

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

JAMES L. KITTLESON,)
)
Petitioner,)
)
vs.)
)
LANE COUNTY,)
) LUBA No. 90-112
Respondent,)
) FINAL OPINION
and) AND ORDER
)
GREGORY A. CALLISTER, VIRGINIA M.)
CALLISTER, MILDRED CLEVELAND,)
LYMAN JONES, LYLA JONES, JAROLD)
GASKILL, GERRI GASKILL, DANIEL)
W. SMITH, and MARYANNE SMITH,)
)
Intervenors-Respondent.)

Appeal from Lane County.

Lee D. Kersten, Eugene, filed the petition for review and argued on behalf of petitioner. With him on the brief was Hutchinson, Anderson, Cox, Parrish and Coons, P.C.

Stephen L. Vorhes, Eugene, filed a response brief and argued on behalf of respondent.

Robert M. Schrank, Eugene, filed a response brief and argued on behalf of intervenors-respondent.

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

REMANDED 11/20/90

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

Opinion by Kellington.

NATURE OF THE DECISION

Petitioner appeals a decision of the hearings official denying his application for a conditional use permit to allow "jackpot roping" activity on property zoned Rural Residential (RR-5).

MOTION TO INTERVENE

Gregory Callister, Virginia M. Callister, Mildred Cleveland, Lyman Jones, Lyla Jones, Jarold Gaskill, Gerri Gaskill, Daniel W. Smith and Maryanne Smith move to intervene on the side of the respondent in this appeal proceeding. There is no opposition to the motion, and it is allowed.

FACTS

The subject property is zoned RR-5 and is 15 acres in size. The record establishes the following additional facts:

"The subject property is bordered on the north and south by land zoned RR-5, to the east and west by land zoned for Exclusive Farm use.

"The subject property is improved with a mobile home, a pump house, a single family dwelling, a 30' by 30' barn, a 20' by 40' barn, a well, and an arena that is used in conjunction with the proposed activity." Record 292.

Petitioner conducts jackpot roping events on the subject property. Jackpot roping is an equestrian event in which livestock are released into a riding arena and participants on horseback compete to determine who can rope

and tie the released livestock the quickest. Participants are often charged entrance fees, and prizes are awarded. Responding to complaints regarding jackpot roping activity on the subject property, the county required petitioner to apply for a conditional use permit as a prerequisite to continuing that activity. Under Lane County Code (LC) 16.231(4)(p), "commercial riding" activities are conditionally permitted in the RR-5 zone.

Petitioner applied for a conditional use permit:

"to continue existing activities on the subject property consisting of roping jackpots, occasional horse boarding, horse training, and maintenance of sufficient animals to engage in these mentioned activities." Record 282.

The hearings official held an evidentiary hearing on petitioner's application and approved the requested conditional use permit. Intervenors-respondent (intervenors) appealed the hearings official's decision to the board of commissioners. After a hearing on the record established before the hearings official, the board of commissioners remanded the decision to the hearings official to reconsider whether the proposed use is properly classified as "commercial riding." Specifically, the board of commissioners stated in its order:

"The record is not convincing that these types of activities are common occurrences on parcels zoned rural residential.

"* * * * *

"Further fact-finding is essential on the issue of whether this is an action that does in fact frequently occur in an RR zone." Record 285.

Pursuant to the remand by the board of commissioners, the hearings official held another evidentiary hearing and determined that the proposed use does not constitute "commercial riding" under LC 16.231(4)(p) because it is not common to the RR-5 zone and because its impacts are greater than the impacts associated with the other horse related activities authorized as conditional uses in the RR-5 zone.¹ The hearings official denied the requested conditional use permit. Petitioner appealed to the board of commissioners. The board of commissioners affirmed the decision of the hearings official without further hearings on the matter. This appeal followed.

FIRST ASSIGNMENT OF ERROR

"Misinterpretation of [LC 16.231(4)(p)]."

LC 16.231(4)(p) provides:

"Uses Subject to Hearings Official Approval.

The following uses and activities are permitted subject to prior submittal of an application pursuant to LC 14.050 and subject to Hearings Official approval pursuant to LC 14.300 and the general provisions and criteria specified by this Chapter of [the] Lane Code.

" * * * * *

¹As we explain infra, LC 16.231(4)(p) authorizes stables and riding academies in addition to commercial horseback riding.

"(p) Stables, riding academies and commercial riding."

Petitioner argues the hearings official misconstrued LC 16.231(4)(p) in determining jackpot roping does not constitute "commercial riding." Specifically, petitioner contends the hearings official's determination that in order to constitute "commercial riding" the proposed use must be found to be "common in RR-5 districts" is incorrect. Petitioner also contends the hearings official impermissibly compared the impacts of the proposed conditional use to the impacts of stables and riding academies, to determine whether the proposed use constitutes "commercial riding."² Petitioner argues that consideration of the impacts of a proposed conditional use is properly addressed under LC 16.231(5)(a), which provides:

"Uses conditionally permitted under LC 16.231(4) above are subject to compliance with the following criteria:

"(a) Will not significantly impact existing uses on adjacent and nearby lands and other uses

²Petitioner cites the following findings as expressing the hearings official's incorrect interpretation of LC 16.231(4)(p).

"[T]he test of whether jackpot roping can be considered 'commercial riding' should focus upon a number of factors. Whether jackpot roping, as proposed by the Applicant, is similar in its impacts to the other uses permitted by LC 16.231(4)(p), i.e., stables and riding academies. Whether commercial jackpot roping is common in RR-5 districts. And whether commercial jackpot roping normally occurs in conjunction with stable operations and riding academies." Record 43.

permitted in the zone in which the property is located."

Petitioner maintains that it makes no sense for the county to analyze the impacts of a proposed use to determine whether it is a conditional use in the first place. Additionally, petitioner argues that if the hearings official's understanding of LC 16.231(4) is correct, almost none of the listed conditional uses in the RR-5 zone could ever be allowed, because by their nature the listed conditional uses are not "common" to an RR-5 area and will have greater impacts than a single family residential use.³

³For example, LC 16.231(4) lists the following as conditional uses:

- "(a) Animal hospitals.
- "(b) Commercial breeding kennel.
- "(c) Commercial kennel.
- "(d) Campgrounds, camping vehicle parks, tourist parks.
- "(e) Cemeteries.
- "(f) Churches.
- "(g) Day Care Nurseries.
- "(h) Golf Courses.
- "(i) Lodges and grange halls.
- "(k) Nursing homes.
- "(l) Parks, playgrounds, community centers.
- "(m) Public and private schools.
- "(n) Radio and television transmission facilities.
- "(o) Solid Waste management.

Petitioner contends it is clear from reading LC 16.231 as a whole, that the kinds of uses which might be approved as conditional uses are set out in LC 16.231(4), and that the impacts of those uses must be addressed under LC 16.231(5).

Respondent and intervenors state that because the term "commercial riding" is not defined in the LC, the county must interpret its meaning. They argue the county correctly interpreted LC 16.231(4)(p) as excluding the proposed jackpot roping because that use is inconsistent with the RR-5 zone as reflected by LC 16.231(1), the purpose statement for the RR-5 zone.⁴

"(p) Stables, riding academies, commercial riding.

"(q) Storage facilities for boats and recreational vehicles.

"(r) Sewage treatment facilities.

"(s) Dams, water storage facilities, power generation or transmission facilities; electric transmission lines which require a right of way of 25 feet in width or wider; canals, flumes, pipelines; flood control facilities and irrigation projects.

"* * * * *"

⁴LC 16.231(1) states the purpose of the RR-5 zone as:

"(a) To provide opportunities for people to live in a rural area.

"(b) To allow primary and accessory residential uses, and nonresidential uses which may be compatible with primary residential uses.

"(c) To implement the policies of the Rural Comprehensive Plan, primarily those policies related to the residential development of areas identified as committed, built upon, or as nonresource land.

Respondent also argues:

"* * * The term 'commercial riding' is not clear and unambiguous. Petitioner's suggested interpretation would only inquire into the commercial and riding aspects of an application. It might enable approval of an application for a race track or rodeo grounds regardless of compatibility with residential uses. The county interpretation measures compatibility by considering the intensity and nature of the proposed use with similar existing uses in the RR-5 zone. That interpretation is reasonable and gives effect to all the provisions of the Code." Respondent's Brief 8.

We are required to determine whether the county's interpretation of LC 16.231(4) is correct. McCoy v. Linn County, 90 Or App 271, 275-276, 752 P2d 323 (1988). Additionally, we construe the provisions of LC 16.231 as a whole, giving meaning to each. Kenton Neighborhood Assoc. v. City of Portland, ___ Or LUBA ___ (LUBA No. 88-119, June 7, 1989), slip op 16.

LC 16.231(4) only lists the uses which may be conditionally permitted in the county's RR-5 zone. LC 16.231(5) provides the standards for approval of the listed LC 16.231(4) uses. Among the approval standards set out in LC 16.231(5) is the requirement that all proposed conditional uses:

"* * * not significantly impact existing uses on adjacent and nearby lands * * *"

"(d) To provide protective measures for riparian vegetation along Class I streams designated as significant on the Rural Comprehensive Plan."

As we understand it, the parties agree that jackpot roping in principle can constitute "commercial riding" because of the entrance fees charged and other commercial attributes. The parties' disagreement centers on the impacts of this particular jackpot roping activity on the particular neighborhood in which it occurs. The county determined that the impacts of the proposed jackpot roping, and the fact that jackpot roping of this intensity is not common in the RR-5 zone, disqualify it from being considered "commercial riding," not that the proposed activity is not "commercial" in nature.

Reading LC 16.231(4) together with LC 16.231(5), we agree with petitioner that the potential impacts of the proposed jackpot roping are relevant only in determining compliance with LC 16.231(5). The potential impacts of the proposed jackpot roping are not a relevant consideration for determining whether the proposed use constitutes commercial riding under LC 16.231(4). Additionally, we agree with petitioner that whether "jackpot roping" is common to the RR-5 area is irrelevant to whether it constitutes commercial riding under LC 16.231(4).⁵

⁵Respondent's fear that it would be required to allow all intensive commercial uses which involve horseback riding, such as race tracks and rodeos, is unfounded. Under LC 16.231(5), it has the authority to deny a proposed conditional use if the proposed use will have significant adverse impacts on neighboring properties, or fails to meet other relevant approval standards.

We conclude the county incorrectly interpreted "commercial riding," as listed in LC 16.231(4)(p), not to include the proposed "jackpot roping" activity.⁶

The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

"Lane County exceeded its range of discretion by denying an application for a use allowed in a RR-5 zone, where such application met all applicable criteria and Respondent County failed to meet denial requirements established by LUBA."

THIRD ASSIGNMENT OF ERROR

"Failure to Find Facts and Apply Law."

FIFTH ASSIGNMENT OF ERROR

"No Goal Eight Findings."

The county made no findings of compliance with LC 16.231(5), or the Goal 8 policies of the county's comprehensive plan, because it determined the proposed use does not constitute "commercial riding" under LC 16.231(4).

⁶Additionally, we do not believe respondent's interpretation of LC 16.231(4), that all uses listed in particular use categories must be of a similar scale and intensity to be approvable as a conditional use, is correct. LC 16.231(4)(d) includes campgrounds, camping vehicle parks, and tourist parks as approvable conditional uses. Further, LC 16.231(4)(l) lists parks, playgrounds, community centers; LC 16.231(4)(p) lists stables, riding academies, and commercial riding; and LC 16.231(4)(s) lists dams, water storage facilities, power generation or transmission facilities, certain large electric transmission lines, canals, flumes, pipelines, flood control facilities and irrigation projects. While there may be some similarity in the kinds of basic functions performed by the types of uses included in any given paragraph of LC 16.231(4), the similarity ends there. Although it specifically sets out particular kinds of activities in particular paragraphs of LC 16.231(4), it is reasonably apparent that the LC recognizes that each such listed use may occur independent of the others and does not have to have a scale and intensity similar to that of other uses listed in the same paragraph of LC 16.231(4).

On this basis, the county concluded that the proposed jackpot roping activity is not approvable as a conditional use in the county's RR-5 zone.

The parties agreed at oral argument, however, that if we determine the county incorrectly interpreted LC 16.231(4), we should remand the appealed decision to the county to determine whether the proposed use complies with LC 16.231(5) and applicable plan Goal 8 policies.

Because we determine under the first assignment of error that the county incorrectly interpreted LC 16.231(4), the challenged decision is remanded to the county for further proceedings, and we do not address these assignments of error.

FOURTH ASSIGNMENT OF ERROR

"Procedural Abuses."

Petitioner contends that the board of commissioners failed to disclose numerous ex parte contacts before reducing its decision to writing.⁷ Petitioner cites various items in the record, primarily letters urging the board of commissioners to deny the application for the jackpot roping activity, and statements by commissioners that they had met with some of the intervenors regarding the proposed use. Petitioner argues he had no opportunity to rebut the content

⁷In the petition for review, petitioner includes argument regarding alleged violations of ORS 197.763. However, at oral argument, petitioner conceded the county had not violated ORS 197.763. Accordingly, we do not address the contentions in the petition for review concerning ORS 197.763.

of these ex parte contacts. Petitioner also maintains the record establishes that the board of commissioners was biased in favor of remanding the hearings official's initial approval decision.

Respondent argues that the board of commissioners complied with ORS 215.422(3),⁸ and adequately disclosed ex parte contacts. Respondent argues that under ORS 197.835(10),⁹ we may not reverse or remand a county decision on the basis of ex parte contacts, when the county decision makers complied with ORS 215.422(3).

Respondent also argues that in addition to disclosure of individual commissioners' contacts with the opponents of

⁸ORS 215.422(3) provides:

"No decision or action of a planning commission or county governing body shall be invalid due to ex parte contact or bias resulting from ex parte contact with a member of the decisionmaking body, if the member of the decisionmaking body receiving the contact:

"(a) Places on the record the substance of any written or oral ex parte communications concerning the decision or action; and

"(b) Has made a public announcement of the content of the communication and of the parties' right to rebut the substance of the communication made at the first hearing following the communication where action will be considered or taken on the subject to which the communication related."

⁹ORS 197.835(10) provides:

"[LUBA] may reverse or remand a land use decision under review due to ex parte contacts or bias resulting from ex parte contacts with a member of the decisionmaking body, only if the member of the decisionmaking body did not comply with ORS 215.422(3) or 227.180(3), whichever is applicable."

the proposal, the board of commissioners specifically rejected the "ex parte" documents and letters, and did not allow any of those letters to become a part of the record of its proceedings concerning the disputed application. Further, respondent argues that petitioner did not specifically object to the disclosed ex parte contacts and did not request an opportunity to rebut those contacts when they were disclosed.¹⁰ Finally, respondent argues that petitioner has not established that he suffered any prejudice as a result of the alleged procedural errors.

Petitioner does not provide much specificity in making his claim that the board of commissioners failed to disclose ex parte contacts, or that he was not given an opportunity to respond to those ex parte contacts. As far as we can tell from the portions of the record to which we are cited, and from the cited portions of the transcript submitted with the petition for review, petitioner did have an opportunity to rebut the substance of the alleged ex parte contacts, but did not do so. From the record, it is reasonably apparent that petitioner was content that the ex parte letters offered at the board of commissioners' hearing were

¹⁰It appears, however, from the transcript attached to the petition for review as Appendix 2, pages 7-9, that petitioner did object to at least some of the letters offered at the board of commissioners' hearing. However, it also appears that at least some, if not all, of the letters objected to were not accepted by the board of commissioners and were not included in the record of the board of commissioners' proceedings, because the board of commissioners was holding an on-the-record review of the hearings official's decision.

rejected. Additionally, as far as we can tell, each of the members of the board of commissioners disclosed the fact and substance of their ex parte contacts, and made numerous efforts to avoid the many ex parte contacts attempted by those complaining of the proposed activity. We agree with respondent that the portions of the record to which we are cited adequately establish that the board of commissioners complied with ORS 215.422(3).

In order to establish bias on the part of a decision maker, petitioner must either show that the decision maker has a personal stake in the outcome of the proceeding or has prejudged the matter. Petitioner has not established that any of the members of the board of commissioners had a personal stake in the outcome or prejudged the application for jackpot roping. See Knapp v. City of Jacksonville, ___ Or LUBA ___ (LUBA No. 90-064, October 31, 1990), slip op 23. We will not infer the existence of bias. See Torgeson v. City of Canby, ___ Or LUBA ___ (LUBA No. 89-087, Order on Motion for Evidentiary Hearing, March 29, 1990), slip op 11 n 6.

We see no basis to reverse or remand the challenged decision on the basis of ex parte contacts or bias.

The fourth assignment of error is denied.

The county's decision is remanded.