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BEFORE THE HEARING EXAMINER  
CITY OF SEATTLE

In the Matter of the Appeal of: ) Hearing Examiner File:  
)  
) **W-19-007**  
**DOUGLAS B. MACDONALD,** )  
) Department Reference 002180-19N  
)  
from a Determination of Non-Significance ) City's Response Brief  
issued by the Director, Seattle Department )  
of Transportation. )  
\_\_\_\_\_ )

**I. INTRODUCTION**

The SEPA checklist and the City's hearing testimony demonstrated that the City made a prima facie showing it procedurally complied with SEPA. The City further demonstrated the e-scooter/bike share program or proposal for SEPA purposes would result in no significant adverse impacts to any element of the environment.

In contrast, Mr. MacDonald presented no evidence that the e-scooter/bike share proposal would have any significant adverse impact. Mr. MacDonald has not met his burden of proof and his appeal should be dismissed.

**II. FACTS**

The City issued a Determination of Nonsignificance (DNS) for the proposal on December 9, 2019. The proposal consists of two elements: issuing permits to allow the e-scooters and bikes

1 to operate on City rights-of-way and legislation that would amend where these devices may  
2 operate.<sup>1</sup> The checklist analyzed each of the elements of the environment Mr. MacDonald raised  
3 in his appeal: air, environmental health, transportation, public services, and utilities.<sup>2</sup> After  
4 analyzing all of the elements of the environment, the City determined the proposal would have  
5 no significant adverse impacts.<sup>3</sup>

6 On December 30, 2019, Mr. MacDonald filed an appeal challenging the DNS. He argued  
7 the proposal would have significant adverse impacts on transportation, air, public services, and  
8 utilities.<sup>4</sup> He also raised a number of other objections.<sup>5</sup>

9 On March 6, 2020, the Hearing Examiner granted the City's motion to preclude Mr.  
10 MacDonald from calling witnesses or entering exhibits at the hearing because of his failure to  
11 timely file a witness and exhibit list. As a result, Mr. MacDonald was precluded from entering  
12 any evidence or testimony that supported his claim that the proposal would result in significant  
13 adverse impacts.<sup>6</sup>

14 At the March 9, 2020 hearing, the City called Dongho Chang, the City's Transportation  
15 Engineer, as its first witness. Mr. Chang testified as an expert that the proposal would have  
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18 <sup>1</sup> Scooter Share Program and Seattle Municipal Code Chapter 11.46 and 15.17 Amendments Seattle, WA  
19 SEPA Checklist December 2, 2019 (Checklist) at page 4; Hearing Exhibit 3.

20 <sup>2</sup> SEPA appeal of Douglas B. MacDonald (Appeal) at paragraph 6.

21 <sup>3</sup> Checklist. *See* Air at pages 7-8; Environmental Health at pages 14-15; Transportation at pages 23-27;  
22 Public Services at pages 27-28; and D. Supplemental Sheet for Non-Project Actions, paragraph 1 at page  
23 31, paragraph 6 at page 32, and paragraphs 1-4 at page 33. All other elements of the environment were  
analyzed. *See* Checklist.

<sup>4</sup> Appeal at paragraph 6.

<sup>5</sup> *See* Appeal generally.

<sup>6</sup> Appeal, relief requested.

1 negligible or a positive impact on the City's transportation infrastructure.<sup>7</sup> Mr. Chang based his  
2 opinion on studies in Portland, Tacoma, and Spokane where in those jurisdictions, individuals  
3 using e-scooters replaced personal trips using motor vehicles.<sup>8</sup>

4 The City then called Joel Miller who is managing the proposal for the Seattle Department  
5 of Transportation (SDOT). Mr. Miller testified that the existing bike-share program allows up to  
6 20,000 bikes and that the e-scooter and bike share program would also allow up to 20,000 e-  
7 scooters and bikes.<sup>9</sup> This established the baseline conditions from which the e-scooter/bike  
8 proposal is measured against to determine what environmental impacts the proposal would have.  
9 Mr. Miller also testified to the mitigation identified in the checklist that addresses air,<sup>10</sup>  
10 environmental health,<sup>11</sup> transportation,<sup>12</sup> and public services.<sup>13</sup>

11 Mr. Miller then testified how the proposal took into account the potential impacts of the  
12 proposal's operations in different locations.<sup>14</sup> Mr. Miller testified that with the proposal, the  
13 Seattle Fire Department would provide services when called upon.<sup>15</sup> Next, Mr. Miller testified  
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17 <sup>7</sup> Transcript of the Hearing Before Hearing Examiner Ryan Vancil March 9, 2020 (Transcript) at 23:10  
18 and 23:17-25. The hearing was transcribed by Chastity M. Freeze, a Court-Certified Transcriptionist with  
19 Reed Jackson Watkins.

20 <sup>8</sup> Transcript at 23:24-24:24.

21 <sup>9</sup> Transcript at 48:3-13

22 <sup>10</sup> Transcript at 48:21-23.

23 <sup>11</sup> Transcript at 48:24-48:8.

<sup>12</sup> Transcript at 49:20-25; 50:1-9; and 114:7-15.

<sup>13</sup> Transcript at 50:11-22.

<sup>14</sup> Transcript at 51:13-18.

<sup>15</sup> Transcript at 51:24.

1 that the City's Pedestrian Master Plan was considered when the proposal was developed.<sup>16</sup> On  
2 cross examination, Mr. Miller testified that e-scooters would not be allowed in bus lanes.<sup>17</sup>

3 The City then called Ms. Macik who testified as a SEPA expert.<sup>18</sup> Ms. Macik testified  
4 that under SEPA when a DNS is issued for a proposal, an alternative analysis is not required,<sup>19</sup>  
5 that none of the proposal's impacts were significant adverse impacts and collectively the impacts  
6 did not rise to a significant level,<sup>20</sup> that the proposal will not establish a precedent for future  
7 actions that may have a significant impact,<sup>21</sup> that the benefits of the proposal were not balanced  
8 against the proposal's impacts,<sup>22</sup> that cumulative impacts are prospective and not retrospective  
9 and were considered,<sup>23</sup> and that Transportation Network Companies (TNCs) were included in the  
10 baseline analysis for the proposal's transportation impacts.<sup>24</sup>

### 11 III. ISSUES

12 The City must make a prima facie showing it complied with SEPA's procedural  
13 requirements. The City's witnesses and the checklist conclusively demonstrated it complied with  
14 SEPA's procedural requirements and that the proposal would have no significant adverse  
15 impacts. Did the City make a prima facie showing it complied with SEPA's procedural  
16 requirements?

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18 <sup>16</sup> Transcript at 52:4-13.

19 <sup>17</sup> Transcript at 81:2-3; and 82:22-24.

20 <sup>18</sup> Transcript at 142: 17-21.

21 <sup>19</sup> Transcript at 143:2-9.

22 <sup>20</sup> Transcript at 143:12-21.

23 <sup>21</sup> Transcript at 143:25; and 144:11-17.

24 <sup>22</sup> Transcript at 144:21.

<sup>23</sup> Transcript at 145:1-7.

<sup>24</sup> Transcript at 145:11-14.

1 Mr. MacDonald must show that the DNS for the proposal was clearly erroneous. Mr.  
2 MacDonald could offer no evidence and failed to demonstrate any error on cross-examining the  
3 City’s witnesses. Did Mr. MacDonald meet his burden?

4 **IV. ARGUMENT**

5 SEPA requires “actual consideration of environmental factors before a DNS can be  
6 issued.”<sup>25</sup> The record must “demonstrate that environmental factors were considered in a manner  
7 sufficient to amount to a prima facie compliance with SEPA’s procedural requirements.<sup>26</sup> Once  
8 the City has demonstrated prima facie compliance with SEPA’s procedural requirements, Mr.  
9 MacDonald has the burden of proving that the DNS issued for the proposal was clearly  
10 erroneous.<sup>27</sup> Under this standard of review, the decision may only be reversed if the Hearing  
11 Examiner is left with the definite and firm conviction that a mistake has been committed.<sup>28</sup>

12 A proposal’s impacts are measured against a baseline of existing conditions.<sup>29</sup> Neither  
13 SEPA’s statute or rules require that an agency’s environmental review be completely contained  
14 in the checklist and DNS. An agency is required to review the checklist,<sup>30</sup> but may conduct  
15 further studies and consult with other agencies about the proposal’s potential impacts. An agency  
16 may also use its own knowledge and expertise when analyzing a proposal.

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20 <sup>25</sup> *Norway Hill Preservation and Protection Ass’n v. King County*, 87 Wn.2d 267, 275, 552 P.2d 674  
(1976).

21 <sup>26</sup> *Id.* at 276 (citations omitted).

22 <sup>27</sup> *Brown v. Tacoma*, 30 Wn. App. 762, 637 P.2d 1005 (1981).

23 <sup>28</sup> *Cougar Mt. Assoc. v. King County*, 111 Wn.2d 742, 747, 765 P.2d 264 (1988).

<sup>29</sup> *East County Reclamation Co. v. Bjornsen*, 125 Wn. App. 432, 435, 105 P.3d 94 (2005).

<sup>30</sup> Seattle Municipal Code (SMC) 25.05.330.

1           The SEPA checklist and the testimony of the City’s witnesses as described above  
2 demonstrates a prima facie showing that the City complied with SEPA’s procedural  
3 requirements. The City also properly considered the existing baseline by which the impacts of  
4 the proposal are measured against—the existing bike-share program that allows up to 20,000  
5 bikes. Against that baseline, the checklist and testimony also demonstrated that the proposal  
6 would have no significant adverse impacts to any element of the environment.

7           Mr. MacDonald’s witness cross-examination and post-hearing brief fail to demonstrate  
8 that the DNS was clearly erroneous. Instead, Mr. MacDonald first addresses in his post-hearing  
9 brief, SDOT’s *Emerging Technology Report*.<sup>31</sup> His discussion of the report is of no value when  
10 trying to meet his burden.

11           Turning to transportation, Mr. MacDonald argues the checklist failed to discuss whether  
12 all locations in the city will have similar impacts.<sup>32</sup> That is incorrect. Mr. Miller stated in his  
13 testimony that the “permit provides for different approaches in different areas” and referenced  
14 how the checklist provides for this.<sup>33</sup>

15           Mr. MacDonald then incorrectly claims there is an absence of evidence-based impact and  
16 assessment of vehicular traffic.<sup>34</sup> Based on programs in Portland, Tacoma, and Spokane, Mr.  
17 Chang testified that the proposal will have a negligible or beneficial impact on the City’s  
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21 <sup>31</sup> Appellant’s Post[-]Hearing Brief (Appellant’s Brief) at 4, *citing* Checklist at page 19.

22 <sup>32</sup> Appellant’s Brief at 5.

23 <sup>33</sup> Transcript at 51:13-18; Checklist paragraph 12 at page 6; and Checklist second paragraph at page 33.

<sup>34</sup> Appellant’s Brief at 6.

1 transportation infrastructure.<sup>35</sup> Turning to bike lanes, Mr. MacDonald again argues no  
2 assessment of impacts occurred.<sup>36</sup> The testimony of Mr. Chang refutes this argument.

3 Then, Mr. MacDonald claims the proposal will have an impact on bus lanes.<sup>37</sup> Mr. Miller  
4 explained that e-scooters will not be allowed to operate in bus lanes.<sup>38</sup> Next, Mr. MacDonald  
5 criticizes the assessment of the proposal's impact on parking.<sup>39</sup> The checklist contains an  
6 extensive discussion of potential parking impacts and mitigation to address the potential  
7 impacts.<sup>40</sup> Moreover, the total number of e-scooters and bicycles under the proposal is the same  
8 as the baseline of the existing bicycle program.

9 Mr. MacDonald then argues with a critique of checklist statements that public services  
10 were not adequately analyzed.<sup>41</sup> The SEPA checklist discusses potential impacts to public  
11 services and proposed measures to reduce or control impacts on public services.<sup>42</sup> Mr. Miller also  
12 testified why there would be no significant adverse impacts to public services, including the  
13 Seattle Fire Department.<sup>43</sup> Mr. Miller did testify that the Seattle Police Department was under-  
14 resourced and could not commit to any sort of enforcement.<sup>44</sup> But that has been the baseline

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17 <sup>35</sup> Transcript at 23:17-25.

18 <sup>36</sup> Appellant's Brief at 7.

19 <sup>37</sup> Appellant's Brief at 7 and 8.

20 <sup>38</sup> Transcript at 81:2-3.

21 <sup>39</sup> Appellant's Brief at 8 and 9.

22 <sup>40</sup> Checklist at pages 24 and 25.

23 <sup>41</sup> Appellant's Brief at 9-10.

<sup>42</sup> Checklist at pages 27 and 28.

<sup>43</sup> Transcript at 50:10-22; Transcript at 51:24.

<sup>44</sup> Transcript at 63:12-13.

1 against which the proposal is measured and this does not indicate the proposal will have a  
2 significant adverse impact on the Police Department's ability to respond to emergencies.

3 Over the course of two pages, Mr. MacDonald cites fourteen passages from the checklist  
4 and argues that SDOT impermissibly balanced the proposal's benefits against its impacts.<sup>45</sup> Ms.  
5 Macik testified that she did not balance benefits against impacts.<sup>46</sup> Mr. MacDonald did not  
6 address balancing in his cross examination of Ms. Macik and her testimony stands unrefuted.<sup>47</sup>

7 To support an argument that a DNS requires an alternatives analysis as occurs in an  
8 Environmental Impact Statement (EIS), Mr. MacDonald references nondispositive code sections  
9 and a SDOT-developed document, the *Emerging Technology Report*.<sup>48</sup> Ms. Macik correctly  
10 testified that a proposal subject to a DNS is not subject to an alternative analysis in contrast to an  
11 EIS where alternatives are analyzed.<sup>49</sup> Case law supports Ms. Macik's testimony.<sup>50</sup>

12 Moving on, Mr. MacDonald claims cumulative effects were not analyzed in the  
13 checklist.<sup>51</sup> That is incorrect. The checklist analyzed cumulative impacts of the proposal on  
14 parking, public and private use of the rights-of-way including transportation, health impacts, and  
15 public services.<sup>52</sup> Ms. Macik also testified to the cumulative analysis for the proposal.<sup>53</sup> Further,  
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17 <sup>45</sup> Appellant's Brief at pages 13-16.

18 <sup>46</sup> Transcript at 144:21.

19 <sup>47</sup> Transcript at 147:1-161:24.

20 <sup>48</sup> Appellant's Brief at pages 16-18.

21 <sup>49</sup> Transcript at 143:2-9.

22 <sup>50</sup> *Chuckanut Conservancy v. Washington State Dept. of Natural Resources*, 156 Wn. App. 274, 292, 232  
23 P.3d 1154 (2010) (Alternatives not required for a DNS issued for forest management plan).

<sup>51</sup> Appellant's Brief at 18-20.

<sup>52</sup> Checklist at pages 24, 33, 34, 35, and 36.

<sup>53</sup> Transcript at 145:1-7.



1 when assessing the cumulative analysis of the proposal, the analysis is again set in the context of  
2 the baseline for this proposal—the existing 20,000 bike-share program.

3 Concluding, Mr. MacDonald argues that SDOT cannot transform the DNS issued for the  
4 proposal into a Mitigated Determination of Nonsignificance or MDNS.<sup>54</sup> Mr. MacDonald failed  
5 to raise this objection in his appeal and it cannot be raised now.<sup>55</sup> And nothing in SEPA  
6 precludes an agency from identifying mitigation in a DNS. Identifying mitigation does not  
7 convert a DNS into a MDNS.

## 8 V. CONCLUSION

9 Mr. MacDonald has failed to demonstrate that the DNS was clearly erroneous, and his  
10 appeal should be dismissed.

11 Dated this 30<sup>th</sup> day of March 2020.

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22 <sup>54</sup> Appellant's Brief at 20-21.

23 <sup>55</sup> See Appeal generally.

1 **CERTIFICATE OF SERVICE**

2 I certify that on this date, I electronically filed a copy of the **City’s Response Brief** with  
3 the Seattle Hearing Examiner using its e-filing system. I also certify that on this date, a copy of  
4 the same document was sent by email to the following party:

5 **Douglas B. MacDonald**  
6 **dbmacdonal@earthlink.net**  
7 *Appellant*

8 the foregoing being the last known address of the above-named party.

9 Dated this 30<sup>th</sup> day of March 2020, at Seattle, Washington.

10 *s/Alicia Reise*  
11 ALICIA REISE, Legal Assistant