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BEFORE THE HEARINNG EXAMINER

CITY OF SEATTLE

In the Matter of the Appeal of)
FOSS MARITIME COMPANY,) No. S-15-001
) S-15-002
)
from an interpretation by the)
)
Department of Planning and)
)
Development.)

VERBATIM TRANSCRIPT OF PROCEEDINGS

OF

AN EXCERPTED PORTION OF DAY 1 OF A HEARING

BEFORE THE HONORABLE ANNE WATANABE, HEARING EXAMINER

8/13/2015

APPEARANCES

For Foss Maritime: David R. West & John C. McCullough
Port of Seattle: Traci Goodwin, Patrick J. Schneider and
Adrian Winston

For DPD: Eleanor S. Baxendale

For Puget Soundkeeper/Earth Justice: Patti Goldman & Matthew Baca

For T-5: Molly Barker

Transcribed at the Request of the Seattle City Attorney

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(Proceedings of 8/13/2015)

(Excerpt begins after opening statements)

HEARING EXAMINER: Thank you.

Well I think then that we are ready to hear from the first witness, and I guess Mr. West?

MR. WEST: We call Mr. McKim.

At this point we are going to steal one of the microphones and slide it over to --

(Brief Pause in Proceedings)

HEARING EXAMINER: As soon as he gets his water, I will swear him in.

All right, if you would raise your right hand?

ANDY MCKIM IS SWORN

HEARING EXAMINER: All right, and your witness, Mr. West?

MR. WEST: Thank you.

* * * * *

D I R E C T E X A M I N A T I O N

BY MR. WEST:

Q. Mr. McKim, in front of you, you have a number of binders there to your right as you can see, and those contain a number of exhibits that have tabs on them that are numbered, and as we go through the testimony today, I will be referring to some of those documents, just to orient you.

All right?

1 A. Where use is already established or?

2 Q. Yes..

3 A. I look to -- I look to permits, in particular, and I will
4 look to -- if we have a permit that clearly is -- lists the
5 uses established per land use code. That is generally on
6 the face of the permit.

7 Something that -- you know in some circumstances the
8 permits are -- you know, I can't say that the department has
9 always perfectly filled those forms out. Occasionally they
10 will list some use that is not an actual land-use code
11 category in -- and in some cases it won't even list a use
12 where work is being done that isn't changing a use.

13 So we will look at, first of all, what uses are listed,
14 and then we will also look at what is happening under that
15 permit because sometimes if the permit is -- you know, some
16 sort of minor repairs or something like that, often that
17 won't involve analysis of established uses, it will just
18 involve somebody coming in to make minor changes to some
19 physical thing that -- you know, it is not -- it is not an
20 important consideration for work under that permit.

21 Q. In order to determine what uses are established at a
22 particular site, do you rely on the background statement of
23 a master use permit decision?

24 A. No, and you know the -- the background statement is just --
25 provides a context for the analysis, so my assumption is

1 that things that are provided in that area that -- largely
2 rely on the applicants or what we are able to glean from
3 looking at maps and photos and so forth about what is
4 actually there.

5 I don't believe that anybody, any of our planners
6 actually have time to fully research permitted established
7 uses on a site for purposes of -- of filling out that
8 statement.

9 Q. So would you rely on background -- description in the
10 background in order to make a formal determination as to
11 what use is allowed and is permitted at a particular site --
12 when use has been established at a particular site?

13 A. Right.

14 We don't rely on the things listed under project, or I
15 would not rely on the things listed under the project
16 background to talk about what is actually being formally
17 established by permit.

18 Q. Looking at the documents that are in Exhibit 11, would you
19 be able to -- in order to determine what uses have been
20 established at the site, do you have to do an analysis of
21 those permits?

22 A. I would -- yeah I would review these permits. I would
23 certainly look at the permits, both what they -- if they
24 actually specify a use, but I would also do that in the
25 context of what was done under that permit.

1 Q. And do there appear to be many different kinds of uses that
2 might be established at terminal 91?

3 A. Yes.

4 Q. So in order to determine whether a particular activity was
5 already established at terminal 91, you would have to do a
6 significant amount of analysis?

7 A. We would have to -- yes, definitely do a fair amount of
8 analysis, and actually in some circumstances, and you know,
9 I don't know if we had it here, but I think we ran into
10 it -- in some circumstances you might have multiple tenant
11 spaces. I don't know if we have that going on at terminal
12 91, but in some cases there are, so even if you do find a
13 use -- for example historically establishing a particular
14 space as a retail space, or a fast food restaurant, it may
15 be that a later permit changed the use of that space, and so
16 sometimes you actually have to go to the plans, as well, to
17 find out what space was affected by that permit to find out
18 if it -- if the use that had historically been listed was
19 still there.

20 Q. I hate to go back to DPD 11 and permit 8400945, but if we
21 could take a moment and find it, and I think maybe it is
22 easier to find it from the back rather than the front.

23 (Brief Pause in Proceedings)

24 Q. (By Ms. Baxendale) I think you counted 21 pages from the --

25 HEARING EXAMINER: Exhibit 28.

1 MS. BAXENDALE: 28?

2 UNIDENTIFIED: Someone gave me that number. I did
3 not --

4 UNIDENTIFIED: 29, I think.

5 Q. (By Ms. Baxendale) So you are looking at page 2?

6 A. Yeah.

7 Q. And Mr. West called out to you that there was language there
8 that described that there was vessel mooring on that site?

9 A. Yes.

10 Q. Does it say what kind of vessel mooring?

11 A. No.

12 Q. Does it say whether it is general mooring or mooring that is
13 consistent with a cargo terminal?

14 A. It doesn't say.

15 Q. So in order to determine what kind of mooring is being
16 referred to, we do have to do some research?

17 A. Yes.

18 Q. When Mr. Schneider was asking you about how to determine
19 whether something was allowed at a particular site, would
20 you also have to -- and he was asking whether a particular
21 vessel could moor at a particular site -- would you also
22 have to look at what permits were allowed for that site?

23 A. Yes.

24 Q. And does the interpretation that -- that is at issue in this
25 case, does that apply to every site?

1 A. No.

2 For one thing, by code interpretations -- are
3 applicable to a specific site and the facts at that site, so
4 it wouldn't be directly applicable to a different site.

5 Q. And is part of the reason for that because different sites
6 have different land-use permits?

7 A. That's correct.

8 MR. WEST: I object to the leading nature of
9 several of these questions.

10 HEARING EXAMINER: Overruled.

11 Q. (By Ms. Baxendale) Mr. West asked you about interpretations
12 and the fact that DPD was required to give a response to a
13 request for interpretation.

14 Is that correct?

15 A. Yes.

16 Q. And Mr. West said would DPD be bound to apply the logic of
17 this interpretation to a request for an interpretation on
18 another site; is that -- and you answered yes?

19 A. I guess I don't remember that specific question and answer.

20 Q. What is it that DPD is required to apply when making a
21 determination on an interpretation request?

22 A. Well again similar to the one that we wrote here, we would
23 have to do an analysis based on the available facts, so
24 we -- we strive to be consistent.

25 I believe that if we had a situation where -- you know,

1 into, the interpretation, for example, was the -- the
2 general nature of the shoreline code.

3 The shoreline code is -- the way it is worded, there is
4 actually a code provision near the beginning of it.

5 When I talk about the shoreline code, I mean chapter
6 23.60, the Seattle Shoreline Master Program; that there is
7 language at the front of it that says it is supposed to be
8 liberally construed to achieve its intent and its effect,
9 which we read as, you know, apply it strictly to achieve,
10 you know, particular things specific to the shoreline, so we
11 are more stringent in how we apply the code standards in the
12 shoreline because of that -- so in that context -- you know,
13 for example.

14 Q. Going back and looking at the definition of cargo terminal,
15 which is in Foss 1 -- which is your interpretation -- and
16 page 2, paragraph 7 --

17 (Brief Pause in Proceedings)

18 Q. (By Ms. Baxendale) You concluded ultimately that the phrase
19 "in order to transfer them to other locations" applied to
20 the list of actions where -- that preceded it in that
21 sentence; is that correct?

22 A. That is correct.

23 Q. What happens if that phrase is not applied to the first
24 part, which is "stored without undergoing any
25 manufacturing"?

1 If you just read it as "stored without undergoing any
2 manufacturing"?

3 A. Well I think that would really be no different than
4 warehoused -- whatever kind of goods -- and I think what we
5 intend to regulate by cargo terminal is actually something
6 that is associated with being transferred to other
7 locations.

8 I think this is -- particularly -- that is ultimately
9 what we concluded in the interpretation.

10 This is particularly the case in the shoreline where in
11 order to even be in that location, as a general rule under
12 the shoreline, you need uses that are water dependent, or
13 water related, so if you had something that, you know,
14 wasn't there, in order to be transferred to another
15 location, and presumably either arriving or leaving by
16 water, then it wouldn't be consistent with what is desired
17 under the shoreline code.

18 Q. Is a storage use different from a transportation use in
19 terms of how they are regulated? Are they --

20 A. Oh, well yes, certainly. Yeah, storage would be a
21 warehouse. You know if it were -- or else outdoor storage.

22 On its own, it wouldn't be water related or water
23 dependent because on its own if all you're doing is storing,
24 then you are not -- you don't need to be water --

25 Q. Historically different category views from transportation?

1 A. Yes.

2 Q. You and Mr. West spent some time talking about goods, and I
3 want to go back through and maybe see if we can parse it so
4 that it is more crystal-clear.

5 So cargo terminal -- so a cargo terminal warehouse is a
6 transportation use?

7 A. Yes.

8 Q. And is it a transportation use that involves goods?

9 A. Yes.

10 Q. Do the goods need to be connected to transportation?

11 A. Yeah. I mean in order to qualify here, and as we have read
12 the interpretation, it has to be stored in order to be
13 transferred to another location, and also -- yeah.

14 Q. So might coffee be goods?

15 A. It might.

16 Q. If coffee is put on the vessel, and the vessel delivers the
17 coffee to a place where it is sold, is that a transportation
18 use?

19 A. Yes.

20 Q. And if the coffee is put on a vessel, and the vessel
21 delivers the coffee to a place where it is put on a train
22 and taken away, is that a transportation use?

23 A. Yes.

24 Q. If the coffee is put on the vessel and the crew consumes it,
25 is that a transportation use?

1 A. I would say no. We regard that, or at least not a cargo
2 terminal use. We would regard that activity as
3 provisioning, so for example you might put coffee on a
4 vessel at a commercial moorage. You might put coffee on a
5 vessel -- or a commercial marina, as it is now categorized,
6 and I don't recall whether that is under the definition of
7 transportation use or not, but it would not be a cargo
8 terminal use.

9 Q. So might fuel filters be goods?

10 A. They could.

11 Q. And if the fuel filters are put on a vessel, and the vessel
12 delivers the fuel filters to a place where it is sold, is
13 that a cargo terminal use?

14 A. Yes, it would be.

15 Q. And if the fuel filters are put on a vessel, and the vessel
16 uses the fuel filters to maintain the vessel function, is
17 that a cargo terminal use?

18 A. On its own, it would not be, no.

19 Q. And if there are pipes, those could be goods, couldn't they?

20 A. They can.

21 Q. If the pipes are loaded onto a vessel, and the vessel
22 delivers the pipes to a place where they are loaded onto a
23 truck and taken away, is that a cargo terminal use?

24 A. Yes.

25 Q. And if the pipes are loaded on a vessel, and the operation

1 of the vessel is to lay the pipe, and the pipes are used for
2 the operation of laying the pipes -- the pipes are actually
3 put into that function -- would that be -- the loading of
4 the pipes on the vessel be a cargo terminal use?

5 A. No, if the vessel were used to lay the pipe, then that would
6 not be.

7 MS. BAXENDALE: I have no further questions at
8 this time.

9 HEARING EXAMINER: All right.

10 Ms. Goldman, did you have questions for Mr. McKim?

11 MS. GOLDMAN: Mr. Baca --

12 HEARING EXAMINER: Mr. Baca?

13 MR. BACA: Yes.

14 * * * * *

15 C R O S S - E X A M I N A T I O N

16 BY MR. BACA:

17 Q. Good afternoon, Mr. McKim.

18 A. Good afternoon.

19 Q. It has been a long afternoon. I am Matt Baca. I represent
20 the environmental intervenors, just to remind you.

21 I want to return to a few lines of questioning that you
22 and Mr. West were engaged in.

23 First of all, he asked you whether certain items in
24 container type boxes were container cargo, and he showed you
25 some photos of those.

1 HEARING EXAMINER: We will just call it port
2 Exhibit 1, port exhibit --

3 MR. SCHNEIDER: Right. Thank you.

4 And just for orientation, these are port exhibits 23
5 and 24, 23 being on the right, and we will talk about those
6 shortly.

7 * * * * *

8 D I R E C T E X A M I N A T I O N

9 BY MR. SCHNEIDER:

10 Q. So Mr. Englin, would you state your name and spell it?

11 HEARING EXAMINER: I will swear him in.

12 GREG ENGLIN IS SWORN

13 HEARING EXAMINER: Your witness, Mr. Schneider.

14 MR. SCHNEIDER: Thank you.

15 Q. (By Mr. Schneider) Mr. Englin, would you spell your name for
16 us, please?

17 A. E-N-G-L-I-N.

18 Q. And what is your position?

19 A. Manager of maritime operations for the Port of Seattle.

20 Q. Port of Seattle?

21 What are your responsibilities in a general way as
22 manager of maritime operations?

23 A. Basically I manage the outer harbor for assets that we
24 manage directly on behalf of the Port of Seattle, including
25 some assets up the Duwamish River.

1 maintain everything.

2 Q. And give us examples of commonplace maintenance of vessels
3 at these cargo facilities?

4 A. Well, for instance -- well we had to bring in the Hanjin
5 Copenhagen, and that was as a result of the -- a US Coast
6 Guard captain of the port order.

7 Basically they had a -- they had what looked like to be
8 a potential breakdown on a pump or something -- some piece
9 of equipment on board.

10 Q. Before you go ahead, what is the Hanjin Copenhagen?

11 A. That is a container ship that was offloading containerized
12 cargo over at terminal 46, and then while they were there,
13 the Coast Guard conducted an inspection and they found that
14 there was a piece of equipment, a pump on board that looked
15 like it had malfunctioned, but it was a critical, critical
16 pump, and so the Coast Guard made the decision, the captain
17 of the port, who is the top person in this region, made the
18 decision you can't leave port until I make sure that this is
19 fixed and inspected.

20 So we shifted that vessel over to terminal 5 in order
21 to conduct that inspection, that repair.

22 Q. So it was at terminal 5 purposes entirely unrelated to
23 cargo?

24 A. Correct.

25 Q. And what kind of repair was done there?

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