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BEFORE THE HEARING EXAMINER
FOR 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 Nos.
S-15-001; S-15-002
(Director’s Interpretation: 15-001)

**FOSS MARITIME’S OPPOSITION TO
DEPARTMENT OF PLANNING AND
DEVELOPMENT’S MOTION IN
LIMINE**

I. INTRODUCTION

Foss Maritime Company (“Foss”) requests that the Hearing Examiner deny the Motion in Limine (“Motion”) filed by the Department of Planning and Development (“Respondent” or “DPD”). As DPD acknowledges, the Hearing Examiner has already twice considered the issues presented by the Motion, and has twice ruled that most of the challenged evidence is relevant to this appeal. The Motion is ultimately a request for reconsideration of these rulings, and the Hearing Examiner should decline to revisit issues already correctly decided. Foss hereby joins in the opposition to the Motion filed by the Port of Seattle (“Port”).

II. AUTHORITY & ARGUMENT

DPD seeks to exclude three general categories of evidence that Foss may offer: (1)

1 evidence of what DPD calls “past enforcement actions;” (2) evidence of what DPD
2 characterizes as “future actions of DPD;” and (3) evidence that demonstrates political
3 motivation behind the Interpretation’s conclusions. None of this evidence should be excluded.

4 **A. The Evidence Characterized By DPD As “Past Enforcement Actions” Is Relevant**
5 **And Should Be Admitted.**

6 Under its broad mischaracterization of “past enforcement actions,” DPD seeks to
7 exclude the following: (1) records of DPD enforcement actions regarding vessel moorage; (2)
8 drawings, renderings, and photographs of Terminal 5, Terminal 91, and other cargo terminals;
9 (3) photographs, maps, and site plans depicting the Port’s maritime facilities and vessels
10 mooring at such facilities; and (4) photographs depicting prior moorage by oil drilling rigs in
11 Seattle. Mot. At 7-8.¹ While conceding that the Hearing Examiner already has ruled that
12 “DPD’s determinations about cargo terminal permits in the past are relevant,” DPD argues that
13 this evidence is not a “determination” by DPD and thus should be excluded.

14 As DPD acknowledges elsewhere in the Motion – but ignores here – the Hearing
15 Examiner already has ruled that evidence regarding “DPD enforcement **or lack of**
16 **enforcement of activities on other sites**” is relevant to and admissible on the issues on
17 appeal.² The challenged evidence demonstrates exactly that: DPD never has enforced, or even
18 sought to enforce, the position it now has taken in the Interpretation that only “cargo vessels”
19 are allowed to moor at cargo terminals, and only while loading and unloading. The fact that
20 some of the evidence may not be a formal “determination” in the form of an enforcement
21 decision is of no moment – and indeed, that DPD has not made any prior “determinations” of
22 the sort reflected in the Interpretation is precisely the point.

23 The Hearing Examiner also has ruled that “[e]vidence and argument concerning past
24

25 ¹ Much of this evidence has little to do with “enforcement actions,” but the City has repeatedly tried to
26 characterize the evidence in that fashion in order to create the impression that it is only relevant to one issue.

² *Order on Motion for a Protective Order Concerning the Deposition of Andrew McKim* at pp. 1-2 (emphasis added).

1 activities deemed by the City to be a cargo terminal use” may be offered at the hearing.³ Foss
2 will show that the City has itself characterized “homeport” activity, consisting of long term
3 moorage of non-cargo vessels, as appropriate in a facility permitted as a “cargo terminal.” Foss
4 will also show that, for purposes of short or long term moorage, the City has never made any
5 distinctions between vessels whose primary purpose is transporting cargo, and vessels who
6 have other primary purposes. The so-called “Past Enforcement Action” evidence is plainly
7 relevant to those issues: Foss will show activities occurring every day for decades at cargo
8 terminals, and the City’s actions and statements about those activities. DPD contends that
9 “[t]here is no presumption that because this moorage occurred this is a DPD determination or
10 approval,” Mot. at 8, but the issue is what the term “cargo terminal” means, as demonstrated by
11 the actions of both the regulator and those who are regulated. As the Hearing Examiner has
12 already ruled, such evidence is relevant and admissible.

13 DPD also claims that evidence of its past enforcement actions and/or historical moorage
14 of oil rigs at cargo terminals should be excluded under *Mercer Island v. Steinman*, 9 Wn. App.
15 483, 513 P.2d 80 (1973) because even if DPD failed to apply the Code correctly in the past, it is
16 not precluded from doing so now.⁴ Mot. at 8. Once more, DPD’s argument is that the evidence
17 is relevant only to one issue, when the Hearing Examiner has already ruled that evidence of
18 activities that have been allowed at cargo terminals is relevant to what constitutes a cargo
19 terminal use and may be offered at the hearing.

20 **B. The Evidence Described By DPD as “Future Actions Of DPD” Is Also Evidence Of**
21 **Cargo Terminal Usage And Should Not Be Excluded.**

22 DPD seeks to exclude certain evidence offered by both Foss and the Port regarding
23 shoreline permits, photographs, and other information concerning vessel moorage at certain
24 Port facilities. This is evidence of cargo terminal uses, is plainly relevant, and should be

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³ *Order on Motion to Dismiss* at ¶ 8.

26 ⁴ Highlighting DPD’s absurdly narrow view of relevance, it contends that historical “photos of the oil rigs at Terminal 91” should be excluded – in an appeal concerning an oil rig mooring at a cargo terminal. Mot. at 9.

1 admitted.

2 DPD argues that this evidence should be excluded because “evidence will show that
3 some of these facilities do not have cargo terminal use permits.” Mot. at 6. This is not a basis
4 for a blanket order excluding all such evidence, or for making a ruling in the absence of a
5 foundational offer of proof. DPD’s apparent belief that it can challenge “some” documents is
6 not a ground for *in limine* exclusion of Foss’s or the Port’s evidence – it is simply an
7 foundational issue for the Hearing Examiner to resolve when the documents are offered.

8 DPD also suggests that this evidence is relevant only to DPD’s “future activities,” but
9 that is not correct. Again, this evidence is relevant to uses allowed at cargo terminals, past and
10 present – one of the central issues in this appeal.

11 **C. DPD’s Objection To Evidence Of “Political Motivation” Is Premature And**
12 **Unworkable.**

13 DPD also seeks an order precluding “questions, testimony, and evidence showing or
14 implying political motivation.” Mot. at 5. This request is impossibly overbroad and should be
15 denied on that basis. Some evidence in this matter – for example, the fact that the Mayor and
16 the City Council directed DPD to perform the Interpretation – “shows or implies” political
17 motivation. Such evidence is also material to other relevant issues, however, including the
18 background of the Interpretation, how it was prepared, the persons involved, the timing, etc.
19 This is but one example – simply because evidence may “show” or “imply” a political
20 motivation does not mean the evidence is irrelevant to all issues before the Hearing Examiner.
21 An order precluding all evidence of any kind that “show” or “imply” the involvement of
22 politics, in the abstract, is unsupported by the law and is simply unworkable as a practical
23 matter. Perhaps recognizing that it is overreaching, DPD admits “a ruling on specific evidence
24 is not possible now.” Mot. at 6. If DPD wishes to object to an exhibit when offered, or to a
25 question asked of a witness, the Hearing Examiner can rule on specific evidence at that time.

26 Further, DPD apparently objects – but does not actually ask the Hearing Examiner to

1 exclude – to press releases and media articles pertaining to the Interpretation, Terminal 5, Foss,
2 cargo terminals, and other issues relevant to this appeal, again in the abstract.⁵ DPD claims that
3 an order excluding evidence of political motivation “will establish a standard” to apply to
4 specific evidence, but such an abstract standard is unnecessary and unworkable, and is a waste
5 of time to consider. This is not a jury trial; there is no chance that the Hearing Examiner will
6 be improperly affected by this issue, if it is in fact deemed to be irrelevant. Again, DPD should
7 be required to object to evidence as it is presented at the hearing, and the Hearing Examiner
8 may issue rulings at that time as she sees fit.

9 **III. CONCLUSION**

10 For the reasons stated above, the Motion should be denied.

11 DATED this 7th day of August, 2015.

12 GARVEY SCHUBERT BARER

13 

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21 By _____

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25 ⁵ Counsel for DPD initially took the position that such exhibits would be hearsay, but as Foss’s counsel explained,
26 they fall within the hearsay exception for party admissions. The purpose of DPD’s reference to this conversation
is unclear.

1 **CERTIFICATE OF SERVICE**

2 I, Dominique Barrientes, certify under penalty of perjury under the laws of the State of
3 Washington that on August 7, 2015, I caused to be served the foregoing document, FOSS
4 MARITIME'S OPPOSITION TO THE DEPARTMENT OF PLANNING AND
5 DEVELOPMENT'S MOTION IN LIMINE, on the person(s) identified below in the manner
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Dated at Seattle, Washington, this 7th day of August, 2015.



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