



## **II. FINDINGS OF FACT**

1. On January 30, 1996, the Redmond City Council (the **Council**) passed Ordinance 1873. This ordinance was identified as “Agriculture Regulations and Transfer of Development Rights.” The ordinance was published on February 7, 1996. *See* Redmond’s Motion to Dismiss, Exhibit A.

2. On April 5, 1996, Cosmos filed a Petition for Review of Ordinance 1873.

3. On May 7, 1996, the Council passed Ordinance 1886. This ordinance was identified as “Interim Floor Area Regulations TDR Program.” The ordinance was published on May 15, 1996. *See* Redmond’s Motion to Dismiss, Exhibit C.

## **III. CITY’S MOTION TO DISMISS COSMOS Petition**

Cosmos’ petition seeks review of Redmond Ordinance 1873, a transfer of development rights (**TDR**) ordinance, alleging that it does not comply with the requirements of RCW 36.70A.060(4). *See* Cosmos’ Petition, at 3.

### *Redmond's Position*

Redmond seeks to dismiss Cosmos’ Petition because the City believes the issues raised therein are now moot. *See* Redmond’s Motion to Dismiss, at 1. Redmond asserts that the basis of Cosmos’ Petition is that, under Ordinance 1873, those development rights which are allowed to be transferred do not result in a meaningful transfer because transfers are based on increased floor area ratios (**FAR**) and the receiving zones identified in the Redmond zoning code did not limit floor area. *Id.*, at 2.

In its motion, Redmond appears to concede that Ordinance 1873 may not meet the standards of “viability,” “reasonableness,” or “practicality” insofar as it did not contain a limit on FARs in the receiving zones. *See* Redmond’s Motion to Dismiss, at 4 (referencing Exhibit C, at 2). However, the City argues that to the extent that this is the basis for the Cosmos’ Petition, this defect was cured when Ordinance 1886 was adopted, because it introduces FAR limits in the receiving zones. *Id.*, at 3. Accordingly, Redmond contends that “[p]etitioners’ claims as to Ordinance 1873 are therefore moot and the Petition for Review must be dismissed” because the City has effected the relief that the Board would be able to provide Cosmos. *Id.*

### *Cosmos' Response*

Cosmos responds that the Board’s review of Ordinance 1873 should be limited to the record available at the time its petition was filed. *See* Cosmos’ Response, at 4. Cosmos argues that because Ordinance 1886 was adopted after its petition was filed, it was not part of the record and

therefore the Board should not consider Ordinance 1886 during its review of Ordinance 1873.*Id.*, at 3-4.

Alternatively, Cosmos argues that Redmond has failed to adequately support its assertion that the FARs established in Ordinance 1886 provide an effective cure to the alleged deficiencies of Ordinance 1873, and thus, even if Ordinance 1886 is considered, Redmond's TDR program remains not viable, reasonable or practical.*Id.*, at 6. Cosmos contends that Ordinance 1886 may not place sufficient restrictions on development in the receiving zones and that "no one will have any need for transferred development rights."*Id.*, at 7.

Lastly, Cosmos asserts that Ordinance 1886 is invalid because it was enacted without the necessary public participation.*Id.*, at 7-8.

### *Redmond's Rebuttal*

Redmond rebuts Cosmos' last response by stating that Ordinance 1886 was properly adopted as an interim regulation.*See* Redmond's Rebuttal, at 7. Redmond cites RCW 36.70A.390 as authorization for enacting an interim zoning ordinance "without a pre-adoption public hearing process, as long as a post-adoption public hearing is held and findings are the adopted justifying the continued application of the ordinance."*Id.*

Redmond also repeats its assertion that Ordinance 1886 renders all development rights authorized under Ordinance 1873 fully usable because either an area cited by Cosmos as being deficient was not authorized as a receiving area (the Overlake area) or Cosmos has not recognized an ongoing increase of FAR in the receiving zones.*Id.*, at 5-6. Redmond repeats its request that Cosmos' Petition be dismissed.

### Discussion

The Act requires the Board to base its review of petitions and decision on the record developed by the city, the county, or the state. RCW 36.70A.290(4). However, the Act also provides that the Board may supplement this record with additional evidence if the Board determines that such evidence would be of substantial assistance to the Board in reaching its decision.*Id.* Furthermore, the Board may take official notice of matters of law such as ordinances enacted by cities. WAC 242-02-660(3). If, as Redmond asserts, Ordinance 1886 corrects the alleged deficiencies of Ordinance 1873, prudence dictates that the Board review the correcting ordinance in conjunction with the allegedly deficient ordinance. Therefore, the Board takes official notice of Ordinance 1886. However, the issue presently before the Board is not whether Ordinance 1886 complies with the Act, but whether, because of its adoption, it is a moot question whether Ordinance 1873 complies with the Act.

Cosmos next argues that in order for the Board to grant Redmond's Motion to Dismiss, the City must prove that Ordinance 1886 cures the alleged defects in Ordinance 1873. *See* Cosmos' Response, at 6. Cosmos misunderstands the requirements of the Act and the burden of proof contained therein. The Act presumes development regulations and amendments to those regulations adopted pursuant to requirements of the Act are valid upon adoption. RCW 36.70A.320(1). To overcome this presumption, the petitioner must demonstrate by a preponderance of the evidence that the City has erroneously applied the Act. *Id.* Once the allegation is presented, the City need only answer the specific issues identified. Cosmos has attempted to shift this burden by requesting that the City demonstrate the overall effectiveness of the TDR program. The Act does not require the City to provide this demonstration. Therefore, the Board declines to require the City prove that Ordinance 1886 cures every defect contained in Ordinance 1873.

Lastly, Cosmos alleges that Ordinance 1886 is invalid because the City did not provide for public participation prior to adoption as required by the Act. *See* Cosmos' Response, at 7-8. Cosmos is correct that this may be an issue for Board review if Ordinance 1886 were the subject of a petition for review. However, this ordinance is not the subject of the present petition, and therefore, the Board will limit its review to the legal issues identified in the existing petition for review as stated in the Prehearing Order. The Board need not determine if Ordinance 1886 was adopted with sufficient public participation at this time.

Redmond is correct that a lack of transfer rights may render a TDR program not "viable, reasonable, or practical." The Board finds that Ordinance 1886 provides floor area limits in the receiving zones identified in Ordinance 1873 and that, with the addition of Ordinance 1886, Redmond's TDR program contains development rights that may be transferred. Therefore, to the extent that Cosmos' complaint with Ordinance 1873 was that it lacked a limit on FARs in the receiving zones, that legal issue is moot.

The Board also finds, however, that the legal issues contained in this petition are not confined to that narrow question.<sup>[1]</sup> Therefore, to the extent that Cosmos' continues to argue that other aspects of Ordinance 1873 do not comply with the GMA, these issues are not moot. Therefore, the Board declines to grant Redmond's Motion to Dismiss on the remaining issues.

#### **IV. ORDER**

Having reviewed the documents listed above that were filed with the Board in support of and in opposition to the dispositive motions before the Board, and having deliberated on the matter, the Board enters the following order.

1. As a result of Redmond's adoption of Ordinance 1886, legal questions alleging a lack of transfer of development rights within Ordinance 1873 are now moot. The portion of

Redmond's Motion to Dismiss in that portion of Legal Issue 1 is **granted**.

2.The portion of Redmond's Motion to Dismiss that seeks to dismiss the remainder of Legal Issue 1 or Legal Issue 2 is **denied**.

So ORDERED this 7th day of June, 1996.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

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M. Peter Philley  
Board Member

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Joseph W. Tovar, AICP  
Board Member

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Chris Smith Towne  
Board Member

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XI.Statement of Legal Issues1.Does the GMA, at RCW 36.70A.060(4), require that a purchase or transfer of development rights program be viable, reasonable or practical, and if so, does Ordinance 1873 meet that standard?2. Will the continued validity of Ordinance 1873 substantially interfere with the fulfillment of the goals of the Act? *Cosmos v. Redmond*, Prehearing Order, at 6.