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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 PRE-HEARING
BRIEF**

The Port of Seattle moors vessels according to the needs of the vessels and the moorage space available at the Port's facilities. Until DPD issued its Interpretation on May 4, 2015 (the date of the Mayor's speech at the Climate Solutions breakfast at which he announced the Interpretation, and three days before the official date of the Interpretation), the City never questioned such moorage.

Specifically, the City did not question the Port's moorage of vessels when it enacted its first Shoreline Master Program (SMP) in 1977. Nor did the City question the Port's moorage of vessels at any time during the City's eight-year-process to update its Shoreline Master Program (SMP). This process began in 2007 and concluded on June 15, 2015, after the issuance of the Interpretation, when the new SMP took effect. The Port actively participated in the SMP update process in order to ensure that the Port's operations, which are a "priority" use under the SMA, RCW 90.58.020, would not be compromised. At no point during the process of updating the

1 SMP did DPD staff or the City's elected officials indicate any concern with or desire to change
2 how the Port moors vessels at its maritime facilities. Nor did the City question the Port's
3 moorage of vessels when it considered and issued permits at Terminal 91, where vessels of all
4 types have moored for decades. Indeed, in issuing those permits, the City itself noted the on-
5 going moorage as an essential element of the operations of that cargo terminal.

6 All vessels must moor in order to load and unload provisions and other cargo, crew, and
7 passengers, and to undertake the endless maintenance that is needed to keep vessels seaworthy.
8 Often vessels moor simply to safely await their next voyage, since many vessels, including those
9 in the Alaskan fishing fleet, operate seasonally or intermittently.

10 In March of this year, however, outside of any legislative process, the Mayor and City
11 Council asked DPD to determine whether the moorage of a drilling rig and a number of support
12 vessels at Terminal 5 was lawful. In response, DPD first prepared a draft Interpretation that
13 concluded that such moorage was lawful and that there is no principled way to distinguish
14 moorage of a drilling rig and its associated support vessels that load and unload cargo, provisions
15 and stores, take on crew, and effect minor maintenance, from all the other vessels that undertake
16 these same activities.

17 After many subsequent drafts of the Interpretation and many "arguments" (to use the
18 word Andy McKim used in his deposition) with the City's lawyers, DPD produced a final
19 Interpretation that reaches the opposite conclusion. DPD's rationale for prohibiting moorage of
20 these vessels at Terminal 5 is that any vessel that wants to moor at a cargo terminal must satisfy
21 two requirements that are nowhere to be found in the code itself: (1) the "primary function" of
22 the vessel must be transporting cargo in the course of commerce, and (2) the vessel must be at
23 the cargo terminal in order to actually load and unload cargo (not just to moor or "layberth").

24 The Interpretation thus imposes two requirements on the Port and the maritime
25 community that are made from whole cloth and not found in the code. Additionally, by focusing
26 on the "primary function" of the vessel, the Interpretation works a profound and ultimately

1 absurd departure from precedent and law by purporting to regulate vessels and conditioning a
2 vessel's right to moor in navigable waters on permission from DPD. A search by the Port's
3 attorneys of more than 20 years of on-line decisions of the Shorelines Hearings Board (since
4 1994) failed to identify a single instance where a city or county required a permit for a vessel to
5 moor. This is not surprising since the Shoreline Management Act regulates "development," and
6 a "use" is not "development" regulated by the SMA unless the use is a "project of a permanent or
7 temporary nature which interferes with the normal public use of the surface of the waters." RCW
8 90.58.030(3)(a). Moorage is not a "project," and it does not interfere with the normal public use
9 of the surface of the waters. This is because moorage, and the piers and other facilities at which
10 moorage occurs, are a normal public use of the surface of the waters:

11 The very genesis of the SMA was concern for the preservation of navigational
12 values, expressed through the public trust doctrine. *See Wilbur v. Gallagher*, 77
13 Wn.2d 306, 462 P.2d 232 (1969); *Orion Corp. v. State*, 109 Wn.2d 261, 747 P.2d
1062 (1987) . . . There is in the Act a built-in pro-navigational bias, serving as the
backdrop for all planning and use conflict decisions.

14 *Sperry Ocean Dock v. City of Tacoma*, SHB Nos. 89-4 & 89-7, Final Findings of Fact,
15 Conclusions of Law, and Order, March 1, 1990, Conclusion of Law IX.

16 DPD's Interpretation expresses an anti-navigational bias. The testimony at the hearing
17 will demonstrate that many kinds of vessels depend upon the Port's cargo terminals for moorage
18 even though the "primary function" of the vessels is not the transportation of cargo, including
19 research vessels, training vessels, law enforcement vessels, Navy vessels, foreign ships of state,
20 construction vessels, and fishing vessels. And many of these vessels, including cargo vessels,
21 moor at cargo terminals without loading or unloading cargo. In other words, the evidence will
22 demonstrate that DPD's Interpretation has an absurd effect by making unlawful much of the
23 ordinary and necessary business of the maritime industry.

24 In its reply brief to its motion to dismiss, DPD asserted that a permit for moorage is
25 required by SMC 23.40.002.A, which is not part of the SMP:
26

1 The establishment or change of use of any structures, buildings or premises, or
2 any part thereof, requires approval according to the procedures set forth in
3 Chapter 23.76 . . .

4 This language requires a permit to use “structures, buildings, or premises,” which of
5 course includes the piers or other mooring structures to which a vessel attaches its mooring lines,
6 and the Port’s moorage facilities all have such permits. A vessel’s use of the navigable waters
7 that adjoin a cargo facility is not a separate use, however, that requires a separate approval from
8 DPD: a vessel’s use of the navigable waters that adjoin a pier is inherent in, and intrinsic to, the
9 use of the pier because without moorage a cargo facility cannot function. DPD’s Interpretation is
10 tantamount to saying that in order to park a car in a parking garage the driver of the car must
11 obtain his or her own land use permit, separate from the permit that approves construction and
12 use of the parking garage, and that the driver of a truck must obtain a different permit from DPD
13 than the driver of a car to park in that same parking spot. Parking garages accommodate vehicles
14 regardless of the primary function of the vehicle, or the reason for which the vehicle is parking
15 on any given day, or the use the vehicle will be put to on streets in another city; and cargo
16 terminals accommodate vessels regardless of the primary function of the vessel, or the reason for
17 which the vessel is mooring on any particular day, or the use the vessel will be put to on an
18 ocean far away.

19 The evidence presented at the hearing will demonstrate that the Interpretation is not
20 supported by the plain language of the code, by legislative history, or by knowledge of the
21 inherent practices of the maritime industry, and that the Interpretation fails to advance any
22 legitimate regulatory purpose. The “primary function” of a vessel has *no* impact on the health,
23 safety, and welfare of the people of Seattle, and neither does the reason for a vessel’s moorage
24 on any particular day. Without such impact, however, there is no lawful basis for regulation
25 under the City’s police power authority.

26 For the first time ever DPD is requiring a permit for a vessel to moor at a moorage
27 facility, but DPD is not doing so in order to prohibit or mitigate an adverse impact of moorage on

1 the City, and DPD is not doing so because of any language in the code that requires a permit for
2 a vessel to moor; DPD is doing so in order to be able to conclude that a specific drilling rig and
3 its support vessels cannot moor at Terminal 5 without further approval from DPD. A land use
4 decision, however, must be based on “reasons backed by policies and standards,” and not on
5 “community displeasure.” *Maranatha Mining, Inc. v. Pierce County*, 59 Wn. App. 795, 805, 801
6 P.2d 985 (1990). And using the regulatory process to impede lawful activity in response to
7 public pressure is so wrongful that City liability can ensue:

8 In the present case, Parkridge alleges both improper motives and improper means
9 of interference. The improper motives arise from the City officials’ apparent
10 desire to gain the favor of a politically active and potentially influential group
11 opposing the Parkridge project. The improper means arise from the City’s actions
12 in refusing to grant necessary permits and arbitrarily delaying this project.

13 *Pleas v. Seattle*, 112 Wn.2d 794, 804-05, 774 P.2d 1158 (1989). The Supreme Court in *Pleas*, of
14 course, concluded that there was substantial evidence supporting liability on such grounds and
15 remanded the matter to the trial court for a calculation of damages.

16 The evidence presented at the hearing will show that the Port moors vessels consistently
17 with the requirements of the City’s SMP, and consistently with the Port’s responsibilities as a
18 public port. As described in a series of articles on HistoryLink.org,¹ the Washington Legislature
19 authorized the formation of port districts in 1911, in reaction against the domination of the waterfront
20 by private railroad companies that limited and controlled the right of vessels to moor on navigable
21 waters. Later in 1911, the voters of King County approved the creation of the Port of Seattle as the
22 first such port district.

23 The Port’s history and enabling legislation (Chapters 53.04 and .08 RCW) enable the Port
24 to provide moorage to any vessel that needs moorage. See RCW 53.08.020 (acquisition and
25 operation of port facilities). The Port moors vessels at any Port facility that can accommodate
26 the vessel, without regard to the purpose or use of the vessel, so long as such purpose and use are

¹ In particular http://historylink.org/index.cfm?DisplayPage=output.cfm&file_id=1002 and
http://historylink.org/index.cfm?DisplayPage=output.cfm&file_id=7241.

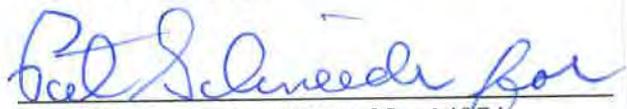
1 lawful. Such provision of moorage is consistent with the Port's obligations as a public port, and
2 also with the Port's obligations under the Federal Shipping Act, which do not allow the Port to
3 refuse to deal with vessel operators, to discriminate among them, or to give undue preferences.
4 Such provision of moorage also is consistent with the City's SMP and the SMA.

5 The Port's witnesses will be Senior Counsel Thomas Tanaka; Michael McLaughlin,
6 Director of Cruise and Maritime Operations; Greg Englin, Manager of Maritime Operations; and
7 Paul Meyer, Manager of Seaport Environmental Programs. These witnesses will testify to the
8 facts summarized above, and will explain how the Interpretation disrupts the Port's operations
9 and its ability to moor the many kinds of vessels that depend on the Port's moorage facilities.

10 The Port's legal arguments will be set forth in detail in its post-hearing closing statement,
11 and will be based on this evidence presented at the hearing. The Port meanwhile joins in the
12 legal arguments made by Foss Maritime in its Pre-Hearing Brief. Together the evidence and law
13 demonstrate that the Interpretation is inconsistent with the plain language of the code, with the
14 purpose and policies of the SMP, with the legislative history of the SMP, with State law, with
15 longstanding practices of the maritime industry, and with DPD's obligation to regulate in a
16 manner that respects the limits on its authority.

17 RESPECTFULLY SUBMITTED this 11th day of August, 2015.

18 PORT OF SEATTLE

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20 Traci M. Goodwin, WSBA No. 14974

21 Senior Port Counsel

22 P.O. Box 1209

23 Seattle, WA 98111

24 Telephone: (206) 787- 3702

25 Facsimile: (206) 787- 3205

26 Email: goodwin.t@portseattle.org

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FOSTER PEPPER PLLC



Patrick J. Schneider, WSBA No. 11957
Adrian Urquhart Winder, WSBA No. 38071
1111 Third Avenue, Suite 3400
Seattle, Washington 98101-3299
Telephone: (206) 447-4400
Facsimile: (206) 447-9700
Email: schnp@foster.com; winda@foster.com

Attorneys for Appellant Port of Seattle

1 **DECLARATION OF SERVICE**

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

6 On August 11, 2015, I caused the foregoing document to be served as follows:

7 Andy McKim
8 City of Seattle Department of Planning & Development
9 700 Fifth Avenue, Suite 2000
10 Seattle, WA 98124-4019
11 andy.mckim@seattle.gov

- via hand delivery
- via first class mail,
- via facsimile
- via e-mail

12 Eleanore Baxendale
13 City Attorney's Office
14 701 Fifth Avenue, Suite 2050
15 Seattle, WA 98104
16 Eleanore.Baxendale@seattle.gov
17 Rose.Hailey@seattle.gov
18 Trudy.Jaynes@seattle.gov

- via hand delivery
- via first class mail,
- via facsimile
- via e-mail

19 John C. McCullough
20 McCullough Hill Leary, P.S.
21 701 Fifth Avenue, Suite 6600
22 Seattle, WA 98104
23 jack@mhseattle.com
24 laura@mhseattle.com

- via hand delivery
- via first class mail,
- via facsimile
- via e-mail

25 David R. West
26 Garvey Schubert Barer
1191 Second Avenue, Suite 1800
Seattle, WA 98101
drwest@gsblaw.com
dbarrientes@gsblaw.com

- via hand delivery
- via first class mail,
- via facsimile
- via e-mail

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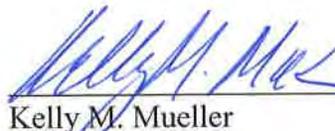
Patti Goldman
Matthew Baca
Earthjustice
705 2nd Avenue, Suite 203
Seattle, WA 98104
pgoldman@earthjustice.org
mbaca@earthjustice.org
epowell@earthjustice.org

- via hand delivery
- via first class mail,
- via facsimile
- via e-mail

Joshua C. Allen Brower
Molly K.D. Barker
Veris Law Group PLLC
1809 Seventh Avenue, Suite 1400
Seattle, WA 98101
josh@verislawgroup.com
molly@verislawgroup.com

- via hand delivery
- via first class mail,
- via facsimile
- via e-mail

DATED this 11th day of August, 2015.



Kelly M. Mueller

GSB:7248366.1