BEFORE THE HEARING EXAMINER
THE 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: S-15-001 and S-15-002 (Director's Interpretation: 15-001) **PORT OF SEATTLE'S RESPONSE TO DPD'S MOTION IN LIMINE**

I. INTRODUCTION

In this brief the Port responds to the two sections of DPD's motion in limine that are directed at the Port:

- Section III, which asks the Hearing Examiner to prohibit Senior Port Counsel Tom Tananaka from testifying about the conflict between the Interpretation and the Port's legal obligation not to discriminate among vessels, and from testifying about moorage at any Port facility that is not a cargo terminal; and
- Section V, which asks the Hearing Examiner to exclude additional evidence about the effect that the Interpretation will have on Port facilities that are not cargo terminals.

DPD's motion is without merit and should be denied for the reasons discussed below.

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II. ARGUMENT

A. The Relief the City Seeks Is Not Appropriate in this Hearing Examiner Appeal.

A motion in limine is typically brought when a case is tried to a jury, so that the probative value of relevant evidence can be weighed against its prejudicial effect outside the presence of the jury, pursuant to ER 403:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Motions in limine are usually not appropriate in cases like this one that do not involve a jury, and when the trier of fact is the same person who rules on the admissibility of evidence. As explained by the Ninth Circuit:

> "The term "in limine" means 'at the outset.'...A motion in limine is a procedural mechanism to limit in advance testimony or evidence in a particular area. In the case of a jury trial, a court's ruling 'at the outset' gives counsel advance notice of the scope of certain evidence so that admissibility is settled before attempted use of the evidence before the jury. Because the judge rules on this evidentiary motion, in the case of a bench trial, a threshold ruling is generally superfluous. It would be, in effect, "coals to Newcastle," asking the judge to rule in advance on prejudicial evidence so that the judge would not hear the evidence. For logistical and other reasons, pretrial evidentiary motions may be appropriate in some cases. But here, once the case became a bench trial, any need for an advance ruling evaporated.

United States v. Heller, 551 F.3d 1108, 1111-12 (9th Cir. 2009) (internal citations omitted). Judge Richard A. Jones of the Western District of Washington recently quoted the "coals to Newcastle" language from *Heller* and then stated:

> In general, a court in a bench trial is better served to permit parties to present evidence at trial, then resolve any objection to the admissibility of the evidence in the context of its use at trial.

Knecht v. Nat. Title Insr. Co., No. C12-1575RAJ, 2015 WL 1514911, at 3 (W.D. Wash. Feb. 27, 2015),

To use Judge Jones' language, the Hearing Examiner is not well-served by DPD's motion because it asks the Hearing Examiner to accept DPD's theory of the case, accept DPD's

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assertions about the purpose for which evidence will be offered by an adverse party, and then rule in a factual vacuum that evidence should be excluded. To the extent that DPD wants to challenge presentation of specific evidence, DPD should be required to raise an objection at the hearing while evidence is being offered, when the Examiner has the proper context to consider and resolve DPD's objection.

B. The Evidence the City Seeks to Exclude is Relevant to the Issues on Appeal.

DPD's motion does not identify the Evidence Rule that DPD's believes justifies exclusion of evidence. DPD makes no effort to demonstrate that the Port's evidence should be excluded pursuant to ER 403 (the usual basis for a motion in limine), and therefore its motion necessarily is based on an implicit assertion that the evidence is simply not relevant. DPD's assertion is without merit and the evidence is relevant.

According to the Rules of Evidence:

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

ER 401. There are multiple reasons why the evidence that DPD seeks to exclude in limine is relevant, not least because it helps demonstrate the absurdity of the Interpretation.

DPD's apparent theory of the case is that the Interpretation should be reviewed in isolation, without reference to its effect on the Port's operations. The evidence will show that such indifference to the effect of the Interpretation is consistent with how DPD prepared the Interpretation, but statutes and ordinances must be interpreted in a manner that does not lead to an absurd result in the real world.

> Courts also avoid interpreting a statute in a way that leads to an absurd result because we presume the legislature did not intend an absurd result."

Olympic Tug & Barge, Inc. v. Washington State Dep't of Revenue, 163 Wn. App. 298, 307, 259 P.3d 338, 343 (2011) (internal citations omitted). Whether an interpretation leads to an "absurd result" cannot be determined in a factual vacuum: such a determination requires an inquiry into

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the real-world consequences of an interpretation. A concise factual example is *Knappett v. Locke*, 92 Wash.2d 643, 645, 600 P.2d 1257 (1979), where the Washington Supreme Court found that Petitioners' proposed interpretation of "grade" in the Lake Forest Park municipal code was absurd because the Petitioner's interpretation would result in a basement being classified as a story even if the basement was otherwise almost wholly underground.

> Petitioners rely upon that provision in contending "grade" is the One lowest point anywhere around the building and within five feet thereof. That interpretation produces absurd results and ignores other language in the ordinance. It is a rule of construction that a statute or ordinance is not construed so as to reach an absurd result. Yakima First Baptist Homes v. Gray, 82 Wash.2d 295, 301, 510 P.2d 243 (1973); Lenci v. Seattle, 63 Wash.2d 664, 671, 338 P.2d 926 (1964); In re Horse Heaven Irr. Dist., 11 Wash.2d 218, 226, 118 P.2d 972 (1941). Every part of an act should be given effect if possible. State ex rel. Wilson v. King County, 7 Wash.2d 104, 108, 109 P.2d 291 (1941); McKenzie v. Mukilteo Water Dist., 4 Wash.2d 103, 112, 102 P.2d 251 (1940); Chlopeck Fish Co. v. Seattle, 64 Wash. 315, 322-23, 117 P. 232 (1911).
>
> ABSURD RESULT. The possibility of an absurd result is great from using the one lowest point anywhere in the area adjacent to the building. If an outside entrance into the basement exists that entrance extends to the basement floor and, thus, probably more than six feet below the basement ceiling. This situation results in a basement being classified as a "story" even if the **1259 basement is otherwise almost wholly underground. A similar situation exists if there is an excavation to admit light and air to a basement window. These results obviously were not intended in the enactment sof ordinance No. 214.

The Supreme Court in *Knappett v. Locke* looked at the real world effect of a code interpretation, and rejected it because the effect would be absurd. The evidence that DPD seeks to suppress in limine is part of the evidence that the Port will present about the real-world effect of the Interpretation, which makes unlawful a significant portion of the Port's maritime business, without *any* benefit to the public health, safety or welfare, let alone a benefit that might justify such an absurd effect on the operations of a public port. The Port provides moorage to all vessels that need moorage, and the Port provides such moorage consistently with the Port's obligations as a public port, without regard to the purpose of the vessel or the use the vessel may be put to on an ocean far away,.

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As explained by Mr. McKim in his deposition, the Interpretation allows only vessels whose "primary purpose" is transporting cargo to moor at cargo terminals, regardless of whether they are loading and unloading cargo, and the logic of the Interpretation means that only vessels whose primary purpose is transporting passengers can moor at passenger terminals. The Interpretation thus means that the many other kinds of vessels that moor at the Port's cargo and passenger terminals, including NOAH and University of Washington research vessels, fishing vessels, Navy and Coast Guard vessels, ships of state, tug boats, and construction vessels, are mooring unlawfully.

It would be hard to find a more forceful example of an absurd result. DPD is asking the Hearing Examiner to rule as a matter of law that evidence of an absurd result is not relevant to interpreting the City's code, and DPD's motion must be denied.

RESPECTFULLY SUBMITTED this 7th day of August, 2015.

PORT OF SEATTLE

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned a resident of the State of Washington, over the age of eighteen years, not a party to the above-entitled action, and competent to be a witness herein.

On August 7, 2015, I caused the foregoing document to be served as follows:

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