

BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

WILLIAM F. DURIG, JUNE WRIGHT )  
and JOHN RANDOLPH DURIG, )  
Petitioners, )  
vs. )  
WASHINGTON COUNTY, ) LUBA No. 97-262  
Respondent, ) FINAL OPINION  
and ) AND ORDER  
TOWNSEND FARMS, INC., )  
Intervenor-Respondent. )

## Appeal from Washington County.

John M. Junkin, Portland, filed the petition for review and argued on behalf of petitioners. With him on the brief was Bullivant Houser Bailey.

No appearance by respondent.

Barry Adamson, Lake Oswego, and Richard A. Uffelman, Portland, filed the response brief. Richard A. Uffelman argued on behalf of intervenor-respondent.

HANNA, Board Member; GUSTAFSON, Board Chair, participated in the decision.

REMANDED 09/25/98

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1                   Opinion by Hanna.

2                   **NATURE OF THE DECISION**

3                   Petitioners appeal a county hearings officer decision  
4                   approving a request to construct seasonal farmworker housing  
5                   in the county's Exclusive Farm Use (EFU) zone.

6                   **MOTION TO INTERVENE**

7                   Townsend Farms, Inc., (intervenor) the applicant below,  
8                   moves to intervene on the side of respondent. There is no  
9                   opposition to the motion, and it is allowed.

10                  **FACTS**

11                  Seasonal farmworker housing is allowed in the county's  
12                  EFU zone under the county's "Type II" procedures, subject to  
13                  Special Use Standards.<sup>1</sup> Washington County Community  
14                  Development Code (CDC) 340-4.1.<sup>2</sup> The challenged decision  
15                  grants approval to construct four 50' by 100' residential  
16                  buildings and a 60' by 60' shower and toilet facility. The  
17                  buildings would house approximately 407 seasonal workers and  
18                  their families.<sup>3</sup>

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<sup>1</sup>Under Type II procedures, the planning director makes the initial decision on permits for land use approval. In this case the county followed Type III rather than Type II procedures. Under Type III procedures there is more extensive public notice and a hearing before the hearings officer, who makes the final decision.

<sup>2</sup>CDC 340-4.1(U) adopts the statutory definition of "seasonal farmworker housing" at ORS 197.675:

"'Seasonal farmworker housing' means housing limited to occupancy by seasonal farmworkers and their immediate families which is occupied no more than nine months a year."

<sup>3</sup>The exact number of seasonal workers that will be housed at the facility is not entirely clear, but the exact number is not important for purposes of this appeal.

1       The proposed facility would be sited on an approximately  
2    35-acre parcel less than a mile west of the City of North  
3    Plains and within sight of Highway 26. An existing dwelling  
4    on the subject property houses 40 to 70 seasonal and year-  
5    round farmworkers. Record 32-33. The proposed housing  
6    facility would be served by a single, existing, on-site well.

7   **FIRST AND SECOND ASSIGNMENTS OF ERROR**

8       The central dispute in this appeal concerns the water  
9    system that will serve the proposed facility. Petitioners  
10   contend Washington County Rural Comprehensive Framework Plan  
11   (Plan) Policy 22, Strategy k prohibits approval of the water  
12   system and, for that reason, the proposal should be denied.

13      **A. Plan Policy 22, Strategy k**

14       Petitioners contend the water system that will be  
15    required to serve the proposal is a "community water system,"  
16    as that term is used in Plan Policy 22, Strategy k.  
17    Petitioners contend Plan Policy 22, Strategy k prohibits  
18    community water systems outside the urban growth boundary  
19    (UGB) for new housing. The hearings officer agreed. The CDC  
20    and Plan do not include a definition of "community water  
21    system." The hearings officer utilized the statutory  
22    definitions of "community water system" and "water system" at  
23    ORS 199.464(7)(c)<sup>4</sup> and ORS 448.115(11),<sup>5</sup> respectively, and

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<sup>4</sup>ORS 199.464(7)(c) provides:

"'Community water supply system' means a source of water and distribution system whether publicly or privately owned which serves more than three residences or other users where water is

1 concluded that the proposal would be served by a community  
2 water system. Record 18-19.

3 Plan Policy 22, Strategy k specifies that the county will  
4 allow "formation or expansion of community, private or public  
5 water systems or districts, to serve existing dwellings in  
6 areas designated Exclusive Farm Use" in certain specified  
7 circumstances. The county planning staff interprets Plan  
8 Policy 22, Strategy k to prohibit formation or expansion of  
9 such community water systems to serve new residential  
10 development on rural EFU zoned lands. Record 329. Although  
11 the hearings officer never expressly interprets Plan Policy  
12 22, Strategy k, we conclude he implicitly adopts the planning  
13 staff's interpretation. Record 19. Alliance for Responsible  
14 Land Use v. Deschutes Cty., 149 Or App 259, 942 P2d 836  
15 (1997), rev allowed 326 Or 464 (1998); see also Weeks v. City  
16 of Tillamook, 117 Or App 449, 452-53 n 3, 844 P2d 914 (1992)  
17 (an interpretation is adequate for review if it "suffices to  
18 identify and explain in writing the decisionmaker's  
19 understanding of the meaning of the local legislation").

20 The hearings officer's decision weaves a circuitous  
21 course to approve the disputed request notwithstanding Policy

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provided for public consumption including, but not limited to,  
a \* \* \* farm labor camp \* \* \*."

<sup>5</sup>ORS 448.115(11) defines "water system" as "a system for the provision of piped water for human consumption." ORS 448.119 provides that a "water system" is subject to regulation by the state Health Division if it has "at least four service connections, or it [serves] water to public or commercial premises which are used by an average of at least 10 individuals daily at least 60 days each year."

1   22, Strategy k. The hearings officer first concludes that  
2 Plan Policy 22, Strategy k is not an approval criterion that  
3 must be applied at this time to the challenged decision. The  
4 hearings officer then concludes that while he need not apply  
5 Plan Policy 22, Strategy k at this time, the Boundary  
6 Commission will have to consider that Plan criterion when it  
7 is asked to approve the proposal's community water system.<sup>6</sup>  
8 The hearings officer next determines that he therefore must  
9 find that it would be feasible for the Boundary Commission to  
10 approve the request, even though Plan Policy 22, Strategy k  
11 prohibits such approval.

12         The hearings officer finally concludes that such Boundary  
13 Commission approval is feasible. The hearings officer's  
14 reasoning in reaching this final conclusion includes the  
15 following:

16         "It is feasible that the Boundary Commission could  
17 find, under the facts of this Application that Plan  
18 Policy 22 effectively bans needed seasonal farm  
19 worker housing because Plan Policy 22, Strategy k  
20 prohibits the creation of new community water  
21 systems, limiting their creation to serve existing  
22 residences. Under ORS 448.115(11) and ORS 448.119,  
23 a community water system is defined as 'a system for  
24 the provision of piped water for human consumption'  
25 and is regulated by the state when it has at least  
26 four connections or serves at least ten individuals.  
27 The Boundary Commission rules define community water  
28 supply system as 'a source of water and distribution  
29 system' supplying farm labor camps. ORS  
30 199.464(7)(c). Depending on the definition used,  
31 Townsend Farms seasonal farm worker housing is

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<sup>6</sup>ORS 199.464 requires that the Boundary Commission approve establishment of a community water system. ORS 199.462 requires that the Boundary Commission "consider local comprehensive planning" when reviewing applications under ORS 199.464.

banned under [Plan Policy] 22 because it has at least four connections and serves ten individuals, or is banned because it is connected to three or more residences at a source of water and distribution system supplying a 'farm labor camp.' It is feasible that the Boundary Commission could find other sources of water are cost prohibitive as contended by the Applicant. The Hearings Officer finds that it is feasible that the Boundary Commission could find Plan Policy 22 to be in direct conflict with ORS 197.685<sup>[7]</sup> and could approve the Application." Record 18-19.

13 The hearings officer's first error was in concluding that  
14 Plan Policy 22, Strategy k is not an approval criterion that  
15 must be applied to the proposal at issue in this matter. The  
16 hearings officer relied in large part on a county legal  
17 memorandum that suggests the standards and criteria in the  
18 acknowledged CDC either eliminate or remove any possible need

<sup>7</sup>ORS 197.685 provides:

- "(1) The availability of decent, safe and sanitary housing opportunities for seasonal farmworkers is a matter of statewide concern.
  - "(2) When a need has been shown for seasonal farmworker housing within the rural area of a county, needed housing shall be permitted in a zone or zones with sufficient buildable land to satisfy that need. Counties shall consider rural centers and areas committed to nonresource uses in accommodating the identified need.
  - "(3) Subsection (2) of this section shall not be construed as an infringement on a local government's prerogative to:
    - "(a) Set approval standards under which seasonal farmworker housing is permitted outright;
    - "(b) Impose special conditions upon approval of a specific development proposal; or
    - "(c) Establish approval procedures.
  - "(4) Any approval standards, special conditions and procedures for approval adopted by a local government shall be clear and objective and shall not have the effect, either in themselves or cumulatively, of discouraging needed housing through unreasonable cost or delay."

1 to consider the Plan as an independent potential source of  
2 relevant limitations or approval criteria in this matter.

3 It is true that "land use regulations," by definition,  
4 "establish standards for implementing a comprehensive plan."  
5 ORS 197.015(11). However, a much broader proposition is  
6 embraced in the legal memorandum and accepted by the hearings  
7 officer, i.e., that the CDC entirely displaces the Plan as a  
8 source of relevant approval criteria for approval of  
9 individual land development applications. This broader  
10 proposition requires explicit supporting language that is  
11 lacking in the Plan and CDC.

12 ORS 197.175 explicitly provides that land use decisions  
13 must be "in compliance with the acknowledged [comprehensive]  
14 plan and land use regulations." This statutory requirement is  
15 at odds with the general, broad proposition adopted by the  
16 hearings officer in this case that the CDC is the exclusive  
17 source of approval criteria. This Board has given effect to  
18 provisions in local comprehensive plans that make it clear  
19 that the acknowledged land use regulations, not the  
20 acknowledged comprehensive plan, establish the relevant  
21 approval criteria for individual land development approval  
22 requests. Avgeris v. Jackson County, 23 Or LUBA 124, 135  
23 (1992); Schellenberg v. Polk County, 21 Or LUBA 425, 432  
24 (1991); Benjamin v. City of Ashland, 20 Or LUBA 265, 277-78  
25 (1990); Miller v. City of Ashland, 17 Or LUBA 147, 162 (1988).  
26 However, the county's Plan does not include such provisions.

1   Indeed the CDC explicitly provides that individual development  
2   proposals must comply with the Plan.   CDC 104-1.

3           As interpreted by both the planning staff and hearings  
4   officer, Plan Policy 22, Strategy k prohibits creating new  
5   community water systems to serve new housing in EFU zones.  
6   The county either failed to adopt CDC provisions to implement  
7   this requirement of Plan Policy 22, Strategy k or intended the  
8   general requirement in CDC 104-1 to ensure that new housing on  
9   EFU-zoned lands will not be served by a new community water  
10   system in contravention of Policy 22, Strategy k.   We assume  
11   the latter was intended.   See Stefan v. Yamhill County, 21 Or  
12   LUBA 18, 22-23 (1991).

13           Our decision in Helvetia Community Assoc. v. Washington  
14   County, 31 Or LUBA 446 (1996), lends at least some additional  
15   support for our conclusion that Policy 22, Strategy k applies  
16   at the time development approval is requested.   That case  
17   involved a plan map amendment and Plan Policy 22.   The Plan  
18   Policy 22 strategy at issue in Helvetia concerned adequacy of  
19   schools, not community water systems.   Nevertheless, Policy 22  
20   is generally directed at assuring, among other things, that  
21   public facilities in rural/natural resource areas are provided  
22   in a way that "support rural type development."   As we  
23   explained in Helvetia, the Board of Commissioners concluded in  
24   that case that Policy 22 "should be applied when development  
25   approval is sought, instead of when the plan map is amended  
26   \* \* \*."   Helvetia, 31 Or LUBA at 451.

1       In view of the above, we conclude that Policy 22,  
2 Strategy k is an approval criterion that must be applied to  
3 the challenged decision.

4           **B. Deferral to the Boundary Commission**

5       In Rhyne v. Multnomah County, 23 Or LUBA 442, 447-48  
6 (1992), we explained that a local government has several  
7 options in reviewing an application for development approval  
8 in a multi stage development process.

9       "First, it may find that although the evidence is  
10 conflicting, the evidence nevertheless is sufficient  
11 to support a finding that [a relevant approval]  
12 standard is satisfied or that feasible solutions to  
13 identified problems exist, and impose conditions if  
14 necessary. Second, if the local government  
15 determines there is insufficient evidence to  
16 determine the feasibility of compliance with the  
17 standard, it could on that basis deny the  
18 application. Third, if the local government  
19 determines that there is insufficient evidence to  
20 determine the feasibility of compliance with the  
21 standard, \* \* \* it may defer a determination  
22 concerning compliance [to a later stage.]"  
23 (Footnotes omitted.)

24 We went on to explain in Rhyne that in selecting the third  
25 option, the local government must assure that the later stage  
26 proceedings satisfy statutory requirements for notice and  
27 hearing. Rhyne, 23 Or LUBA at 448 (citing Holland v. Lane  
28 County, 16 Or LUBA 583, 596-97 (1998)).

29       It is not clear whether the hearings officer was  
30 attempting to rely on one or more of the options discussed in  
31 Rhyne and, if so, which one. However, to the extent the  
32 hearings officer believed he could entirely defer or delegate  
33 the obligation to apply Plan Policy 22, Strategy k to the

1      Boundary Commission, we do not agree. Neither do we believe  
2      the hearings officer can avoid addressing Plan Policy 22,  
3      Strategy k by speculating that it is feasible the Boundary  
4      Commission will ultimately determine that Plan Policy 22,  
5      Strategy k is inconsistent with ORS 197.685.

6                The two arguably relevant principles embraced in Rhyne in  
7      the language quoted above, are the first (that it is feasible  
8      to comply with the criterion) and third (that a finding of  
9      compliance with the criterion may be deferred to a later  
10     stage). However, neither principle is applicable here.

11              The hearings officer effectively finds that it is not  
12     feasible for the proposal to comply with Policy 22, Strategy  
13     k. Once the hearings officer reaches that conclusion, he  
14     must: (1) deny the application; or (2) find that Policy 22,  
15     Strategy k is inconsistent with ORS 197.685 and, therefore,  
16     cannot be applied to the request at issue in this appeal.<sup>8</sup>  
17     The hearings officer did neither.<sup>9</sup>

18              The hearings officer may not approve the disputed  
19     application based on speculation that the Boundary Commission

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<sup>8</sup>In the event the hearings officer concludes that Policy 22, Strategy k is either facially inconsistent with ORS 197.685 or is inconsistent with that statute in the factual situation presented in this case, he presumably could approve the application, notwithstanding Policy 22, Strategy k, and explain why the facts lead him to reach that conclusion. See Schultz v. Springfield Forest Products, 151 Or App 727, 951 P2d 169 (1997) (if a state agency believes an administrative rule is inconsistent with a statute, it must follow the superior law).

<sup>9</sup>It appears the hearings officer may believe ORS 197.685 prevents application of Plan Policy 22, Strategy k in this case. However, the hearings officer's findings do not establish that Policy 22, Strategy k is inconsistent with ORS 197.685 in this case.

1   could, in fulfilling its independent statutory obligations,  
2   find that Plan Policy 22, Strategy k is rendered inapplicable  
3   by ORS 197.685.

4                 The first and second assignments of error are sustained.

5   **THIRD ASSIGNMENT OF ERROR**

6                 Petitioners' third assignment of error states that the  
7   county failed to make the findings required by CDC 423-11.2.<sup>10</sup>  
8   However, the argument that supports the third assignment of  
9   error recognizes that the hearings officer did find that CDC  
10   423-11.2 is satisfied, but challenges the evidentiary support  
11   for that finding. The discrepancy between the assignment of  
12   error itself and the argument presented in support of the  
13   assignment of error invites the kind of technical response  
14   that intervenor makes in its brief and makes our review much  
15   more difficult.

16                 Nevertheless, this Board does not invoke technical rules  
17   of pleading or argument. We consider the evidentiary  
18   challenge petitioners present under this assignment of error.<sup>11</sup>  
19   Eckis v. Linn County, 110 Or App 309, 311, 821 P2d 1127  
20   (1991); Bjerk v. Deschutes County, 17 Or LUBA 187, 194 (1988);  
21   Schoonover v. Klamath County, 16 Or LUBA 846, 848 n 4 (1988).

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<sup>10</sup>CDC 423-11 requires that all development must "have an adequate water supply." CDC 423-11.2 requires "an explanation of the potential impact of the proposed water system on the surrounding properties."

<sup>11</sup>Petitioners make the same mistake in the fourth assignment of error below, and intervenor responds with the same technical arguments about the inconsistency between the fourth assignment of error itself and the argument in support of the fourth assignment of error. We also consider the evidentiary arguments presented under the fourth assignment of error.

1 Petitioners contend the hearings officer's findings  
2 addressing CDC 423-11 inappropriately rely entirely on oral  
3 testimony by Jim Roofner, one of the applicant's experts, and  
4 ignored conflicting evidence. Petition for Review 20.  
5 Petitioners do not identify where in the record this oral  
6 testimony appears. Intervenor also does not identify where  
7 the disputed testimony appears in the record. Because we are  
8 not directed to the disputed testimony, we are unable to  
9 determine whether the testimony constitutes evidence a  
10 reasonable person would rely upon in reaching the challenged  
11 decision. Eckis, 110 Or App at 313.

12 We sustain the third assignment of error, and the  
13 arguments submitted in support of the assignment of error, to  
14 the extent it alleges the hearings officer's findings of  
15 compliance with CDC 423-11.2 are not supported by substantial  
16 evidence.<sup>12</sup>

17 The third assignment of error is sustained.

18 **FOURTH ASSIGNMENT OF ERROR**

19 Petitioners contend that CDC 430-37.2(E)(7) and (8)  
20 require that "the applicant must prove that additional  
21 [farmworker] housing is needed, and that there are no

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<sup>12</sup>Petitioners also argue the hearings officer improperly relied on a condition of approval that the applicant obtain a water rights permit. We agree with intervenor that the hearings officer's finding of compliance with CDC 423-11.2 does not depend on the condition of approval and that imposing that condition of approval provides no independent basis for remand.

1 alternative sites on non-resource land." Petition for Review  
2 24. CDC 430-37.2(E)(7) and (8) provide:

3 "(7) [I]f the full time farm help is of a seasonal  
4 nature, the following information shall be  
5 provided for review:

6 "(a) Why seasonal, additional workers are  
7 needed;

8 \* \* \* \* \*

9 "(8) In the EFU and AF-20 Districts, seasonal farm  
10 worker housing shall meet the requirements of  
11 ORS 197.685."

12 The applicant submitted information concerning the need  
13 for farmworker housing, and the hearings officer found the  
14 applicant demonstrated a need for farmworker housing for 407  
15 farmworkers and their families. Petitioners argue that "the  
16 applicant's 'Pre-hearing Memorandum' admitted that 130 of the  
17 [407] requested persons were for future, speculative  
18 purposes." Petition for Review 25. Petitioners also argue  
19 the decision fails

20 "to consider that crops ripen at different times,  
21 and that workers used to pick early-season crops can  
22 [be] and are used to pick other late season crops.  
23 In failing to consider this fact when calculating  
24 the number of 'needed' workers, the county inflated  
25 the total number of persons actually 'needed.'" Id.

26 Intervenor makes no attempt to address this criticism of the  
27 evidentiary support for the hearings officer's finding that  
28 housing for 407 seasonal farmworkers is needed. We conclude  
29 that the hearings officer's finding that there is a need for  
30 rural seasonal farmworker housing for 407 farmworkers and

1 their families is not supported by substantial evidence in the  
2 record.<sup>13</sup>

3 Petitioners also argue under this assignment of error  
4 that the county must consider alternative sites in rural  
5 centers and areas committed to nonresource uses. This  
6 argument is based on the requirement in ORS 197.685(2) that  
7 such areas be "considered" when accommodating the identified  
8 need for farmworker housing.

9 We agree with petitioners, and we disagree with the  
10 county's decision, to the extent it finds that the hearings  
11 officer was not required to consider the ability of "rural  
12 centers and areas committed to nonresource uses" to  
13 accommodate the identified need for seasonal farmworker  
14 housing. One of the "requirements" imposed by ORS 197.685 is  
15 compliance with ORS 197.685(2), which requires that the county  
16 "consider rural centers and areas committed to nonresource  
17 uses in accommodating the identified need [for rural seasonal  
18 farmworker housing]."

19 Petitioners also challenge the adequacy of the evidence  
20 to support the hearings officer's findings and conclusions  
21 that the applicant adequately addressed alternatives to  
22 providing the disputed housing at the proposed location.  
23 Intervenor treats petitioners' challenge as though it were  
24 limited to challenging the adequacy of the hearings officer's

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<sup>13</sup>Intervenor does not contend this issue was not raised below, and we assume that it was.

1 findings. As we have already noted, petitioners' challenge in  
2 the argument under the fourth assignment of error is broader.  
3 Without some assistance from the intervenor in addressing  
4 petitioners' substantial evidence challenge, we sustain the  
5 substantial evidence challenge.

6 Petitioners make two additional arguments under this  
7 assignment of error. First petitioners state that the  
8 hearings officer erred by not considering whether the housing  
9 can "be provided within the urban area." Petition for Review  
10 26. This argument is not developed further and for that  
11 reason is rejected. Deschutes Development v. Deschutes Cty, 5  
12 Or LUBA 218, 220 (1982).<sup>14</sup>

13 Finally, petitioners also argue that CDC 430-37.2(E)(8)  
14 and ORS 197.685(2) should be interpreted consistently with ORS  
15 215.277, which mandates that the siting of seasonal farmworker  
16 housing be in compliance with the intent and purpose of ORS  
17 215.243. Petitioners contend ORS 215.243 "set[s] forth a  
18 policy that urban-type development be kept off of EFU lands."  
19 Petition for Review 25. ORS 215.243(3) does express concern  
20 about expansion of urban uses into rural agricultural areas.  
21 However, ORS 215.243 does not prohibit such expansion, and the  
22 lists of legislatively authorized uses in EFU zones at ORS

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<sup>14</sup>We also note that ORS 197.685(2) is concerned exclusively with a demonstrated need "for seasonal farmworker housing within the rural area of a county." The need for such housing in the "rural" area of the county may be affected by the availability of housing in "urban" areas that is suitable for seasonal farmworkers. However, once a need for rural seasonal farmworker housing is established, no further consideration of urban areas would be relevant or required under ORS 197.685(2).

1    215.213 and 215.283 make it clear that there is no such  
2    absolute prohibition.

3                 The fourth assignment of error is sustained, in part.

4    **FIFTH ASSIGNMENT OF ERROR**

5                 The Plan requires that the county "review the adequacy of  
6    [schools and fire and police protection] in conjunction with  
7    new development." Plan Policy 22, Strategy a. CDC 501-9.2  
8    governs provision of public facilities outside the UGB and  
9    similarly requires that "impact on [school, fire and police  
10   protection and public roads] shall be considered[.]"

11               Petitioners concede that Plan Policy 22, Strategy a and  
12   CDC 501-9.2 require "consideration" of the specified services  
13   and facilities and do not require that the county "assure  
14   adequate services in the rural area." Petition for Review 28.  
15   Petitioners argue, however, that the county may not "ignore"  
16   the adequacy of police protection.

17               We do not agree that the hearings officer ignored  
18   provision of police services. To the contrary, the findings  
19   and evidentiary record establish the hearings officer  
20   thoroughly considered the effect of the facility on police  
21   services. Nor do we agree with petitioners' argument that the  
22   hearings officer improperly shifted the burden of proof  
23   concerning police services to petitioners.

24               The fifth assignment of error is denied.

25               The county's decision is remanded.