BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeal of:  

) Hearing Examiner File:  

FOSS MARITIME COMPANY  
) DEPARTMENT OF PLANNING AND
) CONSTRUCTION’S CLOSING
) ARGUMENT

from an interpretation by the Director,
Department of Planning and Development.


TABLE OF CONTENTS

I. INTRODUCTION .............................................................................................................. 1
II. ISSUES AND STANDARD OF PROOF ........................................................................... 3
III. STATUTORY CONSTRUCTION ..................................................................................... 5
IV. STATEMENT OF FACTS ............................................................................................... 6
  A. Approvals for Terminal 5 exclude general or commercial moorage ............................. 6
  B. Approval for Terminal 5 bollard work did not approve an oil rig as a cargo terminal use ............................................................................. 9
  C. Foss Activities at T 5 ................................................................................................. 11
    1. Types of vessels ......................................................................................................... 11
    2. Classification of cargo .............................................................................................. 12
    3. What was loaded ....................................................................................................... 15
  D. Activities at cargo terminals ...................................................................................... 16
  E. Activities at Pier 91 ..................................................................................................... 17
1. Permits and land use decisions ................................................................. 17
2. Photographs .......................................................................................... 20
F. How port assigns berths ........................................................................ 20

V. REGULATION OF USES AND PORT ISSUE 4 AND FOSS ISSUE 4 .......... 21
   A. The Shoreline Management Act’s regulation of uses .......................... 22
   B. No moorage use at Terminal 5 is currently lawful except as part of cargo terminal use – Port Issue 4 and Foss Issue 4 ......................................................... 24

VI. THE MEANING OF THE CARGO TERMINAL DEFINITION - FOSS ISSUES 1, 2 AND 3 AND PORT ISSUE 1 ................................................................. 27
   A. Identifying the definition ..................................................................... 28
   B. What are “Goods” .................................................................................. 29
   C. What must happen with the goods ........................................................ 30
   D. The purpose of transferring goods at a cargo terminal ......................... 33
      1. City cargo definitions ................................................................. 33
      2. “Cargo” in Maritime Usage .......................................................... 36
      3. “Cargo terminal” definition meaning ............................................ 36
   E. “Historic actions” do not alter the definition of cargo terminal .......... 38

VII. GENERAL MOORAGE IS NOT ACCESSORY TO A CARGO TERMINAL UNDER THE SMP - FOSS ISSUES 5 AND 6 AND PORT ISSUES 5 (PART RE INHERENT MOORAGE), 7 (PART) AND 8 ......................................................... 41
   A. Accessory uses .................................................................................. 41
   B. SMC 23.60A.090.B does not obviate the need to meet the standards for accessory use – Port issue 8 ................................................................. 43

VIII. FOSS ISSUE 15 ................................................................................ 44

IX. THE INTERPRETATION DOES NOT IMPROPERLY CONSIDER THE ACTIONS OF VESSELS AWAY FROM THE SITE OR INTERFERE WITH THE OPERATION OF VESSELS - PORT ISSUES 5 (PART) AND 7 (PART) AND FOSS 18 ................................................. 44

X. THE INTERPRETATION IS CONSISTENT WITH COMPREHENSIVE PLAN POLICY LU 270 - ALASKA GATEWAY AND MOORAGE PROVISIONS OF THE CITY’S COMPREHENSIVE PLAN – PORT ISSUE 11 ......................................................... 46

XI. REQUIRING AN ADDITIONAL PERMIT IS NOT AN ABSURD RESULT .... 47

XII. CONCLUSION ...................................................................................... 49
I. INTRODUCTION

The Hearing Examiner should uphold DPD’s Interpretation because Appellants have failed to demonstrate it is clearly erroneous, as required by Seattle Municipal Code (SMC)\(^1\) 23.88.020.G.5. In fact, even if the burden were on DPD, the preponderance of the evidence demonstrates the Interpretation is correct. The hearing provided more detail, but no facts that would lead to a different determination.

The Port’s practice of treating its various City-permitted cargo terminal facilities like a “checkerboard” to move around cruise ships, large recreational vessels, fish processing boats, cargo vessels, and government vessels, may make good business sense, but does not absolve the Port from securing the correct land use permits for the specific types of use at each facility. Offering moorage to any vessel, regardless of the permitted use at the site, ignores the Shoreline Management Act (SMA or Act) use requirements on uses.

The City is required to regulate uses of the shoreline through its Shoreline Master Program (SMP), and the Port is required to comply with the Act.\(^2\) The “shoreline” is not just the land, it includes the waters where moorage occurs, and the City’s permits, and the uses authorized through them, apply to the moorage over the water that is part of a use. This is a basic tenet of the Act.

The Port’s business practices do not determine what “cargo terminal” means; the City’s reasoned determination of its SMP controls. DPD’s permitting decisions show a circumscribed range of approvals for Terminal 5, strictly consistent with its cargo terminal function. Even with respect to one of the Port’s most varied terminals, Terminal 91, DPD’s land use decisions

---

\(^1\) Cited sections of the Seattle Municipal Code are in Attachment A. Attachment A is divided into Attachment A-1, all code sections except the Seattle Master Program; Attachment A-2, cited sections of Chapter 23.60; and Attachment A-3 cited sections of Chapter 23.60A.

\(^2\) RCW 90.58.280

DEPARTMENT OF PLANNING AND DEVELOPMENT’S CLOSING ARGUMENT - 1

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200
approve distinct additional uses, such as a public facilities use for mooring fire and rescue boats, a passenger terminal use for mooring cruise ships, and a new refrigeration manufacturing plant for refitting ships moored at the pier for that purpose. Nothing in these decisions creates general moorage as an inherent or accessory (incidental and intrinsic) part of a cargo terminal as the Port claims.

The Port’s real position is that “moorage is moorage” regardless of the permit that authorizes the moorage. Ultimately, the Port’s “checkerboard” practice, treating a cargo terminal permit as an “umbrella permit” for moorage of any vessel, created the situation leading to this Interpretation and the need for Foss and the Port to try to prove that overwintering and provisioning an exploratory oil rig are consistent with a “cargo terminal” use.

Appellants cannot make that showing. The definition of “cargo terminal” turns on the purpose of transferring goods to other locations. Cargo (what is loaded onto ships) is divided into subsets of cargo: stores, provisions and gear - common to all vessels, including recreational vessels, such as a motorboat - and a fourth type of cargo - paying cargo, cargo for hire, or cargo for carriage: what “someone has paid you to put on your vessel and move it to another location and take it off.” Foss’s witness Gallagher called that the “mission” of a cargo ship. Stores, provisions and gear are not the “goods” referred to in the City’s “cargo terminal” definition; if they were, then cargo terminal would be no different from other uses that include moorage (passenger terminal, recreational marina, commercial moorage, tugboat services), because vessels that moor at these facilities take these on, too. The definitions in the Land Use Code and SMP would be meaningless, violating the Shoreline Management Act.

The key distinction between a cargo terminal and other uses is found in the specific purpose for the presence goods at the site: “in order to transfer them to other locations.” The
exploratory oil rig and its accompanying vessels take on stores, provisions and gear — what the rig and the ships consume and use themselves for their mission. They are not loading such cargo “in order to transfer them to other locations.” The “goods” required for a cargo terminal use are paying cargo - the fourth type of cargo.

Since the presence of the oil rig and its accompanying vessels at Terminal 5 is not for a cargo terminal use, they cannot moor there for loading or lay berthing. What the Port needs is an additional permit for Terminal 5, as the Interpretation concludes.

Appellants’ additional arguments concerning DPD approvals and Appellants’ legal arguments concerning accessory uses, approval of permits, authority to regulate vessel operation, and consistency with the City’s Comprehensive Plan are also unavailing. They have not demonstrated by clear and convincing evidence that DPD has erred.

DPD’s Interpretation, and the City’s zoning and SMP permitting scheme the Interpretation reflects, should be upheld. A construction of the Land Use Code and SMP that broadens definitions of “cargo terminal” and “accessory use” outside their intended context destroys the function of the definitions. An interpretation allowing moorage to be used interchangeably by vessels without regard to the use permitted on the moorage site is inconsistent with the Land Use Code, violates the Shoreline Management Act, and should be rejected.

II. ISSUES AND STANDARD OF PROOF

The scope of this appeal is narrow: what activities are within the SMP definition “cargo terminal” at Terminal 5 and do Appellant Foss’s proposed activities at Terminal 5 fit within

3 SMC 23.88.020.A.

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8290
either that definition or the City’s Shoreline Management Program definition of an “accessory use” to a cargo terminal.

The meaning of the term “cargo terminal,” including the activities it authorizes, is a question of law. What activities are being carried out on the exploratory oil rig and accompanying vessels at Terminal 5 is a question of fact de novo. Whether those activities are within the definition of the principal use “cargo terminal” or are accessory to it, because they are both “incidental” and “intrinsic” to the cargo terminal use, are mixed questions of law and fact.

The Hearing Examiner’s jurisdiction is limited to the scope of review specifically set out in the Seattle Municipal Code. For interpretations, “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.” The basis for the Director’s interpretation is limited to the provisions of Title 23, which in this case also direct the Director to consider the provisions of the Shoreline Management Act and the City’s Comprehensive Plan provisions for the Shoreline District.

The decision of the Director “shall be given substantial weight, and the burden of establishing the contrary shall be upon the appellant.” The Examiner construes this to mean that the appellant must demonstrate that the Interpretation is clearly erroneous. Under this standard of review “the Director’s decision may be reversed only if the Examiner, on review of the entire record, and in light of the public policy expressed in the underlying law, is left with the definite and firm conviction that a mistake has been made.”

---

5 SMC 23.88.020.A.6 (emphasis added).
6 SMC 23.88.020.A; SMC 23.60.004/ 23.60A.004; see also, SMC 23.60.016/23.60A.012.
7 SMC 23.88.020.G.5.
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.”

III. STATUTORY CONSTRUCTION

The Hearing Examiner follows customary rules of statutory construction as set out in numerous Hearing Examiner decisions:

In interpreting a statute, or code, the primary objective is to ascertain and carry out the intent of the legislative body that adopted it. Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles, 148 Wn.2d 224, 239, 59 P.3d 655 (2002) (citations omitted). One looks first to the language of the code to determine legislative intent, and if the code is unambiguous, the meaning is derived from the plain language of the code alone. Id. Definitions provided in code are controlling, but if undefined, a term should be given its “plain and ordinary meaning by reference to a standard dictionary.” Id. The words of a statute should not be read in isolation, Markham Advertising Co. v. State, 73 Wn.2d 405, 439 P.2d 248 (1968), and a code section should be construed so the each part is given effect with every other part. City of Tacoma v. Cavanaugh, 45 Wn.2d 500, 275 P.2d 933 (1954).

The Hearing Examiner appropriately looks uniquely to the legislation itself, for it is well established law that “the intention of the Legislature is to be deduced from what it said.” In addition, the Examiner has adopted the Washington State Supreme Court's determination that plain meaning includes the context of the entire statutory scheme.

The Washington Supreme Court has determined that the "plain meaning rule" cited by the Appellants requires an [adjudicative body] to “construe and apply words according to the meaning that they are ordinarily given, taking into account the statutory context. . . . So defined, the plain meaning rule requires [an adjudicative

12 In Re Sanborn, 159 Wn.112, 118, 922 Pac. 259 (1930).
body] to consider legislative purposes or policies appearing on the face of the statute as part of the statute’s context. . . .

The case cited by the Examiner, above, continues, explaining that the adjudicative body should determine legislative intent within the context of the entire legislation, in this case the SMP:

[T]he plain meaning is still derived from what the Legislature has said in its enactments, but that meaning is discerned from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question. Upon reflection, we conclude that this formulation of the plain meaning rule provides the better approach because it is more likely to carry out legislative intent.

In this case, consideration of the intent of the Shoreline Management Act and Shoreline Master Program is key to determining the meaning of the definition of cargo terminal in this appeal.

IV. STATEMENT OF FACTS

A. Approvals for Terminal 5 exclude general or commercial moorage

The permit history for Terminal 5 is clear that DPD’s approval of a cargo terminal use at Terminal 5 does not include general moorage there, regardless of what the Port claims about permits issued for Terminal 91. When DPD issued cargo terminal approvals for Terminal 5, the City classified commercial moorage separately from cargo handling facilities and specifically did not approve commercial moorage for Terminal 5.

---


A permit issued in 1977, shortly after the amendment of the City's earliest Shoreline Master Program (SMP), is to "expand container facilities on existing pier per plan." In that SMP cargo terminals were classified under "transportation facilities," separate from "public marinas," which were classified under "commercial boating." Permits issued between then and 1992 were all for the container facility use.

In 1995 the City issued a land use decision for the premises, including the water portion, under the Shoreline Master Program set out in Chapter 23.60, the decision for Projects 9404118 and 9404124 identified in the Interpretation. The decision authorized a major "future expansion of an existing cargo terminal, including container storage, intermodal railroad yard and approximately 180,000 square feet of new structures with a new overpass from the Spokane Street low level bridge." This decision included the overwater area of the premises for a "400-foot berth extension to accommodate 3 ships," expansion of the shipping berths and wharfing areas, including dredging, and the impacts included ones that were water and shipping related, such as impacts from ships using the facility and impacts to ship traffic. The decision authorized cargo terminal activities, terminal support facilities, landscaping, and public shoreline access.

DEPARTMENT OF PLANNING AND DEVELOPMENT’S CLOSING ARGUMENT - 7
This decision did not authorize general moorage at Terminal 5. The decision does not identify that as a use that is approved. In addition, the decision identifies provisions authorizing a different use, “cargo handling facilities,” as the basis for the decision. The decision states that SMC 23.60.004 requires consideration of the “Shoreline Policies,” which include the “Shoreline Implementation Guidelines, set forth in Resolution 27618.”

The decision cites Implementation Guideline E8: to “allow fulfillment of City-wide objectives for different types of water-dependent businesses and industries.”

The decision determines the proposal is consistent with the specific type of business listed in E8 “a) Cargo Handling Facilities.” That type of business does not include “moorage” independent of the cargo terminal activity. General moorage is set out as a different type of business in a different Guideline, E8(d). The decision does not cite Guideline E8(d) as a basis for approving the Projects. Guideline E8(d) states, in part:

\[
d) Moorage. Meet long-term and transient needs of all of Seattle’s ships and boats including fishing transport, recreation and military. Locate long-term moorage in sheltered areas, close to services, and short-term moorages in more open areas. Support the efficient use of Fishermen’s Terminal, the Shilshole Marina and other public moorage facilities.
\]

By excluding Guideline E8(d), the decision clearly extinguishes any argument that DPD authorized general moorage as part of the use at Terminal 5. Nothing in the record shows that DPD approved such moorage at Terminal 5.

Not only did the City create separate guidelines for “different types” of water dependent businesses and industries and segregate “cargo handling facilities” from “moorage facilities,” the

---

27 Foss 33, Decision, p. 73 (W-88).
28 Foss 33, Decision, p. 79 (W-94) (emphasis added).
29 Foss 33, Decision, p. 79 (W-94).
30 DPD Ex. 4, Resolution 27618, Attachment A, pp. 26-27.
City also adopted different definitions of the two activities in Ch. 23.60, continuing the distinction created in the 1976 SMP.

Nothing in the record shows that Terminal 5 has ever been used previously by the Port as open moorage similar to Terminal 91. The only instance of non-cargo terminal moorage at Terminal 5 is when the Coast Guard asked that a ship that could not travel be moored there temporarily for repairs.

B. Approval for Terminal 5 bollard work did not approve an oil rig as a cargo terminal use

In February 2015, DPD approved an exemption from a shoreline substantial development permit so that bollards at Terminal 5 could be restored to their previous size. Ben Perkowski, the DPD Sr. Land Use Planner issuing the exemption, testified he did not need to determine what the bollards would be used for, because the specific exemption criteria for “repair and maintenance” does not require that. With respect to the approval form, the box marked “compliance” is checked automatically for an approval, and he adds conditions to ensure that is correct. In this case he added above the box that the “project is subject to zoning review and approval for consistency with applicable development standards.” SMC 23.60.020.B.5 authorizes using conditions to ensure compliance with the Shoreline Management Act and the provisions of the SMP. He testified that one of the possible times that zoning review could occur would be in obtaining a building permit for the repair.

---

31 DPD Ex. 8, Ordinance 113466, pp. 172 (cargo terminal) and p. 173 (commercial moorage).
33 SMC 23.60.020.C.1 and Testimony 8/24, Tape 4 at 7:50 to 10:01.
34 Foss Ex. 55; Testimony 8/24, Tape 4 at 29:57 to 30:57.
35 Foss 55, Exemption p. 1 (RFP 40000330); see also, p. 3 (RFP 4000332) “conditions” second bullet. Testimony 8/24, Tape 4 at 29:57 to 30:57.
36 Testimony 8/24, Tape 4 at 32:52 to 33:06.
Perkowski testified he asked the Port about what uses might occur at the site, because he read a newspaper article that described possible manufacturing on the site, which is not allowed under the cargo terminal definition; however, it would not have prevented his issuing the exemption, it would have led him to advise the applicant to apply for an additional permit. Blomberg, the Port applicant, concurred this information was not necessary for the substantial development permit exemption. Nothing Perkowski received from the Port as part of the application materials, including the Port’s informal response to his question, and the Port’s formal response to his correction notice, said that the oil rig would be moored at the site. He testified he did not intend this decision to say he was approving the oil rig as consistent with the cargo terminal use, and he lacked the authority to make that determination.

George Blomberg, the Port applicant for the exemption, testified he knew the oil rig required the bollard replacement, he determined the oil rig moorage was not a change in use for SEPA purposes but did not mention the oil rig in the determination, he had engineering drawings showing an oil rig identified as Polar Pioneer using the bollards (which Perkowski did not see), and that he did not provide any materials to Perkowski showing the oil rig would be using the bollards or stating that the oil rig would be present at Terminal 5. He testified he did not expect

37 Testimony 8/24, Tape 4 at 13:08 to 15:12.
38 Testimony 8/24, Tape 4 at 15:13 to 16:38.
40 Foss 47, Application; Testimony 8/24, Tape 4 at 10:55 to 11:54.
41 Foss 49, email exchange.
42 Foss 53, Correction Notice response; Testimony 8/24, Tape 4 at 22:35 to 22:57.
43 Testimony 8/24, Tape 4 at 31:25 to 32:50.
44 Attachment I, p. 25:9 to 26:1.
45 Attachment I, p. 24:8-22; 26:8-10.
46 DPD 26, drawing marked S3 and S4; Attachment I, p. 27:15 to 28:8.
47 Testimony 8/24, Tape 4 at 25:00 to 25:40.

DEPARTMENT OF PLANNING AND DEVELOPMENT'S CLOSING ARGUMENT - 10
Perkowski to determine whether the oil rig was allowed as part of the cargo terminal use.\footnote{Attachment I, p. 33:14-18.} He testified that at the time Perkowski issued the shoreline substantial development permit exemption he (Blomberg) believed Perkowski had simply issued an exemption.\footnote{Attachment I, p. 33:19-24.}

C. Foss Activities at T 5

1. Types of vessels

The Interpretation states that the Polar Pioneer, an oil drilling rig, was expected at Terminal 5.\footnote{Interpretation, p. 2, Finding 4.} This occurred.\footnote{Attachment J, p. 30:34 to 31:18.}

Paul Gallagher, Vice-President for Terminal Services at Foss Marine, testified the Polar Pioneer is classified as a mobile offshore drilling unit that is a “highly specialized vessel” for the purpose of offshore drilling.\footnote{Attachment J, p. 128:1-17; p.21:2.} He testified that the principal purpose of the Polar Pioneer is to drill holes for exploration, that is “her job.”\footnote{Attachment J, p. 117:25 to 118:24.} Gallagher testified that the “mission” of the Polar Pioneer was the offshore drilling operation.\footnote{Attachment J, p. 117:25 to 118:24.} He also testified, the Polar Pioneer is “not a carrier and she doesn’t get paid by a third party to move cargo from port to port.”\footnote{Attachment J, p. 128:8-13.}

The Interpretation states the Polar Pioneer would be moored at Terminal 5 for several months. Gallagher confirmed that it would.\footnote{Attachment J, p.30:34 to 31:18.}

The Interpretation also states that, based on the information from the Port and Foss, the drill rig would be accompanied by two tugboats that also would be moored at Terminal 5 for several months.\footnote{Attachment J, p. 128:8-13.} Gallagher testified that seven or eight vessels came to the site, including “off
In addition, the TOR Viking came, which has a “different mission” from the off shore supply vessels – it has a large tow and tends large anchors and supports vessels in ice. The Aiviq also came; it is a bigger version of the TOR Viking and has a helicopter pad, two tow winches, and a skimmer and oil boom. In addition, three different barges came; they are “platforms that you load things onto.” Gallagher was not certain how many vessels would come back to Terminal 5 over the winter, and testified that, under the contract with Shell, all the vessels in the Artic drilling fleet could return, including the oil spill response vessels.

2. Classification of cargo

The Interpretation states that Foss represented that it intended to receive and move goods, cargo, equipment, supplies, stores, provisions, and other materials onto the vessels associated with the drilling rig “for transportation to other locations.” The Interpretation does not address whether goods might be loaded onto the oil rig, itself. The testimony showed that a variety of items were loaded onto the drilling rig, itself, as well as onto accompanying vessels.

The Interpretation states that neither the oil rig nor the tugboats would carry “container cargo.” “Containerized cargo” is a defined term in SMC 23.60.906. Although the evidence

---

64 Attachment J, p. 141:24 to 142:9
65 Interpretation, p. 2, top of the page.
67 Interpretation, p. 4, ¶5.
68 “‘Cargo, containerized’ means cargo packed in a large (typically eight (8) feet by eight (8) feet by twenty (20) feet trunklike box and loaded, stored and unloaded as a unit.”
shows material will be in containers, this is not “containerized cargo” as that term is defined or as it is used in the trade.

The Interpretation states that the tugboats would not be carrying goods that are being transferred to other locations; they would be carrying goods for provisioning.

Andy McKim, DPD Planner and the author of the Interpretation, testified that the same items loaded onto a vessel might either be provisions, which are not a transportation/cargo terminal use, or be “goods” within the meaning of a cargo terminal use. If the items were used by the crew (coffee) or for vessel operations (fuel filters for the ship engines and pipe that is to be laid by the ship), they would not be a cargo terminal use; if the same items were delivered to another place where the items are sold, that would be a cargo terminal use. This is consistent with the testimony of all the maritime professionals.

Vince O’Halloran has been the Seattle branch agent (the executive officer) of the Sailor’s Union of the Pacific for the past 18 years. In addition, he has been a seaman from 1969, starting as a scullion and obtaining a small master’s license. He has worked on passenger ships, U.S. flagged tankers, breakbulk freighters, containerships, and in Alaska on fishing boats. As part of his work for the Sailor’s Union, he assigns gangs to work at Terminal 5 and Terminal 91, among others, to work on containerships, tankers and barges.

O’Halloran described stores, provisions and gear in terms that are “common” to the maritime trade. He defined stores this way:

---

69 Foss Ex. 61; Attachment J, p. 43:5-18.
70 Attachment H, p. 74:20 to 75:10.
71 Interpretation, p. 4, ¶7.
73 Attachment H, pp. 6:13 to 7:13 and 13:3-4.
75 Attachment H, p. 14:4-15
76 Attachment H, 2015, p. 28:3-21.
Stores generally are items that the vessel would need to operate. It could be lube oils, engine room parts, radar, you know, electronic parts, whatever operational necessities the vessel needs. Any time a ship docks it has to load stores. No ship ever docks and does not load stores.77

He also described provisions:

Provisions would be items that the crew would use for the necessary operation of the vessel: Food, laundry, you know, blankets, milk.78

And, he described gear:

You would normally refer to gear as items that are necessary to the operation of the vessel. It could be mooring lines, again, lubrication greases, paint, anything that the vessel needs to operate.79

O’Halloran testified that every boat will have stores, provisions and gear, even pleasure craft, such as a motorboat.80

He testified these are cargo and that vessels “carry cargo” in addition to stores, provisions and gear,81 and that what is being carried for revenue purposes, such as fuel that is not “stores,” is just called “cargo.”82

Jim Johnson, President of Glacier Fish Company and chief operating officer of its ground fish division,83 also testified that as “cargo” they have “supplies and provisions in support of the vessel” and there is the “production of the vessel which is the frozen fish that we produce from harvest.”84

77 Attachment H, p.15:8-13 (emphasis added).
78 Attachment H, p. 15:15-18 (emphasis added).
79 Attachment H, p. 16:4-7 (emphasis added).
81 Attachment H, p. 29:6-10.
83 Attachment H, p. 30:25 to 31:1.
84 Attachment H, p. 33:6-20 (emphasis added).
Mark Knudsen, President, Conventional Cargo, at SSA Marine, concurred with O’Halloran’s description of cargo as everything moving on or off a ship, with “subsets” that include stores, provisions and gear and “other material loaded onto the ship,” such as “a piece of steel or a box or whatever,” which he called “paying cargo,”85 “cargo for hire,”86 and “cargo for carriage.”87 This is cargo “someone has paid you to put on your vessel and move it to another location and take it off.”88

Paul Gallagher, Vice-President for Terminal Services at Foss Marine, concurred that cargo is stores, provision and gear, plus paying cargo.89 “Paying cargo” is what pays for the crew and the expenses of transporting cargo from one place to another.90 That is the “mission of that ship,” he testified.91

3. **What was loaded**

Gallagher identified what was loaded onto the vessels at T-5, including the Polar Pioneer, was stores,92 provisions93 and other things that were material, such as drill bits and drill pipe, to be used as part of the enterprise, “so they could be used as part of the mission of the vessel.”94

Gallagher testified that the “mission” of the Polar Pioneer was the offshore drilling operation, that the materials loaded onto it were loaded for that mission,95 and that the materials loaded onto the other vessels were solely to be used for the off shore drilling.96

87 Attachment H, p. 73:9-10; 54:14-17: “containers, or yachts, or logs or whatever it is.”
88 Attachment H, p. 73:708 (emphasis added).
90 Attachment J, p. 100:6 to 1015.
92 Attachment J, p. 143:16-25
93 Attachment J, p. 143:8-15
94 Attachment J, p. 144:10-14
D. **Activities at cargo terminals**

Gallagher testified that “the job” of the terminal is to get the vessel loaded so it can make money away from the dock:

So the job of the terminal is to take things in by rail or by truck or by other vessel, store them, and get everything ready so that when the vessel comes, we limit the time that the vessel is actually at the dock.

The vessel really doesn’t make any money when it’s at the dock. So everybody wants to limit the time at the dock so that she – the vessels can go to work. 97

Knudsen contrasted what happens at a cargo terminal with the activity Foss planned for Terminal 5 and the oil rig: vessel support.

We didn’t know particularly for what client necessarily, but it wasn’t -- it wasn’t a use that we – we’re not that kind of company. If we could lease it for a car operation or, you know, that sort of thing, that’s what we do, but leasing it for a general vessel support is not -- while we try to do everything, that’s not what we do. 98

Vessel support is how Foss originally described its activities at Terminal 5 in negotiating the lease with the Port. 99 Mr. Stevens, CEO of Foss Marine, described the operation at Terminal 5 as being “staging, loading, outfitting or marine assets planned for Shell’s Artic Exploration Endeavor.” 100

In addition, Knudsen testified that sometimes a cargo ship will moor for months in between trips, if it is used in the winter months:

Currently at Terminal 25, we have a Matson ship that used to be in service and has been tied up at Terminal 25 for the last ten months probably.

Q. What kind of ship is it?
A. It’s a cargo ship. It’s a Matson containership. . . Carries autos, carries containers, carries break bulk cargo, carries a mix of things. And it’s between seasons, it usually becomes -- gets put into service in the winter when their -- or when one of their other

---

97 Attachment J, 25:20 to 26:1
99 PSK Ex. 29; Foss Ex. 39; Attachment J, p. 158:22 to 161:2.
100 DPD Ex. 23, p.21:3-5.
vessels is out in dry dock. And that’s -- that ship came in empty, it's been there, they have been doing minor maintenance and repairs and provisioning and that type of thing on it...  

Knudsen also testified it is industry practice to provide moorage for cargo ships that are not loading or unloading if there is space for it:

[T]here is a large difference between the different types of vessels that call in, but some of the ones that aren’t on -- you know, the high profile, big containerships are going to be pretty tight on their schedules. A lot of the other ships have, you know, the opportunity or maybe need the opportunity to stay for a day or two to make up their schedule or wait for crew or wait for parts or whatever.

He also testified that cargo ships carrying one kind of cargo (sulfur) may clean the vessel before picking up another kind of cargo (grain) at a grain terminal. He testified he never considered whether layberthing activities are consistent with the cargo terminal permit.

E. Activities at Pier 91

Pier 91 has a varied permit history quite different from that of cargo terminals such as Terminal 5 and Terminal 18. There is no evidence this permit history has ever been analyzed through an interpretation or “permit to establish a use for the record” to determine what is allowed there, particularly for the fishing fleet. McKim testified that Interpretations are specific to a particular site because the history of approved uses varies from site to site.

1. Permits and land use decisions

Andy McKim testified that to determine what uses are established for a site he looks at permits and Land Use (MUP) decisions. The documents in record show that Terminal 91 has permits and decisions for freight storage, auto import, office, refrigerated cargo warehouse, seafood

102 Attachment H, 64:10-17.
103 Attachment H, p. 58-18 to 59:2.
104 Attachment H, p. 61:3-15.
105 Attachment D, McKim, p. 139:18 to 140:7.
processing and cold storage warehouse, outdoor vehicle storage, manufacturing for fish processing, passenger terminal, a public facility to accommodate fire and rescue vessels. But McKim testified that in order to accurately determine what uses are established for Terminal 91, it would take considerable research.

McKim does not rely on the information in the background data of a land use (or MUP) decision to determine what uses have been approved; he looks at the middle part of a permit, where is says what the permit is doing, and he looks at the “summary of proposed action” at the beginning of a MUP decision.

Nothing in the record shows a permit or land use decision approving commercial moorage. McKim testified that the MUP decision would require research to determine whether the vessel moorage referred to is general moorage or cargo terminal moorage.

Ben Perkowski testified the background statements are for context. He testified that in issuing land use decisions the zoning review is for the proposed project, is done by a planner other than the land use decision writer, and is done before the land use decision writer writes the decision that contains the background statement, so that the zoning review planner would not be reviewing what is written in the background statement in the land use decision.

Paul Meyer, the Port’s Manager of the Environmental Permitting and Compliance section since 2008, testified that he believes that “idle moorage, provisioning and other activities [that] do not involve loading necessarily of cargo” are legal activities for the fishing fleet at a cargo terminal

106 DPD Ex. 11, pp. DPD _ 0001, 2-3, 29, 44, 47-48 (proposal), 67, 80; Foss Ex. 89; Foss Ex. 90.
107 Attachment D, McKim, p. 137:18 to 138:19.
110 DPD Ex. 11, p. DPD11_0029.
111 Attachment D, McKim, p. 138:20 to 139:17.
112 Testimony 8/24, Tape 4 at 40:24 to 41:10.
113 Testimony 8/24, Tape 4 at 42:32 to 43:05.

DEPARTMENT OF PLANNING AND DEVELOPMENT’S CLOSING ARGUMENT - 18
based on background statements of land use decisions.\textsuperscript{114} He read the analysis of a 1984 land use
decision, describing the uses at T-91 as "chill cargo handling, vehicle importing, vessel moorage,
fish processing, ship fueling and tank farm operations" under the "overall" cargo terminal use to
mean that vessel moorage is allowed for any vessel without being restricted to the cargo terminal
use.\textsuperscript{115} However, he conceded that the description could be read to mean vessel moorage is allowed
only to the extent of the cargo terminal uses described.\textsuperscript{116} And, with respect to a decision issued in
1988, Meyer testified that the Background Data section reading, "the entire complex is developed as
a cargo terminal by definition in the Seattle Shoreline Master Program and includes accessory large
ship moorage, warehousing, offices and outdoor cargo storage,"\textsuperscript{117} means to him that large vessel
moorage is allowed at a cargo terminal for all vessels;\textsuperscript{118} but again, he conceded that it could be read
to mean that the moorage is limited to cargo terminal ships as set out in the Interpretation.\textsuperscript{119}

Meyer repeated this testimony with several permits for Terminal 91, each time referring to
the "Background Data" section as the source for DPD approval of moorage that is not limited to
cargo terminal vessels as set out in the Interpretation. Meyer never referred to any specific permit
approval or to the summary of the proposed action in a land use decision.

The evidence shows that the source of these background descriptions Meyer relies on is
sometimes the Port's own SEPA documents. For example, the decision for moving the cruise ship
operations from Terminal 30 to Terminal 91 has a unique background statement that is word for
word the description of activities in the Port's own SEPA document.

\textsuperscript{114} Attachment E, p. 21:17 to 22:5.
\textsuperscript{115} DPD Ex. 11 at p. 11, 030; Attachment E, p. 23:11 to 24:15.
\textsuperscript{117} DPD Ex. 11, at p. 11, 0044 (emphasis added).
\textsuperscript{118} Attachment E, p. 25:7 to 26:3.
\textsuperscript{119} Attachment G Meyer, p. 25:25 to 28:5.
2. Photographs

The Port introduced photographs of naval vessels moored at Terminal 91 and Pier 66 as evidence that DPD has approved mooring large ships at all cargo terminals. All they show is that the Port allowed them to moor, or that the Coast Guard directed them to moor there. Lack of enforcement, as a matter of law is not evidence of approval. In addition, Faith Lumsden, DPD’s Code Compliance Director, testified that due to lack of staff enforcement generally is initiated by a compliant or an observed public safety hazard. If no complaint is made, no enforcement investigation occurs.

The Port included photographs of oil rigs moored at Terminal 91 in 1977, 1983 and 1985. Nothing in the record shows the City approved of their moorage. Nothing in the record shows how long they were at the site and for what purpose. Lumsden testified that she was a Code Compliance liaison for DCLU and the City Attorney’s office in 1987-88, and enforcement was initiated at that time on the same basis as now — by a complaint — and that she understood this had been the policy prior to that time, as well. There is no basis to conclude that the City considered mooring the oil rigs as a lawful part of a cargo terminal. Moreover, there has been no determination of whether other permits for Terminal 91 or Pier 66 (for which the Port produced no permit history) or prior lawful moorage of these rigs would have authorized this moorage.

F. How port assigns berths

The Port’s mooring practices are a reflection of the Port’s indifference to the City’s permitting scheme, rather than a reflection of how the Port construes the permits they have. The Port simply disregards the permits.

121 Testimony 8/14, Tape 3 at 1:29:20 to 1:30:34.
Greg Englin, the Port’s Manager of Maritime Operations, admits that the Port will assign moorage for any kind of vessel at any of the Port’s facilities, that assigning a berth is not dependent on the City permits for the facility, he has never denied moorage based on the type of permit for the facility, and that there are no legal constraints on what vessels can moor or what activities can occur at Terminal 91, at Terminal 5, or at a facility that has just a cargo terminal use permit.

Paul Meyer, the Port’s Manager of Seaport Environmental Programs (acquiring federal, state and City permits and doing SEPA review), admitted that he doesn’t know how the business side of the Port operates with respect to permits. He, too, claimed that a cruise ship could moor at a cargo terminal without even the most minimal “cargo” loading activity, such as provisioning.

To George Blomberg, a Port permit analyst, “moorage is moorage,” regardless of the permits.

In sum, the Port’s position is that all of its properties with a pier for any principal use can provide moorage to any vessel, even if the activity occurring while the vessel is moored is inconsistent with the specific allowed use: moorage is moorage.

V. REGULATION OF USES AND PORT ISSUE 4 AND FOSS ISSUE 4

The fundamental principles underlying the Interpretation are that the City’s Shoreline Master Program identifies different uses in the Shoreline District and that activities on a site must be approved by the City via a permit establishing a “use” on the site. The Shoreline Management Act

122 Attachment F, Englin, p. 10:23 to 11:2.
126 Attachment G Meyer, p. 11:5-17.
128 Attachment I, Blomberg, p. 25:2-3
requires activities be consistent with allowed uses. To meet the goals of the Act, activities that are permissible under the City’s Land Use Code use provisions must nevertheless be permitted through the City’s approval process.

Port Issue 4 and Foss Issue 4 contend that “moorage” is allowed at Terminal 5 independent of the cargo terminal permit issued for Terminal 5 and independent of any City determination. But Appellants’ arguments misconstrue the Shoreline Management Act, the Shoreline Master Program, and the Land Use Code and should be rejected.

A. The Shoreline Management Act’s regulation of uses

The Shoreline Management Act is the state’s expression of the Public Trust Doctrine. The SMA applies to all “shorelines of the state,” which are the land 200 feet from the ordinary high water mark and all the water areas.

The Act is particularly concerned with uses of the shoreline, as expressed in RCW 90.58.020 (emphasis added):

The legislature finds that the shorelines of the state are among the most valuable and fragile of its natural resources and that there is great concern throughout the state relating to their utilization, protection, restoration, and preservation. In addition it finds that ever increasing pressures of additional uses are being placed on the shorelines necessitating increased coordination in the management and development of the shorelines of the state. . . .

It is the policy of the state to provide for the management of the shorelines of the state by planning for and fostering all reasonable and appropriate uses. . . .

In the implementation of this policy the public’s opportunity to enjoy the physical and aesthetic qualities of natural shorelines of the state shall be preserved to the greatest extent feasible consistent

120 RCW 90.58.040.
130 RCW 90.58.030(2)(d)(“shorelands”), (e)(“Shorelines” means all of the water areas of the state, including reservoirs, and their associated shorelands, together with the lands underlying them”), and (g).
with the overall best interest of the state and the people generally. To this end uses shall be preferred which are consistent with control of pollution and prevention of damage to the natural environment, or are unique to or dependent upon use of the state’s shoreline.

Permitted uses in the shorelines of the state shall be designed and conducted in a manner to minimize, insofar as practical, any resultant damage to the ecology and environment of the shoreline area and any interference with the public’s use of the water.

The Act directs local governments to develop “master programs” for all uses and their regulation. Master programs are required to include “a use element which considers the proposed general distribution and general location and extent of the use on shorelines and adjacent land areas.” State approved master programs “constitute use regulations for the various shorelines of the state.” Ignoring uses violates the Act.

The City’s Shoreline Master Program (SMP) is part of the City’s Land Use Code, located in SMC Ch. 23.60/.60A; it is an “overlay district” called the “Shoreline District.” The SMP is adopted by the City and approved by the Washington State Department of Ecology, pursuant the Act. In this overlay district the SMP regulations, including procedures, standards, and definitions, are “superimposed upon and modify the underlying land use zones.” Thus, the procedures and standards for both the SMP and the underlying zone apply (unless those for the

---

132 RCW 90.58.080(1): “Local governments shall develop or amend a master program for regulation of uses on shorelines of the state...”;
133 RCW 90.58.100(2)(c).
134 RCW 90.58.100.
135 After the Interpretation was issued Chapter 23.60 was superseded by Chapter 23.60A effective June 15, 2015.
136 Chapter 23, Division 3, Overlay Districts, SMC 23.59.010.
137 SMC 23.59.010.B: “Property located within an overlay district... is subject both to its zone classification regulations and to additional requirements imposed for the overlay district.” See also, SMC 23.60.014; 23.60A.016.A.
zone are specifically modified by the SMP). In particular, uses must be permitted in both the Shoreline District and the underlying zone.  

B. No moorage use at Terminal 5 is currently lawful except as part of cargo terminal use – Port Issue 4 and Foss Issue 4

The permits for Terminal 5 authorize a cargo terminal use, the cargo terminal permit for that site excluded general moorage, and there is no permit allowing moorage independent of the cargo terminal use. Port Issue 4 and Foss Issue 4 contend that moorage not associated with the cargo terminal use is allowed without additional permits because provisions of the SMP authorize moorage outright and the SMA only regulates “substantial development” and no permit is required for activity that is not substantial development, or because the SMA preempts local permits other than a substantial development permit. If these arguments were correct, the Interpretation would be superfluous, but all of these arguments are wrong.

The SMP allows “boat moorage” over water if it is allowed in the shoreline environment; commercial moorage is allowed as a principal use in the UI environment and in the IG1 zone. The Port claims this is sufficient to authorize the use because no “substantial development permit” is required to use an existing structure, since there is no new substantial development. DPD agrees there is no new substantial development and so no substantial development permit is required; however, the law is clear that the SMA and SMP still regulate the proposed use and that a City permit (not a substantial development permit) is required.

---

138 SMC 23.60.014.A; 23.60A.016.B.
139 See, Statement of Facts Subsection A.
140 SMC 23.60A.090.A.1.
141 SMC 23.60A.482 and Table A; SMC 23.50.012.A. and B. and Table A for 23.50.012.
142 A “substantial development permit” a special permit created by SMA for “development” in the shorelines of the state. This permit is issued by the local government in which the property is located and sent to the Washington Department of Ecology when “substantial development” occurs, as defined by the SMA and the Washington Administrative Code for the Department of Ecology. (RCW 90.58.140.) Such a permit is appealable to the Shoreline Review Board. (RCW 90.58.180.)
Uses are regulated by the SMA and master programs even when no substantial development is required, due to the Act’s particular focus on regulating uses. The Washington Supreme Court has held: “[The] statutory language evinces a policy which allows regulation of uses on shorelines, not just regulation of statutorily defined ‘developments’ on shorelines.” Thus, the Port’s argument that “use” in the SMA is limited to “use” in the definition of “development” is wrong. The Court specifically held that regulating uses that do not require substantial development permits is a requirement of the Act:

Thus, Clam Shacks concludes there can be no use control, regardless of the master program, unless the activity involved constitutes a development. We disagree. Such construction would frustrate the declared policy of the SMA.

The City’s SMP implements this stating:

No development shall be undertaken and no use, including a use that is located on a vessel, shall be established in the Shoreline District unless the Director has determined that it is consistent with the policy of the Shoreline Management Act and the regulations of this chapter. This restriction shall apply even if no substantial development permit is required.

The SMP further states: “A . . . use that does not meet the definition of substantial development . . . shall comply with the Shoreline Management Act, the provisions of this Chapter 23.60A, and any other regulatory requirements.”

The “other regulatory requirement” is that a use permit be obtained, including zoning review to ensure that the use is consistent with the regulations of the SMP and other applicable development standards. This is reflected in SMC 23.40.002, SMC 23.76.004 Table A and SMC

\[144\] Port’s Opposition to DPD’s Motion to Dismiss Claims, p. 8, lines 15-20.
\[145\] Clamshacks v. Skagit County, 109 Wn.2d at 95.
\[146\] SMC 23.60.016/SMC 23.60A.012 (emphasis added).
\[147\] SMC 23.60A.020.A.2.b (emphasis added).
23.76.006. The procedure for obtaining a permit is generally provided in Chapter 23.76. And since requirements for both the underlying zone and the SMP overlay district apply, compliance with the regulations of the underlying zone to establish the commercial moorage use under SMC 23.50.012, the standards for the underlying IG1 zone, would require application of SMC 23.40.002, even if the SMP did not.

SMC 23.40.002.A. requires obtaining a standard Master Use Permit, the DPD permit required to establish or change a use:

A. The establishment or change of use of any structures, buildings or premises, or any part thereof, requires approval according to the procedures set forth in Chapter 23.76, Procedures for Master Use Permits and Council Land Use Decisions [listing exceptions inapplicable here].

Where a use is permitted outright under the applicable zoning, the approval is a “Type I” decision. Even uses approved as Type I decisions require permits. Therefore, the Port needs an additional permit to establish any use that is not part of the cargo terminal use already permitted. Paul Meyer, the Port’s Manager of Seaport Environmental Programs (permit acquisitions), agreed that the City can require use permits when there is no construction.

The Port has previously argued that this provision does not apply to navigable waters, but this is wrong. The water adjacent to the pier is part of “the premises,” as evidenced by the SMA definition of shorelines regulated by the Act, by the land use permit for Terminal 5, which

---

148 SMC 23.59.010.B and 23.60A.016.B.
149 SMC 23.40.002.A and B.
150 Table A for SMC 23.76.004, Type I, second entry “uses permitted outright”; 23.76.006.B.2 (“Establishment or change of use for uses permitted outright”).
152 Port’s Opposition to DPD’s Motion to Dismiss Claims, p. 8, lines 8-13.
153 RCW 90.58.030(2) (e) “Shorelines” means all of the water areas of the state, including reservoirs, and their associated shorelands, together with the lands underlying them . . . .” (emphasis added).
includes “shipping berths [in the water] and wharf structures, including work in the waterway, and the lease to Foss describing the “premises.”

And even if “the premises” did not include the water controlled by the Port, the “use of the structure” – the pier – triggers SMC 23.40.002.A so that what ties up to the pier is consistent with the existing permit for the use of the pier. Therefore, this Port argument is meritless.

The Port also claimed this permit process was preempted by the SMA. Not only does the Clam Shacks decision refute this, but the Act expressly states it does not preempt local permitting requirements:

Nothing in this chapter shall obviate any requirement to obtain any permit, certificate, license, or approval from any state agency or local government.

Therefore, this argument is meritless, too. The Port must apply for a use permit to establish uses not authorized under the cargo terminal permit for Terminal 5.

VI. THE MEANING OF THE CARGO TERMINAL DEFINITION - FOSS ISSUES 1, 2 AND 3 AND PORT ISSUE 1

Determining the meaning of the City’s cargo terminal definition requires both defining the terms of the definition and setting them in context within both the definition and the SMP. The cargo terminal definition describes what happens to “goods” and container cargo. “Goods” is a broad term in common parlance, and becomes narrower in the context of its maritime definition. Determining what happens to the goods at the site of the cargo terminal aids in refining the definition and shows the City’s definition is similar to the general definitions of cargo: goods that are transported. Comparing “goods” to the term “container cargo” and to the

154 Ex. F33, Analysis and Decision p. 4 (W-19); see also, the bollard location in the waterway for the cargo terminal use.
155 Ex. F 36, including the exclusive use berth area in Ex. B and DNR agreement Ex.C to lease. See also,
156 Opposition to DPD’s Motion to Dismiss, p. 9, lines 5-6.
157 RCW 90.58.360 (emphasis added).
definitions of cargo in SMC 23.60.906 and applying the meaning cargo in the maritime trade helps further refine the nature of the goods in the context of “cargo terminal.” Finally, “goods” as it is used in “cargo terminal” must be set in the context of the SMP to differentiate the cargo terminal use from other uses – “goods” at a cargo terminal means paying cargo, not stores, provisions or gear, because those are common to all moorage sites.

A. Identifying the definition

The Shoreline District is an “overlay district.” Property in an overlay district is subject “both to its zone classification regulations and to additional requirements imposed for the overlay district.”158 The Shoreline District regulations are found in the Shoreline Master Program, Ch. 23.60/23.60A.159 As a result, the Land Use Code has two definitions of cargo terminal, one in SMC 23.84A.038 and one in SMP 23.60.906/ 23.60A.906. Foss’s Appeal160 asserts all these definitions apply, and the Hearing Examiner concurred, ruling that 23.60A.906 “does not differ materially from that in SMC 23.84A,” so it is appropriate to consider the definition in SMC 23.84A.038, as well as 2360.906/23.60A.906.161 The Port does not dispute this: Paul Meyer admitted (twice) that the definition of cargo terminal in SMC 23.84A is “the same” as the definition in the SMP, and he relied on it in making his own determinations for the Port.162

The definitions state:

23.84A.038 – “T”

* * *

“Transportation facility” means a use that supports or provides a means of transporting people and/or goods from one location to

158 SMC 23.59.010.B.
159 The regulations in SMC 23.60 were in effect when the Interpretation was written and the regulations in SMC Ch. 23.60A are currently in effect.
160 Amended and Restated Notice of Appeal, page 5, lines 23-25 (Issue 1).
161 Order on Motion to Dismiss, page 1, ¶ 6.
162 Hearing Examiner Record, Day 3, Tape 2 starting at 40:25 and through 44:20; Attachment G Meyer, p. 68:4-19 and 69:19 to 70:8.
another. Transportation facilities include but are not limited to the following:

1. "Cargo terminal" means a transportation facility in which quantities of goods or container cargo are, without undergoing any manufacturing processes, transferred to carriers or stored outdoors in order to transfer them to other locations. Cargo terminals may include accessory warehouses, railroad yards, storage yards, and offices.

23.60A.906 - Definitions — "C"

"Cargo terminal" means 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.

23.60.906 - Definitions — "C"

"Cargo terminal" means 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.

B. What are "Goods"

"Goods" are not defined in Title 23. The definition cited in the Interpretation uses the plural of the word "good," which is how the word is used in the definition of cargo terminal:

3 . . . b pl : personal property having intrinsic value but usu. Excluding money, securities and negotiable instruments . . . d pl: WARES, COMODITIES, MERCHANISE < canned ~s>

This is consistent with the fuller definition in Webster’s Third New International Dictionary, which is the source for the dictionary used in the Interpretation:

3 . . . b goods pl : tangible movable personal property having intrinsic value usu. excluding money and other choses in action but

---

163 The dictionary used by the Washington Supreme Court; Appendix to GR 14.
sometimes including all personal property and occas. including vessels and even industrial crops or emblements, buildings, or other things affixed to real estate but agreed to be severed: chattels, wares, merchandise, food products, chemical compounds, and agricultural products < household ~s> < baked ~s>.

The Dictionary of Maritime and Transportation Terms\textsuperscript{164} is more nuanced and includes the idea of shipping:

Common term indicating moveable property, merchandise, or wares. All materials that are used to satisfy demands. Whole or part of the cargo received from the shipper, including any equipment supplied by the shipper.

All of these definitions include the more restrictive term “merchandise.” Determining whether the scope of “goods” in “cargo terminal” is so restricted requires further analysis of the definition.

C. What must happen with the goods

What happens with the goods is the key to determining whether the use is a cargo terminal use. Reading the City’s definitions of cargo terminal, it is clear that the goods must be on the site “in order to transfer them to other locations.” Each of the definitions says this.

Foss’s argument that a new comma in SMC 23.60A.906 creates a material difference in the meaning of that definition is meritless. The Hearing Examiner has ruled that all definitions apply, as Foss itself admits.\textsuperscript{165} Therefore, the activity in the Shoreline District must comply with the definitions for the underlying zone, as well as the definitions in the SMP, so the definition in 23.84A.038 must be applied. That definition most clearly reflects that transferring goods to other locations is the central purpose of the cargo terminal use.

\textsuperscript{164} PSK Ex. 6 Jeffrey W Monroe, Dictionary of Maritime and Transportation Terms, Cornell Maritime Press (2005).

\textsuperscript{165} Foss Opposition to Motion to Dismiss p. 4:23 to 5:1 and note 3: definitions in 23.84A and the SMP (23.60.906 and 23.60A.906) “cannot be said to differ in any material way.”

DEPARTMENT OF PLANNING AND DEVELOPMENT’S CLOSING ARGUMENT - 30

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8290
Furthermore, in statutory construction the "last antecedent rule" Foss cites does not override statutory context. The basic rule of statutory construction is to consider a definition in its context: if the phrase "in order to transport them [the goods] to other locations" did not apply to the phrase "in which quantities of goods or container cargo are stored," then merely storing goods would be sufficient to be a "cargo terminal" use. This is not consistent with the structure of the Land Use Code and the SMP for three reasons:

First, a cargo terminal is a "transportation facility" use, whereas storage is a separate use category — "storage." The same activity cannot be in two use categories. In order to differentiate the uses, the phrase "in order to transfer them to other locations" must apply to "storage" in the transportation facility use.

Second, a transportation facility is one that "supports or provides a means of transporting people and/or goods from one location to another." "Storage" per se does not support transporting goods, so the phrase "in order to transfer them to another location" must apply to the storage; mere colocation of moorage with a storage facility is not sufficient.

Third, to be a cargo terminal in the UI environment, the cargo terminal must be water-dependent (a use that cannot exist without a waterfront location) or water-related (e.g., the use has a functional requirement to be on the water due to shipment of materials by vessel, storage of

---

166 "We do not apply the [last antecedent] rule if other factors, such as context and language in related statutes, indicate contrary legislative intent or if applying the rule would result in an absurd or nonsensical interstation." State v. Bunker, 169, Wn.2d 571, 578, 238 P.2d 487 (2010). Norman Singer, 2A Sutherland on Statutory Construction, § 47:33 (p. 501) (7th ed. 2014): "The last antecedent rule is merely another aid to discover legislative intent or statutory meaning, and is not inflexible or uniformly binding. In general, then, where the sense of an entire act requires that a qualifying word or phrase apply to several preceding or even succeeding sections, the qualifying word or phrase is not restricted to it immediate antecedent."

167 SMC 23.84A.036; compare Table A for 23.60A.482, subsection M with subsection N.2.

168 SMC 23.84A.036.
material that is transported by vessel). The only way that will occur is if the goods being
stored are also being transferred by a vessel.

Finally, if there were any doubt, the legislative history of SMC 23.60A.906 shows that
adding the comma was not intended to alter the meaning of cargo terminal from the prior
meaning.

Thus, the Interpretation correctly states the “unifying theme” of the cargo terminal
definition is that “the goods are at the cargo terminal in order to be transferred to other
locations.”

Transferring goods is also consistent with the standard definitions of “cargo.” Webster’s
Third New International:

The lading or freight of a ship, airplane, or vehicle: the goods, 
merchandise or whatever is conveyed.

Dictionary of Maritime and Transportation Terms:

Merchandise or goods accepted for transportation by ship. The 
commodities or goods that are transported in commercial 
enterprise, domestic trade or international trade by a common 
carrier.

Black’s Law Dictionary:

Goods transported by a vessel airplane, or vehicle; FREIGHT 
- General cargo – goods and materials of various types 
transported by carriers . . .

---

169 SMC 23.60.840.D.5/23.60A.482.A.2.a and Table A for 23.60A.482, subsection N.2; SMC 23.60A.944.
170 See also, Attachment D, McKim, p. 144:14 to 145:24.
171 DPD Ex. 31 (showing that version 2 of the draft ordinance was submitted to Council without the comma) and
DPD Ex. 33 (a memo stating in ¶ 4 that the changes shown on the substitute bill are housekeeping and not intended
to be substantive, and showing the addition of the comma).
172 Interpretation, p. 4, ¶ 6.
173 Attachment C.
174 PSK Ex. 6, p. 72.
175 PSK Ex. 7, p. 1.
Therefore, the Interpretation is correct that goods must be transferred by a vessel to be a cargo terminal use in the Shoreline District.

D. The purpose of transferring goods at a cargo terminal

As set out in the statement of facts, Foss loaded the exploratory oil rig and accompanying vessels with food, supplies for the ship, instruments, drills, and pipe that the exploratory oil rig will use in its mission by placing it into the sea bed. Appellants claim that what they loaded (and intend to load in the future) are the type of “goods” the City intends to be transported from cargo terminals. The City’s definitions of other types of cargo, the common usage of maritime trade, and the legislation taken as a whole show Appellants are wrong; the Interpretation correctly determines that loading only these materials is not a cargo terminal use.

1. City cargo definitions

The Shoreline Master Program in effect when the Interpretation was written defined three types of cargo:

“Cargo, breakbulk” means cargo packed in separate packages or individual pieces of cargo and load, stored and unloaded individually.

“Cargo, containerized” means cargo packed in a large (typically eight (8) feet by eight (8) feet by twenty (20) feet trunklike box and loaded, stored and unloaded as a unit.

Cargo, neobulk” means cargo which has historically been classified as generalized cargo, such as grain, oil, and automobiles, but now is moved in bulk movements usually in specialized vessels. 176

These are the types of cargo the City expected to be loaded at a cargo terminal. The definitions were enacted as part of the major revision of the SMP in 1987, Ordinance 113444, 177 creating

176 SMC 23.60.906.
177 DPD Ex. 8, p. 1 and 171-172.
Chapter 23.60, when "cargo terminal" was added to the SMP. The Examiner may consider these definitions and this ordinance in determining the meaning of the cargo terminal definition because they are part of the SMP's context and subject to judicial notice:

In addition, background facts of which judicial notice can be taken are properly considered as part of the statute's context because presumably the legislature also was familiar with them when it passed the statute.178

As part of that update, in 1983 City prepared An Assessment of the Future Needs of Water-dependent Uses in Seattle - Seattle Shoreline Master Program Revision Project ("Assessment"),179 which is also part of the context of the SMP that was in effect when the Interpretation was written, and relates to the terms used in the 1987 revision. The Assessment specifically identified the uses classified as water-dependent in the SMP, including:

Cargo handling facilities [sic] including container terminal, general cargo facilities (breakbulk, neobulk, dry and liquid bulk), and tug and barge operations.180

These are examples of the nature of the goods the City anticipated being transferred at a cargo terminal - they are commercial goods, rather than goods used by the ship itself. For example, in describing cargo handling facilities, the Assessment notes, "A majority of consumer goods destined for Alaska passes through Seattle."181 The report refers to the "commerce" and "world trade" that is enabled through cargo handling facilities182 and sets out the "types of cargos" that are handled: containerized, breakbulk, grain, petroleum, automobiles, steel and barge traffic.

[Notes]

179 DPD Ex. 9.
180 DPD Ex. 9, p. I-1. See also, p. II-1.
181 DPD Ex. 9, p. II-1 ¶ 3 (emphasis added).
182 DPD Ex. 9, p. II-1 and passim.
It has a special section on container terminals, such as Terminal 5, which is specifically noted. Breakbulk cargo is described as “commodities.” Neobulk is described as “autos on auto ships” and “steel in steel ships,” and “lumber in lumber ships.” These are the types of goods the City anticipated would be loaded at cargo terminals when the City first defined a cargo terminal.

And, the Assessment differentiates cargo handling from moorage for fishing vessels. The Assessment identifies fishing vessel moorage as occurring at a “general cargo terminal” only when there is accessory cold storage and otherwise is located at “commercial moorage.”

These types of cargo, identified by the City in the mid-1980s, are same types of cargos identified by Linda Styrk, Managing director of the Maritime Division of the Port, in 2015, as part of the description of non-containerized cargo she provided to DPD as part of the interpretation. She also identified breakbulk, and ro-ro (roll-on/roll-off automobile cargo) to the Port commissioners 2014 in connection with possible interim uses for Terminal 5 while it is not being used for containerized cargo. She, too, distinguished these cargo uses from “commercial moorage,” which she noted is being provided for the fishing fleet at Terminal 91. And she distinguished cargo uses, such equipment for a LNG plant construction, from a “home porting opportunity that links to moorage and provisioning of commercial vessels that are

---

DPD Ex. 9, Table 2 page 11-6.
DPD Ex. 9, p. II-7.
DPD Ex. 9, p. 11-8.
DPD Ex. 9, p. II-10.
As does Resolution 27618 (adopted in 1987), DPD Ex. 4, Attachment A, pp.26-27; compare, Guideline E8(a) (cargo handling) with Guideline E8(d) (moorage)
DPD Ex. 9, p.IV-4¶ 1 (under Existing Conditions) and IV-5, ¶ 1.
Foss Ex. 20, p.1.
DPD Ex. 23 p. 4:6 to 5:12
DPD Ex. 23, p. 5:22 to 6:2.

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200
involved in the off-shore activity up in Alaska,”¹⁹² and which she described as an opportunity to
“moor multiple vessels from this exploration activity up in Alaska.”¹⁹³

That fleet of vessels would include exploration, icebreakers,
provisioning, environmental response tugs, barges, again for
seasonal operations in Alaska.”¹⁹⁴

2. “Cargo” in Maritime Usage

All of the maritime professionals, O’Halloran, Johnson, Knudson, and Gallagher, agree
that “cargo” is a broad term for what is loaded or unloaded on a vessel, with a subset of stores,
provisions and gear, which serve the ship; O’Halloran testified that every boat will have stores,
provisions and gear, including pleasure craft, such as a motorboat. Gallagher agreed. Knudson and
Gallagher agree there is a fourth cargo category: paying cargo, which pays for the operation of
the ship. Styrk the Director of the Maritime Division, differentiated that cargo from the
“provisions and supplies for the ship’s crew and the vessel’s work, which may be packaged
similarly, but are loaded into a different area.”¹⁹⁵

3. “Cargo terminal” definition meaning

If “cargo terminal” just means a place where goods that are stores, provisions and gear
are put on a vessel and carried somewhere, then a cargo terminal is indistinguishable from every
other use that includes moorage, because boats moored at passenger terminals, commercial
moorages, and even at recreational marinas also load and carry stores, provisions and gear,
Englin and Gallagher agreed. The only difference will be a difference in scale, as Gallagher

¹⁹² DPD Ex. 23, p. 6:8-12.
¹⁹³ DPD Ex. 23, p. 14:14-16.
¹⁹⁵ Foss Ex. 20, p.1.
conceded. The Interpretation (Conclusion 7) found that what occurs at moorages generally is not sufficient to be a cargo terminal use.

Something other than scale must be different to create a cargo terminal, and that difference is the phrase in the definition: “in order to transfer them [the goods] to other locations.” This states the purpose of the cargo terminal use, and makes it different from other uses. Transfer has several meanings:

1a: to carry or take from one person or place to another: TRANSPORT, REMOVE . . .
1b: to remove or send to a different location esp. for business, vocational or military purposes . . .
1c: to cause to pass from one person or thing to another: TRANSMIT

If the purpose, or mission, or job of the vessel must be to transfer the goods, rather than to use them for the vessel’s own purpose, then the goods that are transferred must be different from what is used or consumed for the vessel’s own purposes. Gallagher agreed that the “mission” of a cargo vessel is to carry the fourth type of cargo – paying cargo.

But the primary purpose of a drilling rig is drilling, Englin testified. Gallagher testified that the Polar Pioneer is a “highly specialized unit” and that its “mission” and its “job” is to drill for oil. He testified the stores, provisions and goods that are loaded on it and on the accompanying vessels are there for that mission. So the goods on the oil rig and its accompanying vessels are not for the mission of transferring goods to another location. Even though the stores, provisions and gear on the oil rig and accompanying vessels may be transferred among them, these goods will be used for the operation of all the vessels on their

---

196 Gallagher, p. 94:18 to 95:9.
197 Attachment C, Webster’s Third New International Dictionary. According to the explanatory notes (included in the Attachment), the sequence of the senses of a word are listed in order from earliest historical use.
198 Attachment F, Englin, p. 26:14-16.
collective mission to drill for oil. They are not the goods intended for the mission of being transferred to another location under the cargo terminal definition.

Therefore, the Interpretation (Conclusion 7) is correct that merely putting provisions on tugs is not sufficient to be a cargo terminal use. The additional detail that stores, provisions and gear were loaded onto the Polar Pioneer and several other accompanying vessels adds information, but does not change the result of the Interpretation.

E. "Historic actions" do not alter the definition of cargo terminal

Appellants argue that "historic actions" by DPD expand the definition of "cargo terminal" to include moorage or lay berthing for vessels that are not engaged (currently or recently) in cargo terminal activity. The Examiner’s Order on DPD’s Motion to Dismiss allowed this line of argument for limited purposes. The Order states:

Evidence and argument concerning past activities deemed by the City to be a cargo terminal use may be offered at hearing for this purpose.199

Similarly, on Issue 7, rejecting Foss’s claim that under Nykreim the City’s failure to appeal a bollard replacement permit barred the City from issuing the Interpretation, the Order states:

Foss also argues that the City’s prior permitting actions are relevant to the appeal, and as noted above, the City’s past determinations of what constitutes a cargo terminal use may aid the Examiner’s understanding.200

The evidence shows that the City has approved permits for a variety of activities at Terminal 91, some in connection with the cargo terminal there and others as new uses (passenger

199 Order, p. 3, paragraph 14(emphasis added).
200 Order, p. 2, paragraph 10 (emphasis added).
terminal, public facilities for fire and rescue boats). However, no evidence exists of "determinations" by DPD approving the general moorage the Appellants claim.

McKim testified that approvals on permits are shown on the face of the permit describing the permitted work, and approvals on land use decisions are found in the summary of the proposed action. The Appellants adduced no evidence showing such an approval for general moorage broader than what the Interpretation authorized as an accessory use: "lay berthing of vessels otherwise used for transporting foods in the stream of commerce." 201

Instead, Port permit manager Meyer testified about his understanding of a series of land use decisions in which the background description of activities on the site included large vessel moorage as part of the cargo terminal use. While he claimed this authorized general moorage as a part of the cargo terminal use, he conceded that these background statements could be read as confined to the meaning in the Interpretation. And indeed, this is the better reading of the language.

In addition, there is no evidence that the DPD writer of any of the decisions determined that the background statements represent approved uses; planner Perkowski testified he did not do so when he wrote decisions.202 In at least one instance, it is clear that the distinctive wording of the background description in the decision for the passenger terminal permit came from the Port's SEPA determination.203 Nor is there any evidence that a zoning reviewer reviewed these background statements to verify their accuracy: the evidence is that the zoning reviewer reviews the standards for the proposed use, and the background statements in the land use decision are written

201 Interpretation, Conclusion 11.
202 Testimony August 24, Tape 4 at 42:12 to 42:30.
203 Compare Foss Ex. 89, p. 2, Project Background ¶1, and DPD Ex. 36, DEIS p. 1-3 ¶2 and p. 2-3, ¶¶ 2 and 3.

DEPARTMENT OF PLANNING AND DEVELOPMENT'S CLOSING ARGUMENT - 39
after zoning review was done.\textsuperscript{204} No basis exists for relying on these descriptions as evidence that DPD actually approved the use of general moorage at Terminal 91, much less at Terminal 5.

Similarly, there is no basis to conclude that the photographs produced by the Port show that DPD “deemed” the activities depicted were a cargo terminal use. DPD Code Compliance Manager Lumsden testified that in carrying out her code compliance responsibilities both in 1987-88 and currently, she understood that DPD investigates based on complaints or observed public safety hazards. If no one question naval ships or oil rigs, DPD does not independently investigate, unless DPD is aware of a health or safety issue — there is not enough staff. In addition, the naval vessels may have been authorized to moor by the Coast Guard based on a claim of sovereign immunity form SMP regulations.\textsuperscript{205} Appellants adduced nothing more than pictures, from which no inferences can be made.

Most importantly, none of the photographs are of moorage of non-cargo terminal vessels at Terminal 5, the actual site that is subject to the Interpretation.\textsuperscript{206}

In addition, the evidence shows that the land use decision actually issued for Terminal 5, approving a major expansion of the cargo terminal use, expressly relied on SMP Guidelines for cargo handling facilities and do not cite to or rely on Guidelines for general moorage. Nothing in the record supports transferring background remarks or photos with respect to Terminal 91 to Terminal 5.

Lastly, the evidence clearly shows that in approving the substantial development permit exemption for repair and maintenance of the bollards at Terminal 5 in February, planner Perkowski

---

\textsuperscript{204} Testimony August 24, Tape 4 at 42:32 to 43:05.

\textsuperscript{205} See, \textit{Friends of the Earth v. U.S. Navy}, 841 F2d 927 (1988) (rejecting the Navy’s sovereign immunity claim only with respect to the environmental provisions in a shoreline master program).

\textsuperscript{206} SMC 23.88.020.A: “A decision by the Director as to the meaning, application, or intent of any development regulation in Title 23 ... as it relates to a specific property. ...” (emphasis added).
was not approving the oil rig as a cargo terminal use. Perkowski testified that is not a part of the
exemption decision and that he lacked authority to make such a use determination. Use
determinations were a condition of the approval that would be made as part of the building permit
process, he said. The Port never submitted documents to him that said the oil rig would be there,
Blomberg, the Port applicant, did not ask Perkowski to make such a determination, and at the time
Perkowski issued the exemption, Blomberg did not think that Perkowski had made such a
determination.

No record of past actions shows approval of general moorage as part of a cargo terminal use,
especially at Terminal 5.

VII. GENERAL MOORAGE IS NOT ACCESSORY TO A CARGO TERMINAL
UNDER THE SMP - FOSS ISSUES 5 AND 6 AND PORT ISSUES 5 (PART RE
INHERENT MOORAGE), 7 (PART) AND 8

A. Accessory uses

The definition of an accessory use in the SMP is a “use which is incidental and intrinsic
to the function of a principal use and is not a separate business establishment.” The definition
of incidental is “subordinate, nonessential or attendant in position of significance.” The
definition of intrinsic is “belonging to the inmost constitution or essential nature of a thing.”

The Interpretation accepts that “lay berthing of vessels otherwise used for transporting
foods in the stream of commerce may be regarded as incidental and intrinsic to the function of a
cargo terminal.” However, the Interpretation excluded vessels that were not of this type

\[\text{References:} 207 \text{ SMC 23.60.940/23.60A.940.} \]
\[208 \text{Webster's Third New International Dictionary.} \]
\[209 \text{Id.} \]
\[210 \text{Interpretation, Conclusion 11.} \]
because that would be a separate principal use, which is defined as a use that “has a separate and
distinct purpose and function from other use on the lot.”

The Port argues (Issue 7, part ) that the Interpretation’s logic means that cargo vessels
could not in fact moor as an accessory use because that would not be “incidental” to the cargo
terminal use. If the Port means mooring for the purpose of actually loading or unloading, DPD
would concur that this is not incidental, that moorage is an inherent part of the cargo terminal use
itself, otherwise the goods could not be transferred by a vessel to other locations – so it is part of
the principal use, not an accessory use.

But the Interpretation addresses lay berthing before or after loading. This activity is
“subordinate” to the purpose of the cargo terminal storing goods or transferring them to other
carriers “in order to transport them to other locations.” Lay berthing of such vessels is also
“intrinsic” to the extent that vessels that are there for this purpose may stay while they await their
next load. However, it is not intrinsic for other vessels to lay berth at a cargo terminal because
their presence is not part of the “essential nature” of the cargo terminal use to store goods or
transfer them to other carriers “in order to transfer them to other locations.”

Since the Polar Pioneer and the accompanying vessels are not vessels engaged in cargo
terminal activities, the Interpretation correctly determines that their lay berthing at Terminal 5
cannot be considered an accessory use and this part of Port Issue 7 and Foss Issues 5 and 6
should be rejected.

211 Id., and SMC 23.60.960/23.60A.940.
B. SMC 23.60A.090.B does not obviate the need to meet the standards for accessory use – Port issue 8

The Port Issue 8 contends that pending SMC 23.60A.090.B obviates demonstrating a proposed accessory use meets the SMP definition of “accessory use” – “incidental and intrinsic” to the principal use. This claim misreads the Code and should be dismissed.

SMC 23.60A.090.B states (emphasis added):

B. Any principal use allowed, allowed as a special use, allowed as a shoreline conditional use, or allowed as a Council conditional use in a specific shoreline environment may be an accessory use using the same process as if the use were the principal use, unless the use is prohibited as an accessory use in the shoreline environment. For the purposes of this subsection 23.60A.090.B, water-based airports, heliports, and helistops shall not be considered to be accessory to a principal use and are allowed pursuant to the applicable shoreline environment.

This means a use that meets the SMP accessory use definition can be allowed in the particular shoreline environment via the appropriate use process for that type of use in the zone. If the use is a “special use,” it can be an accessory use if it (1) meets the SMP definition of accessory use and (2) is approved as a special use, just meeting the accessory use standard is not enough.

Under the Port’s reasoning, any use permitted outright in the shoreline environment could automatically qualify as an accessory use, even if that use were entirely unrelated to the principal use. If this section were interpreted as the Port proposes, the definition of “accessory use” would be surplusage throughout the SMP. “[A] code section should be construed so that each part is given effect with every other part. City of Tacoma v. Cavanaugh, 45 Wn.2d 500, 275 P.2d 933 (1954);” 212 Port issue 8 should be rejected.

VIII. FOSS ISSUE 15

Foss Issue 15 asserts an error in the Interpretation concerning the Director’s authority to define unlisted uses, but does not refer to a specific section of the Interpretation, and for this reason the Examiner declined to grant DPD’s Motion to Dismiss Foss Issue 15. DPD assumes that Foss Issue 15 refers to Interpretation, Conclusion ¶ 8. The legal analysis in that paragraph is self-explanatory: the authority granted to the Director in SMC 23.42.010 expressly does not apply to regulations in SMC Chapter 23.60/60A, because those provisions are in Subtitle III, Division 3 of the Code, and the authority in SMC 23.42.010 applies solely to Subtitle III, Division 2. This issue should be dismissed.

IX. THE INTERPRETATION DOES NOT IMPROPERLY CONSIDER THE ACTIONS OF VESSELS AWAY FROM THE SITE OR INTERFERE WITH THE OPERATION OF VESSELS - PORT ISSUES 5 (PART) AND 7 (PART) AND FOSS 18

Appellants assert the City cannot regulate which vessels use the moorage that is created when a cargo terminal use is authorized, because it improperly makes a “vessel’s right to moor” dependent on what the vessel does when it is away from the pier and interferes with the operation of vessels under SMP 23.60.018 and 23.60A.018. Both arguments are wrong.

The SMA and the City’s SMP regulate what use its owner makes of Terminal 5 – it is a cargo terminal, and only activities consistent with that use are allowed there. The owner cannot use the property for moorage that is inconsistent with the cargo terminal use without obtaining an additional permit for mooring other types of vessels: commercial moorage, or passenger terminal, or recreational moorage or public facility moorage, etc. The Port’s argument is like saying if a grocery store owner has a permit allowing accessory parking for the grocery store, she should be able to also rent out the parking stalls for general paying parking for all cars whose
owners are not shopping at the store without getting an additional permit for principal use
parking; otherwise, under the Port’s argument the City’s regulations would compromise a
“driver’s right to park” or a “driver’s right to shop,” because the lawfulness of the parking
depends on what the car’s owner intends to do, shop at the grocery store or do business
elsewhere.

But in fact, the regulations regulate the use of the property, and it is the property owner’s
choice of use that affects what the users can do. Many types of facilities can have several
different functions and different customers, depending on the owner’s choice - the owner of a
retirement home or a domestic violence shelter (both residential uses) might want to turn the
facility into a hotel (a lodging use), which would require new use permits. The permit directs
how the property can be used, at the owner’s choice.

The SMA and SMP regulate the use of the shoreline, not a “vessel’s right to moor.”
Owners of property get the appropriate use permit to authorize certain types of vessels to moor at
the site – nothing prevents the Port from getting the appropriate permits so their property can
provide a variety of moorage opportunities, as the Port has done, somewhat, for Terminal 91.

SMC 23.60.018/23.60A.018 states in part:

Except as specifically provided otherwise, the regulations of this
Chapter 23.60A do not apply to the operation of boats, ships and
other vessels designed and used for navigation, other than moorage
of vessels and uses on vessels unrelated to navigation . . . .
(Emphasis added.) This regulation does not apply to the operation of vessels. The SMP
identifies what moorage opportunities the property owner may choose; this then affects where
the vessel may moor, which is lawful under this provision. These issues should be dismissed.
X. THE INTERPRETATION IS CONSISTENT WITH COMPREHENSIVE PLAN
POLICY LU 270 - ALASKA GATEWAY AND MOORAGE PROVISIONS OF
THE CITY’S COMPREHENSIVE PLAN – PORT ISSUE 11

The Port contends the Interpretation bars moorage for large commercial vessels and thus
violates amended Comprehensive Plan provision LU 270. Since the Interpretation expressly
allows lay berthing at cargo terminals for vessels engaged in cargo terminal activity, this is
consistent with that policy. With respect to other vessels, nothing in the Interpretation bars
obtaining a permit for such use. If a question arises whether an existing use classification applies
to mooring the oil rigs and accompanying vessels, the SMP says unlisted uses can be
accommodated through the conditional use process. The Examiner has already ruled that
having to obtain a permit does not interfere with a port’s “priority status” under RCW 90.58.020
of the Shoreline Management Act. Similarly, obtaining a permit to comply with the
provisions of the Comprehensive Plan policies for moorage uses is not inconsistent with the
Comprehensive Plan, because the provision encouraging moorage can still be accomplished.
The state’s Growth Management Hearing Board is the expert at determining consistency between
comprehensive plan provisions and development regulations. A provision is inconsistent with
a comprehensive plan policy if it “thwarts” the policy. The Western Growth Management
Hearing Board ruled: “There is no inconsistency if it is possible for a particular development to
meet the requirements of both sets of policies or regulations.” The Port cannot show the
requirement to obtain a permit “thwarts” or makes it impossible to provide moorage for large
boats.

213 Attachment B.
214 SMP 23.60.034; SMC 23.60A.034.
215 Order on Motion to Dismiss, p. 6, ¶ 29.
216 RCW 36.70A.280(1)(a).
217 Chevron USA, Inc. v. Central Puget Sound Growth Management Hearing Board, 123 Wn. App. 161, 167-168, 93
218 Leenstra v. Whatcom County, WWGMHB 03-2-0011, Final Decision and Order (Sep. 26, 2003), at 15.
Comprehensive Plan policies to be an Alaskan gateway similarly are not defeated. They specifically apply to “tug and barge facilities.” In fact, the basis for this policy is found in the 1983 Assessment, describing the “wide variety of general cargo (containerized and non-containerized), dry and liquid commodities, and large specialized equipment” carried in the Puget Sound - Alaska routes, typically on “jumbo container barges,” and noting that “railroad barges are a common method of transporting cargos to Alaska.”

The moorage needs for such tugs and barges are not thwarted by the Interpretation’s allowance of lay berthing for cargo terminal vessels or by requiring a use permit for general commercial moorage on a site that has a cargo terminal permit. This issue should be dismissed.

XI. REQUIRING AN ADDITIONAL PERMIT IS NOT AN ABSURD RESULT

Appellants contend that upholding the Interpretation produces an absurd result because the Port will have to get an additional permit for Terminal 5 so Foss can provide the moorage and supplies to the oil rig and accompanying drilling fleet over the winter. This is not an absurd result. The Port has a permit staff of Paul Meyer and five other people, and they apply for 30 to 50 permits every year. The type of permit needed is likely a permit to establish a commercial moorage/marina permit use, an allowed use in the UI Environment and IG1 zone. Meyer is aware the Port can apply for a permit under protest during the appeal.

Appellants also contend it is absurd to require a permit because the nature of the required permit is unclear and may be a conditional use permit rather a commercial moorage permit. This is based on Port manager Meyer contorted analysis of what a commercial moorage/marina use allows, due to his imposing the use restrictions for “commercial uses” on waterfront lots onto the

219 DPD Ex. 9, p. II-11.
“commercial moorage/marina” use, which is a “transportation facility use” allowed in the UI Environment on waterfront lots, even though there is no authority for doing this in the Code. DPD planner McKim testified this is not the correct construction of the commercial moorage/marina use. And though Meyer initially claimed that the SMP standards for a marina in SMC 23.60A.200.B could not possibly apply to a commercial marina, he ultimately conceded that many of them did, including the requirement for a restroom.

Meyer also claimed not to know what a commercial vessel is, but Gallagher and Knudson, a former Port manager, had no trouble describing what it is. And McKim also noted that under the definition of commercial moorage/marina not every vessel at a commercial marina needs to be a commercial vessel, as the new commercial marina definition requires only that 75 percent of the moorage be occupied by commercial vessels and the former commercial moorage definition only required a majority to be commercial vessels.

To create their absurdity argument, Appellants have inflated the scope of the Interpretation to contend they may need to do an EIS for every cargo terminal facility to obtain a commercial marina permit, and asked their witnesses to testify as to the disastrous effect if general moorage, home porting or lay berthing were “prohibited.” The Interpretation does not “prohibit” such activities, either at Terminal 5 or elsewhere. And as Johnson, President of

224 Attachment G Meyer, p. 52:9 to 53:3.
226 Attachment J, Gallagher, p. 90:3-12 (including fishing vessels); Attachment H, Knudsen, p. 70:18-24 (same).
227 SMC 23.60.906 (commercial moorage) and 23.60A.926 (commercial marina).
228 Testimony day 4, tape 4 at 8:42 to 9:50.
Glacier Fish Company, conceded, as long as there is a permit that allows the current access for the fishing fleet, it doesn’t matter what type of permit it is. 230

Moreover, even if the result of the Interpretation were expanded to require the Port or its operators to ask incoming vessels about their intended operations in order to assign them to a berth at a facility with the appropriate permit, this is no more than currently occurs when vessels seek berths now – the Port or the operator need to ask what loading/unloading and berthing services they need in order to determine whether an appropriate berth is available. 231 These arrangements are made in advance for both scheduled and unscheduled vessels. 232

The true absurdity is that the Port has been assuming that every facility it controls can provide moorage for any type of vessel, regardless of the City permit for the facility.

XII. CONCLUSION

The Shoreline Master Program must be liberally construed to give full effect to the objectives and purposes of the Shoreline Management Act. 233 The Act’s purposes and objectives are to protect the “shorelines of the state,” which includes the waters of the state, by regulating the uses to which the shorelines are put. Appellants’ argument that “moorage is moorage” and that vessels can be moved to different sites like a “checkerboard,” regardless of the permits issued under the City’s Shoreline Master Program, vitiates the Act’s purpose of regulating uses. A construction of “cargo terminal” that opens Terminal 5 for moorage by any vessel loading stores, provisions and goods defeats the purpose of defining uses and differentiating between general moorage and a cargo terminal. The Interpretation appropriately rejects that construction

232 Attachment H, Knudsen, p. 75:15 to 76:15.
233 RCW 90.58.900; SMC 23.60.012 and 23.60A.014. Buechel v. State Dept. of Ecology, 125 Wn.2d 196, 203, 884 P.2d 910 (1994) (Act to be broadly construed to protect the shorelines of the state as fully as possible).
and appropriately limits the use of Terminal 5 to vessels mooring there for cargo terminal purposes. The Polar Pioneer and its accompanying vessels are not at Terminal 5 for this purpose.

The Interpretation should be upheld.

DATED this 10th day of September, 2015.

PETER S. HOLMES
Seattle City Attorney

By: s/Eleanore S. Baxendale, WSBA #20452
Assistant City Attorney
eleanore.baxendale@seattle.gov
Seattle City Attorney’s Office
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
Ph: (206) 684-8232
Fax: (206) 684-8284
Attorneys for Respondent
Department of Planning and Development
CERTIFICATE OF SERVICE

I certify that on this date, I electronically filed a copy of the Department Of Planning And Construction’s Closing Argument with the Seattle Hearing Examiner using its e-filing system.

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

John C. McCullough
McCullough Hill Leary P.S.
701 Fifth Avenue, Suite 6600
Seattle, WA 98104-7006
Attorneys for Appellant
Foss Maritime Co.

David R. West
Donald B. Scaramastra
Daniel J. Vecchino
Garvey Schuber Barer
1191 – 2nd Avenue, 18th Floor
Seattle, WA 98101-2939
Attorneys for Appellant
Foss Maritime Co.

Traci Goodwin
Senior Port Counsel
Port of Seattle
P. O. Box 1209
Seattle, WA 98111-1209
Attorneys for Appellant
Port of Seattle

Patrick J. Schneider
Foster Pepper PLLC
1111 Third Ave., Suite 3400
Seattle, WA 98101-3299
Attorneys for Appellant
Port of Seattle

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200
the foregoing being the last known address of the above-named parties.

Dated this 10th day of September, 2015, at Seattle, Washington.
APPENDIX

A. The Examiner’s Order on DPD’s Motion to Dismiss dismissed or modified Foss Issues 3, 5, 7, 8, 9, 11, 12, 13, 14, 16, 17 and 19, leaving the following issues or arguments to be determined:

1. Foss Issues 1: allowable scope of principal and accessory uses associated with a “cargo terminal,” as that term is defined in SMC 23.84A.038, SMC 23.60.906 and SMC 23.60A.906.
2. Foss Issue 2 —whether the operations fall within that cargo terminal as correctly defined.
3. Concerning Foss Issue 3: DPD past actions are relevant to show whether Foss’s operations here are no different than other activities that have been treated by the City as a cargo terminal use and past activities deemed by the City to be a cargo terminal use.
4. Foss Issue 4: Whether moorage, as carried out by Foss’s operations, is a legally permissible use at Terminal 5 under current Code and existing approvals.
5. Foss Issue 5: Whether the Interpretation correctly applies SMC 23.60.940 (23.60A.940) concerning accessory uses in the Shoreline District (accessory use under SMC 23.84A.040 and 23.42.020 was dismissed).
6. Foss Issue 6: Whether the operations are an allowable accessory use.
7. Foss Issue 15: The Interpretation erroneously determines the Director lacks authority to interpret and define unlisted uses.
8. Foss Issue 18: Whether the Interpretation regulates activities on vessels in a manner that is outside the Director’s authority.

B. The Examiner’s Order on DPD’s Motion to Dismiss dismissed or modified Port Issues 2, 3, 6, 10, 12, 13, 14 and 15, leaving the following issues or arguments to be determined:

9. Port Issue 1: Whether Foss’s activities are consistent with the SMP, the existing permit for Terminal 5 and the historic use at Terminal 5 (not seeking to establish a use for the record) – Same as Foss 1-3.
10. Port Issue 4: Same as Foss issue 4. Whether no permit is required because moorage is permitted use overwater regardless of whether it is associated with a cargo terminal, if no shoreline substantial development permit is required, citing SMC 23.60A.090, 23.60A.484, and 23.60A.020A.2.b.
11. Port Issue 5: Same as Foss issue 18; and whether the Interpretation errs in finding that moorage is not inherent to a cargo terminal use.
12. Port Issue 7: The Interpretation erroneously determines that vessels may moor at a
cargo terminal only if they are otherwise used for transporting goods in the stream
of commerce — related to Foss 18 and part of Port 8; and the Interpretation fails to
properly apply the definition of accessory use: that the use be incidental and
intrinsic to the cargo terminal use — related to Foss 5 and 6.

13. Port Issue 8: Whether SMC 23.60A.090.B means that accessory moorage does not
have to be incidental and intrinsic to the principal use; and whether DPD has the
authority to limit the duration of an accessory use or to prohibit provisioning at a
moorage.

14. Port Issue 9: Is the Interpretation consistent with Public Trust doctrine as reflected
in the state’s Shoreline Management Act and the City’s Shoreline Master
Program.

15. Port Issue 11: Is the Interpretation consistent with Comprehensive Plan policy
LU270.