

**FINDINGS AND DECISION OF THE HEARING EXAMINER
FOR THE CITY OF SEATTLE**

In the Matter of the Appeals of

**FOSS MARITIME COMPANY and
PORT OF SEATTLE**

Hearing Examiner Files:
S-15-001 and S-15-002

DPD Interpretation 15-001

From an Interpretation by the Director,
Department of Planning and Development

Introduction

The Director, Department of Planning and Development, issued a Land Use Code Interpretation which was timely appealed. The hearing on the appeals was held on August 13, 14, 24, 25, and 27, 2015, before the undersigned Deputy Hearing Examiner. Parties represented at the proceeding were: Appellant Foss Maritime Company, by John McCullough and David West, attorneys at law; Appellant Port of Seattle, by Patrick Schneider and Traci Goodwin, attorneys at law; the Director, Department of Planning and Development, by Eleanor Baxendale, Assistant City Attorney; intervenor Puget Soundkeeper Alliance et al., (Soundkeeper), by Patti Goldman and Matthew Baca, attorneys at law; and intervenor T-5 Intervenors, by Joshua Brower and Molly Barker, attorneys at law. The record was held open through September 21, 2015, to receive written closing statements from the parties.

For purposes of this decision, all section numbers refer to the Seattle Municipal Code (SMC or Code) unless otherwise indicated. After due consideration of the evidence elicited during the hearing and the Examiner's inspection of the site, the following shall constitute the findings of fact, conclusions and decision of the Hearing Examiner on this appeal.

Findings of Fact

1. The Port of Seattle (Port) owns Terminal 5, which is located at the north end of the Duwamish River. Terminal 5 has 2,900 feet of moorage capacity and three berths. The terminal includes a 30-acre intermodal yard, with direct access to rail mainlines, a 48,000 square foot maintenance shed and an 80,000 square foot transit shed. Terminal 5 is within the Urban Industrial (UI) shoreline environment and in the General Industrial-1 (IG1 U/85) zoning district.

2. Foss Maritime entered into a lease agreement with the Port in February 2015. The lease is for a term of two years. The leased premises include over 50 acres of space, including 1,370 lineal feet of berth area. Under this lease, Foss was to conduct certain activities at Terminal 5 to support Shell and its contractors, in support of Shell's Arctic operations. The activities described in the lease (Foss operations) include loading and unloading of cargo in containers and non-containerized, equipment, supplies, gear, provisions and other materials, which will be used by

Findings and Decision of the Hearing Examiner

S-15-001 and S-15-002

Page 2 of 14

the vessels and then transported to other locations; storing materials at the terminal in order to load them on vessels; idle moorage of vessels, and other activities.

3. Terminal 5 has been used for a wide range of cargo-related uses for decades. In the recent past, the terminal was redeveloped pursuant to the Southwest Harbor Redevelopment Project. After its redevelopment, Terminal 5 was leased by different entities, including Eagle Marine Services, and used by Eagle's customer, Westwood Shipping. The agreement between the Port and Eagle ended in 2014. During 2015, the Port sought to provide interim temporary uses to tenants while the Terminal 5 "modernization project" occurs; the project is described as "modernizing T-5 to be big ship ready for the larger vessels that are changing the international container business." Foss Ex. 37.

4. The Port also owns and operates Terminal 91. Terminal 91 covers approximately 8,500 feet of moorage on a 152-acre site. Terminal 91 includes Piers 90 and 91, and supports a wide variety of uses, including the moorage of a wide range of vessels as described below. Containerized and non-containerized cargo is handled at Terminal 5 and Terminal 91. Non-containerized cargo includes bulk cargo (dry and liquid cargo); breakbulk cargo (units which must be individually loaded because of the way the cargo is packaged, e.g., cargo stored in boxes, drum, barrels, bags or in bales); and roll-on and roll-off (RoRo) cargo, e.g., automobiles, machinery, or construction equipment.

5. "Lay berthing" describes the moorage of vessels while waiting for cargo, or while idle for other reasons, e.g., fishing vessels which work seasonally in Alaska and "home port" at a marine cargo terminal during the off-season. Large vessels that lay berth at the Port's cargo terminals require deep berths and wide waterways and infrastructure. Commercial marinas in Lake Union and Lake Washington cannot be accessed by large ocean-going vessels because access waterways are too shallow or too narrow for them.

6. Lay berthing occurs regularly at Port cargo terminals and is, according to the Port, an integral part of cargo operations at the Port and throughout the United States as well as around the world.

7. A wide variety of vessels lay berth at Terminal 91; including vessels involved in the fishing industry in Alaska and Washington, marine construction vessels, state ferry and government vessels, tugs and barges, icebreakers, research vessels, oil spill response vessels, and pilot vessels, and other vessels.

8. As noted, large fishing vessels regularly utilize Terminal 91 as a home port during the off-season. For example, Glacier Fish Company has seven "catcher-processor" fishing vessels that moor at Terminal 91. When not at sea or at a shipyard, Glacier considers its vessels to be "home porting" at Terminal 91, as its vessels are moored there for 30-125 days at a time. While some vessels may unload fish at Terminal 91, some vessels never offload fish during their stay at the terminal. Instead, vessels offload fish at other locations, e.g., to cold storage facilities in Dutch Harbor, Alaska or to other locations along the West Coast, before arriving at Terminal 91. Only one of Glacier's catcher-processor vessels has the necessary trade endorsement to allow it

to transport cargo from one harbor to another. While at Terminal 91, fishing vessels undergo maintenance and repairs, have new equipment installed, take on gear and provisions, train crewmembers, or engage in other activities while a vessel is in port.

9. Other fishing fleets which homeport at Terminal 91 follow a practice similar to that of the Glacier vessels, offloading their fish at Dutch Harbor or other locations before they arrive at the terminal. American Seafoods, which moors its vessels at Terminal 91, does not offload any fish at that terminal.

10. The usual practices for assigning and managing vessel moorage space at the Port's terminals were described by Greg Englin, a Port manager. Mr. Englin noted that there is much seasonality in the maritime industry. Vessels need lay berthing, and routinely contact the Port to obtain a berth. For example, fishing vessels will come from Alaska, offload product in Bellingham, and come to Terminal 91 afterwards to home port, undergoing maintenance and repairs, and other activities while moored.

11. The record includes examples of the daily vessel berthing status, schedules, vessel logs, vessel activity reports, indicating the typical status and location of vessels that call in to the Port's terminals.

12. The practice of lay berthing of vessels at Port terminals is reflected in the Port's "Terminals Tariff No. 5," which identifies rates and regulations for use of the Port's terminals; Port Ex. 22. The tariff generally identifies higher dockage fees for vessels that are "working" or handling cargo, and lower rates for "lay berth" vessels. The charges are based on what the vessel does at a cargo terminal, and not on what type of vessel it is.

13. As required by the Marine Trade and Security Act (MTSA), the Port has submitted a Facility Security Plan to the Coast Guard, identifying its security measures at Terminal 91 (which receives calls from vessels engaged in foreign trade.). Various procedures are required to limit access to secured portions of the facility, and credential requirements for vessel personnel.

14. Mr. O'Halloran, a representative for many of the unions who work at the Port's facilities, described the typical activities undertaken by the unions' workers at Terminal 91 and Terminal 5. In addition to loading or unloading vessels, union workers typically conduct activities while a vessel is lay berthed, including maintenance and repair, testing equipment, and other tasks. Mr. O'Halloran also described the activities undertaken by workers while the Polar Pioneer and its supporting vessels were at Terminal 5.

15. Mr. O'Halloran defined "cargo" as "everything that comes on and off the ship." Mr. O'Halloran also identified subcategories of "cargo," which included "stores" (items needed by the vessel in order to operate, such as diesel fuel, lubricating oil), "provisions" (items used by the crew, such as food or blankets), and "gear" (for example, mooring lines or nets).

16. Other witnesses in the maritime industry indicated that, similar to Mr. O'Halloran's description, "cargo" in industry parlance generally means all materials that come on and off a

Findings and Decision of the Hearing Examiner

S-15-001 and S-15-002

Page 4 of 14

ship, regardless of whether they are provisions, merchandise, or other materials. "Paying cargo" or "pay cargo" would be items that someone else paid to have transferred on a vessel; testimony of Mr. Knudsen.

17. The witnesses with maritime experience indicated that lay berthing was a common practice in marine cargo terminals.

18. Several vessels have moored or may moor in the future at Terminal 5 as part of Shell's Arctic operations. The vessels include the Transocean Polar Pioneer (Polar Pioneer), a vessel classed as a Mobile Offshore Drilling Unit (MODU). The Polar Pioneer is a 400-foot long vessel that will be used in the Arctic for exploratory drilling. The Polar Pioneer will carry tubulars (drilling pipe), casings, containers, tools and equipment, and other items. Some of the materials are stored in containers or tanks, and other materials are placed on racks. In addition to materials, the Polar Pioneer will carry up to 114 people, and it will carry food and other supplies that are intended to be used by the crew during the vessel's voyage.

19. The Tor Viking and the Aiviq are ice-class, offshore supply vessels which carry a variety of different materials and move them between the barges and the Polar Pioneer while at sea. (The Polar Pioneer itself is outfitted with two large cranes to move containers onto or off of the offshore supply vessels.) The Tor Viking and Aiviq are multipurpose vessels, equipped with tow winches; the Aiviq also has a helicopter pad, skimmer and oil boom. The Harvey Supporter, Harvey Champion, Harvey Explorer and Harvey Spirit are offshore supply vessel as well.

20. The American Trader, the Tuuk, and the KRS 286-6 are barges. They carry supplies, including additional drilling pipe, and emergency response equipment. The barges ("floating warehouses" according to Mr. Gallagher) from which materials can be transferred to the offshore supply vessels, and from the supply vessels to the drilling rig. The barges are not self-propelled, but are towed by other vessels.

21. Foss's support activities (Foss operations") for Shell included a variety of activities performed at Terminal 5, before and during the arrival of Shell-related vessels at Terminal 5. After taking possession at Terminal 5 pursuant to the lease, Foss began making improvements to the facility, including installation of phones, internet, fiber optic cables. It also trained crewmembers and took delivery of the materials that were intended to be loaded onto the fleet of vessels supporting the Shell operation.

22. Beginning in March 2015, materials were trucked into Terminal 5 in order to be transferred to the vessels associated with the Shell operation. The Polar Pioneer and several other vessels associated with the Shell operation arrived at Terminal 5 in May and June of 2015. The vessels included the Harvey Champion, the Harvey Explorer, the Harvey Supporter and the Harvey Spirit; the KRS 286-6 and the American Trader; and the Tor Viking and the Aiviq.

23. While at Terminal 5, the Polar Pioneer was loaded with materials that included drilling pipe, equipment, wire, and supplies for the crew. The Polar Pioneer has large amounts of empty hull space designed to carry cargo, and according to Mr. Gallagher, over a hundred stevedores

were hired to accomplish the task of loading the vessel. Some of the materials were stored in containers, while other materials, e.g., the pipe and tubulars, were stored on racks. The Polar Pioneer then transported these materials to the Arctic. The support vessels, i.e., the Aiviq, the Tor Viking, the Harvey Champion, the Harvey Explorer, the Harvey Supporter, and the Harvey Explorer were loaded with materials at Terminal 5, for use as part of the Shell operations. Material manifests for the above vessels identify items loaded onto the vessels on specific dates; the manifests in the record are a sample of the thousands of manifests issued for those vessels.

24. The Polar Pioneer and its support vessels left Terminal 5 for the Arctic after completing the activities mentioned above. As noted above, once at sea, the offshore supply vessels would transfer materials to the Polar Pioneer or other vessels, and some of the materials carried on the Polar Pioneer would be transferred to the barges or offshore supply vessels.

25. At the Arctic drilling site, the exploratory wells were to be drilled at a specified location, and pipes transported by the Polar Pioneer and the other accompanying vessels were left in the wells to prevent them from collapsing.

26. A shoreline substantial development permit was issued by DPD in 1995 for Projects 9404118 and 9404124. The decision authorized the future expansion of “an existing cargo terminal, including container storage, intermodal railroad yard and approximately 180,000 square feet of new structures” and other development. The record includes past decisions and permits issued by the City concerning sites at Terminal 91 and other Port facilities.

27. On January 23, 2015, the Port submitted a Shoreline Exemption Request to DPD for what the application described as “Restoration of high-capacity moorage bollards at existing cargo terminal pier.” Foss Ex. 55. The work was to be done at Terminal 5 and was at least in part done to accommodate the moorage of the Polar Pioneer. DPD granted the exemption request. The approval states that the development “is within the scope of normal maintenance and repair of existing structures (WAC 173-27-040-2-b).”

28. In early March of this year, DPD began to review whether the moorage of the Shell vessels would be consistent with the established use at Terminal 5. DPD asked the Port to provide it with information about the Shell vessel moorage. DPD met with Port staff on March 13, 2015, and the Port told DPD that the Port considered moorage of commercial vessels without cargo operations to be a “typical component” of cargo terminal operations. DPD was also provided with declarations from Port planners George Blomberg and Paul Meyer; Foss Ex. 23 and 24.

29. In a March 24, 2015 email to the Port’s counsel, Mr. McKim, the DPD the Land Use Supervisor in charge of the review, asked for more information “that will help us to evaluate whether proposed activities at Terminal 5 are consistent with the established use of that property as a cargo terminal, or whether a different use would need to be established by permit to accommodate those activities.” The email stated that DPD wanted a response soon, because DPD wanted to “respond promptly to the Mayor and City Council members who have asked us to look into this.” Foss Ex. 21.

Findings and Decision of the Hearing Examiner

S-15-001 and S-15-002

Page 6 of 14

30. In response, Foss submitted a letter dated April 8, 2015; Foss Ex. 21. In the letter Foss described its planned activities under the lease with the Port, and stated that its services to the Shell Offshore vessels would be a “fraction of the activity Foss expects and hopes to conduct at Terminal 5.” The letter noted that, with regard to the services it would provide at Terminal 5 to Shell Offshore, it expected two vessels as well as ancillary support fleet to call at Terminal 5. Foss’s letter stated that it intended to “receive goods, cargo, equipment, supplies, stores, provisions and other materials from third parties who will deliver those items to Terminal 5 by rail or truck. The materials will be staged on the terminal for loading, and Foss intends to load those items onto those vessels, for transportation to other locations.” *Id.*

31. The Port submitted a letter to DPD dated April 3, 2015, from its counsel, as well as a memo dated April 6, 2015, from Linda Styrk, who at that time was the managing director of the Maritime Division at the Port, describing the activities that would take place at Terminal 5 and how the Port regarded those activities in the context of cargo marine terminal uses. Foss Ex. 22.

32. Mr. McKim prepared a draft interpretation, shown in Foss Ex. 2. The draft was prepared at some time after April 15. DPD concluded that the drilling rig and two tugboats could moor at the site consistent with the Code’s definition of cargo terminal. The draft stated that the term “goods” as used in SMC 23.60.906 “are something that has an economic utility or satisfies an economic want” and that exploratory drilling equipment “can fall within the definition of goods.” The draft interpretation noted that the phrase “in order to transfer them to other locations” in the definition of “cargo terminal” was “was meant to modify only the words ‘stored outdoors.’ This is clarified by the addition of a comma after ‘carriers’ in the updated version of the code currently being adopted.” DPD concluded that moorage of the Shell drilling equipment was permissible as an accessory use at a cargo terminal, and that moorage or lay berthing would remain a legal activity based on the use of the property before “cargo terminal” was defined or regulated as a use category under the City’s codes.

33. The draft interpretation also noted that “cargo terminal” as a use category was not defined in the zoning code until the mid-1980s, after cargo terminals were already in existence and operation. The draft concluded that 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.” The draft stated that even if the moorage of the Shell Oil vessels did not fall within the scope of the current definition of “cargo terminal,” the moorage would “remain a legal activity based on the use of the property” before the use was defined or regulated under the City’s codes.

34. On May 4, 2015, DPD issued Interpretation 15-001. The Interpretation, shown at Foss Ex. 1, reached opposite conclusions from those contained in the draft interpretation. In Conclusion 5, DPD determined that the proposed activities did not involve “quantities of goods or container cargo.” Conclusion 6 stated that even if the equipment on the drilling rigs or the accompanying tugboats could be considered “goods,” those goods were not at Terminal 5 “in order to be transferred to other locations,” which the interpretation described as “the unifying theme” of SMC 23.60.906. The interpretation further concluded that “moorage of vessels and

equipment not used for the transport of cargo in the process of being transferred to other locations is not intrinsic to the function of a cargo terminal," and therefore the moorage of the drilling rig and tugboats at Terminal 5 was not a "legitimate accessory use." The Interpretation concluded that "an additional use permit" was required for the "proposed seasonal moorage" of the "drilling rig and accompanying tugboats" but it did not specify what kind of use permit was required.

35. On May 18, 2015, DPD issued a "Shoreline Notice of Violation Case No. 1034649" on account of the presence of the Polar Pioneer and the Aiviq; Foss Ex. 105. The Notice identifies the violation as "*Use not established by permit. The recognized existing use of the property, as reflected in permits 9404118 and 9404124, is as a cargo terminal.*" The Correction is identified as "*Remove the Polar Pioneer and the Aiviq from the property OR Obtain a permit establishing commercial moorage use (per existing Shoreline Code 23.60) or commercial marina use (if after the effective date of new Shoreline Master Program Ordinance 124750).*"

36. At hearing, Mr. McKim was asked about the phrase "vessels otherwise used for transporting goods in the stream of commerce," which appears in the Interpretation at Conclusion 11. In explaining the meaning of this phrase, Mr. McKim agreed with a statement that "the primary function of the vessel has to be to move cargo from one place to another" and further explained that this "primary function test" "reflected DPD's understanding of what the cargo terminal definition required." Mr. McKim indicated that because the Polar Pioneer's purpose was to conduct a drilling operation in the Arctic, as opposed to a purpose of moving equipment, it would not be a cargo terminal use. Mr. McKim also indicated in his testimony that if a trawler transferred its catch to another carrier while at sea, and then returned to a cargo terminal in Seattle, such moorage would not be a cargo terminal use; however, if the same vessel unloaded its catch at the cargo terminal, the vessel's moorage would be a cargo terminal use. Testimony of McKim.

37. SMC 23.60A.906 provides in part that: "*Cargo terminal" means a "transportation facility" use in which quantities of goods or container cargo are stored without undergoing any manufacturing processes, transferred to other carriers, or stored outdoors in order to transfer them to other locations. Cargo terminals may include accessory warehouses, railroad yards, storage yards, and offices.*

38. The City's latest amendments to the SMP took effect in June 2015 after the Interpretation was issued. The definition of "cargo terminal" SMC 23.60.906 was nearly identical to the current definition, except that as part of the 2015 amendment, a comma was added before the words "*or stored outdoors in order to transfer them to other locations.*"

39. SMC 23.84A.038 provides that "*Cargo terminal" means a transportation facility in which quantities of goods or container cargo are, without undergoing any manufacturing processes, transferred to carriers or stored outdoors in order to transfer them to other locations. Cargo terminals may include accessory warehouses, railroad yards, storage yards, and offices.*"

Findings and Decision of the Hearing Examiner

S-15-001 and S-15-002

Page 8 of 14

40. SMC 23.84A.038 states in part: "*Transportation facility*" means a use that supports or provides a means of transporting people and/or goods from one location to another.

Conclusions

1. The Hearing Examiner has jurisdiction over this matter pursuant to SMC 23.88.020.G. Appeals are considered de novo, and the Hearing Examiner's decision shall be made on the same basis as was required of the Director. The interpretation is given substantial weight, and an appellant bears the burden of establishing the contrary. The standard of review is "clearly erroneous." Under this standard, the interpretation must be affirmed unless "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Brown v. Tacoma*, 30 Wn. App. 762, 637 P.2d 1005 (1981).
2. At issue in these appeals is the application of the Code to the Foss operations in support of Shell Oil at Terminal 5. The Appellants raised numerous objections to the Interpretation in their appeals. Some of the issues were dismissed prior to hearing. The remaining issues can be generally summarized as alleging that the Interpretation is not supported by facts and incorrectly applies the Code, particularly the definition of "cargo terminal," to the facts.
3. An unambiguous ordinance is to be given its plain meaning, while only ambiguous ordinances will be construed; *Sleasman v. City of Lacey*, 159 Wn.2d 639, 642, 151 P.3d 990 (2007) (citations omitted). Definitions in a code are controlling, but if undefined, a term should be given its "plain and ordinary meaning by reference to a standard dictionary;" *Fraternal Order of Eagles, Tenino Aerie N. 564 v. Grand Aerie of Fraternal Order of Eagles*, 148 Wn.2d 224, 239, 59 p.3d 655 (2002). If a statute is susceptible to two or more reasonable interpretations it is ambiguous; *Five Corners Family Farmers v. State*, 173 Wash.2d 296, 305, 268 P.3d 892 (2011) (quoting *Burton v. Lehman*, 153 Wash.2d 416, 423, 103 P.3d 1230 (2005)). The fact that two or more interpretations are conceivable does not render a statute ambiguous. *Id.*
4. If a statute or ordinance is to be construed, a reviewing court must construe statutes and ordinances to give effect to legislative intent within the context of an entire statute, and give effect to all language used, with no portion rendered meaningless or superfluous. *Davis v. Dept of Licensing*, 137 Wn.2d 957, 963, 977 P.2d 554 (1999) (citations omitted). Courts must avoid interpreting a statute in a way that leads to an absurd result; *Olympic Tug & Barge, Inc. v. Wash. State Dep't of Revenue*, 163 Wn.App. 298, 307, 259 P.3d 338, 343 (2011)(citations omitted).
5. Here, the Code's definition of "cargo terminal" is not ambiguous. The Interpretation acknowledged this, and analyzed the Code's definition of "cargo terminal" with reference to dictionary definitions for undefined Code terms. Therefore, the plain meaning of the Code should be applied to the relevant facts in this case.
6. The Interpretation concluded that the proposed activities at Terminal 5 constituted "transportation facility" uses. This conclusion was not appealed, and is therefore not in dispute.

7. The Interpretation concluded that Foss's proposed activities at Terminal 5 did not meet the definition of "cargo terminal" because they did not involve "quantities of goods or container cargo." In reaching this conclusion, DPD relied on its assumptions concerning Foss's activities at Terminal 5. But the record shows that DPD's characterization of Foss's activities was inaccurate and incomplete. Information describing the operations was provided or available to DPD, but was not considered in the Interpretation.

8. The Interpretation incorrectly identified the operations to include only the Polar Pioneer and "two tugboats" (at least one of which, the Aiviq, can tow but is classed as an off-shore supply vessel). The other vessels and the materials placed on all the vessels while at Terminal 5 were not identified or acknowledged. The Interpretation identified only the "exploratory drilling equipment affixed to the drilling rig" and "provisioning" for two tugboats. But the record shows that other materials were brought to Terminal 5 by truck, stored there, and then loaded on to the Polar Pioneer and the other vessels associated with the Shell operations, including the Aiviq. The materials included tubulars that would be left at the drilling site in the Arctic, cement, equipment, fuel, provisions and other materials. Some of the materials were in containers for handling and storage.

9. With regard to the "affixed equipment" which was examined in the Interpretation, it may be inferred that the Director relied on the two definitions of "good" in the Webster's New Collegiate Dictionary, cited in its Finding 12. This dictionary (based on the Third International Dictionary) is an appropriate resource for determining the meaning of terms that are not defined in the Code.

10. However, the Interpretation does not explain how these definitions were applied to the analysis or why only some of the definitions of "good" were included. The definitions of "good" listed in Finding 12 include: "*personal property having intrinsic value but usu. excluding money, securities and negotiable instruments*" and "*wares, commodities, merchandise.*" *Id.* Webster's also defines "good" as "*something that has economic utility or satisfies an economic want;*" and "*cloth.*" Foss Ex. 25. Neither of these definitions is acknowledged in the Interpretation. While "cloth" is not a relevant definition, the other definitions are applicable and cannot reasonably be excluded from consideration.

11. The materials loaded onto the Polar Pioneer and the other vessels at Terminal 5 met the Webster's New Collegiate Dictionary definition of "good," including the definitions relied upon by DPD. The materials constituted "personal property having intrinsic value" and "something that has economic utility or satisfies an economic want." Thus, quantities of "goods" were brought to Terminal 5 for loading onto the subject vessels, including "provisions" for a crew, which would meet the definition as well.

12. It is also not disputed that while the Polar Pioneer was moored at Terminal 5, it was loaded with materials that were in containers. DPD and Soundkeeper cite a former definition of container cargo, SMC 23.60.906, which defined "*container cargo*" as "*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.*" The language here, even if it could be applied to current uses, only

Findings and Decision of the Hearing Examiner

S-15-001 and S-15-002

Page 10 of 14

references typical sizes and a "trunklike" shape. That language falls far short of setting a requirement of box size and shape in order to be considered "container cargo." There is currently no definition of container cargo in the Code. But applying the above words in the former definition of "container cargo" to the facts here, it must be concluded that at least some of the materials loaded onto the Polar Pioneer was container cargo, for it was inside large trunklike boxes and loaded as a unit.

13. DPD and Soundkeeper argue that "goods" must be interpreted to mean "paying cargo," essentially merchandise. This term was used by some of the maritime witnesses at hearing to describe cargo "that someone has paid you to put on your vessel and move" to another location; DPD Closing Statement at 15, quoting testimony of Knudsen. It appears that DPD articulated this position after the Interpretation was issued; the Interpretation did not reference the term "paying cargo."

14. The Code does not use the term "paying cargo" or define it. There is no reasonable indication in the Code, SMP, or the testimony of maritime witnesses at hearing, that "cargo" as used in the "cargo terminal" definition was intended to be restricted to "paying cargo." And it is not even clear that relying on this concept would lead to the outcome DPD seeks, since the carriers were paid to transport the goods and cargo, in which case it would apparently meet Mr. Knudsen's definition of "pay cargo." The plain language of the Code as applied to the facts in the record shows that the Foss operations involved "quantities of goods and container cargo."

15. The Interpretation concluded that even if the drill rig was "goods," the moorage of the drill rig at Terminal 5 was not a cargo terminal use, because the purpose was "seasonal storage," which was not consistent with the definition's "unifying theme" that all goods, not just those stored outside, be stored in *order to transfer them to other locations*. The Appellants argue that DPD's "unifying theme" construction is not supported by any accepted rules of grammar or statutory construction, in particular, the last antecedent rule.

16. The last antecedent rule provides that, unless a contrary intention appears in a statute, the qualifying phrase applies only to the immediately preceding antecedent, unless the qualifying phrase is separated from the antecedents by a comma; *Garrison v. Sagepoint Financial Inc.*, 185 Wash. App. 461, 493, 345 P3d 792 (2015), *rev denied*, 183 Wn.2d 1009 (2015). But Appellants also assert that, even if the rule is not applied here, Foss operations would meet the Code, because the goods and container cargo were stored in order to transfer them to other locations, i.e., the Arctic.

17. There is no comma separating "stored outdoors" from the qualifying phrase "in order to transfer them to other locations." Under the rule, then, the words "in order to transfer them to other locations" apply only to the immediately preceding words "or stored outdoors." This also seems to be the most common-sense reading of this language. Otherwise, one is left with a meaning that seems awkward or redundant, i.e., goods or cargo transferred to other carriers in order to transfer them to other locations. The recent amendment to this definition placed a comma after the word "carriers," and is further evidence that the last antecedent rule is consistent with what was intended; SMC 23.60A.906. DPD and Soundkeeper cite the definition of "cargo

terminal" in SMC 23.84A.038 as evidence of the unifying theme. But while the wording is different, it does not suggest a different meaning when applied to the facts in this case. That section refers to two categories of goods and container cargo, one of which is transferred to carriers, and another which is stored outdoors in order to transfer the goods to other locations.

18. A non-ambiguous ordinance is not to be construed, as noted above. However, the last antecedent rule should not be applied if there is contrary intent to be found in the Code. DPD and Soundkeeper argue that applying the rule would conflict with the intent of the Code, the SMP, the SMA and legislative history. DPD and Soundkeeper argue that absent the "unifying theme," and DPD's corollary "function test," unrestricted warehousing and storage uses would be allowed as cargo terminal uses in the shoreline, and that this result would not be consistent with the SMP or the SMA.

19. As a threshold matter, cargo terminal uses are limited to those which are by definition transportation facility uses, i.e., uses which support or provide "the means of transporting people and/or goods from one location to another;" SMC 23.84A.038. The use here has been deemed a transportation facility use by DPD in the Interpretation. It is also true that the SMP designation of UI limits warehouses to water-dependent or water-related warehouse use. The application of the last antecedent rule here would not allow unbridled use of the shoreline for warehousing.

20. DPD and Soundkeeper also urge that there is contrary intent expressed in other portions of the Code, including sections not adopted as part of the City's SMP, the SMA, and legislative history. Thus, they argue that the phrase "in order to transfer them to other locations" when applied to all goods and container cargo, further supports the notion that the vessel's purpose or mission must be to transfer cargo. The Interpretation and DPD's testimony at hearing also suggested that the vessels had to be actively unloading in port, in order for their moorage to be a cargo terminal use. Soundkeeper further argues that the "transshipment" requirement inherent in the Code requires that the term "carrier" in SMC 23.60.906 and 23.60A.906 should be interpreted to mean a someone hired by a third party to move goods from one place to another for a fee, citing definitions from the Oxford English Dictionary, as well as sections of the Uniform Commercial Code and Black's Law Dictionary. But even if these references were considered, they could be reasonably be interpreted to include the Foss operations, which involved moving goods to another place in exchange for compensation.

21. The Code does not refer to "paying cargo," does not specify that "carriers" must be for hire by third parties, and does not require that a vessel's purpose or mission be ascertained in order to determine whether its activities constitute a cargo terminal use. The various Codes and legislative history cited by DPD and Soundkeeper cannot reasonably be construed to find these specific and detailed requirements within the definition of "cargo terminal." In addition to an absence of support for the existence of these additional requirements, there are indications to the contrary, such as SMC 23.60A.938, which refer to barge mooring and tugboat mooring as cargo terminal uses. And as pointed out by Appellants, liberal construction of the SMA goals opposes the restrictions on moorage urged by DPD. No contrary intent has been shown that would prevent application of the last antecedent rule.

22. The subject Foss operations at Terminal 5 would constitute a cargo terminal use. The activities were transportation facility uses in which quantities of goods and cargo containers that did not undergo manufacturing processes were stored at Terminal 5, and were transferred to other carriers, or stored outdoors for transfer to other locations. Even if, contrary to the plain wording of this Code section, the phrase "in order to transfer them to another location" could be applied to all goods and cargo containers, the record shows that the Polar Pioneer and support vessels were loaded with goods and container cargo at Terminal 5 in order to transfer them to other locations.

23. The Interpretation also concluded, essentially as a matter of law, that moorage of the drilling rig and tugboats would not qualify as an accessory use; Conclusion 13. This was because vessels "used for transporting goods in the stream of commerce" might be able to lay berth seasonally, but lay berthing of other kinds of vessels was considered a separate principal use; Conclusion 11. It is not necessary to consider whether the Foss operations would qualify as accessory uses, because as noted above, the operations fall within the definition of cargo terminal use. However, Conclusion 13 implicitly relied on the Interpretation's position that a cargo terminal use requires the moored vessels be "used for transport of cargo in the process of being transferred to other locations." Since the Code does not support that position, Conclusion 13 was in error.

24. The Appellants also claimed that the Interpretation would lead to absurd results. The Appellants assert that moorage by the Alaska fishing fleet, icebreakers, oil spill response vessels, state ferries, scientific research vessels, military vessels, and other ships would become illegal, since they would fail the "primary function" test and do not seem to fit within any other use category. The Appellants also argued that the Interpretation flies in the face of how marine cargo terminals actually operate, and sets up unworkable standards, such as ascertaining each vessel's mission or purpose, as opposed to its activities, before it is permitted to moor. The record indicates that current practices, e.g., home porting by fishing vessels over the winter, could be affected if the Interpretation's rationales were applied to them. But because construction of the ordinance was not necessary in this case, and because the Interpretation addresses only the Foss operations at Terminal 5, it is not necessary to further consider this argument.

25. The appeals challenged the Interpretation's conclusion that "an additional use permit" was required for moorage of the vessels at Terminal 5. The Interpretation did not specify what kind of permit was required. The subsequent NOV directed that the Aiviq and the Polar Pioneer be removed, or that a permit be obtained establishing commercial moorage use or commercial marina use under the applicable Shoreline Code. DPD's post-hearing briefs acknowledges that a shoreline substantial development permit could not be required for the moorage because no development is involved. Nevertheless, DPD argues that the City can require separate use approval for moorage of the Foss operations at Terminal 5 and that it has done so in the past. A review of the record does not establish that the City has previously regulated moorage of vessels as a separate use through its permitting process. But because the subject activities constitute cargo terminal uses, it is not necessary to address the broader question of whether the City would be authorized to require an additional permit for the Foss operations.

26. In these appeals, DPD and Soundkeeper point to what they characterize as the Polar Pioneer's mission - to drill for oil in the Arctic -- and argue that a vessel with this mission is surely at odds with the intended use of the City's cargo terminals. But the Code does not support this argument. Neither DPD nor the Hearing Examiner can rewrite the Code through an interpretation. If the City wishes to impose additional restrictions or requirements on the Foss operations, the City must do so through its legislative process, because the existing Codes do not stretch that far.

27. The Director's Interpretation was clearly erroneous. The activities conducted by Foss Maritime at Terminal 5 for the Polar Pioneer and its support vessels are cargo terminal uses within the meaning of SMC 23.60.906 and 23.60A.906.

Decision

Director's Interpretation S-15-001 is hereby reversed.

Entered this 30th day of September, 2015.



Anne Watanabe
Deputy Hearing Examiner

Concerning Further Review

NOTE: It is the responsibility of the person seeking to appeal a Hearing Examiner decision to consult Code sections and other appropriate sources, to determine applicable rights and responsibilities.

The decision of the Hearing Examiner in this case is the final decision for the City of Seattle. In accordance with RCW 36.70C.040, a request for judicial review of the decision must be commenced within twenty-one (21) days of the date the decision is issued unless a motion for reconsideration is filed, in which case a request for judicial review of the decision must be commenced within twenty-one (21) days of the date the order on the motion for reconsideration is issued.

The person seeking review must arrange for and initially bear the cost of preparing a verbatim transcript of the hearing. Instructions for preparation of the transcript are available from the Office of Hearing Examiner. Please direct all mail to: PO Box 94729, Seattle, Washington 98124-4729. Office address: 700 Fifth Avenue, Suite 4000. Telephone: (206) 684-0521.

APPELLANTS

Foss Maritime Company
c/o David West
Garvey Schubert Barer
1191 Second Avenue
Seattle, WA 98101-2939

John McCullough
McCullough Hill Leary
701 Fifth Avenue Suite 6600
Seattle, WA 98104

Port of Seattle
c/o Patrick Schneider
Foster Pepper PLLC
1111 Third Avenue, Suite 3400
Seattle, WA 98101-3299

Traci Goodwin
Port of Seattle
2711 Alaskan Way
Seattle, WA 98121

INTERVENORS

Soundkeeper et al.,
c/o Patti Goldman
Mathew Baca
Earthjustice
705 Second Avenue Suite 203
Seattle, WA 98104-1711

T5 Intervenors
c/o Joshua Brower
Molly Barker
VERIS Law Group
1809 6th Avenue Suite 1400
Seattle, WA 98101

DEPARTMENT DIRECTOR

Diane Sugimura
Suite 2000
700 Fifth Avenue
Seattle, WA 98104

**BEFORE THE HEARING EXAMINER
CITY OF SEATTLE**

CERTIFICATE OF SERVICE


I certify under penalty of perjury under the laws of the State of Washington that on this date I sent true and correct copies of the attached **Findings and Decision** to each person listed below, or on the attached mailing list, in the matter of **Foss Maritime Company and Port of Seattle**, Hearing Examiner Files: **S-15-001 & S-15-002**, in the manner indicated.

Party	Method of Service
<p>Foss Maritime Company c/o John C. McCullough McCullough Hill Leary, P.S. 701 Fifth Avenue, Suite 6600 Seattle, WA 98104 jack@mhseattle.com</p> <p>David R. West Garvey Shubert Barer drwest@gsblaw.com</p> <p>Katie Kendall kkendall@mhseattle.com</p> <p>Laura Counley lcounley@mhseattle.com</p> <p>Dominique Barrientes dbarrientes@gsblaw.com</p>	<p><input type="checkbox"/> U.S. First Class Mail, postage prepaid</p> <p><input type="checkbox"/> Inter-office Mail</p> <p><input checked="" type="checkbox"/> E-mail</p> <p><input type="checkbox"/> Fax</p> <p><input type="checkbox"/> Hand Delivery</p> <p><input type="checkbox"/> Legal Messenger</p>
<p>Port of Seattle c/o Traci Goodwin Senior Port Counsel PO Box 1209 Seattle, WA 98111 goodwin.t@portseattle.org</p> <p>Patrick Schneider Foster Pepper schnp@foster.com</p>	<p><input type="checkbox"/> U.S. First Class Mail, postage prepaid</p> <p><input type="checkbox"/> Inter-office Mail</p> <p><input checked="" type="checkbox"/> E-mail</p> <p><input type="checkbox"/> Fax</p> <p><input type="checkbox"/> Hand Delivery</p> <p><input type="checkbox"/> Legal Messenger</p>

<p>Adrian Winder winda@foster.com</p> <p>Brenda Bole boleb@foster.com</p>	
<p>Andy McKim DPD SMT-18-00 Andy.McKim@seattle.gov</p>	<p><input type="checkbox"/> U.S. First Class Mail, postage prepaid</p> <p><input type="checkbox"/> Inter-office Mail</p> <p><input checked="" type="checkbox"/> E-mail</p> <p><input type="checkbox"/> Fax</p> <p><input type="checkbox"/> Hand Delivery</p> <p><input type="checkbox"/> Legal Messenger</p>
<p>Eleanore Baxendale City Attorney's Office 701 Fifth Avenue, Suite 2050 Seattle, WA 98104 Eleanore.Baxendale@seattle.gov</p> <p>Rose Hailey Rose.Hailey@seattle.gov</p> <p>Trudy Jaynes Trudy.Jaynes@seattle.gov</p>	<p><input type="checkbox"/> U.S. First Class Mail, postage prepaid</p> <p><input type="checkbox"/> Inter-office Mail</p> <p><input checked="" type="checkbox"/> E-mail</p> <p><input type="checkbox"/> Fax</p> <p><input type="checkbox"/> Hand Delivery</p> <p><input type="checkbox"/> Legal Messenger</p>
<p>Molly Barker Veris Law Group molly@verislawgroup.com</p> <p>Joshua Brower josh@verislawgroup.com</p> <p>Patti Goldman Earthjustice pgoldman@earthjustice.org</p> <p>Matthew Baca mbaca@earthjustice.org</p> <p>Eudora Powell epowell@earthjustice.org</p>	<p><input type="checkbox"/> U.S. First Class Mail, postage prepaid</p> <p><input type="checkbox"/> Inter-office Mail</p> <p><input checked="" type="checkbox"/> E-mail</p> <p><input type="checkbox"/> Fax</p> <p><input type="checkbox"/> Hand Delivery</p> <p><input type="checkbox"/> Legal Messenger</p>

Bryan Stevens Bryan.Stevens@seattle.gov DPD Routing Coordinator DPD_Routing_Coordinator@seattle.gov Sue Putnam Sue.Putnam@seattle.gov	<input type="checkbox"/> U.S. First Class Mail, postage prepaid <input type="checkbox"/> Inter-office Mail <input checked="" type="checkbox"/> E-mail <input type="checkbox"/> Fax <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Legal Messenger
--	---

Dated: September 30, 2015



Tiffany Ku
Legal Assistant