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BEFORE THE HEARING EXAMINER  
CITY OF SEATTLE

In the Matter of the Appeal of:	)	Hearing Examiner File:
	)	<b>S-15-001 and S-15-002</b>
	)	
<b>FOSS MARITIME COMPANY</b>	)	THE DEPARTMENT OF PLANNING
	)	AND DEVELOPMENT'S MOTION IN
	)	LIMINE
from an interpretation by the Director,	)	
Department of Planning and Development.	)	
	)	

**I. RELIEF REQUESTED**

DPD respectfully seeks an order excluding evidence on matters the Hearing Examiner has dismissed from this Appeal in the Examiner's Order on Motion to Dismiss Claims issued July 6, 2015 ("Order"). The Examiner determined that:

- The Examiner lacks jurisdiction to hear claims based on laws other than those set out in SMC 23.88.020.
- Allegations that the Interpretation was politically motivated are not within the scope of this appeal.
- The Examiner lacks jurisdiction concerning DPD's future intentions.
- DPD's application of the Code in the past does not prevent DPD from correctly applying the Code in this instance; and DPD's the City's prior permitting actions

1 and determinations are relevant to the Hearing Examiner's understanding of what  
2 constitutes "cargo terminal" use.

## 3 II. FACTS

### 4 A. Issues outside the Hearing Examiner's jurisdiction.

5 The Order dismisses several of Appellants claims that are based on state statutes or  
6 constitutional provisions, stating: "[T]he claim that the Interpretation must be reversed because it is  
7 contrary to state law or the state constitution raises a claim outside the Examiner's jurisdiction to  
8 grant relief."<sup>1</sup> The Order recognizes the Hearing Examiner's jurisdiction is limited to the same  
9 scope as the Director's interpretation under SMC 23.88.020.G.5.<sup>2</sup>

### 10 B. Politically motivated actions

11 The Order, in dismissing Foss Issues 16 and 17, states the Hearing Examiner is required to  
12 "make a decision on the same basis as was required of the Director, which does not include alleged  
13 political and policy considerations on the part of DPD. . . . Claims that DPD engaged in arbitrary or  
14 politically motivated behavior are not within the Hearing Examiner's scope of review."<sup>3</sup>

15 The Hearing Examiner also issued an Order on Motion for a Protective Order Concerning  
16 the Deposition of Andrew McKim that excludes examination on matters to show political  
17 motivation and prejudice.<sup>4</sup>

### 18 C. Future actions of DPD

19 The Order dismisses Foss Issue 14, which alleges that DPD intends to expand the  
20 Interpretation to cover other uses and activities at Terminal 5. The Examiner ruled, "DPD's future  
21

22 <sup>1</sup> Order, p. 4, paragraph 18; *see also* p. 5, paragraph 24, and page 6, paragraphs 31 and 32.

23 <sup>2</sup> Order, p. 1, paragraph 4.

<sup>3</sup> Order, p. 3, paragraph 16.

<sup>4</sup> Order on Motion for a Protective Order Concerning the Deposition of Andrew McKim, p. 1.

1 intentions are not within the Hearing Examiner's jurisdiction to review in this appeal."<sup>5</sup>

2 **D. DPD determinations concerning cargo terminals**

3 The Order states:

4 Evidence and argument concerning past activities deemed by the  
5 City to be a cargo terminal use may be offered at hearing for this  
purpose.<sup>6</sup>

6 Similarly, on Issue 7, rejecting Foss's claim that under *Nykreim* the City's failure to  
7 appeal a bollard replacement permit barred the City from issuing the Interpretation, the Order  
8 states,

9 Foss also argues that the City's prior permitting actions are  
10 relevant to the appeal, and as noted above, the City's past  
determinations of what constitutes a cargo terminal use may aid the  
11 Examiner's understanding.<sup>7</sup>

12 And, the Hearing Examiner's Order on the Deposition of Andrew McKim stated that  
13 subject area 2, "DPD past approvals of activities on other sites" is reasonably calculated to lead  
14 to the discovery of admissible evidence.<sup>8</sup>

15 With respect to enforcement actions, Foss Issue 3 claimed that "the Interpretation  
16 misconstrues the allowable scope of principal and accessory uses associated with a 'cargo terminal,'  
17 as that term has been . . . enforced by the department in the past."<sup>9</sup> The Order ruled that "even if it  
18 were shown that DPD had applied the Code differently in the past, DPD would not be prevented  
19 from correctly applying the Code in this instance; *Mercer Island v. Steinman*, 9 Wn. App, 479,  
20 483, 513 P.2d 80 (1973) (citations omitted)."<sup>10</sup> However, the Hearing Examiner's Order on the

21 <sup>5</sup> Order, p. 3, paragraph 14.

22 <sup>6</sup> *Id.*

23 <sup>7</sup> Order, p. 2, paragraph 10.

<sup>8</sup> Order on Motion for a Protective Order Concerning the Deposition of Andrew McKim, page 1, paragraphs 1 and 5.

<sup>9</sup> Foss Amended Notice of Appeal 3, page 6, lines 3-6, referred to in the Hearing Examiner's Order as Issue 3.

<sup>10</sup> Order, p. 2, paragraph 7.

1 Deposition of Andrew McKim stated that “DPD enforcement or lack of enforcement of activities  
2 on other sites” is reasonably calculated to lead to admissible evidence regarding issues on  
3 appeal.<sup>11</sup>

4 **E. Appellants’ exhibit and witness lists**

5 Appellants produced their exhibit lists on July 21 and sought leave to supplement them to  
6 add documents by July 30, which the Hearing Examiner allowed. On July 28, DPD filed its  
7 witness and Exhibit lists. On July 29, the parties discussed DPD’s concerns the scope of some of  
8 the Appellants exhibits. On July 30, appellant the Port of Seattle revised its witness and exhibit  
9 list; Foss and Terminal 5 Intervenors did not supplement their lists. The parties agreed to refine  
10 exhibits, and Appellants agreed to provide documents August 3-5.

11 **III. NEW ISSUES IN PORT’S WITNESS LIST**

12 The Port’s witness list includes a witness whose testimony should be limited: he is  
13 proposed to testify about laws over which the Hearing Examiner has no jurisdiction, and the  
14 testimony is an amendment to the Port’s Appeal Issues after the deadline. In addition, the non-  
15 legal subject matter of his testimony is outside the scope of this appeal.

16 The Port’s first witness list states:

17 4. **Thomas Tanaka**, Senior Port Counsel. Mr. Tanaka may testify  
18 about how Federal regulations prohibit the Port from  
19 discriminating against or among vessels based on the purpose or  
20 use of the vessels.

21 On July 30, the Port amended the description by adding: “Mr. Tanaka may also testify about  
22 moorage at Port Facilities.”

23 DPD requests that Mr. Tanaka not be allowed to testify about “Federal regulations,”  
because they are outside the Hearing Examiner’s authority under SMC 23.88.020G.5. That

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<sup>11</sup> Order on Motion for a Protective Order Concerning the Deposition of Andrew McKim, p. 1, paragraphs 1 and 5.

1 section limits the Examiner's review to the same scope as the Director's in issuing the  
2 Interpretation. That does not include Federal regulations. *See* Order, p. 5, paragraph 6.

3 In addition, to the extent the Port contends that federal regulations are a basis for  
4 overturning DPD's interpretation, this is a new issue raised outside the time allowed under HER  
5 3.05, allowing amendment for good cause within 10 days after filing, which has long passed.

6 Finally, the general description of the scope of Mr. Tanaka's other testimony about  
7 "moorage at Port Facilities" is outside the scope of this Interpretation on moorage at "cargo  
8 terminals." Without waiving other objections to his testimony, DPD asks that Mr. Tanaka's  
9 testimony be limited to moorage at cargo terminals.

10 **IV. TESTIMONY AND EVIDENCE ON POLITICAL MOTIVATION**

11 The Hearing Examiner has ruled that claims based on political motivation are outside the  
12 Examiner's jurisdiction.<sup>12</sup> Therefore, DPD respectfully requests that an order be entered  
13 precluding questions, testimony, and evidence showing or implying political motivation. For  
14 example, in the deposition of Andy McKim Foss attempted to elicit testimony suggesting that the  
15 timing of the Interpretation issuance was politically motivated.<sup>13</sup>

16 In addition, Foss has proposed as exhibits:

17 41. Press releases pertaining to the Interpretation, Terminal 5,  
18 Foss, cargo terminals, shell, or other issues relevant to this appeal.

19 42. Media articles pertaining to the Interpretation, Terminal 5,  
20 Foss, cargo terminals, shell, or other issues relevant to this appeal.

21 Foss has not yet provided DPD with the specific press releases Foss intends to offer, but Foss's  
22 counsel said, as an example, that Foss would offer a press release from the Mayor as an

23 <sup>12</sup> Order, p. 3, paragraph 16 and Order on Motion for a Protective Order Concerning the Deposition of Andrew  
McKim, p. 1, paragraphs 1 and 5..

<sup>13</sup> Deposition transcripts have been received by DPD counsel, but not yet read by the deponent because he is out.

1 “admission.” While a ruling on specific evidence is not possible now, because the evidence has  
2 not yet been produced, an Order excluding evidence of political motivation will establish a  
3 standard to be applied to specific examination, testimony, or exhibits at the hearing.

#### 4 V. FUTURE ACTIONS OF DPD

5 The Port has offered as exhibits:

6 5. DPD shoreline permits for Port maritime facilities, including  
7 Terminal 5, Terminal 91, Pier 66, and Pier 69.

8 6. Assorted photographs, maps, and site plans that depict the  
9 Port’s maritime facilities and vessels mooring at such facilities.

10 8. Vessel Activity Report of Piers 48, 66, and 69, January 1996 to  
11 May 2000.

12 The evidence will show that some of these facilities do not have cargo terminal use  
13 permits. When counsel for DPD inquired why the Port included permits, photographs and  
14 information for sites that do not have permits for cargo terminal use, counsel for the Port replied  
15 to the effect that owners of properties with other uses could be affected by the Interpretation; he  
16 based this on Mr. McKim’s alleged<sup>14</sup> deposition testimony that the logic of the Interpretation<sup>15</sup>  
17 could be applied to other uses at other sites.

18 This argument is even more attenuated than the issue the Examiner’s Order rejected as  
19 outside the Examiner’s jurisdiction. Foss Issue 14 contended that DPD might apply the  
20 Interpretation to cover actions at Terminal 5 other than mooring the oil rig; the Examiner  
21 dismissed this claim because “DPD’s future intentions are not within the Hearing Examiner’s  
22 jurisdiction to review in this appeal.”<sup>16</sup> DPD’s future intentions with respect to other uses at sites

23 <sup>14</sup> At the time of the discussion the deposition transcript had not been transcribed.

<sup>15</sup> A site may provide moorage for only vessels that have been carrying out the activities authorized by the site’s use permit (e.g., a passenger vessel may lawfully moor at a site with a passenger terminal use, but not a grain carrier.)

<sup>16</sup> Order, p. 3, paragraph 14.

1 other than Terminal 5 is outside the Examiner's jurisdiction, as well. While permits for other  
2 uses such as fish processing or marine terminal may raise similar questions, determining the  
3 scope of such uses involves different facts from determining the meaning of the use "cargo  
4 terminal," and whether oil rig moorage is consistent with that definition.

5 Similarly, Foss lists a category of exhibits that may include more than "cargo terminals:"

6 25. Additional permits, exemptions, other documentation issued by the City of Seattle for  
7 terminals and other properties in Puget Sound (in discussion Foss agreed these would be  
8 limited to the City of Seattle).

9 It is not clear to DPD what "terminals" refers to; there is a defined use "passenger terminal," and  
10 permits often use the undefined term "marine terminal." Neither of those uses is at issue in this  
11 case, and this evidence should be limited to cargo terminals.

12 Therefore, DPD requests an order excluding testimony and exhibits concerning sites that  
13 do not have cargo terminal uses.

## 14 VI. PAST ENFORCEMENT ACTIONS

15 Foss's exhibits specifically include DPD's past enforcement actions:

16 37. Records of DPD enforcement actions regarding vessel  
17 moorage.

18 In addition, Foss has listed:

19 24. Illustrative drawings renderings and Photographs of Terminal 5,  
20 Terminal 91 and other cargo terminals.

21 And, the Port has identified:

22 6. Assorted photographs, maps, and site plans that depict the Port's maritime facilities and  
23 vessels mooring at such facilities.

7. Photographs that depict prior moorage by oil drilling rigs in Seattle.

1 Counsel for the Appellants have provided pictures of 3 oil rigs that the Port allowed to  
2 moor at Terminal 91 in the 1970's and 1980's, which they intend to offer.

3 As set out above, in Section II.D, the Examiner's Order rules that past enforcement does  
4 not preclude DPD's issuing an Interpretation that is inconsistent with such enforcement and that  
5 DPD's determinations about cargo terminal permits in the past are relevant:

6 Foss also argues that the City's prior permitting actions are  
7 relevant to the appeal, and as noted above, the City's past  
8 determinations of what constitutes a cargo terminal use may aid the  
9 Examiner's understanding.<sup>17</sup>

10 These photos are not a "determination" by DPD that this moorage is part of a cargo  
11 terminal. There is no presumption that because this moorage occurred this is a DPD  
12 determination or approval. These photos are not even an action by DPD, they simply record  
13 actions taken by the Port in allowing oil rigs to moor at Terminal 91.

14 Mooring oil rigs at a cargo terminal is inconsistent with the Interpretation, but under  
15 *Mercer Island* this past activity by the Port is not relevant to the determination of what the  
16 definition of cargo terminal means.

17 Similarly, prior DPD enforcement actions - real actions - that might be inconsistent  
18 should be excluded under *Mercer Island*.<sup>18</sup>

19 These photographs and exhibits of inconsistent enforcement actions should be excluded.

## 20 VII. CONCLUSION

21 DPD respectfully requests the Examiner to issue an order generally excluding evidence of  
22 political action, evidence concerning sites that do not have cargo terminal permits, and evidence

23 <sup>17</sup> Order, p. 2, paragraph 10.

<sup>18</sup> The Appellants have not yet provided the specific exhibits this category covers.



1 of inconsistent enforcement actions, as outside the scope of the appeal, based on Examiner's  
2 Order on Motion to Dismiss Claims.

3 In addition, DPD asks the Examiner for an order excluding or limiting the testimony of  
4 Thomas Tanaka and excluding the photos of the oil rigs at Terminal 5, for the reasons stated  
5 above.

6 DATED this 3rd day of August, 2015.

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1 **CERTIFICATE OF SERVICE**

2 I certify that on this date, I electronically filed a copy of the **Department of Planning**  
3 **and Development's Motion in Limine** 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  
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9 the foregoing being the last known address of the above-named parties.

10 Dated this 3<sup>rd</sup> day of August, 2015, at Seattle, Washington.

11  
12   
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