

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

In the Matter of the Appeal of

DOUGLAS MACDONALD

from a Determination of Non-Significance
issued by the Director, Seattle Department of
Transportation

Hearing Examiner File:
W-19-007

Department Reference:
002180-19PN

Introduction

The Director of Seattle Department of Transportation (“Director” or “City”) issued a Determination of Non-Significance (“DNS”) for a proposed ordinance concerning a Scooter Share Program (“Ordinance”). The Appellant, Douglas MacDonald (“Appellant”), exercised the right to appeal pursuant to Chapter 25.05 Seattle Municipal Code.

The appeal hearing was held on March 19, 2020, before the undersigned Hearing Examiner. Parties represented at the proceeding were: the Appellant, by himself *pro se*, and the City, by Patrick Downs attorney-at-law. The record was closed at the conclusion of the hearing.

For purposes of this decision, all section numbers refer to the Seattle Municipal Code (“SMC” or “Code”) unless otherwise indicated. After considering the evidence in the record and reviewing the site, the Examiner enters the following findings of fact, conclusions and decision on the appeal.

Findings of Fact

1. The DNS describes the proposal as:

SDOT proposes to implement a Scooter Share Program (SSP) that allows customers to locate and rent a motorized foot scooter and end the rental at an appropriate location near their destination. Under the SSP, SDOT will issue permits to private companies to operate motorized foot scooters. The combined total number of scooters and bikes will not exceed the 20,000 vehicles specified in the September 2018 DNS that was issued for the free-floating bike share permit. Vendors will be required to pay permitting fees that will be used to administer the SSP and its goals. The City will request a Seattle Municipal Code (SMC) Chapter 11.46 amendment to the City Council in Q1 2020 to allow motorized foot scooters to be operated on bicycle lanes and public paths (multi-use trails) but not on

sidewalks. The City will also request approval from the City Council to amend SMC Chapter 15.17 in Q1 2020 to authorize vending of motorized foot scooters and other mobility devices in public places. Shared scooters will not be allowed to provide assistance propulsion beyond 15 miles per hour. In August 2019, SDOT began a public engagement process to build a community-driven SSP. SDOT is working with stakeholders and community groups to co-create a scooter share program that offers new mobility options while maintaining sidewalk comfort and the safety of pedestrians, people who are blind or low-vision, and people living with disabilities. Before establishing the SSP, SDOT will use lessons learned from the free-floating bike share program including requiring data from vendors, instituting rule consistency with Seattle's suburbs, maintaining the ability to reassess or restrict fleet size at any time, requiring response times for obstruction hazards, and monitoring compliance and enforcement with clearly defined targets and penalties. The SSP will require vendors to prioritize obstruction hazards in responding to reports that scooters are improperly parked or need maintenance. Vendors must have geofencing technology to virtually mark areas where scooters are restricted. The SSP will have permit conditions consistent with state, county, and local laws including requirements for helmet use and where scooters can be operated lawfully (e.g. not on sidewalks).

2. The Director determined that no probable significant adverse environmental impacts were likely to occur as a result of the proposed legislation, and that preparation of an environmental impact statement (“EIS”) was not required. The Director issued a DNS on December 4, 2019.
3. The Appellant filed an appeal of the Director’s decision on December 30, 2019.
4. The Appellant alleged in his Notice of Appeal that the DNS was inadequate and raised the following issues:
 - a. The DNS was not made following proper standards of review;
 - b. The SEPA checklist failed to adequately describe probable significant adverse impacts;
 - c. Lack of alternatives analysis;
 - d. The threshold determination was not supported by adequate information;
 - e. The SEPA official failed to take into account certain SEPA policies;
 - f. The DNS did not show adequate consideration of cumulative impacts;
 - g. The DNS improperly incorporated certain environmental information;
 - h. The DNS did not adequately consider certain relevant City policy documents;and

- i. The DNS failed to adequately identify negative environmental impacts to the following elements of the environment: air; environmental health; transportation; and public services and utilities.
5. Prior to the hearing, the Appellant failed to timely file an exhibit and witness list. The City filed a motion to exclude exhibits and witnesses based on this failure. In keeping with past practice, the Hearing Examiner granted the City's motion, and the Appellant was precluded from filing any exhibits or witnesses. The record for the hearing ,therefore, was limited to the pleadings, a copy of the DNS at issue, testimony from City witnesses and legal argument presented by the parties.
6. At the hearing, the Appellant presented legal argument concerning the issues he had raised.
7. At the hearing, the City called Dongho Chang, the City's Transportation Engineer. Mr. Chang testified as an expert that the proposal would have negligible or a positive impact on the City's transportation infrastructure, based on studies from other jurisdictions. The City then called Joel Miller, who is managing the proposal for SDOT. Mr. Miller testified as to the proposed number of e-scooters and bikes. Mr. Miller also testified to the mitigation identified in the checklist that addresses air, environmental health, transportation, and public services, various elements of the proposed project.
8. SMC 25.05.752 defines "Impacts" as "the effects or consequences of actions. Environmental impacts are effects upon the elements of the environment listed in Section 25.05.444."
9. The impacts to be considered in environmental review are direct, indirect, and cumulative impacts. SMC 25.05.060 D.
10. "A proposal's effects include direct and indirect impacts caused by a proposal. Impacts include those effects resulting from growth *cause by a proposal*" SMC 25.05.060 D. (Emphasis added.)
11. "Probable" is defined in SMC 25.05.782 as "likely or reasonably likely to occur"
12. SMC 25.05.794 defines "significant" as "a reasonable likelihood of more than a moderate adverse impact on environmental quality. . . . Significance involves context and intensity . . . The context may vary with the physical setting. Intensity depends on the magnitude and duration of an impact Section 25.05.330 specifies a process, including criteria and procedures, for determining whether a proposal is likely to have a significant adverse environmental impact."
13. SMC 25.05.330 directs that, in making the threshold determination, the responsible official shall determine "if the proposal is likely to have a probable significant

adverse environmental impact” If the responsible official “reasonably believes that a proposal may have” such an impact, an environmental impact statement is required. SMC 25.05.360.

14. The City’s SEPA Overview Policy states, in part, that:

[m]any environmental concerns have been incorporated in the City’s codes and development regulations. Where City regulations have been adopted to address an environmental impact, it shall be presumed that such regulations are adequate to achieve sufficient mitigation subject to the limitations set forth in subparagraphs D1 through D7 below.

15. SMC 25.05.665 D. Subparagraphs D.1 through D.7 cover situations where existing regulations may be inadequate or unavailable to assure mitigation of adverse impacts, and thus, SEPA-based mitigation is appropriate.

16. The SEPA Cumulative Effects Policy, SMC 25.05.670, states that:

A. Policy Background.

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;

. . . .

B. Policies.

1. The analysis of cumulative effects shall include a reasonable assessment of:

- a. The present and planned capacity of such public facilities as sewers, storm drains, solid waste disposal, parks, schools, streets, utilities, and parking areas to serve the area affected by the proposal;
- b. The present and planned public services such as transit, health, police and fire protection and social services to serve the area affected by the proposal;
- c. The capacity of natural systems—such as air, water, light, and land—to absorb the direct and reasonably anticipated indirect impacts of the proposal; and
- d. The demand upon facilities, services and natural systems of present, simultaneous and known future development in the area of the project or action.

Conclusions

1. The Hearing Examiner has jurisdiction over this appeal pursuant to SMC 25.05.680.B, which also requires that the Hearing Examiner give substantial weight to the Director’s determination.
2. The party appealing the Director’s determination has the burden of proving that it is “clearly erroneous.” *Brown v. Tacoma*, 30 Wn. App. 762, 637 P.2d 1005 (1981).

- Under this standard of review, the decision of the Director may be reversed only if the Hearing Examiner is left with the definite and firm conviction that a mistake has been committed. *Cougar Mt. Assoc. v. King County*, 111 Wn. 2d 742, 747, 765 P.2d 264 (1988).
3. Neither the SEPA statute nor the SEPA rules identify a baseline for environmental analysis. However, environmental impact analysis in relation to existing conditions is the norm. *See, e.g., East County Reclamation Co. v. Bjornsen*, 125 Wn. App. 432, 435, 105 P.3d 94 (2005); *Floating Homes Assoc. v. Washington Dept. of Fish and Wildlife*, 115 Wn. App. 780, 785, 64 P.3d 29 (2003); *Thornton Creek Legal Defense Fund v. City of Seattle*, 113 Wn. App. 34, 59, 52 P.3d 522 (2002); *Richland Homeowners Preservation Ass'n. v. Young*, 18 Wn. App. 405, 411, 568 P.2d 818 (1977).
 4. Nothing in SEPA requires that an agency's environmental review be completely contained within the Checklist and DNS. A DNS is simply a variation of a prescribed form, and normally does not include an analysis of the proposal. *See, e.g. SMC 25.05.970*. An agency is required to review the Checklist, SMC 25.05.330 A.1, but it may also require more information of the applicant, conduct further study and consult with other agencies about the proposal's potential impacts. SMC 25.05.335. It is expected that the agency will utilize its own knowledge and expertise in analyzing the proposal. As noted above, the question on review is whether the agency actually considered environmental factors. *See Hayden v. City of Port Townsend*, 93 Wn. 2d 870, 881, 613 P.2d 1164 (1980), *overruled on other grounds, Save a Neighborhood Environment (SANE) v. City of Seattle*, 101 Wn.2d 280, 286, 676 P.2d 1006 (1984). Therefore, the Examiner will review the appeal issues as if they were framed in terms of SDOT's actual consideration of the alleged project impacts.
 5. Appellant complains generally that the proposal's negative environmental impacts were not adequately analyzed, but Appellant failed to cite any facts or evidence in the record demonstrating the probability that the proposal will cause any significant environmental impacts warranting an EIS. It is not sufficient for Appellant to simply allege inadequacies with the DNS environmental review. Instead, to prevail on the appeal of a DNS, Appellant must demonstrate that there are probable significant negative impacts associated with the proposal. The purpose of the environmental review is not simply to look at all imaginable impacts that may be associated with the proposal, but instead is wholly directed at identifying any probable significant impacts associated with the proposal. In the absence of evidence showing any probable significant impacts associated with the proposal, no additional SEPA review is required. In this case, the Appellant simply raised a series of issues and concerns, with the proposal, without introducing any evidence that the proposal would have any probable significant impacts. Thus, the Appellant failed to satisfy a fundamental element required to prevail in his appeal requesting a remand of the DNS.

6. Under SEPA, when a DNS is issued for a proposal, the alternative analysis called for by the Appellant is not required.
7. No evidence was introduced to show that in considering the environmental impacts, the City weighed the benefits of the proposal against the proposal's impacts.
8. Based on the testimony from the City, the DNS adequately considered cumulative impacts.
9. The City's hearing testimony demonstrated that the City made a *prima facie* showing it procedurally complied with SEPA
10. There is no evidence in the record that the proposed legislation would have a significant adverse impact.
11. The Appellant has not met his burden of proving that the Director's SEPA threshold determination is clearly erroneous.

Decision

The Director's decision to issue a Determination of Nonsignificance for the proposed ordinance is not clearly erroneous and is **AFFIRMED**.

Entered this 28th day of May, 2020.

s/Ryan Vancil
Ryan Vancil, Hearing Examiner
Office of Hearing Examiner

Concerning Further Review

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

The decision of the Hearing Examiner in this case is the final SEPA decision for the City of Seattle. Judicial review under SEPA shall be of the decision on the underlying governmental action together with its accompanying environmental determination. Consult applicable local and state law, including SMC Chapter 25.05 and RCW 43.21C.076, for further information about the appeal process.

If a transcript of the hearing is required by superior court, the person seeking review must arrange for and initially bear the cost of preparing a verbatim transcript of the hearing.

Instructions for preparation of the transcript are available from the Office of Hearing Examiner, Room 1320, 618 Second Avenue, Seattle, Washington 98104, (206) 684-0521.

**BEFORE THE HEARING EXAMINER
CITY OF SEATTLE**

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this date I sent true and correct copies of the attached **Findings and Decision** to each person listed below, or on the attached mailing list, in the matter of **Douglas B. MacDonald** Hearing Examiner Files: **W-19-007**, in the manner indicated.

Party	Method of Service
Appellant Douglas B. MacDonald dbmacdonal@earthlink.net	<input type="checkbox"/> U.S. First Class Mail, postage prepaid <input type="checkbox"/> Inter-office Mail <input checked="" type="checkbox"/> E-mail <input type="checkbox"/> Fax <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Legal Messenger
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Dated: May 28, 2020

/s/ Bonita Roznos

 Bonita Roznos
 Executive Assistant