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BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeal of:) Hearing Examiner File:
) **S-15-001 and S-15-002**
)
9 **FOSS MARITIME COMPANY**)
) DEPARTMENT OF PLANNING AND
10) DEVELOPMENT'S PREHEARING
from an interpretation by the Director,) BRIEF
11 Department of Planning and Development.)
_____)

I. BACKGROUND

The decision on appeal is DPD Interpretation No. 15-001 concluding the use "cargo terminal" established for Terminal 5 does not include "moor[ing] an exploratory oil drill rig and two accompanying tugboats at the Port of Seattle's (Port's) Terminal 5 facility for periods of approximately six months per year when the drilling rig is not in use in the Artic"¹ and that an additional permit is necessary for such moorage.

Interpretations are "a decision by the Director as to the meaning, application or intent of any development regulation in Title 23 or in Chapter 25.09 . . . as to a specific property."² Interpretations apply only to the site at issue, due to different zoning, different permit history, and different activities among sites. Evidence and argument about how the Interpretation applies

¹ Interpretation, p. 1, Background, ¶ 1.
² SMC 23.88.020.A (emphasis added).

1 to different sites is not relevant to determining whether the Interpretation is correct as to
2 Terminal 5.

3 This Interpretation does not determine what permit might be appropriate. The
4 Interpretation does not prohibit the oil rig and accompanying vessels from mooring in the City
5 under additional permits at this site³ or at other locations in the City that already have appropriate
6 permits. Testimony and argument about the feasibility of obtaining other types of permits and
7 about what might be allowed under permits for other types of uses are outside the scope of this
8 Interpretation appeal.

9 There is no dispute Terminal 5 is in the “Shoreline District,” a special review district
10 created in SMC Chapter 23.60/23.60A⁴ that is part of the City’s required Shoreline Master
11 Program (SMP) adopted by the City and approved by the Washington State Department of
12 Ecology (Ecology), pursuant to RCW Chapter 90.58, the Shoreline Management Act (SMA).
13 The SMP regulations, including procedures, standards, and definitions, are “superimposed upon
14 and modify the underlying land use zones.”⁵ In particular, uses must be permitted in both the
15 Shoreline District and the underlying zone.⁶

16 “Cargo terminal” is defined in both the SMP⁷ and in Section 23.84A.038, the definitions
17 for the underlying zone. The Hearing Examiner’s Order held that both definitions apply to this
18 appeal.⁸

19 _____
20 ³ Sites may have more than one use; e.g., The evidence will show that Terminal 91, which appellants describe as a
21 cargo terminal use (Appeal of Port of Seattle, p. 2, lines 3-4), also has use permits for many types of activities,
22 including permits for “public facilities” (fireboats – Master Use Permit 3017290) and “passenger terminal” (cruise
23 ships - MUP 3006901).

⁴ After the Interpretation was issued Chapter 23.60 was superseded by Chapter 23.60A effective June 15, 2015. The Interpretation addresses both chapters.

⁵ SMC 23.60.014; 23.60A.016.A.

⁶ SMC 23.60.014.A; 23.60A.016.B.

⁷ SMC 23.60.906; 23.60A.906.

⁸ Order on Motion to Dismiss (“Order”), p 1, ¶ 6.

1 Appellants do not dispute the cargo terminal use is established in DPD permits, nor do
2 Appellants contend that DPD has issued permits specifically identifying additional uses for this
3 site, as DPD has for Terminal 91. The Examiner has ruled that she lacks jurisdiction to
4 determine whether an additional use has been established under the “establishing the use for the
5 record” process in this appeal.⁹

6 The issues before the Hearing Examiner are: (1) what activities are allowed at an SMP
7 “cargo terminal,” as a matter of law; (2) what activities are being carried out on/by the oil rig and
8 accompanying vessels at the cargo terminal, as a matter of fact de novo; (3) whether mooring the
9 oil rig and its accompanying vessels at the cargo terminal is within the definition of “cargo
10 terminal,” as a matter of law; and (4) if not, whether such activities are “accessory” to a cargo
11 terminal under the SMP definition of “accessory use,” as a matter of law.¹⁰

12 II. JURISDICTION AND STANDARD OF REVIEW

13 A. Jurisdiction

14 The Hearing Examiner’s jurisdiction is limited to the scope of review specifically set out in
15 the Seattle Municipal Code (SMC).¹¹ For interpretations, “the decision of the Hearing Examiner
16 shall be made upon the same basis as was required of the Director.”¹² “The Hearing Examiner may
17 affirm, reverse or modify the Director’s interpretation either in whole or in part or may remand the
18 interpretation to the Director for further consideration.”¹³ The Order recognizes that the Examiner’s
19 jurisdiction is limited to construction of Title 23, and does not include application of state or federal
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22 ⁹ Order p. 3, ¶ 11.

¹⁰ *Clamshacks v. Skagit County*, 45 Wn. App. 346, 351, 725 P.2d 459 (1986).

¹¹ *Chausee v. Snohomish County Council*, 38 Wn. App. 630, 636, 689 P.2d 1084 (1984).

¹² SMC 23.88.020.G.5.

¹³ SMC 23.88.020.G.6.

1 constitutions, statutes, regulations, or agreements.¹⁴ Pending before the Examiner is a Motion in
2 Limine to exclude testimony purporting to show that the Interpretation is inconsistent with other
3 federal regulations not set out in the Appellants' issue statements. This evidence should be
4 excluded as being outside the Examiner's jurisdiction.

5 Appellants also contend that the Interpretation is inconsistent with the Comprehensive
6 Plan policies to retain Seattle's role as a Gateway to Alaska and to meet the moorage needs of all
7 vessels. SMC 23.60A.004 and 23.60A.004 will show that the Comprehensive Plan policies do
8 not apply to an Interpretation. In addition, the documentary evidence from both DPD and the
9 Port will show that the Interpretation is consistent with these policies, in any event. Requiring a
10 use permit does not thwart these policies.

11 Appellants have argued that political motivation has affected the Interpretation decision.
12 The Examiner has ruled that political motivation is not a factor the Examiner considers in
13 determining whether the Interpretation is correct.¹⁵ DPD has moved to exclude evidence of
14 political motivation in its pending Motion in Limine.

15 **B. Standard of Review**

16 The Examiner considers appeals de novo. The decision of the Director "shall be given
17 substantial weight, and the burden of establishing the contrary shall be upon the appellant."¹⁶
18 The Examiner construes this to mean that the appellant must demonstrate that the Interpretation
19 is clearly erroneous.

22 ¹⁴ Order, p. 5 ¶ 24, and p. 6 ¶ 31 and ¶ 32.

23 ¹⁵ Order, p. 3, ¶ 16.

¹⁶ SMC 23.88.020.G.5.

1 site as a cargo terminal in a manner consistent with the Interpretation. The testimony of Mr.
2 Perkowski and documentary evidence will show that DPD did not approve mooring an oil rig at
3 Terminal 5.

4 Appellants have proposed exhibits (photographs, berthing plans and vessel mooring logs)
5 showing mooring of vessels, including oil rigs, at sites with cargo terminal permits. In their
6 Opposition to DPD's Motion in Limine, Appellants contend that such exhibits show that DPD
7 has determined that these activities are allowed under a cargo terminal use. This construction
8 would be inconsistent with the Interpretation and does not preclude the Examiner from
9 upholding the Interpretation. In its pending Motion in Limine DPD seeks to exclude these
10 documents because they are not evidence of a DPD determination or a determination that the
11 activity is lawful, or even that DPD knew of the activity in order to initiate making a
12 determination. The lack of probity of these exhibits will also be demonstrated by testimony on
13 DPD's enforcement policies. Finally the testimony and documentary evidence will show that
14 Appellants' proposed evidence of activities at Terminal 91 and other sites is not relevant to the
15 definition of cargo terminal.

16 Appellants Opposition to DPD's Motion in Limine also asserts that the Examiner has
17 ruled that evidence of permittees' actions is relevant to the meaning of "cargo terminal," but the
18 Examiner did not so rule,¹⁸ and such purported evidence has no probative value.

19 Appellants have argued that political motivation has affected the Interpretation decision.
20 The Examiner has ruled that political motivation is not a factor the Examiner considers in
21 determining whether the Interpretation is correct. DPD has moved to exclude evidence of
22 political motivation in its pending Motion in Limine.

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¹⁸ Order. P. 2, ¶ 8 ("activities deemed by the City") and ¶ 10 "the City's past determinations").

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VIII. CONCLUSION

The evidence will show that the Appellants have not carried their burden of proof to show the Interpretation is clearly erroneous, and the Interpretation should be upheld.

DATED this 11th 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 and**
3 **Development's Prehearing Brief** with the Seattle Hearing Examiner using its e-filing system.

4 I also certify that on this date, a copy of the same document was sent to the following
5 parties listed below in the manner indicated:

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Dated this 11th day of August, 2015, at Seattle, Washington.

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