BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MARYANNE SMITH, DANIEL W. SMITH, LYMAN R. JONES, LYLA M. JONES, GREG CALLISTER, and VIRGINIA CALLISTER,	
Petitioners,	
vs.	
	LUBA No. 91-014
LANE COUNTY,	
	FINAL OPINION AND ORDER
Respondent,	
and	
JAMES KITTLESON,	
Intervenor-Respondent.	

Appeal from Lane County.

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

No appearance by respondent.

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

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

REMANDED 05/31/91

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

Petitioners appeal an order of the county hearings officer approving intervenor-respondent's application for "Verification of Non-Conforming Use Status for Equine/Bovine Eventing, Horse Boarding and Horse Training."

MOTION TO INTERVENE

James Kittleson moves to intervene on the side of respondent in this appeal proceeding. Petitioners do not object to the motion, and it is allowed.

FACTS

The subject property is located on Stallings Lane, a county road. The City of Coburg Urban Growth Boundary is 1,200 feet southeast of the subject property. The property consists of approximately 14 acres and is approximately one mile from the city limits of the City of Coburg.

Intervenor-respondent (intervenor) purchased the property in 1972. Prior to 1977 no zoning restrictions applied to the property. On April 27, 1977, the county imposed an Exclusive Farm Use (EFU) zoning designation on the subject property which established, among other things, that commercial uses in conjunction with agricultural activities constituted conditional uses in the zone. On February 29, 1984, the property was zoned Rural Residential.

This is the third appeal to this Board involving county decisions regarding recreational cattle roping activities on

the subject property. In Kittleson v. Lane County, ___ Or LUBA ___ (LUBA No. 90-112, November 20, 1990) (Kittleson), the county denied an application for a conditional use permit to authorize commercial horseback riding ("jackpot roping") on the property.[1] We remanded that decision to the county for reasons unrelated to the challenged decision in this case.

In Smith v. Lane County, ___ Or LUBA ___ (LUBA No. 91-011, May 7, 1991) (Smith I), the county's approval of a conditional use permit to conduct "commercial riding," including "jackpot roping" on the subject property, was appealed to this Board. The parties stipulated to dismissal of that appeal.[2]

On December 10, 1990, the county hearings officer determined that a nonconforming recreational cattle roping use had been established on the subject property prior to the imposition of EFU zoning in 1977. The hearings officer also approved certain changes to the nonconforming use.

Petitioners appealed the hearings officer's December

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[1]In Kittleson, slip op at 2, we described "jackpot roping" as follows:

> "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."

[2]No party argues that dismissal of the appeal of the county's approval of the conditional use permit at issue in Smith I, supra, renders any of the issues presented in this appeal proceeding moot.

10, 1990 decision to the board of commissioners. Under a procedure available in the Lane Code, the hearings officer elected to reconsider his decision before the appeal was forwarded to the board of commissioners. On December 28, 1990, the hearings officer issued a reconsidered decision, again approving the nonconforming use and certain changes to the use, but clarifying some aspects of the December 10, 1990 decision. Petitioners appealed both hearings officer decisions to the board of commissioners. The board of commissioners elected not to hear petitioners' appeal and allowed the hearings officer decisions to stand. This appeal followed.

The parties do not dispute that under the EFU zoning imposed on the property in 1977, the cattle roping practices and events occurring on the subject property were "commercial activities in conjunction with agricultural use" and required a conditional use permit.[3] The parties also do not dispute that such cattle roping activities on the subject property became nonconforming in 1977. Further, it is not disputed that some level of cattle roping activities occurred on the subject property from the time intervenor purchased the subject property through 1977, when a conditional use permit was first required to conduct such

[3]We express no position on the parties' agreement that recreational cattle roping activities on land zoned EFU are properly considered a "commercial activity in conjunction with agricultural use" requiring a conditional use permit.

activities.

The primary issue in this appeal is whether at the time the disputed cattle roping activities became nonconforming in 1977, the level of operational intensity was as great as that which the challenged decision approves as a nonconforming use.

FIRST ASSIGNMENT OF ERROR

> "Lane County erred in that the decision of the Hearings Official was not supported by substantial evidence in the whole record in the following particulars:
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> "a. There was no substantial evidence presented by the Applicant that the level of activities between 1973 and 1976 was anywhere near the current level of activity.
>
> "b. The Hearings Official failed to require the Applicant to submit independent documentation or corroboration.
>
> "c. The Hearings Official failed to address and consider Petitioners' detailed and documented testimony."

The issue in this assignment of error is whether there is substantial evidence in the whole record to support the hearings officer's determinations, summarized below, regarding the extent of the nonconforming recreational cattle roping use of the subject property occurring at the time of the 1977 zone change.

The hearings officer determined there was a measurable jackpot roping "season" lasting from the second week in June until the first week in September. Record 126. The

hearings officer determined there were jackpot roping practices on weekday evenings, involving up to 10 participants. Id. Further, the hearings officer determined that one day each weekend was devoted to jackpot roping competition lasting until sundown, but that horses and cattle were not put away, and associated activities were not concluded, until 11:00 p.m. or later. The hearings officer found these "normal" weekend competitions involved up to 40 participants and spectators.[4] Id. Finally, the hearings officer determined that one "large" jackpot roping competition occurred each year that involved up to 100 participants. Id.

Petitioners correctly state it is the applicant's burden to establish the existence of a nonconforming recreational cattle roping use of the property at the level described in the hearings officer's decisions. Webber v. Clackamas County, 42 Or App 151, 154, 600 P2d 448, rev den

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[4]Petitioners contend most of the people involved in cattle roping activities, and especially the roping events on the property prior to 1977, were spectators and not participants, and in fact there were very few participants even in the largest jackpot roping events. The number of spectators as opposed to participants is an important distinction to petitioners because it is the recreational cattle roping events themselves which they allege cause the greatest amount of undesirable impacts from traffic associated with horse trailers, dust, noise and escaping cattle.

While the challenged order allows a particular number of participants and spectators in each activity category, the order does not distinguish between the two groups of people in discussing the scope of the nonconforming recreational cattle roping use of the property. However, the challenged order is broad enough such that it is reasonable to conclude it would be consistent with the nonconforming roping use for all or most of the people involved in the cattle roping activities to be participants.

288 Or 81 (1979); J and D Fertilizers v. Clackamas County, ___ Or LUBA ___ (LUBA No. 90-073, September 20, 1990), slip op 12, aff'd 105 Or App 11 (1990), rev den 311 Or 261 (1991). Essentially, petitioners contend the applicant did not carry his burden.

Petitioners argue the evidence in the record establishes the nature of the cattle roping activities prior to 1977 involved only a few casual neighborhood participants and spectators who walked or rode their horses to the subject property, and that even the largest competitive cattle roping events involved only four to five participants. Petitioners argue the applicant failed to produce adequate evidence to establish the existence of a nonconforming cattle roping use at the approved levels. Petitioners claim there is no evidence in the record to support the hearings officer's determination that "jackpot roping" occurred on the property involving "around 100 persons during the period between 1972 and April of 1977." Record 129. Petitioners argue it is unreasonable in view of the evidence in the whole record, for the hearings officer to determine the nonconforming cattle roping use of the subject property consisted of as many as 10 people each weekday participating in cattle roping activities and related activities until 11:00 p.m. (for a total of 50 participants during the week). Further, petitioners contend it is unreasonable for the hearings officer to determine the

nonconforming use involved as many as 40 people participating in cattle roping events and related activities one day each weekend until 11:00 p.m. Finally, petitioners argue there is no reliable evidence in the record to support the hearings officer's determination that the applicant had an annual cattle roping event attracting an average of 100 participants.

Intervenor-respondent (intervenor) essentially contends the evidence in the record establishes that 6-40 people were "in attendance" at ongoing cattle roping events on the property, and that once each year there was a "big" event in which an average of 100 people participated, and that this evidence supports the hearings officer's determinations regarding the scope of the nonconforming use. Record 410, 434.

We are required to affirm the county's decision if it is supported by substantial evidence in the whole record. ORS 197.835(7)(a)(C). To determine whether the challenged decision is supported by substantial evidence in the whole record, this Board is required to decide whether "in light of all the evidence in the record, the [county's] decision was reasonable." Younger v. City of Portland, 305 Or 346, 360, 752 P2d 262 (1988).

We resolve the parties' specific evidentiary arguments below.

A. Reliance on Applicant's Testimony

Petitioners argue the only evidence to support the hearings officer's determinations regarding the number of participants involved in the cattle roping activities, and that such activities occurred every day and every weekend during the "season," is the applicant's. Petitioners also contend the applicant's evidence is vague. Further, petitioners contend the applicant's evidence is unreliable because there is no independent corroboration of it. Citing Horacek v. Yamhill County, 17 Or LUBA 82, 91 (1988) (Horacek), petitioners contend:

> "Unsubstantiated statements from the applicant or his friends are not sufficient to satisfy the requirement of substantial evidence, especially when it is contradicted." Petition for Review 11.

We disagree with petitioners' understanding of the scope of our decision in Horacek. In Horacek the relevant approval standard required the county to determine whether a requested on-site manager's residence for a manager of a mushroom farm would be "customarily provided at a mushroom operation the size of [the applicant's]." Horacek, 17 Or LUBA at 91. In Horacek, we determined the only evidence of whether a manager's dwelling was customarily provided at other similar mushroom farms was the applicant's unsubstantiated statement regarding other operations, which was contradicted by evidence submitted by the opponents. In those circumstances, we determined the applicant's

unsubstantiated statements regarding customary practices of other mushroom farm operations was not substantial evidence to support a conclusion that a dwelling as proposed was indeed "customarily provided" at other similar mushroom growing operations.

This appeal involves a much different question. The applicant is attempting to establish the nature and scope of activities which occurred on his property during a particular period of time. Evidence submitted by the applicant regarding activities on his property can constitute substantial evidence unless the other evidence in the record so undermines the applicant's evidence that a reasonable person would not rely upon it. See Seagraves v. Clackamas County, 17 Or LUBA 1329, 1343 (1989) (if conflicting evidence undermines and refutes the applicant's evidence relied upon by the county to establish compliance with a particular approval standard, then the county must provide some explanation of why the refuted evidence may continue to be considered "substantial evidence").

B. Application Documents

Intervenor cites his application for a nonconforming use determination and attached written statement (application documents), to support the hearings officer's determination that cattle roping activities have been occurring on the subject property at the levels approved by the hearings officer. The application documents describe

the nonconforming use as follows:

> "[The applicant's] primary non-conforming activity relates to bovine/equine eventing. These consist of opportunities for invited participants to practice various bovine/equine competitive events during selected weekends and times during the summer months. This activity also involves competition in bovine/equine events during selected weekends and times during the summer months. Mr. Kittleson held his first bovine/equine event in 1972 when he acquired his property and has consistently held subsequent bovine/equine events every year since 1972.
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> "The events are well known among local riders. They are primarily a family affair. Because they have been occurring since 1972, in some instances there are three generations of families participating. * * * Neighborhood children and adults have participated in the events from from their inception. * * *"
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> "During most events, anywhere from 6 to 40 people will be in attendance. Every year [the applicant] has a 'big' jackpot. The 'big' jackpot is attended by more people. The largest number of people in attendance was in 1977 when there were 156 participants. In 1988 there were 127 participants and in 1989 there were 124 participants. The number of participants has remained essentially the same since the use began in 1972. * * * many of the participants are related. With the exception of one or two persons, all the participants are personally known to [the applicant]. As the years progressed, some families have become bigger and these participants have replaced those who have moved from the area or otherwise stopped participating.
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> "* * * * *
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> "* * * Normal events may have from a half dozen to two dozen horse trailers and three or four cars. The most recent 'big' jackpot had 64 horse trailers and 32 cars. * * *" Record 433-435.

Petitioners argue the application documents do not support the hearings officer's determinations regarding the frequency of events, related activities and number of participants in the cattle roping activities. Further, petitioners argue to the extent the application documents can reasonably be read as specific regarding the nature of the use occurring on the property prior to 1977, they are contradicted by other testimony in the whole record. According to petitioners, the application documents do not constitute substantial evidence to support the hearings officer's determination regarding the scope of intervenor's nonconforming use.

We examine the other evidence cited by intervenor and petitioners to determine whether the statements contained in the application documents are contradicted, and to determine whether the challenged decision is supported by substantial evidence in the whole record.

C. Other Evidence

1. Cleveland Letter

Petitioners cite a letter from Mildred Cleveland, a resident of Stallings Lane for 30 years, which states she was never aware of, or disturbed by, any roping events, but that she has recently been disturbed by dust, traffic and noise from roping events taking place on the subject

property.[5] Record 284.

Intervenor suggests this letter is untruthful and cites his testimony regarding it:

> "Talkin[g] about that letter. When I first went down * * * they wanted me to get this conditional use permit. I went down to [the author of the letter] and I asked her if it was botherin[g] her and it didn't bother her. She had no idea what I was doin[g] until [one of the petitioners] started campaigning the street, * * * then * * * she c[ame] in with the statement." Intervenor's Brief App 14.

This testimony establishes only that the author of the letter told the applicant she was not "bothered" by his activities. The applicant's testimony does not undermine the statement in the letter that no roping activities involving a great deal of noise, dust and traffic occurred on the property prior to 1977. The hearings officer was entitled to give weight to this letter.

2. Smith Letter

Petitioners also cite a written statement from Dan Smith and Maryanne Smith to establish that from 1977 (when the Smiths purchased their home adjacent to the subject property) to the present, the level of cattle roping activity on the subject property changed qualitatively. Record 114-115. Petitioners argue this evidence demonstrates that (1) the current cattle roping activities

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[5]Mrs. Cleveland apparently did not appear at the hearing.

on the property include dramatically greater numbers of participants, (2) many of these participants and their animals currently arrive at the site by vehicles and horse trailers, and (3) currently there are more frequent and longer lasting cattle roping activities. Id.

Intervenor argues that evidence of events occurring after the date the subject use became nonconforming is irrelevant to determining the nature of the disputed use at the time it became nonconforming.

We agree with intervenor that it is the nature and extent of the lawful use which existed at the time the use became nonconforming that is the reference point for determining the boundaries of permissible continued use. City of Corvallis v. Benton County, 16 Or LUBA 488, 497 (1988). However, in this case we believe petitioners' evidence regarding events occurring on the property after 1977 is relevant to determining the scope of the nonconforming use prior to 1977. Intervenor's evidence focuses on showing that the cattle roping activities occurring on the subject property after 1977 are substantially identical to those that occurred on the property prior to 1977.[6] In these circumstances,

[6]According to intervenor, the only difference between activities prior to 1977 and present activities are (1) fewer people are now involved in cattle roping events, (2) there was a dip in attendance at "events" during a period in the "1980's," and (3) intervenor currently uses timing lights, and has constructed a pole lighting arrangement for the riding arena.

petitioners' evidence regarding how the intensity of the events occurring on the property increased after the time the use became nonconforming, is relevant to determining what the intensity of the cattle roping use was at the time it became nonconforming.

Intervenor also contends that based on statements in a September 22, 1990 letter Mr. Smith sent to the hearings officer, all of Mr. Smith's statements should be disregarded. In the September 22, 1990 letter, Mr. Smith stated:

> "After listening to the tapes * * *, I would like to inform you that I mis spoke [sic], about years [and] number of roping steers on the lane * * *. I was under a great stress and very nervous, I could not think clearly. I will swear to this under oath.
>
> "I feel so bad not just for me, but [for] you because I may have made the situation more confusing for you, which may in turn make your job more difficult." Record 281.

We disagree with intervenor that the September 22, 1990 letter discredits Mr. Smith's written submittals provided after September 22. In the first place, the September 22, 1990 letter apologizes for erroneous information given orally at an earlier hearing. Mr. Smith's written statement cited above was submitted in support of the December 20, 1990 appeal of the hearings officer decision to the board of commissioners. This written statement was submitted fully two months after the date of the letter of apology. Accordingly, Mr. Smith's subsequent written evidence is not

tainted by his September 22, 1990 written statement that information given at an earlier hearing was erroneous. Therefore, the written statement from Dan and Maryanne Smith, regarding the the scope of the use of the subject property both before and after 1977, was properly considered by the hearings officer.

3. Petition

Intervenor cites a petition he states is signed by 26 "residents of Stallings Lane." Intervenor's Brief 7. This petition contains a statement that "the team ropings have been held for the last 17 years."[7] Record 139.

This petition does not disclose whether any of the signatories (other than the applicant) lived at the address listed on the petition prior to 1977. Further, it does not disclose or describe the nature or intensity of the "team ropings" which occurred during the 17 year period referred to in the petition. At best, the petition, standing alone, states that "team ropings" have been held on the subject property for 17 years. However, it is not evidence purporting to establish the frequency of, or number of participants in, such cattle roping activities.

4. June 15, 1990 Letter

Intervenor cites a two page letter signed by some of

[7]We note that one of the signatories to the petition lists an address different than Stallings Lane, and some of the signatories sign for spouses as well as for themselves.

the signatories of the petition referred to above. Record 409-410. This letter is referred to in the findings as the the "June 15, 1990 letter." This letter states in part:

> "* * * * *
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> "Jim Kittleson has been conducting bovine/equine eventing activities since the construction of his arena in 1972. Some of us helped him erect the arena. For every year since 1972 Jim has consistently conducted bovine/equine eventing from approximately the second week of June through approximately the first week of September. Events generally occur on Saturday night although there have been weekday events as well. Most of the events are generally completed by 10:00 or 11:00 p.m. although some have gone later. Jim has engaged in virtually all aspects of bovine/equine eventing including but not limited to, team roping, roping jackpots, cow pinning, bull dogging, and steer wrestling. These events have occurred consistently since 1972 on the same pattern.
>
> "Jim's biggest activity is his jackpot ropings where during most events anywhere from 6 to 40 people will be in attendance. Every year Jim has had one 'big' jackpot which normally has attracted slightly in excess of 100 people. The number of participants at these events has remained generally consistent throughout the years with a slight dip in attendance in the early 1980's.
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> "* * * * *" Record 409.

While this letter does state that 6-40 people were in attendance at jackpot roping events which occurred on the property, it does not state the number of <u>participants</u> in such activities, the frequency of such events, or the nature and intensity of the <u>weekday</u> cattle roping activities the

hearings officer determined included up to 10 participants per day.

In addition, petitioners argue the June 15, 1990 letter is unreliable because it states that all of the signatories are residents of Stallings Lane. Petitioners point out that intervenor admits some of the signatories are in fact not residents of Stallings Lane. Petitioners state there is nothing in the June 15, 1990 letter establishing that any of the signatories have personal knowledge of the statements they make in the letter.[8]

Intervenor acknowledges that not all of the signatories of the June 15, 1990 letter reside on Stallings Lane. However, intervenor cites his attorney's testimony that the signatories who did not live on Stalling Lane:

> "* * * have consistently since the initiation of the activities participated in them and were personally aware." Intervenor's Brief App 2.

Petitioners are correct that the accuracy of the June 15, 1990 letter is doubtful in that some of the signatories signed their names as residents of Stallings Lane when they were not. In addition, nothing in the June 15, 1990 letter discloses whether any of the nonresident signatories were spectators or participants in any cattle roping activities

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[8]We note the hearings officer recognized the limited evidentiary value of this letter as it related to the type of events which occurred on the property prior to 1977. Record 128. However, the reasons given in the challenged order for ascribing little evidentiary weight to the letter would limit its evidentiary weight for any purpose.

prior to 1977. The applicant's attorney's explanation that those signatories who were not residents of Stalling Lane had personally participated in roping activities, is some evidence that those signatories had personal knowledge of the facts to which they ascribed their names. However, we do not believe the applicant's attorney's testimony regarding the bases for the signatories' knowledge of the facts in the June 15, 1990 letter is substantial evidence to establish that the nonresident signatories of the June 15, 1990 letter had participated in cattle roping events on the property prior to 1977. Further, other than stating that all of the signatories are residents of Stallings Lane and that each signatory possessed "personal knowledge" of the facts contained in that letter, nothing reveals what the basis of such purported "personal knowledge" of any signatory might be.

5. Lane Testimony

Intervenor cites the testimony of Del Lane, also a signatory of the June 15, 1990 letter. Mr. Lane testified that he lived on Stallings Lane between the months of May and October for eighteen years. His testimony states that prior to 1977, "a couple [of] nights in the evenings there was [sic] some activities," that there were "probably from [5] to maybe 20, 25" people involved in the activities, and that the number of people involved fluctuated. Intervenor's Brief App 4. Mr. Lane further testified the roping

activities on the weekends "might be just a little heavier," that the roping activities were finished at approximately 9:00 p.m. and people would leave the property approximately one hour later.[9] Id.

Petitioners state Mr. Lane's testimony should be read together with the following testimony of the applicant regarding the nature of the use during the period prior to 1977:

> "* * * usually Jerry Kent [would] come over, w[ho] is a neighbor, he had a wife and two kids so there [would] be 10, 12 people every night. Not necessarily every night, but it wouldn't be uncommon if it was seven days a week, and there might be another couple [of] friends, but there would usually be, oh I'd say from 2 to [10] practicers. Probably, five nights a week and then on the weekends, we had * * * team ropin' [sic] and jackpot [sic], and they [would] run anywhere from 10 people to 40 people on an average." Intervenor's Brief App 12."

Petitioners argue that from this evidence, a reasonable person would conclude the usual cattle roping activities occurring on the property prior to 1977 involved the applicant, his family and a neighbor family. Further, they argue that the total number of these people the applicant

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[9]Petitioners point out that Mr. Lane's testimony contradicts the statements in the July 15, 1990 letter regarding the number of people involved in the roping events on the weekends, and argues that his testimony makes the accuracy of the July 15, 1990 letter even more questionable.

identified is ten, and five of them were young children.[10]

We agree with petitioners that it is reasonable to read the applicant's and Mr. Lane's testimony together. We also agree that so read, the testimony reasonably suggests that to the extent there were "usual" weekday cattle roping activities on the property, such activities primarily involved two families with young children, and that occasionally on the weekends, a greater number of people attended such activities.

In addition, we note Mr. Lane's testimony conflicts with that of the applicant in an important respect. Mr. Lane testifies the cattle roping activities occurred twice a week, whereas the applicant's testimony indicates there were cattle roping activities "not necessarily every night, but it wouldn't be uncommon if it were seven days a week." Intervenor's Brief App 12. Accordingly, there is a conflict in the applicant's evidence regarding the frequency of the roping events, and the number of people involved.

6. Morneau Testimony

Intervenor cites the testimony of Julie Morneau who testified she has lived on Stallings Lane for 35 years, and that the applicant:

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[10]Petitioners state, and intervenor does not dispute, that in 1972, the applicant's "twin daughters were 4 years old * * * [and his] other daughter was a few years older," and that Jerry Kent's two children were four and two years of age. Record 28.

> "* * * has always had some type of events going. Usually a couple [or] three times a year it was a big event. But there's always some type of activity * * *." Intervenor's Brief App 11.

At best, this evidence establishes that "big" roping events have occurred on the subject property, but it does not establish whether they occurred during the relevant time period or, if so, just how many people and animals were involved, or whether they traveled by foot to the subject property or by automobile and horse trailer. However, Mrs. Morneau's testimony is relevant in that it establishes she was a resident of Stallings Lane during the relevant time period, and that she has been familiar with intervenor's cattle roping activities over time. Therefore, her testimony indirectly establishes that the June 15, 1990 letter discussed above, to which she signed her name, may well be accurate as to her knowledge.

7. Leary Testimony

Intervenor also cites the testimony of Craig Leary, a neighbor who moved to Stallings Lane in 1970, when he was "two years old." Intervenor's Brief App 6-7. Mr. Leary states that he remembers the applicant having "roping events" on the property. Mr. Leary testified that when he was "four or five years old" he would "pull the chutes for [the applicant],"[11] but the only event he remembered with

[11]Mr. Leary described "pull[ing] the chutes" as follows:

any specificity was the Coburg "Golden Years" event in 1976. Intervenor's Brief App 6. Mr. Leary also testified, however, that he didn't know how many people were involved in roping activities on the property while he was "pulling chutes."

Mr. Leary's testimony is of limited value to establish the nature of the disputed roping activities prior to 1977. Putting aside Mr. Leary's youth during the critical period of time at issue in this appeal, his testimony states what is not disputed, viz, there were roping activities on the subject property, that he remembers "pulling chutes" to facilitate such activities, and that there was a fairly significant event which occurred on the subject property in 1976.[12] However, it does not address the critical inquiry in this appeal regarding the frequency of the cattle roping activities on the subject property prior to 1977, how many people actually participated in those activities and whether participants and spectators walked, rode horses, or drove to the subject property.

While Mr. Leary did not personally recall how many

"You just sit on top of this cage and pull the bar, and the cow runs out * * *." Intervenor's Brief App 6.

[12]Indeed, the hearings officer determined:

"* * * other rodeo-style events may have occurred in the Coburg Rodeo in 1975 and 1976 but this event is no longer sponsored and never acquired the consistency to become a nonconforming use." Record 128.

people attended the 1976 event which he remembered, petitioners cite the written submittal from Dan and Maryanne Smith which provides that Mr. Smith personally attended the 1976 roping event Mr. Leary referred to, that only 4-5 persons displayed their roping skills at that event, and there were "far more spectators than participants."[13] Record 114.

8. Telling Letter

Intervenor next cites a letter from David and Della Telling, two residents of Stallings Lane, who state they have lived there for a period of twenty years. Record 142. However, this letter does not describe the nature or existence of any cattle roping events which might have taken place on the subject property prior to 1977. This letter is of very little evidentiary value in determining the nature and scope of the nonconforming recreational cattle roping use of the property.

D. Conclusion

We have considered all of the evidence cited by the parties in this appeal proceeding. The applicant's evidence is incomplete regarding the scope of the recreational cattle

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[13]In his written submittal, Mr. Smith states:

> "During the applicable time frame (1972-1976) the "BIG Jackpot" was held as the Coburg Rodeo. * * * The Coburg Rodeo/Big Jackpot was held in 1975 and 1976 but has not been held consistently. * * *" Record 113.

roping activities on the subject property prior to 1977. Further, it is inconsistent and vague. As far as we can tell, one of the "big" events about which testimony is given is the 1976 Coburg Golden Days event, about which Mr. Leary and Mr. Smith provided testimony. The only evidence to which we are cited regarding the number of participants in this event is petitioner Dan Smith's statement that there were only four to five participants involved in cattle roping activities.[14] Further, we are cited to inconsistent testimony regarding the number of participants in the "usual" weekend events and weekday practices. The applicant's own description of the people who were "usually" involved in the cattle roping activities was of two families with young children involved in recreational cattle roping activity.

The burden is on the applicant to establish the existence of a nonconforming use at the level approved by the hearings officer. We do not believe it is reasonable to conclude the evidence in the whole record supports a determination that the applicant established the existence of a nonconforming recreational cattle roping use of the property at the level approved in the challenged decision.

Specifically, we do not believe the evidence to which

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[14]All parties acknowledge there were spectators at this event. However, we are cited to nothing which directly contradicts Mr. Smith's statement that there were only four to five participants.

we are cited reasonably leads to the conclusions implicit in the challenged decision. We do not believe there is substantial evidence in the record that the nonconforming use of the subject property consisted of as many as 10 people arriving by automobile and horse trailers and participating in cattle roping activities until sunset every day of the "roping season." We also do not believe there is substantial evidence in the whole record to establish that the nonconforming use during such roping season included a cattle roping event every weekend involving up to 40 participants and spectators arriving by automobile and horse trailer, and associated activities such as loading horses and cattle and arena cleanup until 11:00 p.m.[15] Finally, we do not believe there is substantial evidence in the whole record to support the hearings officer's decision that the nonconforming use included an annual jackpot roping event including up to 100 participants arriving by automobile and horse trailer, and associated activities lasting until midnight.

The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

> "The County erred in failing to adopt findings that adequately address the Lane Code and ORS

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[15]We note this is particularly questionable in view of the applicant's statement that the cattle roping arena was not lit until sometime in 1986, and the undisputed statement that the sun typically goes down in Lane County in the summer months by approximately 9:00 p.m. Record 450, 126.

215.130."

In addition to determining the existence of the nonconforming use discussed above, the hearings officer also approved several changes to the use. The challenged decision authorizes "placement of loudspeakers on poles," "use of a timing light," "use of a two story timing shed," the "addition of a concrete pad in the timing chute," and the "restoration of the lumber in the fencing." Record 129-130.

Petitioners argue the nonconforming use which existed prior to 1977 consists of a relatively quiet, neighborhood activity. Petitioners contend these additional features of the use approved by the hearings officer do not add to the nonconforming use, but rather to a different, more raucous use of the property which has evolved since 1977.

Lane Code 16.251(1) provides:

> "Verification of a nonconforming use is required prior to requesting approval to increase, restore, alter or repair a nonconforming use."

Under the first assignment of error, we determine that the challenged decision verifying the existence of a particular nonconforming recreational cattle roping use of the property is not supported by substantial evidence in the whole record. Therefore, there is no valid nonconforming use verification for the property. Accordingly, under LC 16.251(1) there can be no valid county approval of any alteration of such use. No purpose is served in reviewing

the adequacy of findings which determine whether changes to an unverified nonconforming use of uncertain scope comply with criteria applicable to alterations of verified nonconforming uses.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

> "The County erred by failing to condition approval of the verification of non-conforming use upon satisfaction of all fire, life and safety regulations applicable to the use."

Petitioners argue the hearings officer erred by failing to require as a condition of approval that the nonconforming use comply with laws relating to public water systems and other "applicable regulations that might apply to this use." Petition for Review 19.

We are aware of no requirement that a land use decision be conditioned as petitioners argue.

The third assignment of error is denied.

The county's decision is remanded.