

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

3
4 DAN SMITH and MARY ANNE SMITH,)
5))
6 Petitioners,)
7))
8 vs.)
9))
10 LANE COUNTY,)
11))
12 Respondent,)
13))
14 and)
15))
16 JAMES KITTLESON,)
17))
18 Intervenor-Respondent.)

LUBA No. 92-206

FINAL OPINION
AND ORDER

19
20
21 Appeal from Lane County.

22
23 Michael Farthing, Eugene, filed the petition for review
24 and argued on behalf of petitioners. With him on the brief
25 was Gleaves, Swearingen, Larsen & Potter.

26
27 No appearance by respondent.

28
29 Lee D. Kersten, Eugene, filed the response brief and
30 argued on behalf of intervenor-respondent.

31
32 KELLINGTON, Referee; SHERTON, Chief Referee; HOLSTUN,
33 Referee, participated in the decision.

34
35 AFFIRMED 03/02/93

36
37 You are entitled to judicial review of this Order.
38 Judicial review is governed by the provisions of ORS
39 197.850.

1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a county decision determining the
4 existence of a nonconforming recreational cattle roping use
5 on a 14 acre, Rural Residential (RR-5) zoned parcel.

6 **MOTION TO INTERVENE**

7 James Kittleson moves to intervene on the side of
8 respondent in this appeal proceeding. There is no objection
9 to the motion, and it is allowed.

10 **FACTS**

11 The subject property is located approximately 1,200
12 feet southeast of the City of Coburg Urban Growth Boundary,
13 and one mile from the city limits of the City of Coburg.

14 Intervenor-respondent (intervenor) purchased the
15 property in 1972. From 1966 until April, 1977, the subject
16 property was zoned Agriculture, Grazing, Timber Raising
17 District (AGT). On April 27, 1977, the county zoned the
18 property Exclusive Farm Use (EFU). On February 29, 1984,
19 the property was rezoned RR-5.

20 This is the fourth appeal to this Board involving
21 county decisions regarding recreational cattle roping
22 activities on the subject property. In Kittleson v. Lane
23 County, 20 Or LUBA 286 (1990), the county denied
24 intervenor's application for a conditional use permit to
25 authorize commercial horseback riding ("jackpot roping") on
26 the property. We remanded that decision to the county on

1 the basis that it had misconstrued its code.

2 In Smith v. Lane County, ___ Or LUBA ___ (LUBA No. 91-
3 011, May 7, 1991) (Smith I), petitioners appealed county
4 approval of a conditional use permit to conduct "commercial
5 riding," including "jackpot roping," on the subject
6 property. The parties agreed to dismissal of that appeal.

7 In Smith v. Lane County, 21 Or LUBA 228 (1991) (Smith
8 II), petitioners appealed a decision of the county hearings
9 officer determining that, prior to the imposition of EFU
10 zoning in 1977, a multifaceted nonconforming recreational
11 cattle roping use had been established on the subject
12 property. We remanded this decision on three evidentiary
13 bases. First, we determined the record lacked substantial
14 evidence to support the hearings officer's determination
15 that a nonconforming recreational cattle roping use existed
16 on the subject property.¹ Second, we determined the record
17 lacked substantial evidence to support a determination that
18 there was a nonconforming use right to a cattle roping event
19 every weekend involving up to 40 participants and spectators
20 arriving in automobiles, some with horse trailers. Finally,
21 we determined the record lacked substantial evidence to
22 support the hearings officer's determination there was a
23 nonconforming use right to an annual jackpot roping event

¹The hearings officer determined the recreational cattle roping use consisted of 10 people arriving in automobiles, some with horse trailers, and participating in cattle roping activities until sunset every day of the "roping season."

1 including up to 100 participants arriving in automobiles,
2 some with horse trailers.

3 The county conducted public hearings in response to our
4 remand in Smith II for the purpose of accepting additional
5 evidence on the question of the existence and scope of
6 nonconforming use rights associated with the subject
7 property. The hearings officer determined there was a
8 limited nonconforming recreational cattle roping use
9 established on the property. Petitioners appealed to the
10 county board of commissioners, which summarily affirmed the
11 hearing officer's decision. This appeal followed.

12 **SECOND ASSIGNMENT OF ERROR**

13 "Lane County erred in rendering a decision that is
14 not supported by substantial evidence in the whole
15 record."

16 The issue under this assignment of error is whether
17 there is substantial evidence in the whole record to support
18 the hearings officer's determination that the following
19 nonconforming use of the property was established:

20 "The use of horses and cattle to practice
21 equine/bovine eventing is verified as to the
22 participation of up to ten individuals during any
23 one session." Record 94.

24 Petitioners contend the record lacks substantial
25 evidence to support the above quoted determination.²

²We note the challenged decision does not appear to determine much. We understand the decision to simply decide there is a nonconforming use right for up to 10 people per session to practice cattle roping on horseback on

1 Petitioners argue that under Younger v. City of Portland,
2 305 Or 346, 359, 752 P2d 262 (1988), the evidence they
3 presented on this issue sufficiently refutes intervenor's
4 evidence, such that it is unreasonable for the county to
5 rely on intervenor's evidence.

6 We have reviewed the evidence in the record cited by
7 petitioners and intervenor. The evidence in the record is
8 conflicting. However, there is nothing about petitioner's
9 evidence that so undermines intervenor's evidence that it is
10 unreasonable for the county to have relied upon intervenor's
11 evidence. The choice between conflicting believable
12 evidence belongs to the county. Angel v. City of Portland,
13 22 Or LUBA 649, 659, aff'd 113 Or App 169 (1992). We will
14 not disturb the county's choice here.

15 The second assignment of error is denied.

16 **FIRST ASSIGNMENT OF ERROR**

17 "Lane County erred by verifying a nonconforming
18 use consisting of practice sessions for team steer
19 roping events at a scope and level that was not
20 requested by the applicant and which would have
21 required a conditional use permit in the
22 applicable zoning district."

23 Under this assignment of error, petitioners argue that
24 the nonconforming use found to exist by the county was not
25 lawfully established. According to petitioners, under the
26 AGT zoning district applicable to the subject property at

the subject property. It does not identify the scope of that nonconforming use in any detail.

1 the time the nonconforming use was established, a
2 conditional use permit was required to conduct the disputed
3 cattle roping activities, but was never obtained.³

4 The county determined the approved nonconforming use,
5 consisting of up to 10 people practicing cattle roping with
6 horses, was a farm use allowed outright by the AGT zone, and
7 did not constitute "commercial riding," a listed conditional
8 use in the AGT zone.⁴

9 We are required to defer to the county's interpretation
10 of the AGT zone so long as its interpretation is not clearly
11 contrary to the express words, policy or context of the zone
12 or other plan or ordinance provisions. Clark v. Jackson
13 County, 313 Or 508, 836 P2d 710 (1992). The county's
14 interpretation is not clearly contrary to the AGT zone, or
15 any other provision of the county code or comprehensive plan
16 of which we are aware, in effect at the time the AGT zone
17 was applicable to the subject property.

18 The first assignment of error is denied.

³Under this assignment of error, petitioners also include a number of evidentiary challenges to the county's determination concerning the nonconforming use. We address petitioners' arguments in this regard under the second assignment of error, supra.

⁴Specifically, the hearings officer determined:

"At some point, activity concerning the training of horses for equine/bovine eventing (jackpot roping) becomes so minimal in regard to the number of participants, impacts and structure that it becomes accessory and incidental to normal farm uses. The evening practices, which were normally attended by [intervenor and his children], a few neighbors and friends and their children, fall within this category." Record 95.

1 The county's decision is affirmed.