

**BEFORE THE HEARING EXAMINER  
CITY OF SEATTLE**

In the Matter of the Appeals of

**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 FOR RECONSIDERATION**

1. On June 23, 2015, the Hearing Examiner issued an order allowing intervention by the "T-5 Intervenors" (T-5) in the above-referenced appeals, but limiting them to intervention pursuant to Hearing Examiner Rule (HER) 3.09(d), which allows a substantially interested person to intervene for the purpose of preserving an appeal. The Hearing Examiner also permitted T-5 to provide pre- and post-hearing briefs. On July 2, 2015, T-5 requested reconsideration of that order and seek to be able to participate in the hearing. No responses were filed by the other parties. For the reasons stated below, the motion is granted and T-5 will be permitted to participate at hearing but with limits as set forth below.

2. Hearing Examiner Rule 3.20 sets out the grounds upon which a party may seek reconsideration, including irregularity in the proceedings preventing a fair hearing, or a clear mistake as to a material fact.

3. Hearing Examiner Rule 3.09 governs intervention and provides:

(a) Intervention is not a substitute means of appealing a decision for those who could have appealed but failed to do so.

(b) A person, organization or other entity who has not filed an appeal may request by motion to participate in the appeal. The request must state how the person or entity making it is affected by or interested in the matter appealed, and must demonstrate a substantial interest that is not otherwise adequately represented. Except as provided in HER 3.09(d) below, a written request for intervention must be filed with the Hearing Examiner and served on all parties to the appeal no later than 10 business days prior to the scheduled hearing date.

(c) In determining the merits of a request for intervention, the Hearing Examiner shall consider whether intervention will unduly delay the hearing process, expand the issues beyond those stated in the appeal, or prejudice the rights of the parties. If intervention is granted, the Hearing Examiner may limit its nature and scope.

(d) The Hearing Examiner may allow a substantially interested person, organization, or other entity who has not filed an appeal to intervene for the sole purpose of preserving the right to appeal. Such intervention may be permitted at any time up to the start of the hearing.

4. T-5's motion argues that HER 3.20(a)(a) (irregularity in the proceedings) and (a)(4) (mistake as to material fact) apply to the Examiner's June 23 Order. T-5 asserts that the Examiner's order, which granted intervention status under 3.09(d), denies T-5 of the opportunity to participate. T-5 also asserts that a mistake as to a material fact has been made, because the

Order concludes that T-5's substantial interests are adequately represented by the Appellants Foss Maritime and Port of Seattle.

5. As noted in the June 23 Order, under HER 3.09(a), intervention is not a substitute means of appeal for those who could have appealed but failed to do so. While T-5 argues that it is being denied a fair hearing, T-5 did not appeal DPD's decision even though it opposes it. None of the filings indicate why it did not appeal the decision to the Hearing Examiner, or that it was somehow prevented by some procedural irregularity from doing so. Had T-5 appealed, it would have been able to fully participate as an appellant, and to exhaust its administrative remedies in the event of further review. Instead, it now relies on intervenor status, which must be limited by HER 3.09; the limits of HER 3.09 do not constitute a procedural irregularity.

6. T-5 has repeatedly cited the status granted to Intervenor Soundkeeper as support for granting its request, but the entities are differently situated. Soundkeeper would not have been in a position to appeal DPD's decision, since Soundkeeper agrees with DPD's decision. Furthermore, if the Hearing Examiner reverses a DPD decision, it is the final decision for the City. Thus, DPD will not pursue judicial review of the Examiner's decision, so a party who supports DPD's decision is left without recourse if that occurs.

7. To ensure that HER 3.09(a) is met, and that intervention here is not merely a substitute for an appeal that was not filed, the adequacy of representation already provided by the Appellants, and level of participation by the intervenor, must be considered. In this case, the initial order limited T-5 to pre- and post-hearing briefings.

8. T-5's stated interest in the matter has somewhat evolved over the course of its filings, and based on the assertions presented in its motion, the previous order will be amended. The motion asserts that T-5 is not adequately represented by the Appellants Foss Maritime or the Port of Seattle because T-5 represents a broader and more diverse range of the interests affected by DPD's decision, and that T-5's request meets the liberal standard of *Columbia Gorge Audubon Society v. Klickitat County*, 98 Wash. App 618, 989 P.2d 1260 (1999), with regard to whether its interests will be articulated in this proceeding. T-5's motion also indicates that it would agree to limits on participation and coordinate its presentations with the other Appellants, to avoid delays or duplication at hearing. The Examiner agrees that a limited participation at hearing is consistent with HER 3.09, and therefore T-5 will be permitted to call one witness as it indicated it would do at the prehearing conference, and to have its counsel participate in the proceedings.

Entered this 14<sup>th</sup> 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 of Continuance and Order on Motion for Reconsideration** 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.

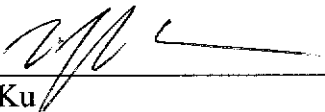
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Dated: July 14, 2015

  
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