

**CENTRAL PUGET SOUND
GROWTH MANAGEMENT HEARINGS BOARD
STATE OF WASHINGTON**

BENAROYA, ET AL.,)	
)	Consolidated
Petitioners,)	Case No. 95-3-0072
)	
and)	ORDER ON REDMOND’S
)	DISPOSITIVE MOTIONS AND
SKCAR and BIAW,)	BENAROYA’S MOTION TO
)	INTERVENE AS A PARTY
Intervenors,)	
)	
v.)	
)	
CITY OF REDMOND,)	
)	
Respondent.)	
<hr style="width:40%; margin-left:0;"/>		

I. procedural Background

On September 15, 1995, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review from the Benaroya Shareholders Trust, Larry R. Benaroya, Trustee (**Benaroya**). On September 25, 1995, the Board received a Petition for Review from Universal Holdings Ltd. Partnership II and Cosmos Development and Administration Corp. (**Universal Cosmos**). Both the Benaroya and the Universal Cosmos petitions for review allege that the Comprehensive Plan (the **Plan**) adopted by the City of Redmond (the **City** or **Redmond**) does not comply with the Growth Management Act (**GMA** or the **Act**).

On October 1, 1995, the Board issued an Order of Consolidation and Amended Notice of Hearing in the consolidated case and assigned Case No. 95-3-0072.

On November 14, 1995, the Board entered a “Prehearing Order and Order Granting Motion to Intervene by Seattle-King County Association of Realtors (**SKCAR**) and Building Industry Association of Washington (**BIAW**)” (the **Prehearing Order**).

On December 8, 1995, the Board received “Respondent, City of Redmond’s Dispositive Motions” (the **City’s Motion**) and “Respondent, City of Redmond’s Memorandum of Authorities

in Support of City’s Dispositive Motions” (the **City’s Memorandum**).

On December 15, 1995, the Board received “Petitioner Cosmos’ Response to City of Redmond’s Motion to Dismiss for Failure to Exhaust Administrative Remedies,” (the **Universal Cosmos Response**) and “Petitioner Benaroya’s Response to City of Redmond’s Motion to Dismiss” (the **Benaroya Response**) and “Benaroya’s Motion and Memorandum in the Alternative to Intervene as a Party” (**Benaroya’s Motion**). No response was received from BIAW.

On December 22, 1995, the Board received “Respondent, City of Redmond’s Reply Memorandum in Support of City’s Dispositive Motions to Dismiss Benaroya Petition and to Dismiss SEPA Claims of Universal Cosmos, and in Opposition to Benaroya’s Motion to Intervene” (the **City’s Reply**).

On January 2, 1996, the Board received the “Supplemental Affidavit of Elaine L. Spencer in Opposition to Motion to Dismiss Benaroya Shareholders Trust” (the **Spencer Supplemental Affidavit**).

II. FINDINGS OF FACT

1. A Draft Environmental Impact Statement (**DEIS**) for the Plan was issued on August 29, 1994. Ex. G to City Memorandum, at ii.
2. On August 25, 1994, the City issued a press release on the availability of the DEIS and Planning Commission Public Hearings on the DEIS. Ex. M to City Memorandum.
3. On October 12, 1994, Oscar Del Moro, Development Manager for Universal Cosmos, commented on the DEIS. Ex. N to City Memorandum.
4. A Final Environmental Impact Statement (**FEIS**) for the Plan was issued on March 1, 1995. Ex. H to City Memorandum, at ii..
5. Universal Cosmos’ comment on the DEIS was included in the FEIS, at page 2-34. Ex. N to City Memorandum.
6. The Planning Commission issued a recommended Draft Plan on May 1, 1995. City Memorandum, at 4.
7. The City adopted the Redmond Comprehensive Plan on July 18, 1995. Plan, at 3.
8. On September 19, 1995, the City’s Planning Director, Roberta Lewandowski, sent a

memorandum to the Mayor and City Council. Attached to that memorandum was a copy of the Benaroya Petition for Review. The copy of the Benaroya Petition for Review attached to the memo bears the stamp “Received Sep 15 1995 CITY OF REDMOND CITY CLERK.” Spencer Supplemental Affidavit, Attachment to Exhibit A.

9. BIAW was granted intervenor status under the Board’s Prehearing Order of November 14, 1995.

III. MOTIONS TO DISMISS

Redmond’s Motion consists of three parts:

1) Dismissing the Petition for Review filed by Benaroya for improper service upon the City

WAC 242-02-230 provides:

(1) The original and three copies of the petition for review shall be filed with a board personally, or by first class, certified, or registered mail. Filings may also be made with a board by telegraph or by electronic telefacsimile transmission as provided in WAC 242-02-240 . A copy of the petition for review shall be served promptly upon all other named parties. When a county is a party, the county auditor shall be served in noncharter counties and the agent designated by the legislative authority in charter counties. The mayor, city manager, or city clerk shall be served when a city is a party. When the state of Washington is a party, the office of the attorney general shall be served at its main office in Olympia unless service upon the state is otherwise provided by law. Proof of service may be filed with the board pursuant to WAC 242-02-340 .

(2) A board may dismiss a case for failure to substantially comply with subsection (1) of this section. (Emphasis added).

The Benaroya Petition for Review was received by the Redmond City Clerk on September 15, 1995. Finding of Fact No. 8. The copy of the Petition for Review bearing the City Clerk’s stamp is undisputed evidence that the “city clerk” was served, regardless of whether the Clerk herself or a duly authorized employee wielded her stamp. Therefore, Benaroya’s petition for review was filed pursuant to the requirements of WAC 242-02-230 and the City’s Motion to Dismiss for improper service will be denied.

2) Dismissing any and all SEPA claims by Universal Cosmos for failure to exhaust administrative remedies

Redmond's Municipal Code provides:

20F.30.250 SEPA APPEALS. Any interested person may appeal a threshold determination, adequacy of a final EIS and the conditions or denials of a requested action made by a non-elected City Official pursuant to the procedures set forth in Section 20F.20.200 APPEALS. No other SEPA appeals shall be allowed.

Redmond's Municipal Code further provides:

20.200(5) Purpose/Scope - The purpose of this section is to provide for the review of decisions by the Technical Committee, other administrative officials, the Hearing Examiner, and the Design Review Board made in the course of interpretation and administering the Development Guide and the State Environmental Policy Act (RCW 43.21C).

...

20.200(15) Time for Filing Appeals - All appeals filed pursuant to this Section must be filed in writing with the Department of Community Development within ten (10) working days of the date of the decision appealed from...

SEPA imposes an exhaustion of remedies requirement on appeals. RCW 43.21C.075(4) provides:

If a person aggrieved by an agency action has the right to judicial appeal and if an agency has an appeal procedure, such person shall, prior to seeking any judicial review, use such agency procedure if any such procedure is available, unless expressly provided otherwise by statute.

Universal Cosmos was aware of the DEIS for the Plan, as evidenced by its comment letter on the DEIS. Universal Cosmos does not dispute the City's assertion that no appeal of the Plan FEIS was submitted, nor does it dispute the assertion that it received a copy of the FEIS. Thus, the Board must presume that Universal Cosmos was aware of the City's appeal process.

The City argued that none of the cases cited by Universal Cosmos supports its position that submitting letters and testimony is a substitute for exhaustion. City Reply, at 12. The Board finds the City's Reply to Universal Cosmos' brief to be totally persuasive. It convincingly refutes the Universal Cosmos Response. The Board concludes that Universal Cosmos therefore did not exhaust its administrative remedies. ^[1]

3) *Dismissing the BIAW as a party for lack of standing*

The City's argument is misplaced. BIAW is an intervenor in this matter rather than a petitioner.

The Board's Rules of Practice and Procedure require that, as part of a petition for review, a petitioner must show standing. WAC 242-02-210(d). However, no such requirement exists for an intervenor. Instead WAC 242-02-270(2) provides:

In determining whether a person qualifies as an intervenor, the presiding officer shall apply the applicable superior court rules (CR) of this state.

The matter of BIAW's qualifications as an intervenor were the specific focus of BIAW's motion to intervene, including briefing by the City in opposition. The Board has already ruled in that matter and will not revisit it here. The portion of the motion to dismiss BIAW as a party for lack of standing will therefore be denied.

IV. ORDER

Having reviewed the above-referenced documents and having deliberated on the matter, the Board enters the following order:

- 1) That portion of the City's Motion that deals with dismissing the Benaroya petition for review for improper service is **denied**. Therefore, the Board need not and will not rule on Benaroya's Motion to Intervene in the event the City's Motion had been granted.
- 2) That portion of the City's Motion that deals with dismissing any and all SEPA claims by Universal Cosmos is **granted**. Legal issue No. 19 as set forth in the Prehearing Order is **dismissed with prejudice**.
- 3) That portion of the City's Motion that deals with dismissing BIAW as an intervenor in the case for lack of standing is **denied**.

So ORDERED this 9th day of January, 1996.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

M. Peter Philley
Board Member

Joseph W. Tovar, AICP
Board Member

Chris Smith Towne
Board Member

[\[1\]](#) The Board agrees with the City that the level of detail required for a Plan EIS is not the rigorous geotechnical and engineering analysis that accompanies project SEPA reviews, such as the 160th Avenue Extension project. Likewise, the City correctly points out that Petitioner will have the opportunity to file an appeal of the City's SEPA compliance actions for the road project.