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 FOSS MARITIME'S POST-HEARING RESPONSE BRIEF (Code Interpretation No. 15-001)

I. INTRODUCTION

The closing briefs of the City of Seattle Department of Planning and Development ("City" or "DPD") and Intervenor Puget Soundkeeper Alliance ("Intervenor PSA" or "PSA") present no evidence or argument to alter the conclusion that the activities at Terminal 5 ("Foss Operations") fall squarely within the plain language of the definition of "cargo terminal." As set forth in Foss Maritime Company's ("Foss") closing brief, the Foss Operations meet the plain and unambiguous language of the City Code definition of a cargo terminal: "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." SMC 23.60A.906 "C". As the uncontested testimony makes clear, those activities are a transportation facility use (*see* Exh. F001) that involves goods, such as pipe,

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wire, supplies, and equipment (Gallagher 25:9-30:13) and container cargo (Gallagher 43:5-45:9) being stored without undergoing manufacturing processes (Gallagher 25:9-30:13; Exh. F061), being transferred to other carriers (Gallagher 21:10-16; 37:15-40:6; 59:1-4), and being stored outdoors in order to transfer them to other locations (Gallagher 59:5-10; 56:2-24; 21:17-24:20). SMC 23.60A.906. Mr. McKim admitted that the activities meet each and every element of the words actually contained in the definition of cargo terminal. McKim 52:4-54:25 (materials are "goods"), 54:13-25 (goods are loaded into containers), 65:14-23 ("goods" are stored without undergoing any manufacturing processes), 156:17-157:2 ("goods" are transferred to another location). Neither at the hearing or in their closing briefs do the City and Intervenor PSA challenge the veracity of these facts, or even address them.

Indeed, the City and PSA appear to have attended a different hearing than appellants. In the face of countless facts not mentioned or taken into account in the Interpretation, and other facts not even known to the City, the City still cannot explain how the activities conducted at Terminal 5, which include loading goods that were, among other things, stored outdoors in order to transfer the goods to other locations, did not fall within the plain language of the statutory definition of a cargo terminal. The City does not even mention the statutory definition until the 29th page of its 52-page brief, instead leading the reader through a random maze of largely irrelevant and immaterial information ultimately designed to alter the plain meaning of the simple words used in the operative definition. The City's approach perverts and ignores the plain language of the Code, and ignores the facts.

Rather than addressing the unequivocal and unrebutted evidence at hearing, the City summarily asserts in its brief that four days of evidence presented at the hearing did not lead the City to any different conclusions. This position was never presented by any DPD witness, and it

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is not consistent with the testimony that was presented. Andy McKim, the principal drafter of the Interpretation, did not validate the Interpretation's conclusions at the hearing; instead, he agreed that the Foss Operations met each definitional element of a "cargo terminal" because they involved "goods" that were "stored without undergoing any manufacturing processes" that were then "transferred to other locations." Tellingly, out of the mere six pages in which the City discusses Mr. McKim's testimony, only two citations address the Interpretation itself. City Closing Brief, p. 13 (*citing* McKim 146:2-148:6), p. 32 (*citing* McKim 144:14-145:24). The City distances itself from Mr. McKim's testimony in order to introduce new theories of the case. Even if these arguments had been discussed in the Interpretation or at hearing, the new theories still fail.

The only fact that seems important to the City and Intervenor PSA is that the Polar Pioneer will drill exploratory wells in the Arctic, some 2,000 miles away from Seattle. Even though the issue here is the appropriate use of the City's shorelines, both the City and PSA argue that activities actually occurring in the shoreline area are ultimately immaterial under the Seattle Land Use Code, because the Code hinges on the function of the vessel being loaded, and whether that vessel is transporting "paying cargo." But the Code makes no such distinction; it only requires that goods be stored at the terminal, without regard to the nature of the goods.

In sum, the Hearing Examiner is left with a choice between two alternatives. Foss, the Port of Seattle ("Port"), and the T-5 Intervenors suggest what the law requires: an interpretation based on the actual language of the Code, and based on the facts established in the record. The City and PSA suggest the Hearing Examiner should ignore the plain meaning of the words in the definition; add qualifications to those terms that are not actually set out in the definition; and impose "paying cargo" and "cargo vessel" requirements that have never been considered as part

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of the elaborate SMP process. Such a manipulation would require the Hearing Examiner to re-write the definition and ignore long-held rules of statutory interpretation.

Foss exceeded its burden to show that DPD committed clear error in the Interpretation. DPD failed to develop or consider relevant facts; its legal analysis is in error; and DPD has failed to apply the relevant facts. The Examiner should reverse the Interpretation and determine that the use of Terminal 5 to load and unload vessels and to moor those vessels is a cargo terminal use or, in the alternative, a use accessory to a cargo terminal use.

II. ARGUMENT

A. The City's brief includes entirely new arguments not made in the Interpretation or presented at the hearing.

Recognizing the errors inherent in the Interpretation, the City's brief improperly presents several arguments that were not addressed in the Interpretation, or at the hearing, nor discussed by Andy McKim, the principal author of the Interpretation, in his many hours of testimony.

First, the City abandons the dictionary definition of goods upon which the Interpretation and Mr. McKim relied, and argues that goods actually includes only "paying cargo." This of course contradicts both the Interpretation and Mr. McKim's testimony, where he admitted that the materials loaded onto the Polar Pioneer and other vessels were goods under the dictionary definition (52:4-54:25). *Compare* City Closing Brief, p. 28 lines 4-5 *with* McKim 52:4-54:25 (admitting the materials were "goods") and Foss Exh. F001, p. 3, ¶12. The City's brief then argues that laying the pipe loaded onto the Polar Pioneer into the seabed does not constitute a transfer of those goods to another location (City Br., pp. 37-38), ignoring Mr. McKim's admission that these goods *were* transferred to another location (156:17-157:2). The City's brief next contradicts Mr. McKim's admission that loading of the offshore supply vessels constituted a cargo terminal use under his Interpretation and met the primary function test. *Compare* City Br.,

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pp. 37-38 *with* McKim 74:13-75:25 (admitting that offshore supply vessels such as the Aiviq meet the primary function test).

One is left to wonder why the City, who charged Mr. McKim with writing the Interpretation and with defending it in this proceeding, has now abandoned his conclusions. One is also left to wonder what the position of DPD actually is. Is it what Mr. McKim said, under oath? Is it what the City asserts in its brief, which largely ignores what Mr. McKim said at hearing regarding the Interpretation's conclusions, the meaning of the new primary function test, and the effects of its application? The City's new arguments regarding "paying cargo" were not presented, explained or vetted by Mr. McKim or anyone else at DPD; they appear to be entirely the product of the City Attorney's office. But it is the job of DPD, not its lawyers, to explain the meaning of the Land Use Code, and the Hearing Examiner should not even consider what are essentially ex post facto arguments designed to avoid, rather than apply, the facts and the position of the agency itself. *See Aviation W. Corp. v. Labor & Indus.*, 138 Wn.2d 413, 458, 980 P.2d 701, 720 (1999) ("agency actions must be upheld on the basis articulated by the agency itself, not post hoc rationalizations of its counsel") (*citing Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 50, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983)). At a minimum, the new arguments certainly do not deserve to be afforded substantial weight. *See* 23.88.020.G.5 (affording substantial weight to the *agency interpretation*, not to post-hoc rationalizations from counsel).

Even if these arguments had been considered, discussed or adopted by DPD in the Interpretation or at hearing, the new theories still fail.

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B. The City's and Intervenor PSA's acrobatic reading of the definition of cargo terminal directly conflict with the plain language of the SMP

Instead of applying the undisputed facts to the unambiguous definition of a cargo terminal, the City and Intervenor PSA manufacture a new set of arguments that they argue justifies ignoring the plain language of the cargo terminal definition. This house of cards falls apart with the slightest examination.

The sheer number of changes that the City and PSA propose to the cargo terminal definition is breathtaking. The City and Intervenor PSA ask the Hearing Examiner to (1) ignore the definition of goods, and indeed to ignore that word entirely, (2) insert the term "cargo" in place of the word "goods", (3) then change that term to "paying cargo," (4) ignore the former SMP definition of "container cargo" and (5) instead require containers to be "standard" sized, and then (6) loaded only with "paying cargo." If that were not enough, they also ask the Hearing Examiner to (7) ignore the last antecedent rule, (8) ignore the insertion of the comma after the word, "carriers," (9) require that "paying cargo" be transferred only by vessels whose primary function or mission is to transfer "paying cargo," and (10) allow those "primary paying cargo function" vessels to moor at a cargo terminal only at times when they are loading and unloading goods. For good measure, Intervenor PSA also requires this "paying cargo" to be (11) "transshipped" to (12) "another entity."

This convoluted set of arguments is obviously oriented toward one result – keeping the Polar Pioneer out of Seattle. However, the goal of this appeal is not to reach a particular result, but to interpret the Code as it is written. Where "a statute is clear on its face, its meaning [should] be derived from the language of the statute alone." *Kilian v. Atkinson*, 147 Wn.2d 16, 20, 50 P.3d 638 (2002) (citing *State v. Keller*, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001)); *see also BedRoc Ltd. v. United States*, 541 U.S. 176, 183, 124 S. Ct. 1587, 158 L. Ed. 2d 338 (2004).

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Ultimately, the City and PSA propose that the definition of a cargo terminal be amended to "a transportation facility use at which paying cargo may be loaded or unloaded onto vessels designed for carrying such cargo." In their view, the storage of such cargo is irrelevant, yet the definition specifically refers (twice) to storage. But "[t]o be reasonable, an interpretation must, at a minimum, account for all the words in a statute." *State v. Johnson*, 179 Wn.2d 534, 544, 315 P.3d 1090, 1095 (2014) (quoting *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 312, 268 P.3d 892 (2011)).

The Hearing Examiner should decline the invitation to re-write the Code. As explained below, the proposed changes are simply not logical or consistent with the SMP or the SMA.

1. Removing the term "goods" and replacing it with "paying cargo" is contrary to the unambiguous and clear definition of cargo terminal

In their quest to narrow and redefine cargo terminal uses, the City and Intervenor PSA propose adding the term "paying cargo" to the definition in place of the word "goods." Neither the term "cargo" nor the limiting subset of cargo, "paying cargo," are included in the cargo terminal definition. The Code instead refers to "goods" (which has a broad dictionary definition; it is uncontested that goods were loaded onto all vessels) and "container cargo" (which was also loaded onto all the vessels and was formerly a defined term in the SMP). This change would mean that the term "cargo terminal" would not mean what it says, but something substantially narrower.

There are several problems with this approach. First, if the City Council wanted to use the term cargo, it would have (and should have) done so. Instead, it chose the broad general term "goods." "Courts should assume the Legislature means exactly what it says" in a statute, and apply it as written. *State v. Keller,* 143 Wn.2d 267, 19 P.3d 1030 (2001); *see also State v. Roggenkamp,* 153 Wn.2d 614, 625, 106 P.3d 196 (2005). In other words, the Hearing Examiner

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should conclude the term "goods" was selected for a reason and must assume the term "means exactly what it says." When the term "goods" is given its ordinary meaning, there is no doubt (as Mr. McKim agreed) that all of the materials loaded onto the Polar Pioneer and other vessels (including provisions, equipment, stores, and supplied) are "goods." *See* Foss Closing Brief, at pp. 20-22; McKim 52:4-54:25.

Secondly, the Hearing Examiner is not permitted to add words or additional conditions to a statute. This well-known rule of statutory interpretation "prohibits courts from adding words or clauses to an unambiguous statute when the legislature has chosen not to include that language." *State v. Kintz*, 169 Wn.2d 537, 549-50, 238 P.3d 470, 477 (2010); *see also, e.g., Dot Foods, Inc. v. Dep't of Revenue,* 166 Wn.2d 912, 919-20, 215 P.3d 185, 188-89 (2009) ("To achieve such an interpretation, we would have to import additional language into the statute that the legislature did not use."). Here, the City and PSA suggest not only changing the word "goods" to the word "cargo," but then adding a modifier to limit the term to "paying cargo." They further suggest adding a "cargo vessel" requirement to the statutory definition, when nothing in the definition refers to vessels at all, let alone a limited subset of such vessels. This is not interpretation of the statute – it is re-writing it to reach a result.

Further, it is unclear what "paying cargo" actually means in practice. Other than using selective quotes from the witnesses, neither the City nor Intervenor PSA ever specifically define this term.[1] For instance, are the parts of the 520 Bridge that were stored on a barge moored at Terminal 25 not considered "paying cargo" because the materials were used in Lake Washington to build the bridge? Would it make a difference if WSDOT owned and operated the barge, or if

[1] In truth, the City's counsel and PSA only adopted the term "paying cargo" when it was identified as a subset of all cargo by the witnesses for Foss and the T5 Intervenors. Prior to that point, the City never identified "paying cargo" as an element of the statutory definition, which shows how the City is simply making up new arguments and rules as this proceeding progresses.

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the barge was chartered from a barge owner? Here, the unrebutted evidence is that Shell paid a third party (Transocean, the owner of the Polar Pioneer) to transport the goods on the vessel from Terminal 5 to the Arctic. Gallagher 163:6-164:25. Does that make those goods "paying cargo?" If not, why not? The term "goods" introduces no such confusion, but the suggested "paying cargo" test creates substantial uncertainty, all without any discussion by the City Council or the Department of Ecology to evaluate whether such a restrictive requirement is wise from a policy perspective. Perhaps this is why the City Council chose not to artificially limit cargo terminal uses with an undefined "paying cargo" requirement.

The City tries to justify its assertion that the term "goods" means "paying cargo" based on a maritime dictionary. But courts look to standard English language dictionaries to determine the ordinary meaning of a term. *See, e.g., Boeing Co. v. Aetna Cas. & Sur. Co.*, 113 Wn.2d 869, 878, 784 P.2d 507, 511 (1990) (citations omitted). The City also argues that "container cargo" can only mean paying goods carried in standard sized shipping containers. City Br. pp 12-13. This means that the words "container cargo" in the definition are entirely superfluous, as "goods" would entirely contain the term "container cargo." Words in the definition are meant to have distinct meaning; one cannot read two terms in the same definition to mean the same thing. *Densley v. Dep't of Ret. Sys.*, 162 Wn.2d 210, 219, 173 P.3d 885, 889-90 (2007) (citations omitted) ("When the legislature uses two different terms in the same statute, courts presume the legislature intends the terms to have different meanings"). This means that "goods" must be distinct from "container cargo." The City and Intervenor PSA's conflation of both terms into a new category of paying cargo is contrary to the plain language interpretation of the definition of cargo terminal.

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Nor does the specialized dictionary actually yield the results the City desires. The maritime dictionary defines goods as, among other things, "moveable property," and "all materials that are used to satisfy demands."[2] Even if a layperson had only this maritime dictionary at hand, it is likely she would not learn about the restricting connotation to "goods" that the City argues is obvious. *See Boeing, supra.* No matter what definition is reviewed and no matter how the City seeks to narrow it, the materials loaded onto the Polar Pioneer and other vessels are goods or container cargo.

a. The materials loaded onto the Polar Pioneer and other vessels are goods or container cargo even utilizing the artificial requirement that the goods be "paying cargo"

The City and PSA mischaracterize the testimony from members of the maritime industry, and make arguments wholly unsupported by expert testimony or other evidence. Neither party called a witness of any sort to actually prove that so-called "paying cargo" is the only type of cargo that is handled at cargo terminals in Seattle or anywhere else in the world. In reality, the testimonies of Mr. O'Halloran, Mr. Knudsen, Mr. Johnson, and Mr. Gallagher directly contradict the City and PSA's conclusions that cargo terminals exclusively handle "paying cargo" and only paying cargo.

PSA also mischaracterizes the testimony of Paul Gallagher when it argues that he conceded that none of the material that was loaded could be considered paying cargo. PSA Closing Brief, pp. 33-34. In fact, Mr. Gallagher testified without rebuttal that the tubulars and other materials being transported to the Arctic are "paying cargo" because the owners of the Polar Pioneer and all of the other vessels are in fact being paid, by charter agreements with Shell,

[2] Out of all of the descriptors found in the cited definition of goods, the City focuses only on the word, merchandise. If the dictionary definitions were as narrow as the City argues, however, the drafters would not have included more expansive terms.

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for carrying the goods and container cargo from Terminal 5 to other locations. Gallagher 21:10-16; 59:1-4. There is no doubt that the Polar Pioneer moves goods for a fee (so-called "paying cargo") to the Arctic. Nothing in the City or Intervenor PSA's descriptions of "paying cargo" contradict this conclusion.

b. The City's comparison of cargo terminal uses to commercial and residential marinas is misleading and illogical

The City argues that the phrase "goods or container cargo" must be read to mean only "paying cargo" because there is no other way to distinguish a cargo terminal use from a commercial or residential marina use, because all types of boats load and unload stores, provisions and gear. Uses in the Code may overlap, but the only real connection between these uses is that each involves boats. The City cannot create false equivalencies in order to justify its tortured reading of the Code.

Indeed, the City's argument ignores the only other time the SMP actually discusses cargo terminal uses in its definitions. The SMP defines "Tugboat services" as "a transportation facility use that consists of moorage for more than one tugboat and dispatch offices, except that facilities that include barge moorage and loading and unloading facilities for barges as well as tugboat moorage are not tugboat services and are classified as cargo terminals." To be a cargo terminal use, the SMP only requires that these barges load or unload and moor alongside tugs. This definition does not even require the barges to even be unloading or loading "goods," let alone "paying cargo" from vessels whose primary function is to move cargo from one place to another, which the City has asserted is the *sine qua non* of cargo terminals. The SMP states, in no uncertain terms, that barge moorage and loading and unloading facilities for barges is a cargo terminal use. Indeed, the evidence at the hearing reflects that barges will be unloading and loading, alongside tugs, as part of the Foss Operations. Even under this definition, the activities

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fall under the plain language of a cargo terminal use. This definition cannot be squared with the new "interpretation" that the City expounds in the brief, or the Interpretation at issue here, or the testimony of Mr. McKim. Contrary to the City's approach, all provisions of the City Code must be read together and reconciled if possible. *Am. Legion Post No. 149 v. Dep't of Health*, 164 Wn.2d 570, 640, 192 P.3d 306, 322 (2008).

The City's comparison of cargo terminal uses with marina uses also reads a surprising amount of flexibility into the definition of a commercial marina, considering the severe limitations it places on a cargo terminal. For instance, the definition and development standards for a commercial marina use do not expressly permit stores, provisions, and gear to be loaded onto vessels at such facilities. The fact that, say, a grocery bag has historically or commonly been carried onto a boat at a residential marina, does not mean such activity is permitted, as the City has so vociferously argued about the maritime industry's testimony of the activities that occur at cargo terminals. Secondly, because loading and unloading of stores, gears, and provisions are not mentioned in the definition of commercial marina, who is to say that paying cargo may not be loaded and unloaded as well?

2. The City and Intervenor PSA improperly narrow the definition of "container cargo"

The City and PSA define container cargo using the SMP that is no longer in effect. Foss agrees that it is appropriate to define container cargo utilizing this definition. Inexplicably, however, they City twists this definition to conclude that the goods and cargo that were loaded into containers at Terminal 5 are not container cargo.

It is an axiom of statutory interpretation that where a term is defined by statute that definition controls, and is to be used. *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 813, 828 P.2d 549 (1992). Only where a term is undefined will it be given its plain and

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ordinary meaning. *Id.* Here, "container cargo" was defined by the SMP to be "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." Former SMC 23.60.906. The activities at Terminal 5 included loading and storing "cargo packed in large trunklike boxes" on the Polar Pioneer and other vessels, and loading them as a unit. Gallagher 43:5-45:9. Some of the boxes were in fact the "typical" 8x8x20 boxes – see Foss Exh. F065, F068 (photos of such containers aboard the Harvey Champion and Harvey Supporter). Others were not that "typical" size but meet the definition of a "large trunklike box" that is "loaded, stored and unloaded as a unit." Foss Exhs. F062, F065, F068, F069, F070, F072. Mr. McKim agreed that all of these boxes were containers; no witness disagreed. McKim 54:13-25. Based on the plain language of the definition, the containers are without a doubt container cargo.

The City and PSA appear to argue that only "standard size" containers are permitted under the former definition of container cargo.[3] Nowhere does the definition exclude any size container that is not listed in the definition, nor does it dictate the specific size of a container. If that was the case, the 40-, 45-, 48- and 53-feet containers discussed by Mr. Knudsen that are regularly loaded and unloaded at a cargo terminal would also not be considered container cargo. Knudsen 74:20-75:14. There are many sizes of boxes that can be container cargo, and the definition of container cargo does not preclude other sizes from being considered container cargo.

[3] The City asserts that the container cargo loaded onto the Polar Pioneer and other vessels are not "containerized cargo" as that term is used in the trade. There is no support for this assertion. No witness testifies that the sizes of the containers used in the Foss Operations were not "standard," and nowhere did the witnesses testify that atypical containers could not be loaded or unloaded at cargo terminals. In fact, Mr. Knudsen testified that "[w]e handle anything that anyone brings us." Knudsen 75:14.

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3. The analysis of carriers from the City and Intervenor PSA demonstrate that the goods and container cargo were transferred to other carriers

Intervenor PSA argues that a "carrier" can only be a person or entity hired by a third party to move goods from one place to another for a fee.[4] PSA Closing Br., p. 11. This would, of course, only be relevant to one of the three alternatives in the definition of the term "cargo terminal." Even using that narrow reading of "carrier," the record is that goods were in fact transferred from trucks (a carrier) that were hired by Shell to move goods from one place to another for a fee, to vessels (another carrier), including the Polar Pioneer, which were hired by Shell to, among other things, move goods from one place to another for a fee. Mr. Gallagher further testified that many of the goods and container cargo were also transferred to other carriers at sea.

PSA argues that the term "carrier" refers to only to an entity in the business of "transshipping" cargo for a fee. PSA never defines "transshipping," the Code never uses the term, and the definitions of carrier proffered by the parties never utilize or define the term. Apparently, the term means whatever PSA wants it to mean in any specific case. Indeed, Mr. Gallagher, who has over 30 years of experience in the maritime industry, was unclear what transshipping even means. Gallagher 102:22-103-5. PSA tellingly does not conclude that the Polar Pioneer and other vessels are not "carriers."[5] Indeed, it would have been difficult for them to do so as the vessels and trucks utilizing Terminal 5 for the Foss Operations are quite clearly

[4] PSA cherry picks the definition of carrier found in the Oxford English Dictionary—which also generally defines carrier as a "thing that carries." It is improperly to selectively choose the definitions that one believes fits its purposes; the dictionary definition must be examined as a whole. *See, e.g., State v. Elgin*, 118 Wn.2d 551,556, 825 P.2d 314 (1992).

[5] PSA includes a picture of Terminal 5 and asserts the pictures shows "typical cargo terminal operations." To the extent PSA implies that only moving containers is considered typical cargo terminal operations, it misreads the definition of a cargo terminal.

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"carriers." Whatever definition they use, and however they seek to limit that the definition, the evidence clearly shows that the goods were transferred to another carrier.

4. The City and PSA's assertion that the phrase "in order to transfer them to other locations" applies to each and every activity at a cargo terminal is contrary to the plain language of the definition of cargo terminal

It is ironic that the City and Intervenor PSA strongly rely on the purported requirement that vessels loading at cargo terminals must "transfer goods to other locations," because the undisputed evidence was that goods and container cargo loaded onto the Polar Pioneer and other vessels were, in fact, transferred to other locations—including Everett, Port Angeles, Dutch Harbor, and a specific, leased location in the seabed. Tellingly, neither party acknowledges that Mr. McKim admitted—twice—that goods loaded onto the Polar Pioneer and then placed in the ocean floor at a designated, leased location constitute goods that are "transferred to another location." McKim 77:15-23 (agreeing that putting tubulars and other materials in the ground at a specific location licensed by the federal government constitutes "transferring that material to another location"); 156:18-157:12 (if pipes, casings or tubulars are left in the ground at a leased location to which Shell intends to return, that is "a transfer under the definition of a cargo terminal"). Indeed, Mr. McKim confirmed his testimony on this point when asked about it on cross-examination by Intervenor PSA. *Id.,* 156:18-157:12. All of the legal twists and turns to avoid acceptance of this fact and the plain reading of a cargo terminal use are simply noise.

a. The phrase, "in order to transfer them to other locations" does not qualify all of the activities at cargo terminals

The City and Intervenor PSA raise a series of related, yet unsuccessful, arguments in support of their narrow readings of this transfer clause. First, both the City and Intervenor PSA argue that the last antecedent rule does not apply because the cargo terminal definition cannot be read without a direct transportation requirement. They claim that "context" requires the clause

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"in order to transfer them to other locations" to apply to all cargo terminal activities, because only that element separates a "transportation" use from a "storage" use. Second, they argue that a cargo terminal use in the UI shoreline environment must be "water-dependent" or "water-related," which can only occur if the goods are being transferred to or from a vessel. Third, they argue the insertion of the comma after "carriers" was not intended to alter the meaning of a cargo terminal use.[6] Finally, they assert the definition of "cargo" confirms that a cargo terminal use must transfer goods.[7] All of these arguments miss the mark and misunderstand the Code.

Foss agrees that a cargo terminal must support or effect the transfer of goods; that is implicit in the definition of "transportation facility." But that is what the Foss Operations accomplished – goods and container cargo were transported to another location from Terminal 5, and will be transported to Terminal 5 in the future. What is objectionable about the City and PSA Intervenor's position is that, by attaching the requirement "in order to transfer them to other locations" to every single activity that occurs at a cargo terminal, they ignore the stated definitions of a transportation facility use and a cargo terminal use and imply restrictions that do not exist. From a practical standpoint, this means, as Mr. McKim explained, an empty cargo vessel, which typically meets DPD's new primary function test, may not moor at a cargo

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[6] Foss does not argue, as both the City and PSA suggest, that the SMP's addition of the comma changed the meaning of cargo terminal. Foss has consistently asserted that the added comma clearly sets off the last phrase from the other two, confirming and reinforcing application of the last antecedent rule. Foss Br., p. 27 (*citing State v. Baldwin*, 109 Wn. App. 516, 527, 37 P.3d 1220 (2001) (holding that "when a former statute is amended, or an uncertainty is clarified by subsequent legislation, the amendment is strong evidence of what the Legislature intended in the first statute") (citation omitted).

[7] The City further confuses the issues by relying on several definitions of cargo to support its argument that goods (which it defines as paying cargo) must be transferred. Even if one could understand the connection of the definition of cargo to the requirement of transferring goods, the definitions of "cargo" cited by the City fully support that the items loaded onto the Polar Pioneer were cargo that was transferred to other locations. Moreover, the City relies, in part, on a maritime dictionary definition of cargo, which Mr. Gallagher testified only covered an aspect of cargo. Instead, Mr. Gallagher testified that the Black's Law Dictionary definition, which defines cargo as "goods and materials of various types transported by carriers," is the definition used at maritime school. Gallagher 105:21-106:5. Upon hearing this testimony, PSA still did not utilize the definition of cargo in Black's Law Dictionary. *Id.*

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terminal while it awaits its next mission.[8] PSA's reading also calls into question those activities where goods are stored for more than 72 hours. Certainly the goods will be transferred, but it is improper to read this "transfer clause" to require "transshipment," however PSA defines the term, for every single visit to a cargo terminal by every single vessel that moors at the cargo terminal.

Moreover, the City's claim that "storage" alone is not a transportation facility use is belied by the definition of transportation facility itself. A "transportation facility" may support or provide a means of transporting people or goods. Indeed, many types of transportation facilities involve storage alone, because (presumably) the use "supports" movement but does not directly involve transport. *See, e.g., "*dry boat storage" and "towing services," 23.84A.038 "T".

In light of the context of the Code, the City and PSA's reading significantly narrows a plain language reading of cargo terminal and transportation facilities.

(1) Adherence to the last antecedent rule does not convert a cargo terminal use to a warehouse

The City and PSA claim that if the last antecedent rule[9] is heeded, then goods can be stored and never transferred. Their concern that a cargo terminal will turn into a storage facility if "in order to transfer them to other locations" is not attached to every single visit on every single vessel is a solution in search of a problem.

First, the City and PSA's concerns ignore the facts at issue in this Interpretation: goods on the Polar Pioneer do in fact get transferred to other locations, as required by a transportation

[8] Quite amazingly, the City's brief contradicts Mr. McKim's testimony and implies that a cargo vessel could moor at a cargo terminal, even though Mr. McKim testified that they could not do so. **Cite.**

[9] Both the City and Intervenor PSA focus on the definition of "cargo terminal" found in 23.84A.038 "T", which defines cargo terminal slightly differently. While the discrepancies in text provides no real meaningful difference, the SMP definition does add a third category of activities, "stored without undergoing manufacturing processes." Whichever definition is used, however, the last antecedent rule continues to apply only to the last clause, "stored outdoors." As discussed in Foss's Closing Brief, the Foss Operations fall well within all three cargo terminal activities, including the fact that goods are stored outdoors in order to transfer them to other locations.

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facility use. Secondly, the warehouses about which the City and PSA are so concerned also require transfer of goods, as outlined in the testimony of Mr. McKim and the definition of warehouse. SMC 23.84A.036 "S" (Warehouse means "a storage use in which space is provided in an enclosed structure for the storage of goods produced off-site, for distribution or transfer to another location."). Third, to the extent the City is concerned that application of the last antecedent rule somehow converts this into not only a warehouse, but a non-water dependent warehouse, that is not a result that can occur under the Code. The City can and does limit uses to water-dependent uses in the shoreline environment. Here, the Code not only limits cargo terminals in the UI environment to those that are water dependent or water related, but also limits warehouses in the same way. SMC 23.60A.482.D.

Moreover, the cargo terminal definition specifically permits accessory warehouse uses that support transportation of goods. PSA argues that by not attaching this "transfer clause" to every activity at a cargo terminal, then storage becomes a principal use—not an accessory use—and treats "indoor" and "outdoor storage" differently. PSA is creating distinctions without a difference. Of course the goods will be transferred. Here, the goods were transferred. Nothing in Foss's reading removes a requirement to transfer goods. Indeed, what is the purpose of describing any activity at a cargo terminal if the only activity that matters is the transfer of goods?

Accordingly, the City and PSA's concerns that application of the last antecedent rule will turn Terminal 5 into a large warehouse are unwarranted.

(2) The City provides no support for its assertion that activities in different use categories cannot overlap

The City further argues, without citation or support, that an activity cannot be described in two use categories. It is nonsensical to argue that definitions and uses in the Code may not

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overlap, and the Code does not prohibit such an overlap. Neither the City nor PSA has pointed to such a provision. Instead, they have, yet again, manufactured a requirement that has no basis in Code. This is merely another meager excuse to avoid application of the last antecedent rule.

b. PSA's artificially-created requirement that goods must be "transshipped" to "another entity" finds no support in the Code

In footnote 15 of its brief, PSA posits another requirement that cannot be found in the definition of cargo terminal, or anywhere else in the Code. Specifically, PSA argues that leaving pipe in the ocean floor does not constitute the transfer of cargo to "another entity." PSA then accuses Foss of going to "linguistic lengths" to justify the Foss Operations as cargo terminal operations. But Foss, the Port, and T5 Intervenors are not the ones adding words and requirements that do not exist to the statute, and then failing to even applying the facts to those artificial requirements. The record shows that the goods not only are transferred to the ocean, but that they were also transferred to other ports or other vessels. Moreover, because the vessels themselves are often owned and operated by different entities, the Foss Operations meet PSA's extraordinarily narrow, artificial requirements. PSA's reading would essentially require a line by line description of where each good or container will be transferred outside of the City of Seattle, as well as a description as to whom it is transferred, in order to determine if the vessel can moor in Seattle. Such a reading goes well beyond the jurisdiction of the City and well beyond the plain language of the Code.

C. The legislative history of the SMP does not support the City's assertion that goods means only "paying cargo"

In reaching its conclusion that the plain language of the definition of cargo terminal allows vessels to transport only "paying cargo" to other locations, the City relies upon a mish-mash of external sources that it alleges are relevant as "legislative history." Because the

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definition cargo terminal is unambiguous, it is improper to resort to a review of legislative history or other extrinsic sources. *Jametsky v. Olsen*, 179 Wn.2d 756, 768, 317 P.3d 1003, 1009 (2014) (if a statute is ambiguous, the court "may resort to statutory construction, legislative history, and relevant case law for assistance in discerning legislative intent") (citation omitted). For that reason alone, the Hearing Examiner should disregard the City's selective journey through history.

Moreover, the "legislative history" proffered by the City does not directly address the evolution of the terms "goods" or "cargo terminal." Even if one were to pick and choose random elements from the "legislative history" of the SMP, it would not support the City's position that the City Council intended to limit "goods or container cargo" to only "paying cargo." As Judge Harold Leventhal once said, the use of legislative history is "the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends." *See, e.g., Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) (crediting Judge Leventhal for the metaphor). This metaphor could not be more apt to describe the balance of the City's brief.

The City's tortured discussion of "sources" of legislative history ignores the evolution of the SMP and the definitions of cargo terminal and commercial marina. For example, the City relies on a 1983 report, *An Assessment of the Future Needs of Water-dependent Uses in Seattle – Seattle Shoreline Master Program Revision Project* ("Report"), a document that explains the general business of the Port. The use descriptions in the Report rarely made appearances as use categories in the SMP, and those that appear in the City Code are broadly defined and do not mirror the Report's description. For instance, the City describes breakbulk cargo as "commodities," even though the Report's description of breakbulk facilities as well as the

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definition in the previous SMP (the definition no longer is part of the SMP) are broader than the City's limited description. Breakbulk cargo was defined as "cargo packed in a separate packages or individual pieces of cargo and loaded, stored, and unloaded individually." SMC 23.60.906. Indeed, much of the Foss cargo falls squarely within this definition of breakbulk cargo. *See* Gallagher 52:19-60:2 (goods on pallets and equipment were loaded). Similarly, "container cargo" and "neo-bulk cargo" were defined in the SMP (its definition no longer exists in 23.60A), but were never set out as a specific use category apart from cargo terminal.[10] Accordingly, the Report's benefit is limited, if not nonexistent.

Moreover, the fact that "consumer goods" destined for Alaska pass through Seattle certainly does not mean that other goods were not handled in Seattle. Indeed, hearing testimony indicated that several oil rigs moored in Seattle in the 1970s and 1980s.[11] If, at the time the City Council reviewed this report, it believed that cargo terminals were limited to "paying cargo" "in the stream of commerce," they certainly would have limited the definition to reflect this narrow understanding of goods.

Secondly, the ordinances themselves—not the overall reports on the waterfront activities—portray cargo handling facilities broadly. Ordinance 106200 from 1977 refers readers to the definition of "water-dependent use" for the definition of "cargo handling and water

[10] As discussed in Foss's pre-hearing brief, "breakbulk cargo" is the only type of cargo that can be handled in the UH shoreline environment, demonstrating that if the City Council wants to limit the type of cargo that is handled at cargo terminals, it knows how to do so.

[11] The City argues that its failure to issue a Notice of Violation to these rigs is not evidence that they are appropriate cargo terminal uses. To support this argument, the City argues, without a hint of irony, that the City will not issue a Notice of Violation unless it receives a complaint, and that Faith Lumsden testified that was the practice when those oil rigs were moored. Ms. Lumsden, however, broke her department's own rule when it issued a notice of violation for the Polar Pioneer and the Aiviq without receiving a complaint, citing the fact that the oil rig was hard to miss, so she knew it was a violation. Lumsden Day 2, Tape 3 of 4, 1:37:00-1:38:35. Certainly, the rigs moored in the 70s and 80s were no harder to spot.

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dependent manufacturing."[12] This definition reads, in relevant part, that water dependent uses include:

> (a) Marine Commercial Uses
> (1) terminal and transfer facilities for transport of passengers or goods over water;
> (2) moorage, fueling and servicing of commercial vessels;
> (3) industries which receive or ship goods or materials by water as an essential part of their operation; and
> (4) marine construction repair.

DPD Exh. 6, p. 8.

The definition also defines marine recreation as pleasure boat moorage and marinas, and other, non-relevant uses. Cargo terminal, which was a listed use at the time, was not defined. Based on this history, it is difficult, if not impossible, for the City to argue that cargo terminal uses were not intended to be broadly read, considering that the term "goods" has been consistently used instead of, or in addition to, more limited subsets of cargo such as "container cargo," "breakbulk cargo," or "neo-bulk cargo."

D. Even though the City and PSA do not address the primary function test by name, their application of the test highlights the test's absurd effects

Despite reliance on its new test in the Interpretation and at the hearing, the City surprisingly never mentions the primary function test by name, nor does it ever describe what the test requires, does not require, or what its limits are. The City only knows that the test excluded exploratory drilling rigs headed to Alaska. PSA accuses Foss of creating the test itself, completely ignoring the language of the Interpretation, the deposition testimony when this test came to light, and the hours of testimony by Mr. McKim confirming its existence. Intervenor PSA Br., p. 23. Nonetheless, both parties rely on the test's fundamental premise: if a vessel that

[12] Table 3 of Ordinance 106200 explains that "cargo handling and water-dependent manufacturing" is defined in Section 21A.155. While this is a list of definitions, the definition most logically related to "cargo handling" is the definition of "water-dependent use."

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is not primarily (perhaps exclusively) in the business of moving paying cargo for a fee wishes to unload or load goods or container cargo, it cannot do so at a cargo terminal. *Id.*; City Br., p. 37.

Interestingly, PSA argues that counsel for the Port and Foss "concocted" the primary function test, and that "no such test is spelled out in the interpretation, nor is one required to apply the interpretation." PSA's argument ignores the Interpretation itself as well as the testimony of Mr. McKim. First, the Interpretation does spell out a test that specifically relies upon the type of vessels that call at cargo terminals. Paragraph 11 of the Interpretation's "Conclusions" refers to vessels "used for transporting goods in the stream of commerce," and compares them to "other vessels and equipment, not used for transfer of goods to other locations." Foss Exh. F001. Mr. McKim testified, specifically, that this language in paragraph 11 sets out a test that examines the primary function of vessels:

> Q. And when you say "vessels otherwise used for transporting goods in the stream of commerce," you mean to say vessels whose primary function is moving goods from one location to another; is that right?
> A. Yes.

McKim 69:10-14. Mr. McKim further testified that this was a test that DPD created, believing it was implicit in the definition of the term "cargo terminal." McKim 71:3-4 (primary function test "reflects our understanding of what the definition calls for").

Second, Mr. McKim agreed that DPD actually applied the test in the Interpretation in making decisions about whether which vessels are allowed to moor at cargo terminals. He testified he "had to" apply this test and reach a conclusion on that issue:

> Q. You also had to determine what the primary function of different types of vessels are; is that correct, to do the interpretation?
>
> A. I had to draw a conclusion about the primary function of the vessels involved in this interpretation.

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McKim 14:24-15:3.

Finally, Mr. McKim agreed that the Interpretation actually made such a determination. See McKim 49:25-50:7 (agreeing that the Interpretation concludes that storing items on a site after they have been transported requires activity "in connection with a vessel whose primary function is moving cargo in commerce").

Perhaps the City and Intervenor PSA now seek to distance themselves from this test because they have been unable to identify any basis in the Code for this test, no matter how it is named. As discussed in Foss's closing brief, the insertion of several new requirements into the Code is contrary to the language of the SMP, and creates an unworkable construct that produces absurd results. In interpreting a statute, the Director (and thus the Examiner) must take the applicable words as the City Council has enacted them, and not insert words in an attempt to give the statute some different "meaning" or "intent." *Shelton Hotel Co. v. Bates*, 4 Wash.2d 498, 508, 104 P.2d 478 (1940); *Auto. Drivers & Demonstrators Union Local 882 v. Dep't of Ret. Sys.*, 92 Wash. 2d 415, 421, 598 P.2d 379, 382-83 (1979) (citations omitted). The primary function test creates an unknown, unwritten, unneeded, and arbitrary test that regulates the shoreline based on the use of the vessel elsewhere.

The City argues that the primary function test does not regulate the use of vessels, but instead regulates the use of the shoreline. Every argument in the City's brief indicates otherwise. There is no difference in the shoreline between loading an offshore supply vessel, an oil rig, a barge, or some other type of vessel with the materials that were loaded at T5. Indeed, the City is regulating the private transactions that occur well offshore, at some other location, by requiring that a vessel's purpose may only be to transport "paying cargo." This is regulating the use of the vessel outside of the jurisdictional waters of Seattle, no matter how it is phrased. What is done

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with the goods, other than the fact they are stored on a terminal and then transferred, should not be and cannot be the business of the City.

This concern over private business transactions is highlighted in the testimony of Mr. McKim, which the City's brief again ignores. Mr. McKim testified that an offshore supply vessel that loads pipe, wire, provisions, stores, and equipment and transfers those materials to a drilling rig in the Arctic could legally moor and operate at a cargo terminal, but a drilling rig, which loads the exact same pipe, wire, containers, provisions, stores and equipment at Terminal 5, cannot moor or load and unload those goods, even if it transfers some of those goods to a specific location and even if it transfers some of them to other vessels. McKim 76:6-16, 79:8-11. Instead of defending DPD's position, the City's brief instead contradicts the sworn testimony of Mr. McKim, the Interpretation's principal author, and argues that the activities of offshore supply vessels are not cargo terminal uses. City Br. at pp. 37-38. Such a contradiction amongst DPD and its attorneys underscores that one does not even know what the primary function test is.

In order to win this narrow issue, the City also throws government vessels, UW research vessels, NOAA vessels, oil spill response vessels, and the entire Alaska fishing fleet, under the bus, in a fashion that makes no practical sense in the shoreline environment. For example, if a vessel loads a large seismic monitor (via crane) to transport and deliver to someone else, the City would agree it can load that monitor at a cargo terminal, so long as the vessel is of the right "type." If a vessels loads the exact same seismic equipment (via crane) to use at sea, it cannot do so, or even moor at a cargo terminal (it remains unknown whether the City permits loading and unloading via crane at commercial marinas). Dozens of vessels will be forced to leave Seattle, for ports where land use regulators choose not to engage in political sophistry in the guise of "interpretation." Dozens of supporting businesses in Seattle, and their hundreds of employees,

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will be put out of work. The Port of Seattle will be left with properties subject to artificial, sanitized tests, unable to compete in the global marketplace. The primary function test, as outlined in detail in Foss's Closing Brief, clearly produces absurd and unworkable results in violation of the plain language definition of cargo terminal.

E. The record does not support the City and Intervenor PSA's assertions that the uses at Terminal 5 exclude commercial moorage

The City and PSA Intervenors argue that because the permits that the City pulled for Terminal 5 did not include a specific permit for commercial moorage, then it must mean that the approvals specifically excluded commercial moorage as an allowed use.[13] Foss agrees that Terminal 5 is a cargo terminal, and has been a cargo terminal well before the permits authorizing an office and inspection use on an existing cargo terminal in 1977.[14] Indeed, the permits indicate that a warehouse use, office use, and likely many other uses, were also established. Contrary to the City's arguments, however, uses are not established to the exclusion of others.

The City and PSA's arguments that T5 is established only as a cargo terminal were not an issue in the appeal, in the Interpretation, or at the hearing.[15] Nevertheless, both the City and PSA also imply, without support in the code, that the cargo terminal uses at Terminal 5 are limited to

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[13] Throughout its brief, the City strangely uses to the term, "general moorage." This is not a current use category and to Foss's knowledge, has never been a use category. It is unclear what this term means and how it relates to the SMP. The City also continues to use the term, "commercial moorage," which is no longer a use category. It has been replaced by a commercial marina use. SMC 23.60A.926 "M". These terms appear designed to create confusion, not to clarify the issues before the Examiner.

[14] Contrary to the statements by the City and PSA Intervenors, the cargo terminal use at Terminal 5 was not "established" in 1977 nor 1995. The use already existed. The permits referenced simply confirm the use.

[15] In fact, the Hearing Examiner's Order on the Motion to Dismiss concluded that this is not an issue in this proceeding. Order on Motion to Dismiss, p. 3, ¶11.

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the specific descriptions found in the 1995 permit.[16] This argument, however, inappropriately pushes for a level of specificity in the "established use" that requires an applicant to establish a new use any time activities deviate from the subset of activities that were initially permitted. At its most extreme, that would require establishing the same "use" just to engage in different activities. Cargo terminal is a broad use category that supports various activities, and is in no way limited, via permit or by the plain language of the Code, to "transshipping cargo" via container or break-bulk cargo.

Without acknowledging its hypocrisy, the City argues that Terminal 5 cannot allow moorage because Andy McKim did not find a permit specifically allowing moorage. This position stands in stark contrast to its stance on Terminal 91 and all other cargo terminals, where the evidence clearly shows that moorage has been occurring for decades, if not since the inception of the port. For cargo terminals not named Terminal 5, the City concludes that significant research is needed to determine whether commercial marina uses were established or could be established; until that research occurs, it argues, the City is not convinced that moorage is not a permitted use. City Br. p. 17. For Terminal 5, in contrast, the City's brief summarily concludes moorage is prohibited, even though Mr. McKim stated in his draft interpretation that the permit search for Terminal 5 was not complete (Foss Exh. F002, RFP1000007).

Simply because the City has differentiated between a marina and a cargo terminal, as it should, permits for cargo terminals not specifically listing moorage do not mean that moorage is

[16] The City argues that the City's 1995 Permit for Terminal 5 proves that "general moorage" is not an approved use at the terminal because the decision analysis does not analyze Guideline E8(d) of the Shoreline Implementation Guidelines, set forth in Resolution 27618. DPD Exh. 4. As discussed *supra*, a permit decision for construction will only analyze what it is permitting and does not extinguish other allowed uses. Moreover, this guidance document does not, as the City implies, state that a cargo handling facility does not include moorage. The document discusses the need for deep water in areas to allow the Port to remain competitive, and asks the Port to work with the City to provide a long-range plan in order to provide predictability for property owners. What the City chose to base its consistency analysis upon during a 1995 decision (when the cargo terminal and other uses had been occurring for decades prior) bears little relevance as to whether the City has permitted a particular use.

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prohibited. Maritime experts have testified that moorage has historically been part and parcel of a cargo terminal use, and remain so today. Knudsen 64:5-20; see also Gallagher 87:2-8. In its draft Interpretation, the City agreed:

> 'Cargo terminal' was not a use category mentioned in the zoning code then in effect. It was first mentioned as a use in the 1970s, and the term was not actually defined in Seattle's zoning codes until the mid-1980s. Permits were obtained, over the years, when improvements were made to the property, however these permits typically describe the specific improvement (office, wharf, pier, warehouse, utility yard). Permits issued after "cargo terminal" became a formal category typically reflected that modifications or improvements were being made to an existing cargo terminal. In effect, a use category was chosen for the existing use that embraced many of the activities at the facility. However, to the extent that additional moorage or lay berthing was also occurring, issuance of a use permit characterizing the facility as an existing cargo terminal does not mean that the right to conduct other activities, permitted under the zoning and already occurring at the site, was abandoned … Even if we were to conclude that moorage of the Shell Oil vessels did not fall under the scope of the current definition of 'cargo terminal' and that that moorage cannot be approved as an accessory use, it still would remain a legal activity based on the use of the property before 'cargo terminal was defined or regulated as a use category under Seattle's codes.

Exh. F002.[17]

This conclusion was entirely removed, without explanation, in the final Interpretation. Foss believes that this conclusion is correct and should be adopted by the Examiner.

F. The uses at other cargo terminals highlight that the cargo terminals accommodate a broad range of vessels

As outlined in the closing briefs from the Port, T5 Intervenors, and Foss, various activities regularly occur at cargo terminals every day—including idle moorage. Mr. Knudsen testified that moorage is part and parcel of what the maritime industry expects to do at a cargo terminal, and the allowance of the various activities described above is standard industry practice

[17] In Mr. McKim's notes in his draft Interpretation, he stated he would ask the Port for documentation that lay berthing at Terminal 5 has been a long-standing practice. Foss Exh. F002. He never asked the Port that question, presumably because he did not want to know the answer. McKim 95:9-16.

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that has been occurring for decades. Knudsen 60:10-64:20. The Port witnesses confirmed this practice.

In an attempt to distract from the actual permit decisions at Terminal 91 that broadly defined cargo terminal uses to include moorage, the City argues that there is no evidence that Terminal 91's varied permit history has been analyzed through an interpretation or permit to establish a use for the record to determine what uses, such as commercial moorage, are allowed, especially for the fishing fleet. City Br., p. 19. Foss does not dispute that other uses have been established at Terminal 91, including a passenger terminal use for passenger ships and a public facility use that authorizes fire boat moorage. However, the City's argument ignores permit decisions that describe Terminal 91's overall use classification for those uses occurring at Terminal 91 as a cargo terminal use (describing the uses as including, among others, chill cargo handling, vehicle importing, and vessel moorage). DPD 11 at p. 30. DPD cannot accordingly hide behind this argument that to determine whether moorage is permitted at Terminal 91 would require DPD to pull apart every element of Terminal 91's complicated permitting history, or to prove a negative. Foss and the Port presented evidence, which no witness rebutted, that the moorage at Terminal 91 was wide ranging, of long standing, and associated with the cargo terminal use. Tellingly, when asked if any permit or use approval at Terminal 91, besides the cargo terminal use, would allow long-term moorage of fishing vessels and other large vessel, Mr. McKim testified that he was not aware of any other approval. McKim 115:5-13.

In spite of all of this evidence—the only evidence in the record—the City claims that only cargo ships moor at cargo terminals. City Br. at 14-17. To do so, the City grossly mischaracterizes the testimony of the maritime industry witnesses. For example, the City argues that Mark Knudsen, the President of Conventional Cargo of SSA Marine, stated that it is industry

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practice to provide moorage only for cargo ships that are not loading or unloading. City Op. Br. p. 17 (emphasis in original). However, when one reviews even the block quote provided by the City on page 17, lines 5-8 of its brief, it is clear that Mr. Knudsen testified that there is a large difference between the types of vessels that call, and never even hinted that only cargo ships moor at Terminal 18. Knudsen 64:5-17. The testimony from the maritime experts as well as the Port exhibits demonstrate unequivocally that that ships of all kinds moor at cargo terminals for various reasons, including military vessels, research vessels, NOAA vessels, other government vessels, construction barges, and even yachts. Arguments to the contrary fall in weight of the evidence presented.

These same maritime witnesses also testified that the Foss Operations are the quintessential activities that occur at cargo terminals. *See, e.g.* O'Halloran 17:22-19:19 ("everything that was done there on the Shell Oil rig was a traditional use of a terminal"). Not surprisingly, City and Intervenor PSA chose to disregard that testimony.

G. In the alternative, moorage is an accessory use to a cargo terminal

What gets lost in the City and Intervenor PSA's briefs is the fact that the moorage is occurring while Foss is conducting cargo terminal activities. As the uncontroverted evidence demonstrates, the Foss Operations falls squarely within cargo terminal activities. Mr. Gallagher testified that when the vessels return, Foss plans to offload materials, equipment, containers, and other materials, which is estimated to take a few months; will conduct routine maintenance and repair of the kind that which occurs every day at cargo terminals; will load stores and provisions each day; will assist the crew; and will ultimately repeat the loading operation of the vessels as it occurred in May. Gallagher 30:18-31:25. The vessel would moor during these activities, whether engaged in active loading or unloading on any particular day. Gallagher 32:1-34:14. As

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Mr. Gallagher and other witnesses testified, these types of activities are exactly the same as activities occurring on other vessels that call at the Port of Seattle and all other cargo ports in the world. Gallagher 33:9-19, 87:2-8; Testimony of Mark Knudsen 64:5-20; Testimony of Jim Johnson 41:12-25.

Even the City and PSA agree that moorage is accessory to cargo terminal activities. Interpretation, Foss Exh. F001 at p. 5, ¶11; Intervenor PSA Closing Br., pp. 19-20. Accordingly, in the alternative, the Hearing Examiner should determine that the current and proposed use of Terminal 5 is accessory to the permitted cargo terminal use.

III. CONCLUSION

Under the plain language of the City Code and the uncontested evidence at hearing, the activities at Terminal 5 constitute a cargo terminal use. The Hearing Examiner must reject the Interpretation because it is contrary to the record in this proceeding, contrary to the plain meaning of the City Code, contrary to standards of statutory interpretation and leads to absurd results. Foss has more than met its burden to demonstrate that DPD's Interpretation is clearly erroneous, and accordingly, the Hearing Examiner should reverse the Interpretation. The Examiner should instead determine that the use of Terminal 5 to load and unload vessels and to moor those vessels, is a cargo terminal use or, in the alternative, accessory to a cargo terminal use.

[signatures on following page]

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Respectfully submitted this 21st day of September, 2015.

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