

**BEFORE THE HEARING EXAMINER
CITY OF SEATTLE**

In the Matter of the Appeals of

Hearing Examiner Files
S-15-001 and S-15-002

FOSS MARITIME and PORT OF SEATTLE

From an interpretation by the Director,
Department of Planning and Development

Director's Interpretation:
15-001

ORDER ON MOTION TO DISMISS CLAIMS

1. The Department of Planning and Development (DPD) filed a motion on June 15, 2015, to dismiss certain claims from the above-referenced appeals. Appellants Foss Maritime (Foss) and the Port of Seattle (Port) filed responses opposing the motion on June 25, 2015. DPD filed a reply to the responses on July 2, 2015.

2. The decision on appeal is Director's Interpretation S-15-001 (Interpretation) which was issued on May 7, 2015. The Interpretation is shown at Ex. 1 to DPD's Motion.

3. Hearing Examiner Rule 3.02(a) provides that 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.

4. SMC 23.88.020.G.5 provides that appeals of an interpretation shall be considered de novo, and that *"the decision of the Hearing Examiner shall be made upon the same basis as was required of the Director. The interpretation of the Director shall be given substantial weight, and the burden of establishing the contrary shall be upon the appellant."*

5. The motion seeks to dismiss the following issues or sub-issues on the grounds that they raise claims over which the Hearing Examiner lacks jurisdiction: Foss issues¹ 3, 7, 8, 9, 12, 13, 14, 16, 17 and 19, and Port issues 1(in part), 2, 3, 6, 9, 12, 13, 14 and 15. The motion also seeks dismissal of other issues or sub-issues as a matter of law: Foss issues 1 (in part), 5, 11, 15, 18, and Port issues 4, 5(in part), 7, 8, 10, and 11. Having reviewed the filings in this matter, the Examiner enters the following order granting the motion in part, and denying it in part, as discussed below.

Foss appeal issues

6. Issue 1. DPD's motion seeks to dismiss the portion of this issue which cites the definition of "cargo terminal" set forth in SMC 23.84A.038, on the grounds that the Shoreline Master Program (SMP) definition of "cargo terminal" controls. However, the SMP definition in SMC 23.60A.906 does not differ materially from that in SMC 23.84A. The motion is denied as to this portion of Foss Issue 1.

¹ Foss's Appeal issues are referenced by the numbers set out in Ex. 5 to DPD's Motion.

7. Issue 3. This issue states that the interpretation misconstrues the allowable scope of principal and accessory uses associated with a cargo terminal, as implemented and enforced by the Department in the past. DPD's motion argues that the issue's focus on past DPD actions raises a claim that is outside the Examiner's jurisdiction for review. Foss argues that the historical implementation of the code affects the deference the Examiner should give this decision. But even if it were shown that DPD had applied the Code differently in the past, DPD would not be prevented from correctly applying the Code in this instance; *Mercer Island v. Steinman*, 9 Wn.App 479, 483, 513 P.2d 80 (1973) (citations omitted). And, to the extent this issue claims that inconsistent implementation of the Code allows the Hearing Examiner to withhold deference or utilize a different standard of review, that claim is also rejected. The reasoning expressed in the cases cited by Foss, *Sleaseman v. Lacey*, 159 Wn.2d 639, 151 P.3d 990 (2007) and *Ellensburg Cement Prods. Inc. v. Kittitas County*, 179 Wn.2d 727, 317 P.3d 1037 (2014) does not change the Code's specific language controlling the Examiner's review of a land use code interpretation in SMC 23.88.020. The Examiner cannot alter this deference on account of DPD's prior permitting or enforcement actions. The portions of Issue 3 which raise the above claims are therefore dismissed.

8. However, Issue 3 as stated is broader than the claims noted above and asserts that the operations here are no different than other activities that have been treated by the City as a cargo terminal use. Information concerning other activities which are considered to be a "cargo terminal use" would be relevant to the Examiner's determination as to whether the activities here constitute a cargo terminal use. Evidence and argument concerning past activities deemed by the City to be a cargo terminal use may be offered at hearing for this purpose.

9. Issue 5. In this issue, Foss refers to SMC 23.84A.040 and 23.42.020, as well as 23.60.940. DPD's motion asserts that the definition of "accessory use" in Ch. 23.84 and the process described in SMC 23.42.020.A do not apply to this case. Under SMC 23.60.900 and 23.60A.900, the definition found in SMC 23.60.940 (23.60A.940) rather than that in Ch. 23.84A controls, because the definitions differ. Under 23.60A.940, the use must be both "incidental and intrinsic," while 23.84A.040 refers only to a use that is incidental to a principal use. SMC 23.42.020.A would not apply here, since cargo terminal and moorage are uses specifically permitted in the industrial environment under SMC 23.50.012. Although the cited 2002 Hearing Examiner decision considered whether a use in a single family zone within the shoreline environment was "customarily incidental," the decision does not indicate that 23.84A.040 or 23.42.020 would apply to this case. To the extent the issue is that the Interpretation is in error for failure to rely on SMC 23.84A.040 and 23.42.020, the motion is granted.

10. Issue 7. Foss claims that the Interpretation is a modification of rights granted under a previously-approved shoreline exemption approved for the replacement of mooring bollards at Terminal 5. Foss argues that because the City failed to appeal the bollard approval and other permits, it is time-barred under *Chelan County v. Nykriem*, 146 Wn.2d 904, 52 P.3d 1 (2002) from "challenging the legality of the Operations under the Land Use Code;" Foss Appeal at page 7. The Examiner's authority to review the Interpretation is limited to that granted by the Code. The Examiner therefore lacks jurisdiction to decide whether DPD was time-barred under LUPA and *Nykriem* from issuing this Interpretation. Foss also argues that the City's prior permitting actions are relevant to the appeal, and as noted above, the City's past determinations of what constitutes a cargo terminal use may aid the Examiner's understanding. However, the claim that DPD was barred from issuing the interpretation, because it failed to appeal the exemption for the bollards, is dismissed.

11. Issue 8. Foss asserts that the even if the operations are not consistent with the permitted principal use, they are a legally nonconforming use under Chapter 23.42 SMC. Foss argues that the Examiner has jurisdiction to consider this claim as part of the appeal, because DPD's decision states that the subject activities require a new permit. DPD's motion asserts that absent a DPD determination establishing the use for record, and an appeal of that determination, the Examiner lacks jurisdiction to decide whether the proposed activities would constitute a legally non-conforming use. DPD's response and reply confirm that the Interpretation does not reach the question of whether the subject activities could be established as uses for the record, and that neither Foss nor the Port is precluded by this Interpretation from applying for a determination to establish the use for the record. Therefore, the question of whether the subject activities are legally nonconforming uses is not properly before the Hearing Examiner in this Interpretation appeal, and is dismissed.

12. Issue 9. Here Foss claims that the "right to proceed with the Operations is a right vested under the Land Use Code and state law under prior permits issued relating to Terminal 5." Foss Appeal, page 7. The Examiner lacks jurisdiction to determine whether Foss has a vested right under the Code or state law, so this claim is dismissed.

13. Issue 11. Foss's response states that it is no longer raising Issue 11 in this appeal. The issue is therefore dismissed.

14. Issues 12, 13 and 14. Issue 12 seems generally to merely dispute the facts in the Interpretation. Therefore, the motion is denied as to Issue 12. As to Issue 13, Foss has not specified in its appeal or response which amendments or modifications to the Interpretation have been made which would violate the procedural requirements of SMC 23.88.020, or which procedural requirements are implicated, and therefore Issue 13 is dismissed. In Issue 14, Foss alleges that DPD intends to expand the Interpretation to cover other uses and activities at Terminal 5. To the extent Issue 14 claims an error in the subject Interpretation, DPD's future intentions are not within the Hearing Examiner's jurisdiction to review in this appeal. Therefore, Issue 14 is also dismissed.

15. Issue 15. DPD's motion anticipates this issue as a challenge to Conclusion 8 in the Interpretation. DPD asserts that SMC 23.42.010 is specifically limited to uses in zones that are regulated by Subtitle III, Division 2, and does not extend to the use regulations of the Shoreline Master Program, which is in Subtitle III, Division 3. The issue as set forth in Foss's appeal statement does not refer to either SMC 23.42.010 or Conclusion 8 of the Interpretation. As stated and as referenced in Foss's response, it refers to whether the Director has authority to interpret or define unlisted principal and accessory uses under the SMP. At this time, the motion is denied as to this issue.

16. Issues 16 and 17. Issue 16 essentially contends that the Interpretation represents a case of arbitrary and inconsistent interpretation and enforcement of the Code against Foss. Issue 17 argues that the Interpretation is based on political and policy considerations outside the Code and is an attempt to legislate new policy and regulations. The Hearing Examiner's review of an interpretation is as authorized under SMC 23.88.020, and requires that the Hearing Examiner make a decision on the same basis as was required of the Director, which does not include alleged political and policy considerations on the part of DPD. The Hearing Examiner is to accord the decision substantial weight. This standard of review is "clearly erroneous," not arbitrary and capricious. Claims that DPD engaged in arbitrary or politically motivated behavior are not within the Hearing Examiner's scope of review under SMC 23.88.020, and Issues 16 and 17 are therefore dismissed.

17. Issue 18. Foss contends that the Interpretation purports to regulate activities occurring on vessels, for example, by considering the use and/or activities of the vessels when at sea, in order to determine whether the activity at Terminal 5 constituted cargo terminal use. DPD's motion argues that SMC 23.60.018 is not applicable, as the Interpretation does not purport to regulate vessel operations at sea. However, Foss's contention is not so narrowly focused on the applicability of SMC 23.60.018 (which is not actually mentioned in the appeal). The issue alleges that the Interpretation relied on the subject vessels' activities at sea in order to classify the vessels' activities at Terminal 5, and that this resulted in an error. The questions raised involve facts and law, and the motion is denied as to Issue 18.

18. Issue 19. Foss claims that the interpretation interferes with the Port's discharge of its rights and duties to operate maritime facilities under the SMA, the SMP, state law and the state constitution. As noted in the discussion of the Port's issues below, the claim that the Interpretation must be reversed because it is contrary to state law or the state constitution raises a claim outside the Examiner's jurisdiction to grant relief.

Port of Seattle

19. As a threshold matter, the Port's response argues that the motion does not seek dismissal of the appeal, but instead seeks to dismiss arguments or reasons for the appeal. It is true that some of the "issues" as presented in the Port's Appeal Statement are more in the nature of arguments or other rationales for the appeal, rather than specific claims. As noted in this Order with regard to both the Foss and Port appeals, not all of the "issues" have been treated as claims that are subject to dismissal. As to whether certain portions of the appeal may be dismissed prior to hearing, the Hearing Examiner Rules authorize the Examiner to dismiss an appeal which fails to state a claim for which the Examiner has jurisdiction to grant relief, or, if it is without merit on its face (akin to a CR 12(b)(6) disposition). Discrete claims within an appeal may therefore be dismissed if HER 3.02(a) is met.

20. Issue 1. DPD moves to dismiss the portion of Issue 1 which refers to the "historical use of Terminal 5," and argues that this is essentially a claim that the subject use is a legally nonconforming use. Although the Examiner would not have jurisdiction in this appeal over that claim (see Foss issue 11), Issue 1 does not make such a claim, and appears to simply argue that the use is similar to historic uses at Terminal 5, which may be relevant to characterizing the use. The motion is denied as to Issue 1.

21. Issues 2 and 3. The Port's Issue 2 asserts that DPD became bound by its February 5, 2015 approval of a shoreline exemption for replacement of mooring bollards after it failed to appeal this decision under LUPA. Citing LUPA and *Nykriem*, the Port asserts that because DPD failed to appeal the Port's determination that the subject use was categorically exempt from SEPA review (because the Port determined that the use would remain essentially the same as the existing use) DPD is barred from determining that the use would constitute a change in use from the legally established cargo terminal use. The Hearing Examiner lacks jurisdiction to determine whether DPD was bound to previous unappealed decisions made by DPD or the Port. Issues 2 and 3 are therefore dismissed.

22. Issue 4. The Port asserts that no shoreline permit is needed, because no development is proposed and the use at issue, moorage, is exempt from permitting requirements. The Examiner

declines to rule on the motion in advance of receiving further relevant evidence and argument. The motion is therefore denied.

23. Issue 5. DPD moves to dismiss the portion of this issue which asserts that the Interpretation wrongly determines that the "right to moor depends on the use that the vessel is put to when at sea, or on the kind of goods the vessel will transport." As noted under Foss 18 above, the motion is denied because questions of fact and law are involved.

24. Issue 6. Here, the appeal states that "it is arbitrary and irrational in a constitutional sense" and outside of the scope of the City's police power under the state constitution, for DPD to have based its determination on the use that the vessel would be put to once it is under navigation elsewhere. Unlike Issue 5 (which, although similar, alleges that the Interpretation is not consistent with the SMA) Issue 6 claims errors for which the Hearing Examiner lacks jurisdiction to grant relief. The cases cited by the Port in its response do not support its contention that the Examiner has authority to strike down DPD's decision on constitutional grounds. In *In the Matter of the Appeal of Duffy Investments, LLC*, MUP-04-027, a design review decision was considered by the Hearing Examiner pursuant to the applicable Code provisions, which specify that the Design Review Board's recommendation must not conflict with "the requirements of state or federal law;" SMC 23.41.014.F. SMC 23.88.020, which controls in this case, does not include such language. In *Johnson v. City of Seattle*, 184 Wn.App. 8, 335 P.3d 1027 (2015), procedural due process at the administrative hearing level was considered, but the case does not support finding that the Examiner has authority to review the constitutionality of DPD's Interpretation. In *In the Matter of the Appeal of Squire Park Committee*, S-98-003, the Hearing Examiner considered whether a homeless shelter in a church was a customarily incidental use under SMC 23.42.020.A. The parties' argument there concerning whether the use was "a constitutionally protected element of religious activity/expression for the parishioners" was deemed "not an issue to be decided here;" Conclusion 5. Because the Examiner lacks jurisdiction over the claim raised in Issue 6, that issue is dismissed.

25. Issue 7. In this issue, the Port asserts that the Interpretation "wrongly makes a vessel's right to moor depend upon the use that the vessel is put to once it casts off its lines, and this determination also ignores half of the definition of accessory use" by focusing on the word "intrinsic" and ignoring the word "incidental." Port Appeal, page 7. DPD's motion disputes the arguments raised by the Port in support of its claim, but facts are required in order to resolve the issue. The motion is denied as to Issue 7.

27. Issue 8. This issue states that "Moorage is permitted as a principal use, and it therefore is permitted as an accessory use regardless of whether it is 'incidental and intrinsic' to a cargo terminal use" and that DPD may not impose limits on time or prohibit provisioning; Port Appeal, page 7. Although not directly acknowledged by the Port's response, the appeal notice implies that if a use is permitted as a principal use in a district, it is an accessory use without having to be determined to be an accessory use. It is not clear what the specific statutory or legal authority would be for this proposition, and it would seem to contradict SMC 23.60.092.A and SMC 23.60A.090. Nevertheless, in advance of a hearing and more information and argument on this issue, the motion is denied.

28. Issue 9. The Port's appeal statement argues that the Interpretation is contrary to the public trust doctrine. As noted in DPD's motion, the doctrine is reflected in the SMA and the City's SMP, and the Examiner would not directly apply the doctrine to a use. The Port's response, however, indicates that

it is simply asking the Examiner to interpret the SMP in conformance with the state doctrine. The motion is denied in light of the clarification provided by the Port as to this issue.

29. Issue 10. This issue asserts that the Interpretation is contrary to RCW 90.58.020 (and therefore the City's SMP) which lists ports as a priority use. The Interpretation concludes that a permit is required, but nothing in RCW 90.58.020 states that priority uses do not require permits. To the extent the claim here is that requiring a permit for the port is prohibited by the priority use provision of RCW 90.58.020, that claim is dismissed.

30. Issue 11. The Port states that the Interpretation is contrary to the adopted shoreline policies of the SMP which are part of the Comprehensive Plan, including LU 270. Although DPD's Motion argues that requiring a permit is not inconsistent with the policies, this issue requires consideration of the facts, and the motion is denied as to Issue 11.

31. Issue 12. This issue claims that the Interpretation is inconsistent with Article XV, Section 2 of the Washington State Constitution. As with Issue 6 above, the Hearing Examiner lacks jurisdiction over this claim, and it is dismissed.

32. Issue 13. This issue claims that the Interpretation is inconsistent with RCW 79.90.475, which authorizes the Port to enter in Port Management Agreements with the state and to act as the state's agent for purposes of managing aquatic lands. The Examiner lacks jurisdiction to grant relief on this basis, so the issue is dismissed.

33. Issue 14. The issue states that Terminal 5 has been used to "moor and provision vessels of all kinds since 1916 and nothing in the City's SMP was intended to, or does change the lawfulness of that use." To the extent this issue claims that the use is legally nonconforming, the claim is dismissed (see Foss Issue 8).

34. Issue 15. This issue states that the Interpretation is an "action" that will have a significant adverse impact on the environment and is subject to SEPA review. Under SMC 25.05.680, the Hearing Examiner lacks jurisdiction over this claim. The issue is dismissed.

35. As noted above, DPD's motion is hereby granted as to Foss Issues 3 (part), 5, 7, 8, 9, 11, 13, 14, 16, 17, and 19. The motion is granted as to Port Issues 2, 3, 6, 10, 12, 13, 14, and 15. The motion is denied as to the other issues identified in the motion.

Entered this 6th day of July, 2015.



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**BEFORE THE HEARING EXAMINER
CITY OF SEATTLE**

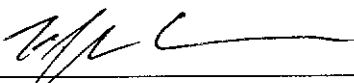
CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this date I sent true and correct copies of the attached **Order on Motion to Dismiss Claims** to each person listed below, or on the attached mailing list, in the matter of **Foss Maritime Company and Port of Seattle**, Hearing Examiner Files: **S-15-001 & S-15-002**, in the manner indicated.

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Dated: July 6, 2015



Tiffany Ku
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