change a use, if there is no new
20 "development" at that time. DPD also agrees a SSDP is the only permit the Shoreline
21 Management Act (SMA) requires – it is a permit filed with the Department of Ecology. That
22 does not end the matter. A SSDP is an additional permit to the regular permits issued by DPD.

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⁵⁰ Foss's citations to the SMP are a mystery – these sections do not exist.

1 The SMP requires all uses be consistent with the SMA.⁵¹ All permits must comply with
2 the SMP, whether a shoreline permit is required or not. Such compliance is determined when
3 DPD reviews the required “use permit” under its regular permit process.

4 The Port’s Opposition argues the use permit applies only to structures, buildings or
5 premises. It is undisputed that the oil rig and its assisting vessels were moored at existing
6 structures – the piers at Terminal 5 – and that the oil rig and assisting vessels were using both the
7 land premises of Terminal 5 for obtaining their provisions and the water premises of Terminal 5
8 for moorage. The requirement for a permit applies.

9 The Port makes no argument in opposition to DPD’s demonstration that being listed as a
10 “permitted” use does not mean no permit is needed.

11 Lastly, the Port makes the bald claim that the SMA preempts requiring permits other than
12 the SSDP. Raising this new issue is an untimely attempt to amend the Port’s Appeal. HE Rule
13 3.05. The Port cites no authority to support its preemption claim, and it is outside the Hearing
14 Examiner’s jurisdiction to determine whether a state statute, even the SMA, preempts application
15 of City codes.

16 The Port’s Issue 4 that no permit is required as a matter of law should be dismissed.

17 **E. Port Issue 7 (part)**

18 As part of this issue the Port contends that the Interpretation is erroneous because it does
19 not adequately discuss one of the two criteria for being an accessory use as defined in the SMP:
20 the use must be incidental and intrinsic. Failing to discuss the “incidental” component
21 sufficiently to satisfy the Port is not a ground to overturn the Interpretation. Conceding for the
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⁵¹ DPD’s Motion cites authority that will not be repeated here.

1 sake of this argument that oil rig mooring would be incidental, such mooring must still be
2 “intrinsic,” and that standard cannot be read out of the definition.

3 The Port’s Opposition claims this issue raises a factual question. Certainly, whether the
4 oil rig mooring is “incidental and intrinsic” to the cargo terminal use is a factual question to be
5 resolved at the hearing as part of Port Issue 1. DPD’s Motion is directed to the Port’s proffered
6 construction of the definition set out in Issue 7. This should be dismissed as a matter of law.

7 **F. Port Issue 8**

8 This issue argues that SMC 23.60A.090 obviates the need to apply the definition of
9 “accessory use” in the SMP. This can be resolved on this Motion as a matter of law. The Port’s
10 Opposition tries to step around this, contending that this is a factual determination that requires
11 deciding that certain types of vessels are not an accessory use. This is not DPD’s contention or
12 the gravamen of Issue 8.

13 As DPD’s Motion sets out, to apply the provisions of SMC 23.60A.090 a use first must
14 meet the definition of “accessory use.” Then SMC 23.60A.090 sets out the rule for processing
15 the accessory use permit – by special use permit or a conditional use permit if the use falls into
16 those categories. But even if the use is permitted, it still must meet the definition of accessory to
17 be allowed. The Port’s Opposition offers no analysis or argument on this legal issue. It should
18 be dismissed.

19 **G. Port Issue 10**

20 The Port offers no opposition the DPD’s Motion on this issue and it should be dismissed.
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1 Interpretation is not inconsistent with the Plan policies cited by the Port. The Port offers no
2 response except to say this is a matter of fact to be addressed at the hearing. DPD does not
3 agree, and urges the Examiner to dismiss this issue based on the reasoning in DPD's Motion.

4 **V. CONCLUSION**

5 For the foregoing reasons the Hearing Examiner should grant DPD's Motion to Dismiss.

6 DATED this 2nd day of July, 2015.

7 PETER S. HOLMES
8 Seattle City Attorney

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

1 **CERTIFICATE OF SERVICE**

2 I certify that on this date, I electronically filed a copy of the **Department of Planning and**
3 **Development's Reply on Motion to Dismiss** with the Seattle Hearing Examiner using its e-filing
4 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

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12
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23

Patti A. Goldman
Matthew R. Baca
Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104-1711
Attorneys for Intervenors
Puget Soundkeeper Alliance, Seattle
Audubon Society, Sierra Club, and
Washington Environmental Council
Joshua C. Allen Brower
Molly K.D. Barker
Veris Law Group PLLC
1809 Seventh Avenue, Suite 1400
Seattle, WA 98101-1394
Attorneys for T-5 Intervenors

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

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

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

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



ROSIE LEE HAILEY