

SEP 13 11 13 AM '83

BEFORE THE LAND USE BOARD OF APPEALS  
OF THE STATE OF OREGON

CITADEL CORPORATION, an )  
Oregon corporation, DOUGLAS )  
E. KAUFMAN and WARREN A. )  
McMINIMEE, )  
Petitioners, )  
vs. )  
TILLAMOOK COUNTY, )  
Respondent. )

LUBA No. 83-049

FINAL OPINION  
AND ORDER

Appeal from Tillamook County.

Timothy V. Ramis, Portland, filed the Petition for Review and argued the cause on behalf of Petitioners.

Lynn Rosik, Tillamook, filed the brief and argued the cause on behalf of Respondent.

BAGG, Board Member.

AFFIRMED

09/13/83

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of Oregon Laws 1979, ch 772, sec 6(a), as amended by Oregon Laws 1981, ch 748.

1 BAGG, Board Member.

2 NATURE OF THE DECISION

3 Petitioners appeal Respondent Tillamook County's denial of  
4 an application for a zone change from rural residential to  
5 rural residential with a planned unit development overlay (RR  
6 to RR-PD). Petitioners ask the Board to reverse the decision.

7 On August 11, 1982 petitioners asked for a zone change from  
8 RR to RR-PD for a 13 acre portion of a 32 acre ownership in  
9 Tillamook County. Part of the property is zoned rural  
10 residential, and the remainder is zoned F-1, a farm use zone.  
11 The purpose of the planned unit development overlay was to  
12 allow for the placement of single family dwellings.

13 Several hearings were held on the matter, and on March 16,  
14 1983, the board of commissioners voted in a two to one decision  
15 to direct staff to prepare findings to deny the request. On  
16 April 20, 1983, the board of commissioners passed a motion to  
17 adopt those findings. The findings were adopted and signed on  
18 April 20, 1983.

19 FIRST ASSIGNMENT OF ERROR

20 "RESPONDENT IMPROPERLY ANNOUNCED THE APPLICABLE LAW."

21 In this assignment of error, petitioners complain the  
22 county did not announce its standards in advance of the  
23 decision. Petitioners argue the county relied on its own  
24 definition of "compatibility," "detrimental" and "general  
25 welfare" to deny the request; and, these definitions were not  
26

1 made available to the parties prior to the hearing, or even  
2 during the course of the hearing. Petitioners assert the  
3 county was under an obligation to allow for public input into  
4 the development of the "compatibility" standard. In the  
5 alternative, the county should have announced the standard  
6 during the course of the proceeding so the applicant would have  
7 a chance to comment on it and gear his presentation to it. The  
8 county failed to follow either possible procedure, according to  
9 petitioners. See Springfield Education Association v The  
10 School District, 290 Or 217, 621 P2d 547 (1980); Marbet v  
11 Portland General Electric Company, 277 Or 447, 561 P2d 154  
12 (1977).

13 Petitioners claim the county's alleged defect violates  
14 general principles established in the Marbet case and further  
15 violates the specific requirement in ORS 215.416(5) that  
16 approval or denial of a permit application "shall be based on  
17 standards and criteria which shall be set forth in the zoning  
18 ordinance or other appropriate ordinance or regulation of the  
19 county...." Also, petitioners' allege the procedure violates  
20 Goal 1 in that it does not allow citizens an opportunity to be  
21 involved in all phases of the planning process. Petitioners  
22 complain only the staff and the board of commissioners were  
23 involved in the formulation of the standards used, and no  
24 citizen had the opportunity to participate.<sup>1</sup>

25 Lastly, petitioners allege a violation of Goal 2 on the  
26 ground that there was no hearing conducted on the subject of

1 specific definitions of the general standards, and therefore,  
2 this form of "implementation measure" was not adopted after  
3 public hearing in violation of Goal 2.<sup>2</sup>

4 Respondent County argues the county clearly explained what  
5 it meant by "compatible" and other terms used in its order.  
6 The county says all that is required of ORS 215.416 is that the  
7 county make a brief statement explaining the criteria and  
8 standards and the county made such a statement. The county  
9 further complied with ORS 215.416(5) in that the standards for  
10 the approval of this project were set out in Tillamook County  
11 Zoning Ordinances, Sections 9.020(2) and 9.020(3).<sup>3</sup> The  
12 standards in the county's zoning ordinance were adopted after  
13 public hearings, and there has, therefore, been neither a Goal  
14 1 nor a Goal 2 violation, according to the county.

15 The county order in this matter explains the standards and  
16 criteria used. The following is from the county's order:

17 "Section 9.020 (3)(b) requires consideration of the  
18 land use compatibility of the proposed zone with the  
19 existing developed land use pattern in the vicinity.  
20 Compatibility is assigned its ordinary meaning; in  
21 Webster's New World Dictionary, 'compatible' is  
22 defined as 'capable of living together harmoniously or  
getting along well together; in agreement;  
congruous'.[sic] Land use compatibility means that  
adjacent uses exist harmoniously, with one use not  
seriously infringing or interfering on the ability of  
others to function.

23 "To show land use compatibility of a proposed zone  
24 with adjacent land uses and land uses in the vicinity,  
25 an applicant needs to introduce evidence to show that  
26 the uses permitted in the proposed zone are  
non-obtrusive on neighboring uses (both adjacent and  
in the vicinity).

1 "Section 9.020 (3)(c) requires denial of a zone change  
2 if the change would be detrimental to surrounding or  
3 adjacent properties. To rephrase this statement, the  
4 applicant needs to show that the proposed new zone  
5 will not be detrimental to surrounding properties.  
6 They key term is 'detrimental'. [sic] It is  
7 interpreted to mean damaging or harmful to the uses in  
8 the area. The damage or harm may be from noise,  
9 geologic hazard, or increased risk of flooding. It  
10 may also be from a demonstrated limitation of the  
11 ability of surrounding uses to function  
12 economically."<sup>4</sup>

13 "Section 9.020 (3)(d) requires denial if a proposed  
14 zone change conflicts with the comprehensive plan. An  
15 applicant must show conformity with relevant sections  
16 of the comprehensive plan. The comprehensive plan was  
17 adopted in December, 1981 and took effect in June,  
18 1982. As of this date the comprehensive plan is not  
19 acknowledged by the Land Conservation and Development  
20 Commission. State law requires the county to apply  
21 the statewide goals to all land use decisions made  
22 until a plan is acknowledged. ORS 197.175(2)(c).

23 "Section 9.020 (3)(c) requires denial of a zone change  
24 if the change would adversely affect the 'public  
25 health, safety and general welfare.' The applicant  
26 must show that the proposed change would not adversely  
27 affect the public health, safety and general welfare.  
28 Health considerations involve water, sanitation, air  
29 quality and other possible pollutants or wastes.  
30 Safety consideraions include traffic, fire hazards,  
31 flooding and geologic hazards. 'General welfare'  
32 requires consideration and balancing of environmental,  
33 economic, energy and social consequences of the  
34 proposal.

35 The Board finds the county has used common dictionary  
36 definitions of terms that exist in its ordinance. The Board  
37 does not believe a rule making proceeding, ordinance amendment  
38 or special announcement is necessary before terms having common  
39 dictionary meanings may be applied by a local government and  
40 relied upon in findings and an order. The order gives a clear  
41 understanding of the standards used and how the county believed

1 they were to be applied. The Board does not believe  
2 petitioners could be surprised or prejudiced by the meaning  
3 which the county attached to the terms of its ordinance.  
4 Further, there is no claim that the adoption of these standards  
5 in the county ordinance violated state law or LCDC goals. The  
6 Board finds the county acted correctly in its use of its  
7 ordinance and the standards therein. There is no error as  
8 alleged. See Footnote 8, supra.

9 The first assignment of error is denied.

10 SECOND ASSIGNMENT OF ERROR

11 "RESPONDENT ADOPTED SHAM FINDINGS.

12 "A. Deliberations Improperly Took Place Outside of a  
13 Public Hearing."

14 In this subassignment of error petitioners allege that  
15 deliberations took place outside the proper forum in violation  
16 of Oregon's Open Meeting Law. ORS 192.610 to 192.690.  
17 Petitioners further allege that violations of the open meeting  
18 law constitute reversible error in land use proceedings because  
19 such violations are also violations of planning and zoning  
20 hearings requirements set out in ORS 215.416(4).<sup>5</sup>

21 Petitioners allege private deliberations violate Goals 1  
22 and 2 because citizens are not involved in "all phases" of the  
23 planning process and because decisions "cannot be made based  
24 upon an adequate factual base if irrelevant concerns which are  
25 not part of the record become the basis for private  
26 deliberations." Petition for Review at 7.

1       The Board does not believe the evidence is sufficient to  
2 show that any private deliberations took place. The Board has  
3 denied petitioners' motion for a special evidentiary hearing on  
4 the ground that petitioners were not able to assert more than a  
5 hunch or speculation that such meetings took place. See "Order  
6 Denying Motion for Special Evidentiary Hearing" issued this  
7 date. Without clear proof that the decision was made in a  
8 manner not contemplated by state land use criteria, the Board  
9 will not hold the county to have committed error.

10       The Board does not reach the matter of whether or not  
11 private deliberations conducted in violation of the open  
12 meeting law result in violation of statute or statewide  
13 planning goals. The Board will not rule on the legality of  
14 circumstances it has not found to exist.

15       "B. The Decision Was Reached on a Basis Other Than  
16       Those Described in the Findings."

17       In this subassignment of error, petitioners allege the  
18 actual reason for denial is "the financial and other  
19 implications of the Commissioners' fear that DLCD would contest  
20 the decision." Petitioners allege these fears are irrelevant  
21 to the decision-making standards and not described in the  
22 findings. Decisions made on this basis violate ORS 215.416(5)  
23 requiring approval or denial of a permit to be based on  
24 standards and criteria set forth in the ordinance," according  
25 to petitioners. Petitioners also say a decision based on  
26 criteria not found in the zoning ordinance is a violation of

1 ORS 215.416(6) which requires a brief statement accompanying  
2 the decision explaining the criteria and standards considered,  
3 stating the facts relied on and explaining the justification  
4 for the decision based on those criteria, standards and facts.  
5 Petitioners allege the county order violates the statute  
6 because it does not explain the relevance of considerations  
7 actually leading to the decision.

8 Petitioners go on to allege these facts show violation of  
9 Goal 1 in that petitioners and the public received inadequate  
10 feedback from the governing body on their concerns.<sup>6</sup>

11 Petitioners allege Goal 2 is broken because a decision based  
12 upon facts not contained in the findings violates the Goal 2  
13 mandate that a factual base exist for each decision.

14 The Board understands petitioners to be referring to the  
15 alleged statements of Commissioner Carol Williams as set forth  
16 in the affidavit of Douglas E. Kaufman in support of  
17 petitioners' motion for an evidentiary hearing. Commissioner  
18 Williams is alleged to have said that she voted against the  
19 proposal because of "the announced opposition of Jim Ross the  
20 Director of LCDC" and "financial problems the County is now  
21 having with the jail." She is also alleged to have stated that  
22 the county wants to spend money on other property. Finally,  
23 she is alleged to have stated that were it not for these  
24 reasons, she would have voted for the requested zone change.

25 The Board believes that the written decision is what  
26 controls. Assuming Commissioner Williams made the statements



1 alleged does not mean that when faced with the written reasons  
2 for denial, the Commissioner disbelieved the written reasons.  
3 That Commissioner Williams is alleged to have said she would  
4 have voted for approval (or presumably to draw findings for  
5 giving approval) is also not determinative of the outcome. At  
6 the time of the alleged conversation, the facts had yet to be  
7 found. See Heilman v City of Roseburg, 39 Or App 71, 59 P2d  
8 290 (1979). The vote to prepare findings for denial of the  
9 zone change was not the "decision." A further act had to  
10 follow -- the written order of denial. See Bettis v City of  
11 Roseburg, 1 Or LUBA 174 (1980). What controls the outcome of  
12 the case is the written decision, not a preliminary directive  
13 to staff. See Sloane v Walsh, 245 N.Y. 208, 156 N.E. 668  
14 (1927).<sup>7</sup>

15 As to an alleged violation of ORS 215.416(5) and ORS  
16 215.416(6), the Board understands the substance of petitioners'  
17 argument to be that the county's decision was based on  
18 considerations other than those found in the zoning ordinance,  
19 e.g., budgetary concerns resulting from an anticipated  
20 challenge by LCDC. Therefore, according to petitioners, the  
21 county's decision was actually based on facts and criteria not  
22 in the ordinance and these facts and criteria were not revealed  
23 in the county's written decision.

24 Because the Board has found insufficient evidence to  
25 establish the county's decision was based on considerations  
26 other than those in the record, this subassignment of error

1 must fail.<sup>8</sup>

2 As to an alleged violation of Goal 1, the Board finds no  
3 violation. If the Board assumes the county commissioner made  
4 the statements alleged, that does not mean citizens have been  
5 denied access to the planning process. What exists in a  
6 particular commmssioner's mind is not a subject for feedback to  
7 the public except as may be expressed in a lawfully executed  
8 order. The goal's requirement that "the rationale used to  
9 reach land use policy decisions be available in the form of a  
10 written record" is satisfied by the issuance of the county's  
11 order.

12 Similarly, the Board finds no violation of Goal 2 as  
13 alleged. A "factual base" for the decision as called for in  
14 the goal exists in the written order whether or not a  
15 particular commissioner believes that other facts exist which  
16 may be relevant to the case. The goal requires there be an  
17 adequate factual base, and if adequate facts are expressed in  
18 the order, the goal is satisfied. The facts in the instant  
19 case, even as alleged, however, do not show that there is an  
20 inadequate factual base for this decision.

21 This second assignment of error is denied.

22 The decision of Tillamook County is affirmed.

FOOTNOTES

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3 1

"Citizen Influence - To provide the opportunity for citizens to be involved in all phases of the planning process. Citizens shall have the opportunity to be involved in the phases of the planning process as set forth and defined in the goal and guidelines for Land Use Planning, including Preparation of Plans and Implementation Measures, Plan Content, Plan Adoption, Minor Changes and Major Revisions in the Plan and Implementation Measures." Goal 1

8  
9 2

"All land use plans and implementation ordinances shall be adopted by the governing body after public hearing and shall be reviewed and, as needed, revised on a periodic cycle to take into account changing public policies and circumstances, in accord with a schedule set forth in the plan. Opportunities shall be provided for review and comment by citizens and affected governmental units during preparation, review and revision of plans and implementation ordinances." Goal 2, Part I.

15  
16 3

"(2) the Planning Commission shall employ the following procedure and criteria in the analysis of a zone map amendment request:

"(a) prepare a land use analysis of the site and affected surrounding area in the form of a map and text.

"(b) the above-mentioned land use analysis shall consider the following land use factors:

"(1) size, shape and orientation of land parcel.

"(2) topography, drainage and other physical site characteristics.

"(3) ownership identification of parcel.

"(4) economic and population data for affected area.

- 1                   "(5) traffic circulation and traffic standards
- 2                    where relevant.
- 3                   "(6) compatibility of the proposed new zone with
- 4                    the pattern of existing zoning and
- 5                    developed land usages in the site vicinity.
- 6                   "(7) photographs, when necessary.
- 7                   "(8) aesthetic factors.
- 8                   "(9) water supply and sewerage.
- 9                   "(10) other factors where relevant (e.g. nuisance
- 10                   characteristics, [sic] if any).
- 11                   "(3) the Planning Commission shall employ the following
- 12                    procedure and criteria in consideration of the
- 13                    Department report and in consideration of the proposed
- 14                    new zone with respect to its possible allowance or
- 15                    disallowance.
- 16                    "(a) study and discussion of Department report,
- 17                    considering all zoning and land use factors
- 18                    outlined in the report.
- 19                    "(b) give paramount attention to the effect of the
- 20                    proposed new zone on the existing developed land
- 21                    use pattern in the site vicinity, and
- 22                    particularly with respect to the factor of land
- 23                    use compatibility.
- 24                    "(c) a zone change shall not be granted if it would be
- 25                    detrimental to properties surrounding or adjacent
- 26                    to the area requested for zone change.
- 27                    "(d) a zone change shall not be granted if it is in
- 28                    conflict with the adopted comprehensive plan.
- 29                    "(e) a zone change shall not be granted if it would
- 30                    adversely affect the public health, safety and
- 31                    general welfare." Tillamook County Zoning
- 32                    Ordinance Sections 9.020(2) and 9.020(3).

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"Detrimental  
 "causing detriment: Harmful, damaging...." Webster's 3d  
 New International Dictionary, 1961.

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2 "Hearings under this section shall be held only after  
3 notice to the applicant and also notice to other persons as  
otherwise provided by law." ORS 215.416(4).

4  
6

5 Goal 1's feedback mechanism is

6 "[t]o assure that citizens will receive a response  
7 from policymakers."

8 "Recommendations resulting from the citizen  
9 involvement program shall be retained and made  
10 available for public assessment. Citizens who have  
11 participated in this program shall receive a response  
12 from policymakers. The rationale used to reach land  
13 use policy decisions shall be available in the form of  
14 a written record."

12  
7

13 "'Final decision or determination' means a decision or  
14 determination which has been reduced to writing and which  
15 bears the necessary signatures of the governing body."  
LUBA Rule 3(C), OAR 661-10-010(3).

15  
8

16 The parties have not raised the issue of whether ORS  
17 215.416 applies to this proceeding. ORS 215.416(5) and  
18 (6) may not apply. That statute establishes hearing  
19 requirements and criteria for granting or approving a  
20 permit application. A request for a zone change, while a  
21 contested case under ORS 215.402(1), is not a request for  
22 a permit for "a proposed development of land." ORS  
23 215.402(4). Changing the zone on a piece of property may  
24 facilitate the development of that property, but it does  
25 not constitute development itself. Cf Constant v City of  
26 Lake Oswego, 5 Or LUBA 311 (1982). The Board notes the  
substance of the requirements in ORS 215.416(5) and (6)  
apply to contested cases other than permit application  
because of Fasano v Board of County Commissioners, 264 Or  
574, 507 P2d 27 (1973).



## STATE OF OREGON

## INTEROFFICE MEMO

5.4

TO: MEMBERS OF THE LAND CONSERVATION AND DEVELOPMENT COMMISSION      DATE: 8/09/83

FROM: THE LAND USE BOARD OF APPEALS

SUBJECT: CITADEL CORPORATION v TILLAMOOK COUNTY  
LUBA NO. 83-049

Enclosed for your review is the Board's proposed opinion and order in the above captioned appeal.

This case is about a denial of a zone change. The zone change would place a planned unit development overlay on a rural residential zone in Tillamook County. The purpose of the zone change is to allow a planned unit development to be constructed at sometime in the future.

Petitioners allege violations of statewide planning Goals 1 and 2 in both assignments of error. In the first assignment of error, petitioners allege Goal 1 is broken because citizens were not afforded the opportunity to take part in the formulation of the standard used by the county to deny the zone change. Goal 2 is alleged to be violated because there was no hearing conducted to arrive at the standards. The Board rejects both complaints. The Board finds that the standards used were not the result of any ad hoc or illegal procedure but were contained in the existing county ordinance.

The second assignment of error alleges violations of statewide Goals 1 and 2 on the ground the decision made was not made in the appropriate forum. Because the decision was made outside of public view, according to petitioners, petitioners and the public received inadequate feedback (Goal 1), and an inadequate factual base existed for the decision (Goal 2).

The Board rejects both allegations because the Board does not find the county engaged in any impropriety as alleged. The Board holds it is the written order that controls a land use decision, and the Board does not agree with petitioners' charge that the written order in this case does not contain the reasons for denial.

The Board is of the opinion that oral argument will not assist the commission in its understanding or review of the statewide goal issues involved in this appeal. Therefore, the Board recommends that oral argument before the commission not be allowed.



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BEFORE THE  
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LAND USE  
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SEP 6 12 02 PM '83

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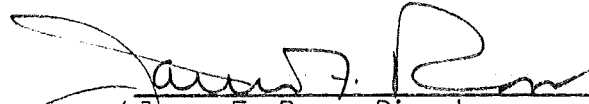
LUBA No. 83-049

LCDC DETERMINATION

The Land Conservation and Development Commission hereby approves the recommendation of the Land Use Board of Appeals in LUBA 83-049.

DATED THIS 31st DAY OF AUGUST, 1983.

FOR THE COMMISSION:

  
James F. Ross, Director  
Department of Land Conservation  
and Development

JFR:RE:jj  
5504B/76C