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6	BEFORE THE HEARING EXAMINER		
7	CITY OF SEATTLE		
7	In the Matter of the Appeal of:	 Hearing Examiner File: S-15-001 and S-15-002 	
8) 5-15-001 and 5-15-002)	
9	FOSS MARITIME COMPANY)) DEPARTMENT OF PLANNING AND	
10	from an interpretation by the Director, Department of Planning and Development.) DEVELOPMENT'S PREHEARING) BRIEF	
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13	I. BACKGROUND		
14	The decision on appeal is DPD Interpretation No. 15-001 concluding the use "cargo		
15	terminal" established for Terminal 5 does not include "moor[ing] an exploratory oil drill rig and		
16	two accompanying tugboats at the Port of Seattle's (Port's) Terminal 5 facility for periods of		
17	approximately six months per year when the drilling rig is not in use in the Artic" ¹ and that an		
18	additional permit is necessary for such moorage.		
19	Interpretations are "a decision by the Director as to the meaning, application or intent of		
20	any development regulation in Title 23 or in Chapter 25.09 as to a specific property." ²		
21	Interpretations apply only to the site at issue, due to different zoning, different permit history,		
22	and different activities among sites. Evidence and argument about how the Interpretation applies		
23	¹ Interpretation, p. 1, Background, ¶ 1. ² SMC 23.88.020.A (emphasis added).		

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

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

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

"Cargo terminal" is defined in both the SMP⁷ and in Section 23.84A.038, the definitions for the underlying zone. The Hearing Examiner's Order held that both definitions apply to this appeal.⁸

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- 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.

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

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

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

JURISDICTION AND STANDARD OF REVIEW II.

Jurisdiction A.

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

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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.

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

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

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

B. Standard of Review

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

¹⁴ Order, p. 5 ¶ 24, and p. 6 ¶ 31 and ¶ 32.
¹⁵ Order, p. 3, ¶ 16.
¹⁶ SMC 23.88.020.G.5.

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III. THE MEANING OF CARGO TERMINAL

A. Legal issues

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The interpretation of the term "cargo terminal" is based on the plain meaning of the words considering the legislation as a whole – the context of the definition. In this case the context is the relationship among the cargo terminal definition in the SMP and 23.84A and: the purpose of the SMP; other moorage definitions; regulation of other activities in the SMP. The analysis in the Interpretation, Mr. McKim's testimony at the hearing, and consideration of the context as set out in the relevant code provisions will show the Interpretation is correct.

9 If the Interpretation is ambiguous, the Examiner may consider the legislative history of 10 the provision. In this case the documentary evidence will show that the definition of cargo 11 terminal is based on an understanding of marine transportation needs, and documents and 12 testimony will show this understanding is consistent between the City and the Port over the 13 years. Documentary evidence will show the City intended to maintain consistency with the 14 context in the most recent update of the SMP.

The evidence will also show that DPD's Interpretation turns on regulation of the use of Terminal 5 and does not regulate the "operation of vessels," as prohibited under SMC 23.60018/23.60A.018.

B. Facts

The Order recognizes that possible past inconsistent enforcement or application of the code will not preclude the correct application of the Code in this Interpretation.¹⁷ In addition, the Examiner has ruled that determinations by DPD about activities at cargo terminals may be relevant to the determination. The Permits for Terminal 5 show DPD has regulated the use of the

¹⁷ Order, p. 2, ¶ 7.

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

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

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

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

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

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IV. ACCESSORY USES

The parties disagree about the correct legal standards to apply to determine whether a use is accessory in the Shoreline District. As a question of law, the correct reading of the Code will show that a proposed accessory use must be both incidental and intrinsic to the principal use.¹⁹ The evidence will show that the proposed general moorage is not "intrinsic" to the operation of a cargo terminal, although moorage of the vessels engaged in cargo activities or layberthing, and moorage of the vessels assisting the cargo vessels is intrinsic and incidental and so accessory to the cargo terminal use.

V. ACTIVITIES CONDUCTED AT TERMINAL 5 IN CONNECTION TO THE OIL RIG

Testimonial and documentary evidence presented at the hearing will show that food, equipment for use in oil rig maintenance and drilling activities and similar items are loaded and unloaded on the oil rig and its assisting vessels.

VI. ACTIVITIES ARE NOT CARGO TERMINAL ACTIVITIES

Whether the activities demonstrated to occur at Terminal 5 are consistent with cargo terminal activities is determined by applying the law to the facts. The documentary evidence will show that the activities are correctly characterized as simply moorage and storage, as the Port admits in its documents, which is not consistent with cargo terminal.

VII. USE PERMITS ARE REQUIRED

The Port contends that no use permit is needed for the moorage use. The correct legal construction of the Code shows that it is, and testimony from Mr. McKim will address this requirement.

¹⁹ SMC 23.60.940/23.60A.940.

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1	VIII. CONCLUSION		
2	The evidence will show that the Appellants have not carried their burden of proof to		
3	show the Interpretation is clearly erroneous, and the Interpretation should be upheld.		
4	DATED this 11 th 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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