

MEMORANDUM OF UNDERSTANDING BETWEEN THE PORT OF SEATTLE AND THE CITY OF SEATTLE TO PERMANENTLY CLOSE W MARGINAL WAY SW

THIS MEMORANDUM OF UNDERSTANDING TO PERMANENTLY CLOSE W MARGINAL WAY SW (“MOU”) is made and entered into by and between the City of Seattle, a Washington first class city and municipal corporation, through its Department of Transportation (“City” or “SDOT”) and the Port of Seattle (“Port”), either of which may be referred to hereinafter individually as “Party” or collectively as the “Parties.”

WHEREAS, The Port proposes to rehabilitate the existing marine cargo facilities at Terminal 5 at the west margin of the West Waterway in Elliott Bay; and

WHEREAS, the proposed changes include redesign of entrance/exit gates and access points; and

WHEREAS, a Final Environmental Impact Statement prepared by the Port of Seattle states that eliminating the north leg of the five-legged SW Spokane Street / W Marginal Way SW / Chelan Avenue SW / Delridge Way SW intersection would dramatically improve traffic operations; and

WHEREAS, the Port, as part of its permit application for a Shoreline Substantial Development Permit, permit application Number 3019071, received from the City of Seattle (“City”) “Analysis and Decision of the Director of the Seattle Department of Construction and Inspections,” dated April 3, 2017 (“City Decision”);

NOW, THEREFORE, in consideration of mutual promises, covenants and MOU terms set forth herein, and for other good and valuable consideration, the sufficiency of which is hereby acknowledged by both Parties, the Parties agree as follows:

1. PURPOSE

- 1.1. The purpose of this MOU is to describe how the Port and City will work together to accomplish a permanent closure of the surface railroad crossing of W Marginal Way SW north of SW

Spokane St, across the Terminal 5 lead railroad tracks, to all motorized traffic, and retain and upgrade nonmotorized access.

- 1.2. The closure will take place before or when the number of lifts at the Terminal 5 On-Dock Intermodal Yard exceeds 245,000 lifts in a 12-month period (equivalent to 426,300 intermodal TEUs).

2. PORT RESPONSIBILITIES

- 2.1. The Port shall provide the funding to complete a scope of work that will identify appropriate measures to design and implement street closure measures in compliance with Condition 2 in the City Decision.
- 2.2. The Port shall provide the funding to implement measures associated with the street closure identified in the scope of work defined in 2.1 and as approved by SDOT, before or when the lift volumes in Section 1.2 are reached.
- 2.3. The Port shall coordinate with adjacent businesses north of West Marginal Way SW between the Terminal 5 gate and under the West Seattle Freeway prior to implementation of any access, signalization, signage, or striping changes in the public right-of-way adjacent to and connecting Terminal 7 to West Marginal Way SW under the West Seattle Freeway and prior to approval by SDOT.
- 2.4. The Port shall convene regular meetings of Port and SDOT representatives to review the proposed scope of work and to implement the street closure.
- 2.5. The Port shall retain nonmotorized access across active railroad tracks at W Marginal Way SW, and upgrade as needed to maintain access before and after the street is closed to motorized traffic.
- 2.6. The Port shall install a pedestrian pathway extending southeast from the northeast corner of the SW Spokane St/Delridge Way SW/W Marginal Way SW intersection to the crossing to the

east for use when the primary nonmotorized crossing at W Marginal Way SW is blocked by a train.

- 2.7. The Port shall complete an analysis of the existing Terminal 5 bridge to determine if it is feasible to reconfigure existing lanes to accommodate Terminal 5 truck service as well as emergency access and heavy vehicle movement to industrial sites adjacent to Terminal 5, and north and east of rail lines that provide service to the terminal and the West Seattle yard. The analysis will specify lane dimensions, truck circulation and queue capacity for all lanes. The Port will submit the analysis to SDOT for review and approval of the re-channelization changes should the study indicate that the bridge could support three lanes of traffic. If the Port, SDOT and/or the Seattle Fire Department (SFD) determine that the existing bridge structure is insufficient to provide the three-lane cross section, the Port will provide alternate truck and emergency access to these sites equivalent to the mitigation provided by the three-lane cross section subject to the review and approval of SDOT and SPD, to be implemented prior to occupancy of Terminal 5 by a tenant.
- 2.8. The Port shall monitor and report the number of lifts annually at the Terminal 5 On-Dock Intermodal Yard to SDOT, noting specifically when the number of lifts approaches the threshold for street closure.
- 2.9. If work performed by the Port or its designee requires correction to meet the agreed plan per 2.1 above as identified by SDOT at the completion of road closure construction, the Port shall fund the cost of corrections.

3. CITY RESPONSIBILITIES

- 3.1. SDOT shall provide general oversight, direction, review and approval to ensure that Port responsibilities under this MOU are completed consistent with the terms of the Decision.

- 3.2. SDOT shall provide direction, review, and approval of all Port measures needed to safely close the street to ensure that after completion of Port responsibilities that measures will promote safe and efficient transportation operations.
- 3.3. At the completion of each improvement, the City will identify any work that does not meet the terms of the Decision, prepare a specific list of revisions, and submit them to the Port or its designee for correction.
- 3.4. For purposes of safety, SDOT may approve construction of quiet zone improvements as set forth in the memorandum of understanding between the Port and the City to establish a railroad quiet zone, that supersede the schedule for providing public access using permanent nonmotorized access improvements. Reasonable temporary nonmotorized access shall be provided during construction.
- 3.5. SDOT may prepare one or more additional analyses to assess design, implementation and efficacy of Port measures to ensure consistency with the Decision.
- 3.6. SDOT shall inform the Director of the Seattle Department of Construction and Inspections or his designee as to SDOT's assessment of completed Port responsibilities.

4. INVOICING AND PAYMENT

- 4.1. SDOT may obtain reimbursement for actual costs from the Port for the purposes of providing oversight and direction to the Port toward completing Port responsibilities and for completing any assessment of Port-implemented measures. Both Parties, in good faith, will work together to determine a reasonable methodology for establishing the total cost of work performed.
- 4.2. SDOT shall keep records as appropriate to describe work performed and actual costs incurred and, if it is obtaining reimbursement for actual costs, submit an invoice on a regular basis, not more than once a month, for reimbursement for the actual costs incurred by SDOT, subject to any appropriations and/or other authorizations that may be necessary.

5. OWNERSHIP OF DOCUMENTATION

- 5.1. The Port shall own all documentation prepared by the Port to complete each Port responsibility. The Port shall reasonably make available all interim and final documentation to the City upon request for the purposes of timely oversight and direction by the City.
- 5.2. The City shall own all documentation prepared by the City for review and concurrence and for purposes of assessing Port measures. The City shall reasonably make available all interim and final documentation upon request for the purposes of review and comment by the Port.
- 5.3. The Port and City shall notify the other Party of any requests for access to materials or information prepared by either the Port or City by persons or entities outside this MOU. Both Parties recognize that they are public entities and are subject to the public disclosure laws of the State of Washington, and are not liable for breach if they disclose documents as required.

6. INDEMNIFICATION

- 6.1. **Indemnification and Hold Harmless.** Each Party shall protect, defend, indemnify, and save harmless the other Party, its officers, officials, employees, and agents while acting within the scope of their employment as such, from any and all suits, costs, claims, actions, losses, penalties, judgments, and /or awards of damages, of whatsoever kind arising out of, in connection with, or incident to activities undertaken pursuant to this MOU caused by or resulting from each Party's (or their respective agents and contractors) own negligent acts or omissions. Each Party agrees that it is fully responsible for the acts and omissions of its own contractors or subcontractors, their employees and agents, acting within the scope of their employment as such, as it is for the acts and omissions of its own employees and agents. Each Party agrees that its obligations under this provision extend to any claim, demand, and/or cause of action brought by or on behalf of any of its employees or agents. The foregoing indemnity is specifically and expressly intended to constitute a waiver of each Party's immunity under Washington's Industrial Insurance Act, RCW Title 51, as respects the other Party only, and only to the extent necessary to provide the indemnified Party with a full and complete indemnity of claims made by the indemnitor's employees. The Parties acknowledge that these provisions were specifically negotiated and agreed upon by them. Each Party shall require

similar indemnification language in all agreements with contractors or subcontractors entered into in conjunction with this MOU.

7. EFFECTIVE DATE AND TERM OF MOU

7.1. This MOU and its obligations shall take effect when fully executed by all Parties. The MOU will end when the Port has completed construction as per the approved and agreed design.

8. TERMINATION

8.1. **Termination for Cause.** Either Party may terminate this MOU with cause by giving the other Party written notice of such termination at least (30) calendar days prior to the effective date of termination, and allowing the other Party to remedy the cause of termination.

9. ENTIRE MOU AND AMENDMENTS

9.1. **Entire MOU.** This document contains all term, conditions and provisions agreed upon by the Parties hereto, and shall not be modified except by written amendment.

9.2 **Amendments.** Except as otherwise provided for in this MOU, amendments may be made to this MOU within applicable authority for and on behalf of the City by its Transportation Director or authorized representative, and for and on behalf of the Port by its Director of Seaport Environmental and Planning or authorized representative and shall be in writing and executed by such duly authorized representative of each Party. No variation or alteration of the terms of this MOU shall be valid unless made in writing and signed by authorized representatives of the Parties hereto.

10. NOTIFICATION AND IDENTIFICATION OF CONTACTS

10.1. **Notice.** Any notice or communication, other than termination for cause as provided for in Subsection 8.1, required or permitted to be given pursuant to this MOU shall be in writing, and shall be sent postage prepaid by U.S. Mail, return receipt request, to the contact persons and addresses identified in Subsection 10.2 of this MOU unless otherwise indicated by the Parties in writing.

10.2 **Contact Persons and Addresses.** The contact persons for the administration of this MOU are as follows:

City of Seattle

Christopher Eaves, P.E.
700 5th Avenue, Suite 3800
Seattle, WA 98124-4996
(206) 684-4524

Port of Seattle

Anne Porter
2711 Alaskan Way
Seattle, WA 98121
(206) 787-3133

11. DISPUTE RESOLUTION PROCESS

The Parties, through their designated representatives identified in Subsection 10.2 of this MOU, shall use their best efforts to resolve any disputes pertaining to this MOU that may arise between the Parties. If these designated representatives are unable to resolve a dispute, the responsible project leads of both Parties shall review the matter and attempt to resolve it. If they are unable to resolve the dispute, the matter shall be reviewed by the department directors of the Parties or their

designees. The Parties agree to exhaust each of these procedural steps before seeking to resolve disputes in a court of law or any other forum.

12. RECORDS RETENTION AND AUDIT

All MOU activities must be documented, including assessments, review comments, agendas and minutes of meetings, copies of invoices, or financial system expense reports documenting these items.

13. LEGAL RELATIONS

- 13.1. **No Partnership or Joint Venture.** No joint venture, agent-principal relationship or partnership is formed as result of this MOU. No employees or agents of one Party or any of its contractors or subcontractors shall be deemed, or represent themselves to be, employees or agents of the other Party.
- 13.2. **No Third Party Beneficiaries.** It is understood and agreed that this MOU is solely for the benefit of the Parties hereto and gives no right to any other person or entity.
- 13.3. **Assignment.** Neither this MOU, nor any interest herein, may be assigned by either Party without the prior written consent of the other Party.
- 13.4. **Binding on Successors and Assigns.** This MOU, and all of its terms, provisions, conditions, and covenants, together with any exhibits and attachments now or hereafter made a part hereof, shall be binding on the Parties and their respective successors and assigns.
- 13.5. **Mutual Negotiation and Construction.** This MOU and each of the terms and provisions hereof shall be deemed to have been explicitly negotiated between, and mutually drafted by both Parties.

13.6. Waiver of Default. Waiver of any default shall not be deemed to be a waiver of any subsequent default; as such, failure to require full and timely performance of any provision at any time shall not waive or reduce the right to insist upon complete and timely performance of any other provision thereafter. Waiver of breach of any provision of this MOU shall not be deemed to be a waiver of any other or subsequent breach and shall not be construed to be modification of the terms of this MOU unless stated to be such in writing, signed by duly authorized representatives of the Parties, and attached to the original MOU.

13.7. Applicable Law. This MOU shall be governed by and construed in accordance with the laws of the State of Washington.

13.8. Jurisdiction and Venue. The King County Superior Court, situated in Seattle, Washington, shall have exclusive jurisdiction and venue over any legal action arising under this MOU.

13.9. Rights and Remedies. The Parties' rights and remedies in this MOU are in addition to any other rights and remedies provided by law

13.10. Severability. If any provisions of this MOU are held invalid by a court of competent jurisdiction, the remainder of the MOU shall not be affected thereby if such remainder would then continue to serve the purposes and objectives originally contemplated by the Parties.

13.11. Entire MOU. This MOU embodies the Parties' entire understanding and MOU on the issues covered by it, except as may be supplemented by subsequent written amendment to this MOU, and supersedes any prior negotiations, representations or draft MOUs on this matter, either written or oral.

13.12. Survival. Each of the provisions of this Section 13 (Legal Relations) shall survive any expiration or termination of this MOU.

14. EXECUTION OF MOU – COUNTERPARTS

14.1. This MOU may be executed in two (2) counterparts, either of which shall be regarded for all purposes as an original.

