BEFORE THE HEARING EXAMINER
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

FOSS MARITIME’S PRE-HEARING BRIEF
(Code Interpretation No. 15-001)

I. INTRODUCTION

This case involves the use of Terminal 5 by Foss Maritime to load several vessels on hire to Shell Offshore Inc. (“Shell”) for the loading of goods and container cargo for transportation to the Arctic. This use fits squarely within the definition of “cargo terminal,” an approved use at Terminal 5, and is consistent with the Port of Seattle’s (“Port’s”) use of its cargo terminals for decades. Nevertheless, the City of Seattle (“City”) Department of Planning and Development (“DPD”) issued an interpretation (“Interpretation”) determining in clear error that the use is not a cargo terminal use. The Port of Seattle (“Port”) and its lessee Foss Maritime Company (“Foss”) appeal this decision. The Hearing Examiner should reverse the Interpretation because it is not supported by the law or the facts and is clearly erroneous. The Examiner should determine that

MCCULLOUGH HILL LEARY, P.S.
701 Fifth Avenue, Suite 6600
Seattle, WA 98104
206.812.3388
206.812.3389 fax
the use of Terminal 5 to load and unload Shell’s vessels, and to moor those vessels, is a cargo
terminal use or, in the alternative, accessory to a cargo terminal use.

II. FACTS

The following facts will be established at hearing:

Pursuant to the lease between Foss and the Port, Foss intends to provide a variety of
services to Shell and its contractors in support of Shell’s Arctic Drilling Program.

The operations to be conducted under this lease and that are the subject of DPD’s
interpretation include receiving and storing goods, cargo, equipment, supplies, stores, provisions
and other materials at Terminal 5; loading and unloading goods, cargo, equipment, supplies,
stores, provisions and other materials on to and off of each of the vessels associated with the
operations, for those vessels to use and to transport to other locations; staging, arranging and
storing on the terminal to facilitate loading the goods onto vessels; packing some of the materials
into containers; temporary moorage of vessels; and other related activities, including standard
routine “run and maintain” activities (collectively, “Foss Operations”).

Materials to be loaded and unloaded onto vessels include, among other things, pipe, wire,
food, fuel, container cargo, equipment, provisions, and other supplies. These goods and
container cargo will be received by Foss at Terminal 5, then loaded onto the vessels there and
transferred by the vessels to other locations.

The City has historically viewed all of this activity as well within the scope of a cargo
terminal use, as reflected in the City’s permitting decisions on Port projects at cargo terminals.
Terminal 91, a cargo terminal, routinely hosts all types of vessels for short and long term moorage,
including icebreakers, research vessels, oil spill response vessels, naval vessels (U.S. and foreign),
fishing vessels, fire boats, police boats, tugs, barges, and cargo vessels, and loads and unloads all

McCULLOUGH HILL LEARY, P.S.
701 Fifth Avenue, Suite 6600
Seattle, WA 98104
206.812.3388
206.812.3389 fax
sorts of goods and materials onto and off of such vessels. As part of these activities, providing seasonal moorage at cargo terminals is an intrinsic and necessary aspect of the Port’s mission to support maritime business in Seattle.

In addition to its historical implementation of the “Cargo Terminal” use, DPD previously agreed that the specific intended Operations are consistent with the permitted use in the context of a land use decision. Prior to taking possession of Terminal 5, Foss was required to replace bollards on the pier apron. The Port applied for, and received, a shoreline exemption for that bollard work. As part of the City’s consideration of that request, the City investigated the proposed use that is currently at issue here. The Port provided information describing the intended activities (i.e., the Foss Operations) and the City approved the shoreline exemption.

In the Interpretation in question, however, DPD improperly limited its inquiry to a fraction of the activities occurring pursuant to the lease on Terminal 5 – namely, the proposed overwintering moorage of a drilling rig and two accompanying tugboats – rather than considering the full scope of the Foss Operations. For this reason, among others, DPD erroneously concluded that the Foss Operations do not constitute a cargo terminal use or accessory use.

This appeal followed. The City filed a motion to dismiss a number of the claims set forth in the Notices of Appeal filed by Foss and the Port. The Hearing Examiner dismissed Foss Issues 3 (part), 5, 7, 8, 9, 11, 13, 14, 16, 17, and 19. This pre-hearing brief addresses the remaining issues in Foss’s appeal, and incorporates those arguments made in the Port’s pre-hearing brief.

III. EVIDENCE RELIED UPON

This pre-hearing brief relies on Foss’s Amended Notice of Appeal, the Port’s Notice of
Appeal, and the pleadings and other documents on file with the Hearing Examiner.

IV. ARGUMENT

A. Standard of Review

The Seattle Municipal Code ("City Code" or "SMC") provides that for appeals of code interpretations, "[a]ppeals shall be considered de novo, and the decision of the Hearing Examiner shall be made upon the same basis as was required of the Director." SMC 23.88.020.G.5; see also King County v. Central Puget Sound Growth Mgmt. Hearings Board, 142 Wn.2d 543, 555, 14 P.3d 133 (2000) ("The court's interpretation of a statute is inherently a question of law, and the court reviews questions of law de novo.") "A trial or hearing 'de novo' means trying the matter anew the same as if it had not been heard before and as if no decision had been previously rendered." In re Disciplinary Proceeding Against Deming, 108 Wn.2d 82, 88, 736 P.2d 639 (1987). Under this standard, the Hearing Examiner must consider anew the question raised in the request for code interpretation at issue here. The evidence at hearing will show that the question raised here, whether the various uses of Terminal 5 by Foss are cargo terminal uses or accessory to such uses, must be answered "yes."

The City Code also provides that "[t]he interpretation of the Director shall be given substantial weight, and the burden of establishing the contrary shall be upon the appellant." 23.88.020.G.5. The Hearing Examiner has interpreted this standard of review to be "clearly erroneous." See Order on Motion to Dismiss Claims, p. 3. "An application of law to the facts is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

Whatcom County Fire District No. 21 v. Whatcom County, 171 Wn.2d 421, 427, 256 P.3d 295 (2011), citing Norway Hill Pres. and Prot. Ass'n v. King County Council, 87 Wn.2d 267, 274,

McCullough Hill Leary, P.S.
701 Fifth Avenue, Suite 6600
Seattle, WA 98104
206.812.3388
206.812.3389 fax
552 P.2d 674 (1976) (internal quotations omitted). Here, the evidence at hearing will show that DPD first acted in response to pressure from the Mayor’s office for an interpretation that did not allow this specific use, and that DPD then made no effort to obtain all of the facts; further ignored some key facts; and then misconstrued others in the march to a predetermined decision. In addition, the evidence will show that DPD rendered a decision contrary to the plain language of the City Code and well accepted principles of statutory interpretation. The Hearing Examiner will be left with the definite and firm conviction that a mistake has been made.

Accordingly, the Hearing Examiner should reverse the Code Interpretation and determine that the Foss Operations are a cargo terminal use or accessory to such a use.

B. Statutory Interpretation

Well established principles of statutory interpretation govern DPD’s decision on the Interpretation request and the Hearing Examiner’s review. Sleasman v. City of Lacey, 159 Wn.2d 639, 643, 151 P.3d 990 (2007) (“We interpret local ordinances the same as statutes.”).

Primary among these principles is that the plain language of a statute or ordinance controls.

When interpreting a statute, we first look to its plain language. State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). If the plain language is subject to only one interpretation, our inquiry ends because plain language does not require construction. Id.; State v. Thornton, 119 Wn.2d 578, 580, 835 P.2d 216 (1992). “Where statutory language is plain and unambiguous, a statute's meaning must be derived from the wording of the statute itself.” Wash. State Human Rights Comm’n v. Cheney Sch. Dist. No. 30, 97 Wn.2d 118, 121, 641 P.2d 163 (1982). Absent ambiguity or a statutory definition, we give the words in a statute their common and ordinary meaning. Garrison v. Wash. State Nursing Bd., 87 Wn.2d 195, 196, 550 P.2d 7 (1976). To determine the plain meaning of an undefined term, we may look to the dictionary. Id. “Where statutory language is plain and unambiguous, courts will not construe the statute but will glean the legislative intent from the words of the statute itself, regardless of contrary interpretation by an administrative agency.” Agrilink Foods, Inc. v. Dep’t of Revenue, 153 Wn.2d 392, 396, 103 P.3d 1226 (2005). “A statute that is clear on its face is not subject to judicial construction.” State v. J.M., 144 Wn.2d 472, 480, 28 P.3d 720 (2001).
HomeStreet, Inc. v. Dep't. of Revenue, 166 Wn.2d 444, 451, 210 P.3d 297 (2009); see also
Sleasman v. City of Lacey, 159 Wn.2d 639, 151 P.3d 990 (2007). An administrative
interpretation will not be accorded deference if it conflicts with the relevant statute. Cowiche

In interpreting a statute, the Director (and thus the Examiner) must take the applicable
words as the City Council has enacted them, and not insert words in an attempt to give the statute
some different “meaning” or “intent”:

Even if the court is fully persuaded that the legislature really meant and intended
something entirely different from what is actually enacted, and that the failure to
convey the real meaning was due to inadvertence or mistake in the use of
language, yet, if the words chosen by the legislature are not obscure or
ambiguous, but convey a precise and sensible meaning (excluding the case of
obvious clerical errors or elliptical forms of expression), then the court must take
the law as it finds it, and give it its literal interpretation, without being influenced
by the probable legislative meaning lying back of the words.

a statute that which it may believe the legislature has omitted, be it an intentional or inadvertent
omission.” Auto. Drivers & Demonstrators Union Local 882 v. Dep't of Ret. Sys., 92 Wash. 2d
415, 421, 598 P.2d 379, 382-83 (1979) (citations omitted). See also Vita Food Prods., Inc. v.
State, 91 Wash. 2d 132, 587 P.2d 535 (1978) (court may not add words to statute even if it
believes the legislature intended something else but failed to express it). This is in fact the
method that is employed by the Director,¹ and thus must be applied by the Hearing Examiner.²

¹ Mr. McKim testified the Director does not consider the historical context of a definition’s enactment “[b]ecause
when we’re applying the definitions, we’re applying the words that are actually into the code or in the code. I can’t
make assumptions that something else was intended.” McKim Deposition, 54:3-6. “In interpreting the code, where
we have definitions, I will apply the definitions as they are in the code. I can't make assumptions that something
additional or different was intended. I can't read something else into the code.” Id., 54:9-13.
² "Appeals shall be considered de novo, and the decision of the Hearing Examiner shall be made upon the same
basis as was required of the Director." SMC 23.88.020.G.5.

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In addition, absurd results must be avoided. Post v City of Tacoma, 167 Wn.2d 300, 310, 217 P.3d 1179 (2009) (“A reading that produces absurd results should be avoided, if possible, because we presume the legislature does not intend them.”).

Finally, the Shoreline Management Act (“SMA”) is liberally construed to effect its purposes. RCW 90.58.900. The purpose most relevant here is to give priority to “industrial and commercial developments which are particularly dependent on their location on or use of the shorelines of the state.” RCW 90.58.020. Consistent with this priority, one of the purposes of the City’s Shoreline Master Program (“SMP”) is to encourage water-dependent uses. SMC 23.60A.002.B.2. More specifically, the purpose of the UI environment in which Terminal 5 is located is to provide for efficient use of the shoreline by cargo terminals and other water-dependent and water-related industrial uses. SMC 23.60A.220.D.9.a.1.

Here, the evidence at hearing will show that the Foss’s use of Terminal 5 is consistent with the plain language of the definition of “cargo terminal.” The City’s novel reading of the term “cargo terminal” in the Interpretation improperly conflicts with this plain language. The City’s Interpretation also leads to absurd results, construing the term so narrowly that legal activities freely and openly conducted at cargo terminals around Seattle for decades are now transformed into unpermitted uses. The Hearing Examiner must reject the City’s Interpretation.

C. The Interpretation is clearly erroneous because it is based on a set of factual assumptions that are inaccurate and/or incomplete (Foss Issues 6 and 7)

The evidence will show that City neglected to investigate the facts on which the Interpretation was based, and therefore relied on several incorrect “facts” in its Interpretation, including the following:

- The City incorrectly stated that the “drilling rig would be at Terminal 5 only for purposes of seasonal storage.” As the evidence will show, the drilling rig and other vessels also have been and will be loaded and unloaded with goods or container cargo that will be
transferred to another location. The evidence will show that the temporary moorage will be intrinsic to the cargo terminal operations.

- The City incorrectly relied on the mistaken fact that only a drilling rig and two tugs would utilize Terminal 5 in support of the Foss Operations. The evidence will show that at least eight vessels have moored or will moor at Terminal 5 in support of Foss Operations.

- The City incorrectly relied on the mistaken fact that exploratory drilling equipment is the only material that would be loaded and unloaded onto the drilling rig. The evidence will show that myriad goods and container cargo were and will be loaded and unloaded onto the various vessels that support the Foss Operations, including onto the drilling rig.

- The City further assumed that no container cargo would be loaded onto the vessels, when in fact, a substantial number of containers were loaded and will be unloaded.

- The City incorrectly relied on the mistaken fact that the goods being loaded and unloaded onto the various vessels supporting the Foss Operations would not be transferred to other locations. The evidence will show that the goods or container cargo will be transferred to the Arctic, to other vessels in the Arctic, or to a location in Alaska.

- The City ignored the various historical operations that have occurred at Terminal 5 and other cargo terminals and Port facilities in Seattle. The evidence will show that the City’s fundamental misunderstanding of how the maritime business operates in Seattle and throughout the world produced an unworkable Interpretation that will undermine historical operations and have a ripple effect on other industries and maritime businesses throughout the Port of Seattle.

The evidence will show that the City had – or could have had – access to all of these facts regarding the cargo terminal use at Terminal 5, but chose either not to investigate or not to apply those facts to its Interpretation. Because the City either did not investigate or deliberately chose to ignore the Foss Operations or the breadth of cargo terminal activity occurring at Terminal 5 at the time of the Interpretation, its interpretation is clearly erroneous. *Whatcom County Fire District No. 21, supra*, 171 Wn.2d at 427 (the City’s decision may be reversed if the Examiner is left with the “definite and firm conviction that a mistake has been made”).

D. **The Foss Operations, properly defined, fall within the plain language of the definition of cargo terminal (Foss Issues 1 and 2)**

The SMP defines a cargo terminal as:

**McCullough Hill Leary, P.S.**
701 Fifth Avenue, Suite 6600
Seattle, WA 98104
206.812.3388
206.812.3389 fax
a "transportation facility" use in which quantities of goods or container cargo are stored without undergoing any manufacturing processes, transferred to other carriers, or stored outdoors in order to transfer them to other locations. Cargo terminals may include accessory warehouses, railroad yards, storage yards, and offices.

SMC 23.60A.906.

In interpreting a local ordinance, the ordinance's plain meaning is controlling. Sleasman, supra, 159 Wn.2d at 646. As described infra, the evidence at the hearing will show that the Foss Operations are clearly consistent with the plain meaning of cargo terminal uses. Because the plain meaning of the statute is clear and unambiguous, the inquiry into the meaning of cargo terminal must end there, as "there is no need for the agency's expertise in construing the statute."


1. The definition of cargo terminal broadly allows three categories of activities

The City Council has designated three categories of cargo terminal activity:

1. Goods or container cargo are stored without undergoing any manufacturing processes
2. Goods or container cargo are transferred to other carriers
3. Goods or container cargo are stored outdoors in order to transfer them to other locations

SMC 23.60A.906.

To discern the plain meaning of the Code, courts employ traditional rules of grammar.

State v. Bunker, 169 Wn.2d 571, 578, 238 P.3d 487 (2010). In Washington, it is well settled that, where the statute being interpreted includes a qualifying phase, the last antecedent rule applies.


The last antecedent rule provides that, unless contrary intention appears in a statute, a qualifying phrase only applies to the immediately preceding antecedent (instead of all phrases).

In its final Interpretation, the City ignores this controlling rule of statutory construction and determines that the qualifying phrase at the end of the definition — “in order to transfer them to other locations” — qualifies all three preceding phrases instead of just the last phrase. However, if the City Council intended for this qualifying phrase to apply to the three preceding phrases, it would have placed a comma before the qualifying phrase. See Judson, 32 Wn. App. at 801. As the definition is written, it is clear that the City Council intended for “in order to transfer them to other locations” to qualify only the third phrase, “or stored outdoors.” This reading is particularly compelling when one considers the most recent SMP revisions, where the City Council added a comma before “or stored outdoors,” but chose not to add a comma before the qualifying phrase, “in order to transfer them to other locations.” Compare SMC 23.60A.906 with SMC 23.60.906. The added comma sets off the last phrase from the other two, reinforcing the last antecedent interpretation of the ordinance.

The City’s conclusion that “the unifying theme is that the goods are at the cargo terminal in order to transfer them to other locations,” (Interpretation, p. 4) is contrary to the SMP’s intent, as evidenced by the most recent revision to the SMP, and lacks any basis in the Code itself.

3 The evidence will show that initial drafts of the Interpretation properly heeded the last antecedent rule.

McCullough Hill Leary, P.S.
701 Fifth Avenue, Suite 6600
Seattle, WA 98104
206.812.3388
206.812.3389 fax
That conclusion elevates a proviso clearly applicable only to one antecedent to become the central “unifying theme” of the entire definition, thereby manufacturing an Interpretation in which the tail is wagging the dog. Also, as discussed in Section E.2, infra, the SMP takes a broad view of cargo terminal uses and the definition of cargo terminal must accordingly adhere to the last antecedent rule. As explained in section D.2.b, below, and will be demonstrated at hearing, the loaded goods are, in fact, transported to other locations, but the City committed clear error in requiring that additional conditions (specifically, that the vessel loading had to be of a certain type and have specific “principal functions”) to be met in order to satisfy the definition. Because the City’s Interpretation heavily and improperly relied on this qualifying phrase, the Interpretation must be reversed.

2. The activities at Terminal 5 fall within the plain language definition of a cargo terminal use

In its Interpretation, the City agrees that Terminal 5 is a transportation facility as it is defined by the Code, but, ignoring the actual activities that will and have occurred at Terminal 5, finds that drilling equipment “affixed” to the drilling rig are not “goods or container cargo.” It also finds that Terminal 5 would not serve as a stop where the rig and equipment would be stored or transferred from one location to another. As the evidence will show, the City was aware, before the issuance of its Interpretation, that the activities that were to occur at Terminal 5 included receiving goods, cargo, equipment, supplies, stores, provisions and other materials; staging the materials on the terminal for loading; and loading those items onto the vessels for transportation to other locations. These are the quintessential activities that occur on cargo terminals, as contemplated by the Code’s definition of a cargo terminal use.
a. The materials being unloaded and loaded onto vessels at Terminal 5 are goods

The City’s Interpretation determined that the “exploratory drilling equipment affixed to the drilling rig, however, would not fall under the definition of goods as it is used under the code.” Interpretation at Conclusion 5. The evidence will show that when considering if “goods and container cargo” were being received at Terminal 5, the City inexplicably ignored many of the materials that were to be loaded and unloaded from the vessels utilizing Terminal 5, including the drilling rig. This omission was apparently based upon the City’s unfounded decision not to conduct any investigation into the facts relating to the Foss Operations.

Because the City’s SMP and Land Use Code do not separately define “goods,” the dictionary definition applies. Sleasman, 159 Wn.2d. at 643. Goods, as defined by Webster’s New Collegiate Dictionary (based on Webster’s Third New International Dictionary) are (a) “something that has economic utility or satisfies an economic want”; (b) “personal property having intrinsic value but usu. excluding money, securities, and negotiable instruments”; (c) “cloth”; or (d) “wares, commodities, merchandise.”4 The evidence will show that the materials being loaded and unloaded onto the vessels at Terminal 5 constitute goods under Webster’s definition, and that the City’s witnesses conceded this point at deposition.

Tellingly, the City’s Interpretation only quotes sections (b) and (d) from the definition of goods.5 However, it is not up to the City to cherry pick parts of a definition in order to support its preferred result; the dictionary definition must be examined as a whole. See, e.g., State v. Elgin, 118 Wn.2d 551,556, 825 P.2d 314 (1992). The City’s choice to ignore the full definition of “goods” in its final Interpretation is a consequential mistake, and one intended (as the

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4 See Attachment A for a copy of the definition of goods that the Interpretation states it relied upon.
5 As the evidence will show, the City initially relied upon the definition found in section (a) in a draft of its Interpretation, but chose to limit that definition in the final Interpretation.
deposition records reflect) be consistent with the intended outcome of the Interpretation. The Interpretation must accordingly be reversed. See Moss, 109 Wn. App. at 13.

Moreover, even if the Hearing Examiner determines that the City reasonably selected sections of the definition of goods to support its interpretation—which it did not—the evidence at the hearing will show that the types of materials being loaded and unloaded from all of the vessels, including the drilling rig, constitute goods as defined by the Code and as limited by the Interpretation.

b. The goods at Terminal 5 meet all three alternative prongs of the definition of a cargo terminal, as they are stored outdoors without undergoing manufacturing processes, they are transferred to other carriers, and they are stored outdoors in order to transfer them to other locations.

The City’s Interpretation improperly concludes that the “drilling rig would be at Terminal 5 only for the purposes of seasonal storage,” and that “Terminal 5 would not serve as a stop where the rig or the equipment on it would be stored or transferred in the course of transit from a started location to an ultimate destination.” Interpretation at Conclusion 6. The City’s sole focus on moorage, or lay-berthing, represents its fundamental misunderstanding of the activities that will occur at Terminal 5. The evidence will show that the goods were, and will be, stored at Terminal 5 without undergoing any manufacturing processes; that some of the goods were, and will be, transferred to other carriers; and the goods were, and will be, stored outdoors in order to transfer them to other locations. The evidence will also show that the vessels will also moor at Terminal 5 to unload goods after their mission, and then will moor prior to the next mission, just like many other seasonal vessels mooring in Seattle in the winter, as a necessary and intrinsic aspect of a cargo terminal use. See discussion of accessory uses at Section F, infra.
Even if the Hearing Examiner determines that all goods and container cargo must be
"transferred to other locations" as interpreted by the City and discussed in Section D.1, supra,
the evidence will show that the activities at Terminal 5 are intended to do—and in fact do—just
that. Because the activities at Terminal 5 constitute a cargo terminal use, the Interpretation is
mistaken and must be reversed.

E. Even if there is ambiguity in the Code, the Foss Operations are cargo terminal uses
under well-established principles of statutory interpretation

1. The City cannot create additional rules and code limitations through an
   Interpretation

In this case, the evidence at hearing will show that the Foss Operations constitute a cargo
terminal use. The sole basis in the Code on which the Operations may be characterized as cargo
terminal uses are whether Terminal 5 is a transportation facility where goods or container cargo
are (1) stored without undergoing any manufacturing processes; (2) transferred to other carriers;
or (3) stored outdoors in order to transfer them to other locations. Yet, the evidence at the
hearing will show that the City, in issuing its Interpretation, intends to regulate the use of the
vessel when it is no longer in Seattle’s shoreline environment, exceeding the City’s authority
under the SMP.

Instead of looking at the uses occurring in the shoreline environment, the City claims that
the SMP contains a requirement that the principal use of a vessel at sea must be to load and
unload cargo in order to transfer the cargo to another location. However, that requirement is not
contained in the definition of cargo terminal, and nowhere did the City Council limit the type or
purpose of the vessel at its ultimate destination. Indeed, if the City had attempted to impose such
an extra-territorial use requirement in the SMP, it would have violated state law and the
Department of Ecology would have presumably refused to approve such a change. See, e.g.,
23.60A.215 (regulating only the use of the vessel while moored); 23.60A.218 (prohibiting regulations of vessels other than while the vessels are moored).

In essence, the City's Interpretation says that a use is a not a cargo terminal use even if it stores goods or container cargo, transfers goods or container cargo, or stores goods or container cargo in order to transfer them to other locations unless the “primary function” of the vessel when it outside of Seattle's jurisdiction is to trans-ship cargo to other cargo terminal locations. There is no Code requirement that a vessel’s primary purpose outside of the jurisdictional waters be to transport cargo. The City cannot create such a limitation by interpretation. Washington Federation of State Employees v. State Personnel Bd., 54 Wn. App. 305, 308, 773 P.2d 421 (1989) (“Agencies do not have the authority to make rules which amend or change legislative enactments.”); see also Auto. Drivers & Demonstrators Union Local 882, 92 Wash. 2d at 421 (A “court cannot read into a statute that which it may believe the legislature has omitted, be it an intentional or inadvertent omission.”).

While an administrative agency can interpret ambiguous statutory language, it cannot create new statutory requirements from whole cloth. Specifically, an agency cannot create a bright line rule where none exists in the statute. Viking Properties, Inc. v. Holm, 155 Wn.2d 129-130, 118 P.3d 322 (2005). Here, the City artificially manufactured a new standard for the sole purpose of finding a way to disallow this particular use. This factually devoid result is clearly erroneous.

2. The Interpretation is inconsistent with the SMP’s intended treatment of cargo terminals

6 Notably, the phrase “primary function” appears nowhere in the relevant portions of the SMP, having been invented by the City out of whole cloth for the purpose of the Interpretation, as discussed in the McKim Deposition.
“The fundamental objective of statutory construction is to ascertain and carry out the intent of the Legislature.” Rozner v. City of Bellevue, 116 Wn.2d 342, 347, 804 P.2d 24 (1991). In order to determine legislative intent, each statutory provision should be read by reference to the whole act. Davis v. Dep't of Licensing, 137 Wash. 2d 957, 970-71, 977 P.2d 554, 559-60 (1999); Whatcom Cnty. v. Bellingham, 128 Wn.2d 537, 546, 909 P.2d 1303, 1308 (1996). In other words, the Hearing Examiner should give effect to legislative intent “within the context of the entire statute.” Elgin, 118 Wn.2d at 556.

In this case, the evidence will also show that the Interpretation ignores SMP’s treatment of cargo terminal uses in other contexts. For example, the definition of “tugboat services” states, in relevant part, that “facilities that include barge moorage and loading and unloading facilities for barges as well as tugboat moorage are not tugboat services and are classified as cargo terminals.” SMC 23.60A.938. Tellingly, this definition supports a broader interpretation of “cargo terminal” that allows a range of activities and demonstrates that DPD’s narrow, myopic Interpretation is clearly erroneous. It does not require the barges to load and unload in order to moor at the location; it does not require the barges to load and unload “goods,” as limited by the City’s definition of goods; and it does not require that the barges transfer them to other locations, as interpreted by the City’s Interpretation. Instead, this definition recognizes the City Council’s intent to permit a broad range of activities at cargo terminals and lends support to the conclusion that the Foss Operations are consistent with the SMP’s intended cargo terminal use.

In instances where the City Council wanted to limit the type of cargo terminal uses permitted in shoreline environments, it has done so. For example, cargo terminal uses that are break bulk facilities are allowed as a conditional use in the Urban Harborfront environment, but all other cargo terminal uses are prohibited. See SMC 23.60A.442.M. If the City Council
intended to limit the type of cargo terminal or type of vessels that can use a cargo terminal at Terminal 5, it would have done so.

Moreover, the Urban Industrial ("UI") environment, where Terminal 5 is located, was established to facilitate all maritime operations. Indeed, the purpose of the UI environment is to "provide for efficient use of industrial shorelines by major cargo facilities and other water-dependent and water-related industrial uses, and to allow for warehouse uses that are not water-dependent or water-related where they currently exist." SMC 23.60A.220.D.9.a.1. Contrary to the City's Interpretation, the intent of the SMP is not to impede port and maritime operations in Seattle by allowing the City to pick and choose the vessels at its shoreline based on objections to the vessel's use outside of the City's jurisdiction. Id.

Because the SMP takes a broad view of cargo terminal uses, the definition of cargo terminal cannot be limited on an ad hoc basis.

3. The City's Interpretation is Inconsistent with Its Past Implementation and Would Lead to Absurd Results

Statutes and ordinances must be interpreted in a manner that does not lead to absurd results in the real world. 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 the real-world consequences of an interpretation.

The evidence at hearing will show that the Interpretation would allow only vessels whose "primary function" outside of the jurisdictional waters of Seattle is transporting cargo to moor at cargo terminals. This means that even if a vessel plans to load and unload cargo or goods, and even if it plans to transfer that cargo or those goods to other locations, it would not be allowed to moor at a cargo terminal if the vessel's primary purpose at sea is to fish, drill, conduct scientific
research, perform a military exercise, or anything other than transporting cargo. Not only is this
an unworkable construct, it is certainly not what the SMP intended. See, e.g., SMC

The evidence will also show that the City's Interpretation not only limits use of a cargo
terminal to vessels whose "primary function" is transporting cargo, but would only allow such
vessels to use the cargo terminal only if the vessel was also unloading or loading at that terminal.
Such an interpretation leads to the conclusion that a fishing boat, which typically loads and
unloads fish, cannot dock at a cargo terminal if it off-loaded its fish in Bellingham or Everett or
even at some other cold storage in Seattle - even if one concludes, as the City has suggested, that
its "primary function" is to transport cargo as opposed to catching fish. Such a result flies in the
face of decades of accepted practice and makes no sense whatsoever.

The Interpretation results in a finding that the many other kinds of vessels that moor at
the Port's cargo terminals, including NOAA and University of Washington research vessels,
fishing vessels, Navy and Coast Guard vessels, oil spill response vessels, ships of state, tug
boats, and construction vessels, are mooring unlawfully. These results obviously were not
intended in the enactment of the SMP. See, e.g., Knappett v. Locke, 92 Wash.2d 643, 645, 600

4. The Interpretation conflicts with the principle that the legislative body is
presumed to know how its legislation has been interpreted and applied.

In its recent revision of the SMP, the City was required to conduct an inventory of
shoreline uses. Here, the City inventoried, among other things, the maritime business and Port
uses occurring at Seattle's waterfront. The evidence at hearing will show that the City

^ The City's statement that it does not intend to enforce the Interpretation against such vessels illustrates how result-oriented the Interpretation is, and is incorrect as any citizen can request an interpretation that applies to such vessels, forcing the City's hand.

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understood the wide variety of vessels and activity that occur at the shoreline, and, understanding
much of this activity occurs at cargo terminals, did not seek to limit the definition of cargo
terminal to exclude those vessels that are not specifically loading and unloading at the terminal
itself. The evidence at the hearing will show that many vessels moor at cargo terminals, even
though the vessel may have offloaded its goods or container cargo elsewhere. The evidence at
the hearing will demonstrate that the City either had or should have had an understanding of Port
operations, and chose not to limit the definition of cargo terminal uses. Instead, the City only
clarified that there are three separate types of activities that occur at cargo terminals, and added a
comma to the definition which more clearly separated the last antecedent from the prior phrases
in the definition.

By analogy to the legislature’s presumed awareness of an interpretation of a statute by the
courts, the City Council is presumed to know how DPD has interpreted the Code. If the City
Council has declined to amend the Code, under a well-established canon of statutory
interpretation, this indicates agreement with the historic interpretation. See Broom v. Morgan
Stanley D.W., Inc., 169 Wn.2d 231, 238, 236 P.3d 182 (2010) (“[t]he Legislature is presumed to
be aware of judicial interpretation of its enactments,’ and where statutory language remains
unchanged after a court decision the court will not overrule clear precedent interpreting the same
(“This court presumes that the legislature is aware of judicial interpretations of its enactments
and takes its failure to amend a statute following a judicial decision interpreting that statute to
indicate legislative acquiescence in that decision.”). Accordingly, DPD’s Interpretation that all
goods or container cargo must be transferred to other locations in order to be consistent with a
cargo terminal use is in error.

McCullough Hill Leary, P.S.
701 Fifth Avenue, Suite 6600
Seattle, WA 98104
206.812.3388
206.812.3389 fax
5. The revisions to the SMP in the recent SMP update contradict the Interpretation.

In the City’s latest SMP, adopted in 2015, the City Council added a comma to the definition of a cargo terminal use. The addition of this comma clarifies that there are three specific activities that constitute a cargo terminal use: goods or container cargo must be (1) stored without undergoing any manufacturing processes; (2) transferred to other carriers; or (3) stored outdoors in order to transfer them to other locations.

It is a long-recognized principle of statutory interpretation that a legislative body’s subsequent amendment to a statute should be considered as evidence of legislative intent when interpreting the prior statute. See, e.g., Rozner, 116 Wn.2d at 347-48 ("[W]hile the views of subsequent Congresses cannot override the unmistakable intent of the enacting one, such views are entitled to significant weight, and particularly so when the precise intent of the enacting Congress is obscure.") (quoting Seatrain Shipbuilding Corp. v. Shell Oil Co., 444 U.S. 572, 596 (1980)); Carr v. Blue Cross of Washington and Alaska, 93 Wn. App. 941, 950, 971 P.2d 102 (1999) (noting principle of statutory construction of “looking to the content of subsequent amendments to the statute in question and related statutes” when terms are ambiguous).

Accordingly, the insertion of the comma provides further clarification that that last clause, “or stored outdoors in order to transfer them to other locations” is independent of the other two clauses. Moreover, as discussed in Section D.1, supra, the fact that the City Council chose not to add a comma before “in order to transfer them to other locations” is further evidence that the City Council intended this qualifier to modify only the last antecedent. See State v. Baldwin, 109 Wn. App. 516, 527, 37 P.3d 1220 (2001) (holding that “when a former statute is amended, or an uncertainty is clarified by subsequent legislation, the amendment is strong evidence of what the Legislature intended in the first statute”) (citation omitted).
that the Hearing Examiner determines that all goods and container cargo must be transferred to
other locations in order to constitute a cargo terminal use, the evidence will show that the Foss
Operations continue to be consistent with a cargo terminal use.

F. The Interpretation misconstrues the allowable scope and nature of accessory uses
and improperly determines the Foss Operations are not an accessory use (Foss
Issues 4 and 5).

The Code Interpretation erroneously concludes that moorage is not “accessory” to the
established cargo terminal use of Terminal 5. This conclusion is inconsistent with the law and
facts to be shown at hearing. The Hearing Examiner should reverse the City’s decision.

City Code 23.84A.040 defines “accessory use” as “a use that is incidental to a principal
use.” In addition, City Code 23.60A.940 defines “accessory use” as “a use that is incidental and
intrinsic to the function of a principal use and is not a separate business establishment unless a
home occupation.” SMC 23.60A.900 states that the definitions of Chapter 23.60A apply when
they differ from the definitions in the rest of the Land Use Code.

The Code Interpretation relies solely on SMC 23.60A.940, asserting that the word
“intrinsic” makes this definition more stringent than the one appearing in SMC 23.84A.040.
However, the City provides no support for its bare assertion that the term “intrinsic” somehow
yields a more narrow definition that would exclude the moorage of the drilling rig. The weight
that the City places on the word “intrinsic” renders meaningless the preceding use of the word
“incidental.” To the contrary, under the plain meaning of these terms, moorage is both incidental
and intrinsic to the cargo terminal use. The City is bound by standards of statutory
interpretation.

Where a term is not defined by code, the dictionary definition applies. HomeStreet, Inc.,
supra, 166 Wn.2d at 451. According to Webster’s New World College Dictionary online,
“incidental” means (among other things) being secondary or minor, but usually associated.\(^8\)

“Intrinsic” means (among other things) “inherent.”\(^9\) Here, vessel moorage is incidental to cargo terminal use. Under the plain language of the definition, a cargo terminal use involves either storage or transfer of goods or container cargo. Moorage is incidental to these uses in that vessels must moor in order to deliver goods or cargo for storage or transfer. In addition, moorage is intrinsic: while the definition focuses on what happens to the goods or cargo (storage or transfer), vessels must moor at the terminal in order to deliver or (as here) be loaded with the goods or cargo. The undisputed evidence that will be presented at the hearing will make this clear.

For this reason, in the alternative, the Hearing Examiner should determine that the current and proposed use of Terminal 5 is accessory to the permitted cargo terminal use.

V. CONCLUSION

For the reasons stated above, Foss respectfully requests that the City’s motion to dismiss be denied.

[signatures on the next page]

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\(^8\) The dictionary used by the City to determine the definition of “goods” is not readily accessible. Accordingly, the definition of “incidental” is available at: [http://www.yourdictionary.com/incidental/#websters](http://www.yourdictionary.com/incidental/#websters) (last visited August 11, 2015).

Respectfully submitted this 11th day of August, 2015.

MCCULLOUGH HILL LEARY, P.S.

By: 
John C. McCullough, WSBA #12740
Attorneys for Foss Maritime Company

GARVEY SCHUBERT BARER

By: 
David R. West, WSBA #13680
Donald B. Scaramastra, WSBA #21416
Daniel J. Vecchio, WSBA #44632
Attorneys for Foss Maritime Company
WEBSTER'S
New
Collegiate
Dictionary
AMUSING, CLEVER (a ~ joke)  d (1) : CONSIDERABLE, AMPLE (a ~ margin)  (2) : FULL (weighs a ~ 200 pounds —Current Blog)  e (1) : WELL-FOUNDED, COGENT (a ~ reasons)  (2) : TRUE (holds ~ for society at large)  (3) : REAL, ACTUALIZED (made ~ his promises)  (4) : deserving of respect (HONORABLE (a ~ standing)  (5) : legally valid or effectual. ~ title  f (1) : ADEQUATE, SATISFACTORY (a ~ care)  (2) : conforming to a standard ~ English  (3) : CHOICE, DISCRIMINATING (a ~ taste)  (4) : containing less fat and being less tender than higher grades —used of meat and esp. of beef  2 a (1) : VIRTUOUS, JUST, COMMENDABLE (a ~ man)  (2) : RIGHT (a ~ conduct)  (3) : KIND, BENEVOLENT (a ~ intentions)  b : UPPER-CLASS (a ~ family)  c : COMPETENT, SKILLFUL (a ~ doctor)  d : LOYAL (a ~ party man)  <a ~ Catholic> —good-ish \gód-ish \\ adj —as good as  2 in effect : VIRTUALLY <as good as dead> —as good as gold 1 : of the highest worth or reliability (his promise is as good as gold)  2 : well-behaved <the child was as good as gold> —good and \gód-ən\\ —VERY, ENTIRELY (was good and mad)  

good n 1 a : something that is good  b (1) : something conforming to the moral order of the universe  (2) : praiseworthy character : GOODNESS  c : a good element or portion  2 : PROSPERITY, BENEFIT <for the ~ of the community>  3 a : something that has economic utility or satisfies an economic want  b pl : personal property having intrinsic value but usu. excluding money, securities, and negotiable instruments  c pl : CLOTH  d pl : WARES, COMMODITIES, MERCHANDISE <canned ~s>  4 : good persons —used with the <the ~ die young>  5 pl : proof of wrongdoing <didn’t have the ~s on him —T. G. Cooke> —for good : FOREVER, PERMANENTLY — in good with : in a favored or preferred position with —to the good 1 : for the best : BENEFICIAL (the government’s efforts to restrict credit were all to the good —Time)  2 : in a position of net gain or profit <he wound up the game $10 to the good>  

good adv : WELL (he showed me how ~ I was doing —Herbert Gold)  

good book n, often cap G&B : BIBLE  
good-bye or good-by \gód-bi, go(d)-\\ n [alter. of God be with you] : a concluding remark or gesture at parting  
good fellow n : an affable companionable person —good-fel-
low-ship \gód-fel-ə-ship, -félo-\  
good-for-nothing \gód-for-noth-ing\\ adj : of no value: USE-
LESS, WORTHLESS (he was fat, lazy, ~ —C. G. Norris)  
good-for-nothing n : an idle worthless person