

**Interpretation of the Director
Under Seattle Municipal Code Title 23**

Regarding the Use of the

Property at

2701 - 26th Avenue SW (Terminal 5)

**DPD Interpretation No. 15-001
(DPD Project No. 3020324)**

Background

This interpretation was generated by the Department of Planning and Development (DPD) in response to general questions it has received regarding a proposal to moor an exploratory drilling rig and two accompanying tugboats at the Port of Seattle's (Port's) Terminal 5 facility for periods of approximately six months per year when the drilling rig is not in use in the Arctic. The central issue is whether this proposed moorage is consistent with the legally established use of the property as a cargo terminal or whether a permit must be obtained to establish a different or additional use. The Port and its lessee, Foss Maritime (Foss), have been cooperative in providing information about proposed activities at Terminal 5.

Media reports indicate that two drilling rigs are destined for Seattle: the Polar Pioneer and the Noble Discoverer. The information provided by the Port indicates that only one of these, Polar Pioneer, would moor at Terminal 5. This interpretation is based on the Port's representations.

Findings of Fact

1. The Port's Terminal 5 facility is at the north end of the Duwamish River, near Harbor Island, and located in an IG1 U/85 (General Industrial-1) zone and a UI (Urban Industrial) shoreline environment.
2. Seattle Municipal Code (SMC) Section 23.40.002 requires a permit in order to establish or change the use of a property. The recognized existing use of the Terminal 5 facility, as reflected in decisions including Projects 9404118 and 9404124, is as a cargo terminal.
3. Foss entered into a two-year lease of Terminal 5 with the Port on February 9, 2015. By the terms of the lease, Foss is to use the facility as a marine cargo terminal. In an April 8 letter to DPD, Foss expressed its intent to load and unload its own vessels as well as those

of other customers at Terminal 5 during the lease. The Foss representative said Foss intended to receive and move goods, cargo, equipment, supplies, stores, provisions and other materials into the vessels associated with the drilling rig, for transportation to other locations. The letter indicates that the services they intend to provide for Shell Offshore would be a fraction of the activity they hope to conduct at Terminal 5.

4. As reported in the Seattle P-I, the Polar Pioneer is a 400-foot tall, 292-foot drilling rig. The Peninsula Daily News describes it as a 400-foot-long, 355-foot-tall rig. Based on the media reports, the Polar Pioneer was delivered to Port Angeles aboard a heavy-lift ship, to be unloaded and towed to Seattle. Based on information provided by the Port and Foss, the drilling rig and two tugboats would be moored at Terminal 5 for several months out of the year.
5. The Port has indicated that a variety of types of vessels use its facilities. The Port documented that its fee schedules include specific fees for "lay berthing" of vessels that are not actively being loaded or unloaded. The Port has asserted that this is common and necessary, as much cargo activity is seasonal, and some vessels used to transport cargo sit idle during the off-season.
6. Seattle's current Shoreline Master Program is codified at SMC Chapter 23.60, which is a part of Subtitle III, Division 3 of Title 23. An updated shoreline master program has been approved by the City and is awaiting final approval by the Washington State Department of Ecology. DPD anticipates that the new provisions will take effect later in May.
7. "Cargo terminal" is defined at SMC 23.60.906 as:

[A] transportation facility 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.
8. The definition of "cargo terminal" under the new provisions, to be codified at SMC 23.60A.906, remains the same as the current definition, apart from minor punctuation changes, such as addition of a comma after "carriers."
9. SMC 23.42.010 provides in part:

Principal uses not listed in the respective zones of Subtitle III, Division 2 of SMC Title 23, Land Use Code shall be prohibited in those zones. If a use is not listed, the Director may determine that a proposed use is substantially similar to other uses permitted or prohibited in the respective zones, therefore, and should also be permitted or prohibited.

10. SMC 23.42.020.A provides in part:

Any accessory use not permitted by Title 23, either expressly or by the Director, shall be prohibited. The Director shall determine whether any accessory use on the lot is incidental to the principal use on the same lot, and shall also determine whether uses not listed as accessory uses are customarily incidental to a principal use.

11. For purposes of the Land Use Code generally, “accessory use” is defined at SMC 23.84A.040 as “a use that is incidental to a principal use.” A more specific and limiting definition of “accessory use” is provided for purposes of the current shoreline code at SMC 23.60.940: “a use which is incidental and intrinsic to the function of a principal use and is not a separate business establishment unless a home occupation.” This definition remains the same under the new shoreline provisions, at SMC 23.60A.940.

12. “Good” is defined, in relevant part, by Webster’s New Collegiate Dictionary (based on Webster’s third new international dictionary) as:

3 . . . b pl : personal property having intrinsic value but usu. excluding money, securities and negotiable instruments . . . **d pl** : WARES, COMMODITIES, MERCHANDISE <canned ~s>

Conclusions

1. The activity that is the subject of this interpretation is the proposed moorage of an oil-drilling rig and two accompanying tugboats that would be located at the Port’s Terminal 5 facility during winter months when this equipment is not being used for exploratory drilling in the Arctic. In recent years permits for this property have characterized the use as a “cargo terminal.”
2. The question raised is whether the proposed activity requires a permit to legally establish a use that allows this moorage. The analysis may be broken down into two sub-questions:
 - Is the proposed activity properly characterized as a “cargo terminal” use based on the definitions in the current code, and in the updated shoreline master program the City is in the process of adopting; and
 - If the proposed activity does not specifically match the activities described in the cargo terminal definition, may the proposed activity nevertheless be allowed as an accessory use, without obtaining a separate use permit?

Consistency with current and future use definitions

3. Under the current and the proposed new shoreline standards, a cargo terminal is a **transportation facility 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. (The proposed new definition adds a comma after “carriers.”)

4. **Is Terminal 5, if used for the proposed activity, a “transportation facility”?** This term is not defined within the shoreline code, but is generally defined in the Land Use Code, at Section 23.84A.038 as “a use that supports or provides the means of transporting people and/or goods from one location to another.” One of the subcategories in the general definition is parking and moorage. The proposed activity would support the transportation of the equipment to and from the Arctic, and falls within the range of uses listed under the broad category of “transportation facility.”
5. **Does the proposed activity involve “quantities of goods or container cargo”?** Neither the drilling rig nor the tugboats would carry container cargo. The definition of cargo terminal is broad enough to include transportation of many different types of goods, in greatly differing quantities. The exploratory drilling equipment affixed to the drilling rig, however, would not fall under the definition of “goods” as it is used under the code, nor could the drilling rig itself be considered “quantities of goods or container cargo.”
6. **If the equipment on the drilling rig could be considered goods, would they be “stored without undergoing any manufacturing processes, transferred to other carriers, or stored outdoors in order to transfer them to other locations”?** This provides three options for activities that might occur at a cargo terminal: storage without manufacturing, transfer to other carriers, or outdoor storage. The unifying theme is that the goods are at the cargo terminal **in order to be transferred to other locations.** The drilling rig would be at Terminal 5 only for purposes of seasonal storage. Terminal 5 would not serve as stop where the rig or the equipment on it would be stored or transferred in the course of transit from a starting location to an ultimate destination.
7. The two tugboats that would accompany the drilling rig with the equipment likewise would not bear quantities of goods in the process of being transferred to other locations, apart from provisioning that might be anticipated for vessels at moorages generally.
8. It has been argued that even if the proposed use does not meet the definition of cargo terminal, it should be regulated as a cargo terminal use, as this is the most similar use category regulated under the code. In general, under SMC 23.42.010, if a principal use does not fit in any of the regulated use categories, as defined, there is authority to regulate that use according to the standards for the most similar defined use. That provision, however, specifically extends to the standards in Subtitle III, Division 2 of the Land Use Code. Seattle’s Shoreline Master Program, which includes the use regulations specific to the Shoreline Overlay District, is in Subtitle III, Division 3 of the code, and is outside of the scope of Section 23.42.010. The authority to regulate an undefined use according to the standards for the most similar defined use does not extend to the use provisions in the shoreline code.

Moorage as an accessory use

9. Even if we were to determine that the proposed seasonal moorage of the drilling rig and tugboats did not meet the definition of cargo terminal, it might be permissible if that sort of moorage activity is accessory to a cargo terminal. The definition of cargo terminal says that cargo terminals may include accessory warehouses, railroad yards, storage yards, and offices. It does not state that other accessory uses are not allowed. We do not conclude that other accessory uses are precluded merely because they are not specifically listed.
10. Based on information received from the Port, "lay berthing," or moorage of vessels that are not actively loading or unloading materials, is a normal, customary and essential practice at marine cargo terminals. The Port has specific dockage fees for lay berthing in the fee schedule for its facilities. According to the Port, lay berthing occurs at marine cargo terminals throughout the coastal and inland waterways of the country and the world, specifically at marine cargo terminals in Seattle, Bellingham, Everett, Port Angeles, Tacoma, Olympia, San Diego, Los Angeles, Long Beach, Sacramento, San Francisco, Oakland and Portland. According to the Port, temporary, seasonal and sometimes indefinite berthing of vessels must be provided by ports until duty calls those vessels back to the sea. The Port indicates that cargo, emergency response, military, and research vessels, as well as barges and tugboats, commonly lay berth at the Port of Seattle's cargo terminals.
11. For purposes of the shoreline code, "accessory use" is defined as "a use which is incidental **and intrinsic to the function** of a principal use, and is not a separate business establishment unless a home occupation." SMC 23.60.940. This differs, and is more stringent than, the definition that generally applies under the Land Use Code: "a use that is incidental to a principal use." SMC 23.84A.040. We accept that lay berthing of vessels otherwise used for transporting goods in the stream of commerce may be regarded as incidental and intrinsic to the function of a cargo terminal. This recognizes that shipment of some sorts of goods is seasonal, and that vessels involved in that sort of trade are necessarily idle for periods during the year. We do not, however, find that provision of moorage to other vessels and equipment, not used for transfer of goods to other locations, is intrinsic to the function of a cargo terminal. Such moorage would be regarded as a separate principal use, defined as "any use, whether a separate business establishment or not, which has a separate and distinct purpose and function from other uses on the lot." SMC 23.60.940.
12. Even if we were to agree that moorage of the drilling rig and tugboats could be allowed as an accessory use at a cargo terminal, some question also is raised as to whether sufficient levels of activity relating to the principal cargo terminal use, transfer of quantities of goods or container cargo, would continue while the drilling rig and tugboats are moored there. The factual component of that question is unresolved. On the one hand, the drilling rig and tugboats would occupy much of the site's frontage available for moorage along the Duwamish, and upgrades and repairs to that frontage are also contemplated which would possibly limit its use for loading and unloading of cargo

during the same period. On the other hand, both the Port and Foss have advised us that it is their intent that other cargo terminal use of the property will continue.

13. The legal component of that question obviates the factual question because, even if cargo terminal activity is the predominant use, moorage of vessels not used for transport of cargo in the process of being transferred to other locations is not intrinsic to the function as a cargo terminal, and thus would not qualify as a legitimate accessory use.

Conclusion

An additional use permit is required for the proposed seasonal moorage at the Port of Seattle's Terminal 5 facility of a drilling rig and accompanying tugboats.

Entered May 7, 2015



Andrew S. McKim

Land Use Planner – Supervisor



City of Seattle
Edward B. Murray, Mayor

May 8, 2015

The Honorable Stephanie Bowman and Courtney Gregoire
Port of Seattle Co-Presidents
Port of Seattle
P.O. Box 1209
Seattle, WA 98111

Dear Co-Presidents Stephanie Bowman and Courtney Gregoire;

As I have indicated to you in the past, I stand behind our maritime industry and support continued success for the Port of Seattle and maritime businesses in our community. The Port and its tenants provide thousands of family-wage jobs, adding needed diversity to our region's economy.

I also understand that you have been very concerned about the potential reach of the Department of Planning and Development's (DPD's) interpretation regarding Terminal 5 and the proposed presence of a drilling rig and related vessels. In a separate letter, DPD indicated to Port staff that the interpretation is very narrowly focused to the specific site and specific proposed use. The interpretation would not extend to other Port facilities.

In addition to that declaration, in a meeting with Port staff on May 7, 2015, DPD suggested working with Port staff to review and update the Shoreline ordinance's definition of "cargo terminal." If there is concern that the definition does not accurately describe the activities typically taking place at a cargo terminal, we should make a revision. I have asked DPD to conduct this work in the coming months, so that the definition accurately reflects the historic, current and future uses at marine cargo terminals in Seattle.

Thank you very much. I look forward to working with you to make sure we address this issue.

Sincerely,

Mayor Edward B. Murray

cc: Commissioner Tom Albro
Commissioner Bill Bryant
Commissioner John Creighton

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City of Seattle

Edward B. Murray, Mayor

Seattle Department of Planning and Development

Diane M. Sugimura, Director

May 8, 2015

Mike Merritt
Local Government Relations Manager
Port of Seattle
P.O. Box 1209
Seattle, Washington 98111-1209

Dear Mr. Merritt:

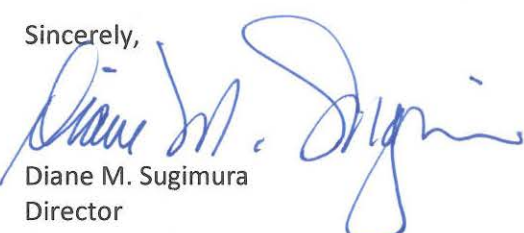
MIKE

Thank you very much for meeting with us yesterday. It was a helpful discussion for moving forward. Per our conversation, we would like to clarify the interpretation.

Based on the code provisions governing Land Use Code interpretations (SMC 23.88.020), interpretations are site specific. DPD's interpretation is based on the specific facts relating to the permit history for Terminal 5, and facts relating to the presence of a drilling rig and related vessels proposed at that site. The conclusions in the interpretation cannot be directly applied to activities that may be occurring at other Port facilities.

Thank you very much. I hope this is helpful.

Sincerely,


Diane M. Sugimura
Director



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Foss Maritime to appeal city determination on Terminal 5 permit

May 8, 2015

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Foss Maritime plans to appeal the city of Seattle's determination that Foss's use of the Port of Seattle's Terminal 5 is not allowed under the Port's existing use permit.

The appeal process will take months to complete. In the meantime, Foss intends to provide its customer, Royal Dutch Shell, the services for which it contracted over the next few weeks as it prepares for the summer oil exploration season in Alaska.

The city's position is not supported by the plain language of the permit at issue, and will cause long-term harm to the maritime industry as a whole. The permit for Terminal 5 allows Port customers to tie up vessels so that goods and cargo can be stored, loaded and unloaded, which is precisely what Foss is doing at Terminal 5.

By taking this action so late in the day, Mayor Ed Murray is trying to stop a lawful project that has already put 417 people to work full-time and will soon employ hundreds more, many of them citizens of Seattle. Worse, he has openly solicited the Port of Seattle to use the city's action as a pretext to break a valid lease at Terminal 5, despite the separately elected Port Commission's recent unanimous vote to uphold the lease.

These actions are an attempt to prevent one of the city's oldest and most prominent companies from performing marine services that it has provided and the Port has welcomed for generations. This action is akin to the mayor ordering Seattle City Light to cut off all electricity to Amazon on the Friday after Thanksgiving.

If his actions simply impacted Foss, that would be bad enough. But it jeopardizes many other business activities across the waterfront, and calls



into question the sincerity of the mayor's previous statements in support of the maritime sector.

For example, under the city's initial determination, Alaska fishing trawlers would not be allowed to winter over at the cruise ship docks at Terminals 90 and 91; the Seattle Fire Department's fire boats could not dock at Terminals 90 and 91 as they are currently doing; and the vessels of the U.S. Navy and other navies that visit during Seafair would not be allowed to tie up at Port facilities. Maritime businesses from Ballard to South Park are doubtless nervously checking their permits and wondering whether the mayor will deem them worthy.

Foss believes that the permitting at Terminal 5 is appropriate for our use, and that the city's determination is a statement of politics rather than policy. Accordingly, we will challenge it through the appropriate channels. The process looks like this:

- Foss will appeal the determination to the Seattle Hearing Examiner within 14 days. Other interested parties, such as the Port, may join in the appeal.
- The Hearing Examiner will then set a hearing date on the matter.
- The hearings officer would typically produce a ruling on the matter within 15 days after the hearing.
- Under normal circumstances, the city would not issue a violation to Foss or the Port of Seattle until and unless it prevailed in the hearing.

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ABOUT FOSS MARITIME

Founded in 1889, Seattle-based Foss Maritime offers a complete range of maritime services and project management to customers across the Pacific Rim, Europe, South America and around the globe. Foss has one of the largest fleets of tugs and barges on the American West Coast. The company has harbor services and transportation operations in all major

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