BEFORE THE HEARING EXAMINER
FOR THE CITY OF SEATTLE

In the matter of the appeal of	Hearing Examiner File:
MacDonald, Douglas B.	**W-19-007**

from a SEPA Determination of Non-Significance (DNS) issued by the Director, Seattle Department Of Transportation

APPELLANT'S POST HEARING BRIEF

Introduction

This appeal from an SDOT SEPA Determination of Non-Significance (DNS) comes before the Hearing Examiner in an unusual posture. The policy mandates of SEPA against which the sufficiency of the DNS must be tested are clear. SDOT's own Checklist, either meeting or failing to meet the prescriptions of the City's SEPA Ordinance, is in the record. There is no question that the "clearly erroneous" standard of review applies.[1] There is no question that for the DNS to be sent back to SDOT, the Hearing Examiner must form the definite and firm conviction that a mistake has been committed.[2] The evidentiary record, beyond the Checklist itself, is spare. But not empty.

In that posture, what must take prominence is how the matter arrays against the *legal standards* that are the core of the SEPA Ordinance constituting the heartwood of SEPA's fundamental public purpose.

So viewed, and with the help of critically important, if sparse, evidence adduced at the hearing, this DNS should be remanded to SDOT – following the applicable review standard – for SDOT to assemble, if it can, a threshold determination commensurate with its responsibilities under the Ordinance.

The Basic Policy Purpose and Requirements of the SEPA Ordinance

The words of the Ordinance[3] brook no ambiguity as to an agency's duties. It is SEPA Policy that (SMC 25.05.030 B):

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[1] *Brown v. Tacoma,* 30 Wn. App. 763 (1982).

[2] *Cougar Mtn. Assoc. v. King County,* 111 Wn. 2d 742 (1986).

[3] Seattle's SEPA Ordinance (SMC Chapter 25.05) is adopted as required by chapter 197-11 WAC to implement the State Environmental Policy Act and its rules contained in 197-11 WAC. The chapter can be referred to as the "SEPA Rules." The SEPA Rules shall be given substantial deference in the interpretation of SEPA. SMC 25.05.010.

"Agencies shall to the fullest extent possible . . .

> Find ways to make the SEPA process more useful to decisionmakers and the public; . . . and emphasize important environmental impacts and alternatives;
>
> Prepare environmental documents that are concise, clear, and to the point, and are supported by evidence that the necessary environmental analyses have been made;
>
> Integrate the requirements of SEPA with existing agency planning and licensing procedures and practices, so that such procedures run concurrently rather than consecutively."

Nor is there any question as to the basic purpose of the SEPA process (SMC 25.05.055):

> "A major purpose of the environmental review process is to provide environmental information to governmental decisionmakers for consideration prior to making their decision on any action."

The DNS, the threshold determination and the Checklist.

SEPA provides that for its proposal for legislation an agency may avoid the requirement of preparing an Environmental Impact Statement by conducting a review leading to a threshold determination that the proposal does not present probable significant adverse environmental impacts. (SMC 25.05.330). A Determination of Non-Significance serves to document that review.

The SEPA Rules strictly discipline how that end result is to be reached. To assist in making a threshold determination, the agency must substantially address impacts and assessments in a required form (unless the agency has decided to prepare an EIS on its own proposal). (SMC 25.05.315). The prescribed form is the Checklist stipulated in the Ordinance (SMC 25.05.960).

All environmental review documents, including Determinations of Non-Significance, "must be supported by evidence that the necessary environmental analyses have been made." This is a *mandatory* standard, not an aspirational standard. Moreover, the Elements of the Environment to which review must be given are prescriptive and specific. There is no wiggle-room in SEPA for a threshold determination to rest on any foundation other than an evidence-based revieww of at least the relevant Checklist inquiries.

The opposite of a review based on evidence and analysis is a conclusory statement about impacts; and all the worse when carried into a DNS from statements devoid of evidence or analysis in the required Checklist. A DNS with that flaw then and there and for that fundamental flaw alone, should be rejected by a Hearing Examiner charged with scrutiny of the DNS against the cardinal requirement to the SEPA Ordinance. This is a proposition of law – the failure to have met the *prima facie* test -- not a matter of a burden of proof, when it pushes through uncontested matters of record.

Outcome of SEPA review should *never* present decisionmakers (or the public) with environmental judgments taken only from thin air (or, worse, an agency's opinions or conjectures, however earnestly held), rather than evidence.

It is strange indeed, but true, that this appeal has come down to the case about *absent* evidence. Hardly, in fact, what one would normally expect. Also, suddenly, quite simple at its core.

SDOT's Threshold Determination Has No Evidence-Based Support

The Proposal.

The SDOT Shared Scooter Proposal has two chief features;

First, a proposal that SDOT be authorized to implement a scooter share program in which private vendors are granted permits to operate and rent motorized foot scooters for use on Seattle's public right-of-way. That requires the City Council to amend SMC Chapter 15.17 to authorize vending of motorized foot scooters and other mobility devices in public places.[4] (Checklist ¶ 10, page 3).

The proposal specifies a program scale of shared *rented* devices of "up to 20,000 total combined motorized foot scooters and bikes." But it stipulates no requisite number of bikes be operated in the program either at its outset or at any future time. As of the 3rd quarter of 2019, SDOT's bike share program deployed between 6800 and 7300 bikes. (Checklist ¶ 11, page 4). SDOT anticipates indefinite annual extensions of the shared scooter program solely at SDOT's discretion. (Checklist ¶ 7, pages 2-3).

The second feature of the Proposal is a proposed amendment of an existing provision of the City's Traffic Ordinance to allow motorized scooters of *all* kinds (not just rented scooters) to be operated on bicycle lanes and public paths (multi-use trails).[5]

[4] SMC Chapter 15.17 is the Seattle Municipal Code section that governs the authorization of vending in public places.

[5] The applicable Traffic Code section (SMC 11.46.010) currently provides, "Except as otherwise provided in this chapter, motorized foot scooters may be operated on roadways, shoulders and alleys, but not on sidewalks, bicycle lanes or public paths.

The Checklist describe the City proposed shared scooter rental program to be implemented with private vendors' e-scooters mechanically governed to a top speed of 15 mph. (Checklist ¶ 10, page 4).

In that regard, the Checklist refers in the following terms to SDOT's *Emerging Technology and Mobility Options Operating in City right of Way – Response to Statement of Legislative intent 35-3-A-2019* (June 2019) (hereinafter *Emerging Technology Report)* (Checklist ¶ 8, page 19):

> "It [the Report] includes a strategic framework to assess the integration of these new options, including scooters, into the transportation network in a safe and sustainable manner. SLI 35-3-3-A is informing SDOT's strategy toward the SSP especially with respect to right-of-way management, safety, and mode integration. These policies inform amendments to SMC Chapter 11.46 for allowing scooters to operate on bicycle lanes and public paths (multi-use paths) but not on sidewalks."

Extracts from the *Emerging Technology Report* are in the hearing record as Exhibit 4.

Reference to the *Emerging Technology Report* (Exhibit 4, extracted page 15), and as confirmed by the hearing testimony of SDOT's Checklist preparer, Mr. Joel Miller, is that motorized scooters as a generic class are characterized as having a top speed of 20 mph. These are the vehicles to which SDOT's proposed code amend-ment will open the bike lanes and multi-use trails. If, as stated in the Checklist (see above) the *Emerging Technology Report* serves to inform SDOT's strategy as to "right-of-way management, safety and mode integration," SDOT elected *not* to inform its SSP Checklist with this essential vehicle-speed feature of its proposed bike lane code amendment.

The Checklist further suggests (Checklist ¶ 9, page 3) possible other amendments to the pertinent Traffic Code provision "to address requirements for other micro-mobility devices "such as" electric powered personal assistance mobility devices EPAMDs.[6] What other micro-mobility devices SDOT might have in mind is unclear; there is a range of candidate devices, as seen in the *Emerging Technology Report* (Exhibit 4, extracted page 15)

The *Emerging Technology Report* also, finally, sheds further light on a detail of the proposed vending authorization in the first part of the proposal. The vending authorization speaks not only to "motorized foot scooters," but also "other mobility

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[6] An EPAMD is defined in Traffic Code Section 11.14.186 as a self-balancing one or two wheel device.

devices" specified neither as to type or number. Only by venturing outside the Checklist to SDOT's *Emerging Technology Report* (Exhibit 4, extracted page 15) is SDOT's own potential construction of the breadth of the proposed vending authorization revealed.

See note below as to the two prior paragraphs.[7]

Transportation: Absence of evidence-based identification or assessment on required Elements of the Environment.

The prescribed form of Checklist calls out "Transportation" for impact identification and assessment. (Checklist ¶ 14, pages 23- 27). This follows the identification of "Transportation" in the Elements of the Environment, to which according to the Ordinance a SEPA review must attend: (a) Transportation systems; (b) Vehicular traffic; (c) Waterborne, rail and air traffic; (d) Parking; (e) Movement/circulation of people or goods; and (f) Traffic hazards. (SMC 25.05.444 B [Built Environment] 3 (a) – (f)).

SDOT's conclusory disposition of impact identification and assessment.

SEPA review can *combine* specific elements. (SMC 25.05.044 C). There is no authority to *select* among relevant elements disregarding or downplaying some while attempting to focus on others.

Vehicular traffic (SMC 25.05.444 B 3 (b), and Transportation systems (SMC 25.05.444 B 3.a.)

The field for inquiry should have been broad. For the proposal has a sweeping geographic range. Checklist (¶ 14. a, page 23):

> "The SSP will operate in public rights-of-way throughout the city."

Although the Checklist fails to discuss whether all locations in the city will feel similar impacts,[8] SDOT took a pass on many questions of gravest interest.

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[7] While these open-ended features of the proposal are a bit afield from the most basic flaws of the Determination of Non-Significance, they are a reminder of this feature of the SEPA Rules for arriving at threshold determinations (SMC 5.05.330 C 5 d),

> "In determining an impact's significance, the responsible official shall take into account that: . . .
> 5. A proposal may to a significant degree: . . .
> d. Establish a precedent for future actions with significant effects, involves unique and unknown risks to the environment, or **may affect public health or safety** [*emphasis supplied*]

[8] Consider SMC 25.95.330 C. 1:

The most glaring void in the SSP Checklist is the absence of evidence-based impact and assessment of "vehicular traffic." The required Checklist question asks (Checklist ¶ 14. f, page 26):

> "How many vehicular trips per day would be generated by the completed . . . proposal. Indicate when peak volumes would occur... What data or transportation models were used to make these estimates?"

These questions were not answered. This only – conclusory – statement was offered:

> "With the addition of shared scooters, the number of micro-mobility trips is expected to increase."

The only semblance of evidence entering the discussion was a recitation of the number of *bike share* trips taken in nine months of 2019 – a program that as of the third quarter of 2019 only involved 6800 – 7300 shared bikes (Checklist, ¶ 11, page 4), this would be about a third of the numbers of shared scooters envisioned in the SDOT proposed *completed* SSP for 20,000 e-scooter devices. Even if those obviously tangential numbers for bikes could have been transposed into anticipated scooter share trip volumes (and no attempt was made to do so) no account has been paid of expectations for *privately owned* motorized scooters or any consideration for other growth drivers (population growth; not to mention the growth of bicycling itself availing of capacity in the bike lanes) that SDOT itself identified (see immediately below) as reinforcing additional micro-mobility impacts on the bike lanes.

At least so far as the increased traffic contribution of shared scooter trips was concerned, lack of a calculation wasn't for lack of evidence for SDOT to draw upon. Mr. Miller, the preparer of the Checklist, testified to his familiarity with the evaluation of the 120-day (a third of a year) e-scooter pilot program conducted in Portland in 2018 with 2040 e-scooter devices, about a ninth of the scale of 20,000 devices in the SSP proposal. The Portland evaluation as to which he testified to his familiarity also included availability of volume and time-of-day data that would have supported estimates of the "when" of peak volumes for a 20,000 e-scooter program in Seattle, as asked for in the pertinent Checklist question.

With no estimates offered by SDOT, SDOT clearly had no answer to the Checklist query: "What data or transportation models were used to make these estimates?"

"In determining an impact's significance, the responsible official shall take into account that:
1. The same proposal may have a significant adverse impact in one location but not in another location."

SDOT has attempted no such accounting (so far as can be seen in the Checklist) for differing locational aspects (different areas of the city) of the impacts of its proposal.

Bike Lanes[9]

Nevertheless, an *impact* on bike lanes was *identified,* and in terms of added trips, even though no increment of trip volumes was calculated (Checklist, ¶ 14.f., page 26):

> "With the addition of shared scooters, the total number of micro mobility trips is expected to increase. The development of recommended facilities in the Bicycle Master Plan and growth in population may also increase trips. If code amendments allow scooters to be operated on bicycle lanes and public paths (multi use trails) there could be an increase in bike facility users that may impact bicyclists, pedestrians and other users."

No assessment was made of the identified impact(s). Accordingly, there is no evidence-based analysis to support the Determination of Non-Significance.

Bus only lanes[10] on the arterials.

The SSP, though it proposes to *open* bike lanes to all motorized scooters, does nothing to *restrict* motorized scooters against operating on any other aspect of the right-of-way except the sidewalks. That should have led SDOT to identify and evaluate impact on other portions of the right-of-way, including all manner of arterials, major and minor, to be used unenumerated numbers of trips by the many thousands of 15 mph SDOT sponsored rented shared scooters to be introduced on to the right-of way (except sidewalks) throughout the entire city. Those issues go unexamined, indeed unmentioned, in the Checklist, so there is no Checklist section to refer to.

A narrow glimpse into the issues emerged, however, from the cross-examination of Mr. Dongho Chang, the City's Traffic Engineer. He offered testimony on a point *not even mentioned* in the Checklist: That e-scooters (unlike bicycles) would not be allowed to operate in the City's many miles of bus-only lanes that are essential to the operation of Seattle's bus transit services operated by King County Metro, Sound Transit and Community Transit, and Pierce Transit.[11] The SEPA review failure here lies not just in omitting to bring *evidence* to the review, but perhaps altogether missing the need for even cursory impact analysis. Mr. Chang's understanding that shared

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[9] No one would argue otherwise than that bike lanes are part and parcel of Seattle's transportation system. Any such suggestion would be flatly overruled by reference to the Bicycle Master Plan incorporated into the Checklist (Checklist, ¶ 8 l, page 18):

[10] See the preceding footnote and the Transit Master Plan incorporated by reference into the Checklist. (Checklist, ¶ 8 l, page 18). An entire section of the Transit Master Plan is devoted to the importance of "Transit Corridors" (extending even beyond bus only lanes) for Seattle's current and future transportation system. There is not even an attempt to evaluate for impacts the Shared Scooter Proposal against the corridor operating concepts in the Transit Master Plan, *despite* the incorporation into the SSP Checklist of the Transit Master Plan. See Seattle Transit Master Plan, Chapter 3 Corridors, accessed at http://www.seattle.gov/Documents/Departments/SDOT/TransitProgram/TMP2016CH3.pdf

[11] Checklist (¶ 14,b,, page 23)

scooters and other motorized scooters as well would not be allowed in the bus only lanes even though bicycles are allowed in the bus only lanes -- seemed oblivious to the Traffic Code:

> 11.46.020 – Rules of Operation
>
> F. Except as otherwise provided in this chapter, operators of EPAMDs and **electric motorized foot scooters** shall have the same rights and duties as:
>
> **operators of bicycles when upon any portion of a highway [***emphasis supplied***]** except a sidewalk, crosswalk, or pedestrian zone; and [12]
>
> pedestrians when upon any sidewalk, crosswalk, or pedestrian zone.[13]

The prospect drawn from Mr. Chang's testimony when juxtaposed to the Traffic Code itself seems to underscore an operating entitlement of motorized scooters in the bus lanes (absent a code amendment nowhere suggested or alluded to in the Proposal). That that question as to the impacts of the SDOT proposal should have elicited not a word in the Checklist – *whatever* the ultimate resolution of the circumstances to be drawn from the language of the Traffic Code -- should be a red flag as to the sufficiency of the SDOT review supporting a DNS for the SSP Proposal.

Arterial streets apart from the bus-only lanes.

Never mentioned in the Checklist, apart the passing reference to traffic collision information *yet to be studied* is found in the discussion of Public Services (see below).

Parking

Where and how e-scooters will be parked received scant attention at the hearing, yet it received extensive treatment in the Checklist. Absent a deeper dive in the hearing, one statement in the Checklist standing alone nevertheless betrays an irreparable defect in what should have been, but has not been, an evidence-based analysis of impacts (Checklist, B. Supplemental Sheet for Non-Project Actions, ¶ 6 page 36).

> "The combined total number of e-scooters and bikes will not exceed the 20,000 micro-mobility vehicles specified in the free-floating bike share permit. While the total number of micro-mobility vehicles allowed will not change, SDOT i**s considering the cumulative parking impact** of adding the SSP **with the existing free-floating bike share program** [*emphasis supplied*]."

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[12] The Appellant's search has found no proviso otherwise in the Traffic Code.

[13] The provision otherwise, of course, is found in the immediate prior code section, SMC 11.46.010, that explicitly disallows motorized scooters on sidewalks and bike lanes, which under the SSP proposed code amendment would leave the sidewalk ban in place but eliminate the bike lane ban for motorized scooters.

The problem is that it is to the *existing bike share program*, not some hypothetical but unrealized bike share scale written into a blue sky permit, to which the cumulative impact of adding many thousands of e-scooters must be considered. The existing bike share program – the baseline – is stated in the Checklist itself to be (as of the third quarter of 2019) 6800 to 7300 bikes. (Checklist, ¶ 11, page 4). Whatever SDOT, according to the Checklist, *is now considering* as to this acknowledged impact, it *did not consider* in preparing the Checklist on which it based its threshold determination.[14]

SDOT's conclusory summation on transportation

The endpoint of SDOT's review is this (Checklist, B. Supplemental Sheet for Non-Project Actions, ¶ 6, page 36):

> "As discussed above, it is anticipated that this non-project proposal will not result in probable significant adverse direct, indirect or cumulative impacts on transportation . . ."

This is a conclusion unsupported by evidence-based analysis.

Public Services: Absence of evidence-based identification or assessment on required Elements of the Environment.

[14] More could be written. Note, for example, that SDOT has identified but not assessed impacts even on waterborne and rail commerce (Checklist ¶ 14. e, page 26):

> "Scooters in designated parking areas may be located in the immediate vicinity of water or rail transportation facilities. Users will not be allowed to park scooters in any manner that interferes with water, rail or air traffic. Occasionally a rider may attempt to board a ferry or light rail. Vendors must remove scooters from property owned or controlled by King County Metro (including the Water Taxi) Sound Transit and Washington State Ferries. Washington State Ferries and the Coast Guard have reported that abandoned bikes (personal bikes on bikes share vehicles) can cause delays for search and rescue. SDOT may require vendors to establish geofences around ferry terminals, over water and as [*sic*] movable bridges or at destination areas to address this behavior."

Note also this – hardly trivial - impact not assessed although data from the bike share program ("similar to bike share") would seemingly have provided the basis for doing so (Checklist ¶ 12, page 22)

> "SDOT is currently in discussions with Parks on options to allow scooters in certain areas of City parks . . . Similar to bike share, improperly parked scooters may create a distraction hazards which could temporarily impact recreational opportunities until the scooter is reparked or removed."

The prescribed form of Checklist calls out "Public services" for impact identification and assessment. (Checklist ¶ 15, page 22). This follows the identification of "Public services" in the "Elements of the Environment, to which according to the Ordinance a SEPA review must attend: (a) Fire; (b) Police (c) Schools; (d) Parks or other recreational facilities; (e) Maintenance; (f) Communications' (g) water/stormwater; (h) sewers/solid waste; (i) Other governmental services and utilities. (SMC 25.05.444 B Built Environment] 4 (a) – (h)).

SDOT's conclusory disposition of impact identification and assessment.

SDOT' SEPA review came to this:

> ""The SSP is not anticipated to create a significant impact in the need for fire, police or health services. (Checklist, ¶ 15.a, page 27).

The Checklist itself provide direct window into why SDOT failed to provide more evidentiary substance for its conclusory statement of anticipation. It hadn't yet (at least as of the date of the DNS) done the homework:

> "SDOT **will assess** [*emphasis supplied*] potential health and safety impacts when developing the SSP permit." (Checklist, B. Supplemental Sheet for Non-Project Actions, ¶ 6, page 35).

Verb tenses matter. Identification and assessment of impacts is not supposed to *follow* in the wake of a proposal's DNS. The SEPA Ordinance couldn't be clearer or more on point – and SDOT has missed the point. To restate:

It is SEPA Policy that (SMC 25.05.030 B.5):

> "Agencies shall to the fullest extent possible . . .
>
> Integrate the requirements of SEPA with existing agency planning and licensing procedures and practices, so that such procedures run concurrently rather than consecutively."

E-scooter safety and health concerns loom prominently, if abstractly, in the Checklist, embedded in the discussion of Public Services. A capsule summary is presented of studies by the Centers for Disease Control of shared e-scooter experience in Austin, Texas ("20 riders injured per 100,000 trips"). Also summarized is the injury tally from the Portland e-scooter pilot in 2018 ("176 scooter related injuries identified") (Checklist, ¶ 15.a, page 27-28). Mr. Miller testified that he was aware of the duration of the Portland pilot that yielded the aforementioned results (120 days) and the number of s-scooters deployed in the Portland pilot (2040).

That is all the beginning evidence one needs in hand to prepare, with simple arithmetic, at least a useful *pro forma* assessment to extrapolate Seattle's likely experience with an -scooter deployment nine times as large and three times the duration of the Portland experience. SDOT did not even venture that first step. Nor, had it done so, has SDOT offered refinements from "other scooter share studies" that it nonspecifically alludes but does not describe (Checklist, ¶ 15.a, page 28).

Indeed, here SDOT *repeats* its out-of-order approach to SEPA's impact identification and assessment policy command stated above (SEPA Policy quoted immediately above: concurrent, not consecutive, analysis required) (SMC 25.05.030 B).

> "SDOT is reviewing lessons learned from these and other scooter share studies **while developing the SSP permit in its conditions** [*emphasis supplied*]. This includes assessing where crashes/collisions are most likely to occur within right of way, what the source is, and what measures can be taken to reduce the potential for crashes/collisions and injuries." (Checklist, ¶ 15.a,, page 28).

SDOT's own Checklist thereby announces it was in possession of evidence that could have been brought to bear for evidence-based analysis of its proposal. In that circumstance, SDOT resorts to mere conclusory assertions (Checklist, ¶ 15.a,, page 27):

> ""The SSP is not anticipated to create a significant impact in the need for fire, police or health services."

Without evidence-based support, that will not wash.

Where impacts of Transportation and impacts on Public Services Come Together.

Two subparts of Elements of Transportation separately stated in the SEPA Ordinance are these:

- In Transportation: "Traffic hazards."
- In Public Service and Utilities: "Police."

The Checklist discussion of studies from Austin and Portland reveals not just injury statistics but collision with vehicle statistics and collision location statistics in one or the other of the two studies. (Checklist, ¶ 15. a, page 27-28). Moreover, Mr. Miller testified to expressed matters about traffic collisions from discussions with the Seattle Police Department as well as limitations on SPD resources.

With no further foundation than that convergence of evidentiary sources and input from the SPD, SDOT should have provided, but did not provide, a robust assessment

of traffic hazards and demands on police resources from an e-scooter rental program of up to 20,000 15 mph e-scooter devices operating on the public right-of-way (except, in theory, on sidewalks) throughout the entire city.

Why is it noteworthy that SDOT did not use the evidence in its own hands to make an assessment of traffic collisions from its 20,000-device program? Simply because it means SDOT had no bridge to the following conclusion other than an unsupported leap of faith (Checklist, B. Supplemental Sheet for Non-Project Actions, ¶ 6, page 35):

> "Although **there may be instances of future scooter share collisions** [*emphasis supplied*] . . . this is not expected to result in a substantial increase in the need for public services or create probable significant adverse instances on public services."

Maybe. Maybe not. A SEPA review is supposed to provide the evidence-based bridge. SDOT failed to build the bridge.

Meanwhile, tucked into the Environmental health section of the Checklist is this juxtaposition of Transportation and Public services (unassessed) impacts is this (Checklist, ¶ 7 a, 4, at 14):

> "As with other vehicle collisions, collisions involving scooters may require emergency medical or other servicers.".

The All-in Conclusory Statement

Apparently taking the view that it would be best to sweep together its evidence-free conclusions on lack of probable significant adverse impacts on **transportation** and on **public services,** SDOT Checklist's preparer thought it best to wrap up a sweeping summation. It is accompanied by an extraordinary declaration of how this proposal is actually supposed to work (Checklist, B. Supplemental Sheet for Non-Project Actions, ¶ 6, page 32):

> "The SSP is not expected to result in adverse impacts to traffic parking or public services and utilities. **It is the vendor's responsibility to inform riders how to rent right and park their vehicles**" [*emphasis supplied*].

In plain English: SDOT concludes (though not on evidence-based analysis) that there would be no significant potential adverse impacts from the SSP. But SDOT's program is arranging for and counting on the bulwark against trouble on the public right-of-way throughout the entire City of Seattle -- will be on the private vendors to assure the riders and scooters in the program won't cause adverse impacts.

Going back to SEPA's basic policy goal of strengthening *decisionmakers'* capacity to make sound policy decisions of agency proposals these two sentences alone should show that this SSP Determination of Non-Significance warrants the closest possible scrutiny.

Unpermitted Weighing of Proposal Benefits

The Scooter Share Proposal threshold determination documented by the DNS is based on a Checklist replete with the embrace of purported benefits thrown into a balancing of environmental impacts. This the SEPA Ordinance simply (and unequivocally) does not allow (SMC 25.05.330.E):

> "A threshold determination shall not balance whether the beneficial aspects of a proposal outweigh its adverse impacts, but rather, shall consider whether a proposal has any probable significant adverse environmental impacts under the rules stated in the section. For example, proposals designed to improve the environment such as sewage treatment plants or pollution control requirements may also have significant adverse environmental impacts."

An important policy objective lies behind this injunction. SEPA's purpose is to alert and inform decisionmakers (and the public) about potential adverse environmental implications of a proposal. That is to assist *decisionmakers* (and the public) in weighing possible cons alongside the pros of a proposal. When an agency seeks to inject ahead of the decisionmakers its *own* judgment, biases, or program aspirations into SEPA's intended neutral process for issue identification and assessment, the policy purpose in favor of informed decision-making *by the decisionmakers* is fatally compromised.

It might be one thing if an agency in minor fashion should incidentally stub its toe on this rule. It is another thing altogether when the Checklist *repeatedly and unabashedly* stumbles into manhole scale pitfalls of disregard for the rule. Often, here, making the situation even worse, by offering assertions of purported benefits immediate juxtaposition to *required* impact identification and assessment that the agency has evaded.

The Checklist in at least a dozen separate instances, virtually all respecting matters of transportation and/or safety/public health services potentially adverse impacts, has wandered into unallowed promotion (in a SEPA document) of the proposal on grounds of claimed benefits.

In order both to dramatize the problem and economize on verbiage, this brief adopts an unconventional format. Each of the following dozen instances extracts a section from the Checklist. It illuminates within each *verbatim* extract, with the assistance of the word processing "strike out" feature, what seem to be the offending Checklist assertion.

This makes clear both the claimed benefit and the Checklist context so that the impropriety of these inclusions of claimed benefit is clear (Commencing with Checklist, Section B, at page 5 and following):

> B. Environmental Elements
>
> *First.* "1. Earth. The SSP service area is throughout the city topography varies from flat to rolling hills including steep slopes in some areas. Topography may affect ridership patterns and the geographic distribution of scooters. ~~The use of scooters will more easily allow users to navigate the city's varying topography.~~" (Checklist, page 6).
>
> *Second.* "2. Air a. ~~Implementing the SSP may have beneficial effects on air quality. The SSP may help implement the City's Climate Action Plan by increasing nonmotorized mobility options. The SSP may replace vehicle trips.~~" (Checklist, page 8).
>
> *Third.* "2. Air c. ~~Once implemented the SSP will be expected to reduce emissions by encouraging more micro-mobility vehicle activity there by contributing to a decrease in automobile use and related emissions~~. (Checklist, page 8).
>
> *Fourth.* "7.a.4. Environmental health. ~~During an earthquake or other emergencies, the SSP may provide an important mobility option.~~ SDOT encourages vendors to make their scooters free during emergencies. (Checklist, page 14).
>
> *Fifth.* "8. a Land and Shoreline Use: . . . ~~The SSP may have positive effects on current land use by reducing motor vehicle trips and by providing alternative mobility options.~~ One of the policies in the Transit Master Plan. Policy TA.2.3 2.3 is to provide bike-share at all multimodal hubs, rail stations, priority access nodes and major neighborhood transit destinations to facilitate the last-mile connection to employment sites, retail sites and residences. ~~Scooters could provide a last-mile connection for those that may prefer to ride a scooter instead of biking or walking~~. (Checklist, page 15)
>
> *Sixth.*[15] "8.I. Land and Shoreline Use: The program supports the [Comprehensive Plan's] Urban Village strategy by providing the SSP in existing urban centers and villages, transit and community centers and by ~~contributing to mobility options in neighborhood centers.~~

[15] In this Section 8 I SDOT has conflated the question whether the SSP is *compatible* with existing and projected land use and plans with the question of whether the SSP *furthers* a possibly desirable outcome (*e.g.*, "last mile" connections to or from transit).

The Bicycle Master Plan Objectives 6 is to identify and implement actions to support and promote bicycle riding. The use of bikes and scooters is a key long-term goal for SDOT to promote low-carbon mobility throughout the city. . .

The Transit Master Plan anticipates a long-range vision where most residents can walk or bike to high-quality high-capacity transit. The SSP may supplement some types of transit service and may offer a last mile connection option to and from transit." (Checklist, pages 17 – 18)

Seventh. "12.b. Recreation. The SSP will not displace existing recreational uses in parks or on trails but has the possibility to increase recreational opportunities" (Checklist, page 21).

Eighth. "12 c. Recreation. The SSP will likely improve recreational opportunities by increasing the availability of on-demand scooters to access parks and other recreational areas." Checklist, page 22)

Ninth. "14. b. Transportation. Seattle is served by several public transit agencies including King County Metro, Sound Transit, Community Transit, Pierce Transit and Washington State Ferries. Scooter share as well as bike share may supplement some types of transit service and may offer a last-mile connection to and from transit." (Checklist, pages 23-24).

*Tenth. "*14.f. Transportation. With the addition of shared scooters, the total number of micro-mobility trips is expected to increase. The development of recommended facilities in the Bicycle Master Plan and growth in population may also increase trips. If code amendments allow scooters to be operated on bicycle lanes and public paths (multi-use trails) there could be an increase in bike facility users that may impact bicyclists, pedestrians and other users. Increase in SSP users may contribute to a decrease in automobile trip use. The SSP along with bike share may also encourage transit use by potentially providing the last mile connections to and from transit." (Checklist, page 26).

Eleventh. "D. Supplemental sheet. 5 . . . The SSP along with bike share may supplement some types of transit service and may offer a last mile connection to and from transit." (Checklist page 35).

Twelfth "D. Supplemental sheet. 6. . . . Any allowable increase in scooter share users along with bike here may contribute to a decrease in personal automobile use and associated traffic congestion. The SSP may encourage transit use by providing last mile connections to and from transit. The SSP may provide more mobility options to the public and may reduce automobile use and parking demand over time. (Checklist, page 34)

There is a consistent feature of these putative claims of *benefit* from the SSP proposal. In a document in which analysis of impacts and assessment is supposed to be "supported by evidence that the necessary environment analyses have been made" (SMC 15.05.030) a dozen utterly conjectural and speculative "benefits" have intruded – without even a scrap of supporting evidence-based analysis.

At the hearing, a witness for the City seemed to assert that no undue weight was given to considerations infelicitously included in the Checklist: the threshold determination, she testified, was arrived at only based on assessments of significant adverse potential impacted. This is an easy assertion to speak. It is a harder assertion to credit, given a Checklist in which time and again alongside the vacancy of evidence-based assessments of impact, there are sideline claims of SSP benefits.

Failure to Meet the SEPA Requirement To Identify and Evaluate Alternatives

The SEPA ordinance states the SEPA policy goals that (SMC 25.05.030 B):

> "Agencies shall to the fullest extent possible: . . .
>
> (2) Find ways to make the SEPA process more useful to decision makers and the public . . . and emphasize important environmental impacts and alternatives. . .
>
> (7) Identify [and] evaluate . . . Reasonable alternatives that would mitigate adverse effects of proposed actions on the environment."

SEPA practitioners in the refined world of preparing full-fledged SEPA and NEPA Environmental Impact Statements are well-versed in the Herculean labors of "alternatives analysis."

Identifying and assessing alternatives for a DNS on a city proposal for rending e-scooters should be a far less imposing burden. It is still a core SEPA purpose and requirement. Alternatives analysis is *not* confined only to Environment Impact Statement preparation. Even for reaching a DNS, at least minimal consideration of alternatives is called for by the Ordinance. There is no doubt on that point. If there were, it would be dispelled by the instruction from the Ordinance as to the importance of alternatives being in view, both to decisionmakers and the public (SMC 25.05.655. C):

> "When a decisionmaker considers a final decision on a proposal:
>
> 1. The alternative is in the relevant environmental documents shall be considered. . .
>
> 3. If information about alternatives is contained in another decision document which accompanies the relevant environmental documents to

the decisionmaker, agencies are encouraged to make that information available to the public before the decision is made."

In the DNS subject to current appeal, the failure of SDOT to give any consideration to any alternative to the 20,000 e-device proposal might seem at first like a dusty sidetrack. Except for a crucial fact that is *in the evidentiary record*. SDOT *itself* in mid-2019 identified and even suggested in a formal submission to (and that had been requested by) the City Council as an obvious alternative. Underscoring that fact is *another* fact in the evidentiary record: Mr. Miller's testimony that he was familiar with the Portland Bureau of Transportation pilot program that extended over 120 days in mid-2018 deploying 2040 e-scooters.

With that context established in the record, the significance is clear of SDOT's own *Emerging Technology Report* delivered in June, 2019 to the City Council.[16] The Checklist (at page 19) expressly references the Council's SLI as directing SDOT to present a strategic framework for integrating new technology options, *including* scooters into the transportation network in a safe and sustainable manner.

A section of the *emerging Technology Report* (Exhibit 4, extracted pages 20-22) is captioned *5.0 Strategy Development Recommendations*. It strikes several crucial notes (Exhibit 4. at extracted page 20):

> "By their nature many of these "doclkess" devices are parked on or near sidewalks after users complete their trips. This can present safety and accessibility issues as those who are elderly or mobility impaired may have their paths blocked by improperly parked devices. . .
>
> In contrast to many other cities Seattle's ROW is relatively narrow with much competition for limited space – in the travel way, flex zone and pedestrian zone . . .
>
> Within the mobility function, however, formal guidance is lacking on how to prioritize amongst traditional modes of auto, transit, pedestrians, bicycles and freight; emerging mobility modes further necessitate the need for this exercise. . ." (Page 20).
>
> "To realize the potential benefits of emerging mobility devices and minimize negative impacts, however, we must consider right-of-way management more holistically -- from allocation of ROW, to curb and sidewalk management, to street design and enforcement -- not only for mobility but also in consideration of other essential functions in the right away . . . " (Page 21).

[16] See this brief, pages 4-5, above.

At Exhibit 4, page 22, is "Table 3 Summary of Potential Next Steps." Across the top row on the table is the discussion of Pilot Programs.

> "Pilot programs allow the City to gather data and evaluate the benefits, opportunities and challenges of any new product or service. They give the city time to test and iterate appropriate regulations, educational efforts and fees."

In the same table, same row, under the heading "Potential Next steps," SDOT reported to the Council this next step:

> "• conduct pilot programs to test emerging mobility options before launching any large-scale permit program.
> - Develop a shared a scooter pilot program plan (underway)."

A SEPA proposal (1) for up to 20,000 e-scooters, multiple times larger than any true pilot program (such as the first pilot e-scooter program in Portland at 2040 devices); and (2) lacking any sunset mechanism but is explicitly framed for indefinite extension at SDOT's discretion, is not truly a pilot program in any ordinary meaning of the word. To borrow the words for what it is directly from Table 3 in SDOT's own contrast to a pilot program, the SSP is "launching a large-scale permit program."

Many of the crippling deficiencies in the current SDOT effort at a SEPA review for potentially significant adverse environment effects this SSP would not now need to be highlighted had SDOT simply picked up the alternative it had *itself* identified in June 2019 and wrapped it into a true pilot program proposal for a SEPA review. Unfortunately for the tack it chose, failing to have informed decisionmakers in this SEPA review of that alternative of its own invention, SDOT has contravened the SEPA Rules and baked a fatal flaw into the instant Determination of Non-Significance. Because *now*, with regard to *this* shared scooter and code amendment proposal, decisionmakers are entitled to know that an obvious alternative was and is at hand, with potentially far less consequential adverse impacts than the proposal. SEPA is designed to produce that information for decisionmakers (and the public).

Failure to Meet SEPA Requirement to Identify and Evaluate "Cumulative Effects."

SEPA cumulative effects policy bearing on the shared scooter proposal is straight-forward (SMC 25.05.070(A(1) and (B) (1)"):

> "A project or action which by itself does not create undue impacts on the environment may create undue impacts when combined with the cumulative effects of prior or simultaneous developments."

> "The analysis of cumulative impact shall include a reasonable assessment of the present and planned capacity of such public facilities as. . . streets , , and parking areas to serve the area affected by the proposal.

SDOT's attempts at "cumulative impacts" accounting in the SEPA review simply misses the point. (Checklist, B. Supplemental Sheet for Non-Project Actions, ¶ 6, page 36). Cumulative effects analysis required by SEPA must take account of *this proposal's* impacts (even if not creating undue impacts itself) "when *combined with* [*emphasis supplied*] prior or simultaneous developments.

The record is spare in its survey of developments other than the Shared Scooter Proposal. But it is not empty. Because Ms. Macek testified that in the assessment of cumulative impacts on transportation she had indeed taken into account the Transportation Network Companies (TNCs, *i.e.*, Uber and Lyft).

Accordingly, the proposition that 20,000 shared e-scooters and many thousands of Uber and Lyft ride-share vehicles may have to be assessed for cumulative impact in the scooter share proposal SEPA review is tacitly conceded by the City.

However, she had only considered the static level of the TNCs impact now existing on the streets.

Two modest wildfires might neither by themselves threaten a destructive conflagration. When they *merge* together on the landscape, however, the whole can be vastly more destructive than what might be the mere sum of the parts. Assessing impacts from two wildfires converging is the simple plain-speak metaphor for the cumulative impact assessment requirement clearly stated in the SEPA Ordinance.

Ms. Macik testified that her consideration in the setting of cumulative impact analysis of Uber/Lyft was informed by only a moment-in-time snapshot of Uber/Lyft's impact. That is not looking at "developments." More would be required: what would scooter impacts be at full-roll out of the e-scooter program *and* what would the convergence look like with the likely reasonably ascertainable TNCs' impacts *to come*.[17]

Even worse, however, was the basic misunderstanding reflected in this Checklist statement (Checklist, B. Supplemental Sheet for Non-Project Actions, ¶ 6, page 34).

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[17] There is no real opportunity for hair-splitting here. But if there were, the importance of the reasonable "look ahead" is established by the policy direction in the SEPA rules: "An individual project my have an adverse impact on the environment or public facilities and services that, though acceptable in isolation, could not be sustained given the probable development of **subsequent** [emphasis supplied] projects with similar impacts." (SMC 25.050.670 Cumulative effects policy, A. Policy Background 2.)

"The SSP is consistent with city goals and policies in the indirect and cumulative impact of **this** non-project proposal will not result in probable significant adverse transportation impact."

That kind of statement, to be clear and without belaboring the point, is rooted in notions of concurrency analysis under the Growth Management Act. "Consistency with Polices" and "Cumulative Impact Assessment "are arias from different operas. Conflating them, as in this statement in the Checklist, is to reveal an SDOT SEPA process out of touch with the very purpose of SEPA, far detached from the plain requirements of the Ordinance itself.

Then unhappily, once again, that giveaway future verb tense (*Id.*):

"SDOT **will assess** [*emphasis supplied*] the SSP's indirect and cumulative effects on other uses of the public right-of-way through interdepartmental and agency coordination, vendor reporting requirements and public feedback . . ."

Precisely what should have happened (with evidence-based analysis) *before* the DNS was signed, not in its aftermath.

SDOT Cannot now Transform the SSP SEPA Review into a Mitigated DNS

At the hearing the City launched a creative, but necessarily failed, defensive gambit. Perhaps the DNS could be embellished with *mitigating features* as an agency might do in attaching mitigation conditions to a project or non-project proposal such that a SEPA review could pass a "threshold determination" filter that would support a Determination of Non-Significance. See SMC 25.05.660.

But mitigating a DNS is not a process that emerges on an appeal of a DNS to the Office of the Hearing Examiner. A Mitigated DNS is provided for in the SEPA Rules (SMC 25.05.350). Providing or attaching mitigation measures for a project or a proposal is a *prelude* to issuance of a DNS, not duct tape from a post issuance tool kit. (SMC.05.350 and SMC.05.330 E):

"[T]o allow clarifications or changes to a proposal prior to making the threshold determination. . .

E. Agencies may clarify or change features of their own proposal and may **specify mitigation measures in their DNSs** as a result of comments by other agencies or the public or as a result of additional agency planning."

A DNS cannot be bootstrapped by the identification of features called out of a Checklist that are not specified as mitigation. What is equally clear is that the purpose of mitigation measures in SEPA has to do with *responding to problematic impacts:*

"Avoiding the impact:" "Minimizing impacts;" "Rectifying the impact;" "Reducing or eliminating the impact;" "Compensating for the impact." (SMC 25.05.768).

SEPA Rules are clear and the course is narrow. The necessary *predicate* for mitigation is a specific adverse impact – something that *needs* to be mitigated (SMC 25.05.660, A.2.):

> "Mitigation measures shall be related to specific adverse environmental impacts clearly identified in an environmental document."

Mitigation pronouncements, however well-intended and even unarguably for the good of the general order, have nothing to attach to in a SEPA process and its review by the Hearing Examiner if they are not explicitly responsive to "specific adverse environmental impacts." If, as in this case, an agency has itself neither identified or evaluated specific adverse environmental impacts, window dressing called "mitigation" is wholly surplusage to the question of whether a SEPA review stands on its own foundation of evidence-based analysis of environmental impacts.

Conclusion

For the reasons presented in this brief, including, but not limited to the failure of the DNS to be supported by actual analysis and disclosure supported by evidence, and therefore a finding of *prima facie* compliance cannot be made, the DNS should be remanded to the Seattle Department of Transportation. Other shortcomings of SDOT's SEPA process that have demonstrated preparation of a threshold determination for the DNS that has failed to accord with SEPA Rules should independently also be the basis for a remand.

Respectfully submitted:

Douglas B. MacDonald
Appellant, *pro se*

March 20, 2020

CERTIFICATE OF SERVICE

I certify that on this date I filed an electronic facsimile of **Appellant's Post Hearing Brief** on the e-file website of the Office of the Hearing Examiner in accordance with the Office of the Hearing Examiner Temporary Rules. A copy of the filing was also mailed today by U.S. First Class Mail to the Office of the Hearing Examiner, Seattle Municipal Tower, 705 5th Avenue, Suite 4000, Seattle WA 98104 on account of the exigency of the current emergency.

I also certify that on this date a copy of the same document was sent via e-mail to the following party and also, as above, mailed today the following party by U.S. First Class Mail.

Patrick Downs
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Dated this 20th day of March 20, 2020.

Douglas B. MacDonald