

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeals of:

FOSS MARITIME COMPANY AND
PORT OF SEATTLE,

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

HEARING EXAMINER FILE NOS.
S-15-001; S-15-002

T-5 INTERVENORS'
POST-HEARING BRIEF

I. STANDARD OF REVIEW

While an interpretation is generally given deference, SMC 23.88.020(G)(5), it is unwarranted here because the overwhelming weight of evidence adduced at the hearing proves the Director's Interpretation¹ is "clearly erroneous."² Moreover, under Washington law, the Interpretation need not be afforded deference if, as here, it conflicts with the relevant local ordinance or it is based upon incorrect tenants of statutory construction.³

¹ The T-5 Intervenor hereby adopt the terms and definitions used in the Port of Seattle's and Foss Maritime's post-hearing briefs and join in said briefs and arguments.

² *Whatcom County Fire Dist. No. 21 v. Whatcom County*, 171 Wn.2d 421, 427, 256 P.3d 295 (2011).

³ *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 815, 828 P.2d 549 (1992); *see also Sleasman v. City of Lacey*, 159 Wn.2d 639, 643, 151 P.3d 990 (2007).

1 Upon applying the law to the facts at issue here—what actually happened and happens at
2 Terminal 5 not just what DPD assumed happened—the Hearing Examiner must be left with a
3 definite and firm conviction that a mistake has been committed. As the testimony proved, DPD
4 employed a strained and convoluted reading of the Code and ignored basic rules of statutory
5 construction (i.e., ignoring a comma) to reach a pre-determined outcome (e.g., compare first
6 version of the Interpretation with the last version). Such legal and mental gymnastics do not
7 warrant deference and the Interpretation must be reversed. Lacking that, the T-5 Intervenors,
8 who represent the broad cross-section of Seattle’s maritime and industrial businesses, labor,
9 fishing vessel owners and operators, and local, regional and national policy advocacy groups,
10 will be irretrievably harmed because the Interpretation calls into question whether their
11 operations will be permitted at the Port’s cargo terminals, with or without further permits.
12 Seattle’s maritime industry cannot operate and compete in a global market under a whimsically
13 changing cloud of uncertainty.

16 **II. FACTS AND ARGUMENT**

17 **A. The Interpretation, as Applied, Will Detrimentially Impact Seattle’s Maritime**
18 **Industrial Economy**

19 The testimony and evidence proved that DPD’s Interpretation would have devastating
20 unintended and foreseen consequences on Seattle’s maritime industries. One witness after
21 another testified that the Interpretation as applied would detrimentially impact—if not shut
22 down—Seattle’s maritime industries. Mr. Gallagher testified that many businesses and
23 commercial projects involving typical cargo terminal activities would effectively be banned or
24
25

1 become untenable pursuant to the Interpretation.⁴ The City’s proposed work-around—requiring
2 the Port, vessel owners or operators or some other party to obtain a new permit—was rendered
3 unworkable and impracticable when offered to the some of the most experienced maritime
4 industrial players in the Seattle community, including Messrs. Knudsen, O’Halloran, Gallagher
5 and Johnson. Specifically, when asked what impact the Interpretation would have to the
6 maritime economy if it required maritime players to obtain a new permit, Mark Knudsen,
7 President of Conventional Cargo at SSA Marine, explained that it would stop cargo-related
8 activities and detrimentally impact Seattle’s economy:
9

10 Q: Mm-hmm. Would you say that this idle moorage activity you’ve
11 described is intrinsic in operating a cargo terminal?

12 A: Yeah, it’s just part and parcel of what people expect out of a cargo
13 terminal to be able to do, or at least what our customers expect, is the ability to
14 come in, lay their vessels up if they need to between vessels. . .

15 [...]

16 Q: [...] What would be the impact if the Port told you you [*sic*] cannot
17 conduct any more of these idle moorage activities I’ve described until we, the
18 Port, obtain another permit?

19 A: Well, I guess the idle moorage that’s there would have to disappear in
20 that interim period, which would be tough. What it would – probably the biggest
21 impact to us, assuming the Port could get that other permit that was coming,
22 would be our reputation with our customer base and the reputation of Seattle. And
23 I think you’ve probably followed sort of in the general news that the cargo
24 volumes in Seattle are down significantly from where they have been in the past.
25 And part of what we’re trying to do as a company and in conjunction with the
Port and the new seaport alliance is create the atmosphere for these customers that
says that the Pacific Northwest is where you want to bring your vessels and is
where you want to do your business and is where you want to route your cargo.
***And it would do some significant damage to our reputation in the region if we
couldn’t do this.***⁵

⁴ Examination of Gallagher, RP 8/25/15; 96:21-25; 97:1-8; 98:21-25; 99:1-10.

⁵ Examination of Knudsen, RP 8/24/15; 64:5-10; 24-25; 65:1-18. (Emphasis added).

1 Vince O'Halloran, who represents and works with numerous unions, explained how the
2 Interpretation would impact Seattle's unionized labor force if certain cargo-related activities
3 were no longer permitted at cargo terminals:

4 Q: If vessels -- certain kinds weren't allowed to call into Seattle because
5 of the application of the interpretation, would that have an impact on your
6 members and the affiliates?

7 A: *It would have a severe impact. It would have a very negative impact
8 on my members.*[...]

9 Q: And so if the interpretation were applied in such a way to ban or
10 prohibit vessels coming into Seattle, that would have a negative impact on those
11 jobs?

12 A: Yes. Any loss of -- any loss of a vessel's ability to access the Port of
13 Seattle would create a negative impact on the employment of our Seattle
14 workforces.⁶

15 Jim Johnson, President of Glacier Fish Company, echoed these themes, explaining the severe
16 impact application of the Interpretation would have to Seattle's maritime community:

17 Q: Okay. And we've talked about this homeporting activity. If I told you
18 that this interpretation that's on appeal would prohibit homeporting, where there
19 was no vessels, where there was no offloading of, in your case, the fish product
20 occurring at T-91, what would be your reaction? What effect would that have?

21 A: Yeah, I mean, *it would have a huge effect*, because I think I mentioned
22 earlier that our office is proximate -- at close proximity to the terminal, all of our
23 vendors are here, and net manufacturers, everybody is in proximity of the terminal
24 to service the vessels that are doing repair and backload there. So it would have a
25 huge impact. And I just don't think there is -- we have looked over time, and there
is just not -- for what we do for our three originally, and as of November seven
vessels, very little appropriate dock space for what we do available. *We would be
moving to, I don't know, Everett.*⁷

⁶ Examination of O'Halloran, RP 8/24/15; 19:20-25; 20:17-22. (Emphasis added).

⁷ Examination of Johnson, RP 8/24/15; 42:14-25; 43:1-5. (Emphasis added).

1 As Messrs. Knudsen, O'Halloran and Johnson explained, all of the vessels calling into
2 Seattle are indispensable to the City's maritime economy and livelihood. These vessels' business
3 relations with Seattle are not merely in the form of on-loading and offloading cargo, but rather
4 involve a variety of other idle moorage activities intrinsic to vessel operations and the Port's
5 cargo terminals. DPD's Interpretation that only idle moorage is allowed at cargo terminals if the
6 "primary function" of the vessel is to transfer cargo in very limited circumstances demonstrates
7 DPD's complete lack of understanding of what actually happens and needs to happen at cargo
8 terminal facilities and is further evidence that the Interpretation is not based on facts and a proper
9 application of the law, and was instead drafted to achieve a pre-determined outcome. Being
10 clearly erroneous, it must be reversed.
11

12 **B. The Interpretation is Based on an Incorrect Understanding of "Cargo" and**
13 **What Actually Happened/Happens at Terminal 5**

14 As Mr. O'Halloran testified, anything that is not "nailed down"— in that it is not a fixture
15 on the vessel— is considered cargo.⁸ He explained that "stores, provisions and gear" all fit
16 within the umbrella definition of cargo.⁹ Stores are items that the vessel will need to operate,
17 which can include lube oils, engine room parts, radar, electronic parts and other operational
18 necessities.¹⁰ Provisions are items that the crew uses for the necessary operation of the vessel,
19 like food, laundry, blankets and the like.¹¹ Gear are items that are necessary for the vessel's
20
21
22

23 _____
24 ⁸ Examination of O'Halloran, RP 8/24/15; 16:11-12.

⁹ Examination of O'Halloran, RP 8/24/15; 16:8-10.

¹⁰ Examination of O'Halloran, RP 8/24/15; 15:8-12.

¹¹ Examination of O'Halloran, RP 8/24/15; 15:14-17.

1 operation and include mooring lines, lubrication greases and paints.¹² Mr. Johnson affirmed Mr.
2 O'Halloran's definitional framework of "cargo" and testified that his business, Glacier Fish
3 Company, loads and unloads all aspects of such defined cargo within its typical operations.¹³
4 Likewise, Mr. Gallagher confirmed that Mr. O'Halloran's definitional framework of "cargo" and
5 the sub-categories therewith, is the commonly used framework within the maritime industry in
6 general.¹⁴ Both Messrs. O'Halloran and Gallagher emphasized that cargo terminal use also
7 encompasses prepping for long voyages, repair work, loading and unloading, testing systems on
8 the vessel, and mooring.¹⁵ Again, all of this is subsumed within the definitional framework of
9 cargo and cargo terminal operations.
10

11 In contrast, Mr. McKim admitted that, when the Interpretation was being drafted, DPD
12 made no investigation into "cargo" and cargo terminal operations. Neither he nor DPD asked
13 what was being loaded onto or off of Shell's vessels, what these vessels did after they left
14 Terminal 5, and how the cargo would be used.¹⁶ Instead, Mr. McKim chose to rely on incorrect
15 assumptions and unanswered inquiries and elected not to use resources offered to DPD by Foss
16 and the Port to gain correct information.¹⁷ Mr. McKim then filled the void of DPD's lack of
17 knowledge with flawed assumptions that flew in the face of the commonly understood definition
18 for "cargo terminal use."¹⁸ As such, DPD's Interpretation is based on Mr. McKim's uninformed
19 assumptions regarding the cargo-related activities actually associated with Shell's vessels and an
20
21

22 ¹² Examination of O'Halloran, RP 8/24/15; 16:2-7.

23 ¹³ Examination of Johnson, RP 8/24/15; 33:6-25; 34:1-2.

24 ¹⁴ Examination of Gallagher, RP 8/25/15; 40:7-18.

25 ¹⁵ Examination of Gallagher, RP 8/25/15; 83-86.

¹⁶ Examination of McKim, RP 8/13/15; 16-18, 56-57.

¹⁷ Examination of McKim, RP 8/13/15; 77:7-13; 116:22-25; 117:1-7.

¹⁸ Examination of McKim, RP 8/13/15; 16: 12-4; 17:16-25; 18:1-5; 50:14-17.

1 extremely limited definition of the term “cargo.”¹⁹ When pushed, Mr. McKim admitted that
2 such assumptions are not proper legal grounds upon which to base the Interpretation.²⁰

3 Contrary to DPD’s “assumptions,” Mr. O’Halloran testified that union gangs *actually*
4 loaded and unloaded cargo, including stores, provisions and gear, onto and off of the Shell-
5 related vessels while at Terminal 5.²¹ Mr. O’Halloran noted that all of these activities conducted
6 by the union gangs for Shell’s vessel are also conducted on containerships, tankers, barges and
7 other vessels docked at other cargo terminals throughout Seattle.²² All of these activities, Mr.
8 O’Halloran explained, both on Shell-related vessels as well as others, fit within the traditional
9 use of a cargo terminal.²³ DPD ignored all of this and crafted an Interpretation aimed to keep
10 certain vessels out of Seattle.
11

12 The ken of cargo terminals established by DPD’s Interpretation, however, will severely
13 impact Seattle’s maritime industries because it has far reaching implications. As the witnesses at
14 hearing testified, under DPD’s Interpretation, many of the cargo-related activities that actually
15 occur every day in Seattle, and which occurred for Shell’s vessels at Terminal 5, would be
16 prohibited lacking some additional permit. These witnesses also confirmed that getting such a
17 “permit” could undermine Seattle’s viability as a world-class port and would likely damage or
18 destroy numerous business relations. Instead of using the common, plain meaning understanding
19 of cargo as confirmed by the witnesses at hearing, DPD relied upon on extra-jurisdictional
20
21

22 ¹⁹ Examination of McKim, RP 8/13/15; 76:24-25; 80:1 (Q: So your understanding of how an oil rig
23 operates is based on assumptions? A: Yes.).

24 ²⁰ Examination of McKim, RP 8/13/15; 77:5-6 (Q: Are interpretations supposed to be based on
25 assumptions? A: No.).

²¹ Examination of O’Halloran, RP 8/24/15; 17:22-25; 18:1-16; 13:14-23.

²² Examination of O’Halloran, RP 8/24/15; 13-14.

²³ Examination of O’Halloran, RP 8/24/15; 19:17-19.

1 assumptions about what may or may not happen on a vessel after it leaves Seattle to
2 impermissibly craft the Interpretation to achieve a desired goal in violation of Washington law.
3 *Sleasman, supra*, 159 Wn.2d at 646 (“While the construction does not have to be memorialized
4 as a formal rule, it cannot merely ‘bootstrap a legal argument into the place of agency
5 interpretation,’ but must prove an established practice of enforcement.”) The Interpretation
6 must be reversed.
7

8 III. CONCLUSION

9 Based on all of the evidence adduced at hearing, the Examiner must be left with a
10 “definite and firm conviction that a mistake has been committed.” *Whatcom County Fire Dist.*
11 *No. 21*, 171 Wn.2d at 427. Having met their burden of proof, the T-5 Intervenors respectfully
12 request that the Hearing Examiner reverse the Interpretation as it is clearly erroneous.

13 DATED this 10th day of September, 2015.

14 VERIS LAW GROUP PLLC

15 By /s/ Joshua Brower
16 Joshua C. Allen Brower, WSBA #25092
17 Molly K.D. Barker, WSBA #46587
18 Attorneys for T-5 Intervenors
19
20
21
22
23
24
25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that on this date I caused the foregoing document to be served on the following persons via the methods indicated:

Foss Maritime Company
John C. McCullough
McCullough Hill Leary
jack@mhseattle.com

- Overnight Delivery via Fed Ex
- First Class Mail via USPS
- Hand-Delivered via ABC Legal Messenger
- Facsimile
- E-mail

David R. West
Garvey Shubert Barer
DrWest@gsblaw.com

- Overnight Delivery via Fed Ex
- First Class Mail via USPS
- Hand-Delivered via ABC Legal Messenger
- Facsimile
- E-mail

Port of Seattle
Traci Goodwin
Goodwin.T@portseattle.org

- Overnight Delivery via Fed Ex
- First Class Mail via USPS
- Hand-Delivered via ABC Legal Messenger
- Facsimile
- E-mail

Patrick Schneider
Foster Pepper
schnp@foster.com

- Overnight Delivery via Fed Ex
- First Class Mail via USPS
- Hand-Delivered via ABC Legal Messenger
- Facsimile
- E-mail

City of Seattle, Department of
Planning and Development
Eleanore Baxendale
Eleanore.Baxendale@seattle.gov

- Overnight Delivery via Fed Ex
- First Class Mail via USPS
- Hand-Delivered via ABC Legal Messenger
- Facsimile
- E-mail

Earthjustice, Intervenors
Patti Goldman and Matthew Baca
pgoldman@earthjustice.org
mbaca@earthjustice.org

- Overnight Delivery via Fed Ex
- First Class Mail via USPS
- Hand-Delivered via ABC Legal Messenger
- Facsimile
- E-mail

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

/s/ Whitney Jackson
Whitney Jackson
Legal Assistant