BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

PATRICIA LAWRENCE,	)	
	)	
Petitioner,	)	
	)	LUBA No. 98-132
vs.	)	
	)	FINAL OPINION
CLACKAMAS COUNTY,	)	AND ORDER
	)	
Respondent.	)	

Appeal from Clackamas County.

Mary W. Johnson, Oregon City, filed the petition for review and argued on behalf of petitioner. With her on the brief was Mary Ebel Johnson, P.C.

Michael E. Judd, County Counsel, Oregon City, filed the response brief and argued on behalf of respondent.

HOLSTUN, Board Chair; BASSHAM, Board Member; BRIGGS, Board Member, participated in the decision.

AFFIRMED 6/15/99

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioner appeals a county decision concerning a nonconforming go-kart track located on petitioner's property.

FACTS

Petitioner's 8.27-acre property is developed with a single-family residence and "a quarter-mile closed loop go-kart track" that was operated as a commercial venture on the subject property by a prior owner from 1960 to 1968. Record 17. That facility included "go-kart races open to the public, go-kart rentals to the public, and a food concession." Id. The parties dispute whether the prior owner discontinued the go-kart facility between 1968 and 1970. Petitioner purchased the subject property in 1971 or 1972 and has operated a go-kart facility on the subject property since that date.

The county first adopted zoning for the subject property in 1964. Since 1964, the zoning applied to the subject property either did not allow the disputed go-kart track facilities or required permits that have not been issued. The disputed go-kart track facility has been allowed to continue as a nonconforming use.

The operation of the disputed facility on the subject property has generated substantial opposition by area residents and has been the subject of a number of county enforcement actions. One of those enforcement actions led to petitioner's application seeking county confirmation that the go-kart facility may continue as a nonconforming use. The county planning director concluded that the right to continue the disputed go-kart facility as a nonconforming use was lost when that facility was discontinued between 1968 and 1970. Petitioner appealed the planning director's decision to the county hearings officer, who affirmed the planning director's decision. This appeal followed.

FIRST ASSIGNMENT OF ERROR

ORS 215.130 establishes statutory standards that counties must apply to determine

whether nonconforming uses may continue or be altered. Petitioner argues the county improperly construed ORS 215.130.[1]

The challenged decision finds that the disputed go-kart facility has existed continuously since petitioner purchased the property in 1971 or 1972, a period of more than 10 years. Record 17. Therefore, the rebuttable presumption provided for in ORS 215.130(10)(a) applies. However, the county found, based on evidence submitted during the local proceedings, that between the years 1968 and 1970 the disputed facility was interrupted for more than a year.[2] Based on that finding, the county concluded that the right to continue the disputed go-kart facility as a nonconforming use was lost under ORS 215.130(7).[3]

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[1]The relevant portions of ORS 215.130 are set out below:

> " (5) The lawful use of any building, structure or land at the time of the enactment or amendment of any zoning ordinance or regulation may be continued. * * *
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> "* * * * *
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> "(7) Any use described in subsection (5) of this section may not be resumed after a period of interruption or abandonment unless the resumed use conforms with the requirements of zoning ordinances or regulations applicable at the time of the proposed resumption.
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> "* * * * *
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> "(10) A local government may adopt standards and procedures to implement the provisions of this section. The standards and procedures may include but are not limited to the following:
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> > "(a) For purposes of verification of a use under subsection (5) of this section, a county may adopt procedures that allow an applicant for verification to prove the existence, continuity, nature and extent of the use only for the 10-year period immediately preceding the date of application. Evidence proving the existence, continuity, nature and extent of the use for the 10-year period preceding application creates a rebuttable presumption that the use, as proven, lawfully existed at the time the applicable zoning ordinance or regulation was adopted and has continued uninterrupted until the date of application;
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> "* * * * *." (Emphasis added.)

[2]The county has adopted code provisions that substantially duplicate the statutory provisions quoted in n 1. Although ORS 215.130(5) does not specify a particular period of time for an interruption, Clackamas County Zoning and Development Ordinance (ZDO) 1206.02, the county code provision implementing the statute,

Petitioner reads ORS 215.130(10)(a) to create an alternative method for establishing the existence and continuation of a nonconforming use where "only" the 10-year period immediately prior to the date the application is submitted need be examined. Under petitioner's reading of ORS 215.130(10)(a), once petitioner established that the disputed facility existed continuously for the ten years leading up to the date the application was submitted in 1998, it became irrelevant whether the disputed facility was discontinued between 1968 and 1970.[4]

After quoting the statute,[5] the county explains its understanding of how the rebuttable presumption under ORS 215.130(10)(a) works:

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provides that a nonconforming use may not be resumed after it has been "discontinued for a period of more than twelve (12) consecutive months."

[3]In her second assignment of error, discussed below, petitioner argues that the evidentiary record in this appeal does not support the county's finding that the disputed facility was discontinued for more than a year.

[4]Petitioner cites two items of legislative history from HB 2021, which was adopted in 1997 and is the source of the current version of ORS 215.130(10)(a).

> "Representative Larry Sowa, the sponsor of [HB 2021], made the following comments to the Senate Water and Land Use Committee while testifying on behalf of HB 2021 on May 29, 1997:
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> > "'The County only has to look back ten years to make sure that it is a nonconforming use * * *. It allows them to go back ten years for people to prove that they were a nonconforming use * * *. What it allows is the County to go through a process by which they adopt a rule saying 'we are not going to go back more than ten years.' So, if a person has been there twenty-five years, they have to just prove that they have been there ten years. It doesn't require them to prove that they have been a nonconforming use for twenty-five years.'
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> "Additionally, Senator Bob Kintigh, the carrier of HB 2021 on the Senate floor on June 9, 1997, made the following comments:
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> > "'This bill * * * allows the County governments to adopt * * * standards and provisions that would require them only to verity back for a ten year period. Otherwise, they would have to verify clear back to the beginning.'" Petition for Review 10 (footnote omitted).

Petitioner argues that this legislative history supports her contention that only the 10 years preceding the submission of an application requesting verification of the existence of a nonconforming use need be examined.

[5]See n 1.

> "[Petitioner's] argument is built around the use of the word 'only' in the first sentence of [ORS 215.130(10)(a)]. This argument in effect ignores the second sentence, which states that proof of an ongoing nonconforming use for the prior ten years creates a rebuttable presumption that a lawful nonconforming use was created at the time zoning was imposed and has continued uninterrupted up to the present. Petitioner mentions the rebuttable presumption in passing, but continues to argue that the County should only look back at the prior ten years.
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> "The clear intent of the statute is to allow the possibility of verification of a nonconforming use on the basis of a 10-year history, to avoid the obvious proof problems of having to look back for evidence of what use existed 20, 30 or more years ago. The basic inquiry, however, is still whether the use 'lawfully existed at the time the applicable zoning ordinance or regulation was adopted and has continued uninterrupted.' ORS 215.130(10)(a). If evidence is presented that the use did not exist at the time of zoning or (as in this case) was discontinued for a period of time, the presumption has been rebutted, and the 10-year provision becomes irrelevant. At that point, the proponent of the nonconforming use has the burden of showing that the nonconforming use was lawfully established at the time of zoning and continued uninterrupted since then. Petitioner's two short quotes from the legislative history of HB 2021 are not inconsistent with this reading of the statute. They point out that the bill allows verification of a nonconforming use with only ten years' history, but do not address the question of what happens if the presumption is rebutted." Respondent's Brief 3-4.

We generally agree with the county's interpretation of ORS 215.130(10)(a).[6] The plain language of ORS 215.130(10)(a) is consistent with the county's explanation of the statute and is inconsistent with petitioner's reading of the statute.[7]

Because we do not believe that the statute is ambiguous, resort to legislative history is improper. PGE v. Bureau of Labor and Industries, 317 Or 606, 611-12, 859 P2d 1143 (1993). Even if resort to legislative history were appropriate in this case, we agree with the

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[6]It is possible to read the county's explanation to conclude that evidence rebutting the legal presumption for a specific time period would entirely eliminate the legal presumption, rather than eliminate the legal presumption only for the specific period of time for which rebuttal evidence is submitted ("If evidence is presented that the use * * * was discontinued for a period of time, the presumption has been rebutted, and the 10-year provision becomes irrelevant."). Respondent's Brief 3-4. We question that aspect of the county's explanation. However, because that issue is not presented in this appeal, we need not and do not address it.

[7]The county also quotes in its brief the hearings officer's more elaborate analysis of the meaning of ZDO 1206.06(B), which adopts ORS 215.130(10)(a). We agree with the hearings officer's analysis as well.

county that the legislative history cited by petitioner is consistent with the county's interpretation of ORS 215.130(10)(a).

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioner argues that the hearings officer's decision is not supported by substantial evidence. Petitioner also argues that under ORS 215.130(10)(a), the burden of proof concerning the alleged interruption of the disputed go-kart facility between 1968 and 1970 shifted to the county, after petitioner carried her burden of proof to establish the continued existence of the facility for the 10 years prior to the date the application was submitted. Petitioner argues that the hearings officer failed to hold the county to the appropriate evidentiary standard and improperly shifted the burden of proof to petitioner.

A. Clear and Convincing Evidence

Petitioner suggests that once a rebuttable presumption was established under ORS 215.130(10)(a), the county must rebut that presumption by "clear and convincing evidence." Petition for Review 13. The only authority petitioner cites in support of that proposition is J.R. Widmer, Inc. v. Dept. of Rev., 261 Or 371, 494 P2d 854 (1972). That case does not purport to establish any generally applicable principles concerning the quality or quantum of evidence that is required to rebut a rebuttable presumption. Absent some indication in ORS 215.130(10)(a) to the contrary, we think it is much more likely that the legislature intended to impose the same evidentiary burden on parties attempting to rebut a legal presumption under ORS 215.130(10)(a) that would be required under OEC 308 in civil proceedings generally.[8] Cf. Pfeifer v. City of Silverton, 146 Or App 191, 195, 931 P2d 833 (1997)

[8]OEC 308 provides:

> "In civil actions and proceedings, a presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence."

(although LUBA is not bound by the Oregon Rules of Civil Procedure, those rules are "highly instructive as to what the legislature meant" in analogous statutory contexts).

We therefore reject petitioner's argument that the county was required to rebut the presumption in this matter with "clear and convincing evidence."

B. Improper Shifting of the Burden of Proof

We agree with the county that the hearings officer's decision, read as a whole, reflects a correct reading of the allocation of the burden of proof among the parties below under ORS 215.130(10)(a). First, we do not agree that ORS 215.130(10)(a) shifts the "burden of proof" to the county, in the sense petitioner appears to argues that it does. Once petitioner carried her burden to establish the continued existence of the disputed facility for the prior 10-year period, unless the county or some other party produced evidence to establish that the disputed facility was interrupted between 1968 and 1970, the continued existence of the facility between 1968 and 1970 was established as a matter of law through the rebuttable presumption. In other words, the rebuttable presumption in ORS 215.130(10)(a) shifts the burden of going forward with evidence to the county or any party opponents.

The burden of proof to establish the continued existence of the disputed facility from the time it became nonconforming in 1964 remains with petitioner under ORS 215.130. ORS 215.130(10)(a) simply allows petitioner to carry her burden of proof concerning the continued existence of the facility by establishing the continued existence of the facility for the 10 years prior to the date the application was submitted. The rebuttable presumption allows petitioner to carry her burden of proof with regard to prior years without having to produce evidence that the use existed or continued at all times during those prior years. However, the rebuttable presumption created by ORS 215.130(10)(a) is simply that—a rebuttable presumption. Where the county or other parties present evidence that establishes the disputed facility was interrupted, the rebuttable presumption no longer applies, and

petitioner no longer may rely on the rebuttable presumption to carry her burden of proof with regard to that period of interruption.

Petitioner argues that the hearings officer improperly placed a burden on the applicant to produce evidence concerning the alleged period of interruption, rather than imposing a burden on the county and opponents of the application to produce evidence sufficient to rebut the ORS 215.130(10)(a) presumption. [9] We do not agree. The hearings officer specifically explained:

> "[T]he question becomes whether the Planning Director's finding of discontinuance has the requisite evidentiary support such that it effectively rebuts the 'rebuttable presumption' of a 10-year nonconforming use under [the county code provisions adopted to implement ORS 215.130(10)(a)]." Record 21-22.

Viewed as a whole, the hearings officer's decision reflects a correct understanding of how the rebuttable presumption under ORS 215.130(10)(a) operates.

C. Substantial Evidence

Petitioner argues that the record includes "overwhelming evidence * * * that the go-kart track had been in continuous operation since its inception in 1960, including during the disputed years of 1968-1970[.]" Petition for Review 14. Petitioner complains that the hearings officer relied upon "the testimony of one neighbor and the absence of 20-year old business record" in reaching his conclusion that the disputed facility was discontinued between 1968 and 1970. Id. Petitioner contends the hearings officer's decision "is clearly not supported by substantial evidence * * *." Id.

The testimony of the neighbor was described by the planning director as follows:

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[9] Petitioner relies on the following language in the hearings officer's decision:

> "[N]otwithstanding Appellant's proof that the use had endured for the last ten years, nothing about that proof either rebuts the [planning director's] affirmative finding of a prior discontinuance or serves to revive or resuscitate a discontinued use." Record 25.

> "One letter was received from a neighbor who has lived in close proximity to the subject property since August of 1965. This neighbor has lived in the neighborhood longer than any other person submitting comments, and also longer than the applicant herself. This neighbor states that the track has not been in continuous usage since the adoption of restrictive zoning regulations on [September] 8, 1964. This neighbor states that Perry Jones owned the subject property at the time he moved to his property in 1965. He also indicated that after that time, the track was used off and on and not on a steady basis. He states that Mr. Jones moved to Canada in 1966 or 1967 and the track was not operated during the time Mr. Jones was away. He continues by stating that during this time, Mr. Jones rented the property to tenants and that the track was not in operation during that time. Approximately one year prior to the purchase of the property by the [Lawrences], Mr. Jones returned from Canada due to problems he was having with the renters of the subject property. He spent approximately one year evicting these tenants. Subsequently, the property was purchased by the [Lawrences]. [T]he last restaurant license issued to the [Joneses] for the concession stand was issued on [January] 9, 1968. The only later record related to the [Joneses] operation was the change of address filing with the Corporation [Commissioner] in 1970 indicating that the [Joneses] no longer lived at the subject property. The [Lawrences] did not file the Articles of Amendment with the Corporation [Commissioner] until April 5, 1973. The comments from neighbors and the information submitted by the applicant indicates that the track has been used on an irregular basis for many years since the purchase by the [Lawrences] in 1971 or 1972. Based upon the lack of records for the period between 1968 and 1970, and the statements of the long-term neighbor, the staff must conclude that the nonconforming use was discontinued for a period exceeding twelve (12) consecutive months; therefore the nonconforming use status of the commercial go-kart track was lost." Record 117.

The hearings officer adopted the above-quoted findings. Record 18. The hearings officer ultimately found "the [planning director's] finding of discontinuance long prior to the 10-year period [before the date the application was submitted] effectively rebuts any 'presumption' of nonconforming use." Record 25. The hearings officer adopted detailed findings addressing the evidence that was submitted in support of petitioner's application. Those findings explain that much of the testimony that go-karts actually used the track

during 1968 through 1970 did not really address whether the disputed commercial business facility continued. [10]

We reject petitioner's contention that the hearings officer's decision is not supported by substantial evidence.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

The county processed petitioner's application as a verification of a nonconforming use. However, petitioner argues that she applied "for an interpretation of a nonconforming use," and was therefore entitled to appeal the hearings officer's decision to the Board of County Commissioners under ZDO 1304.01.[11] Petition for Review 15. Petitioner contends

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[10]The hearings officer explained:

> "[Petitioner] has submitted affidavits and letters that attest to the fact that the go-kart facility had been established sometime in the early 1960s and has been operating since. However, all of those affidavits and letters contain the same significant omission: none of them offer any specific, credible details that directly and specifically challenge the testimony from the longtime abutting neighbor—cited in the [planning director's decision]—that the original owners (the Joneses) discontinued operations in approximately 1966 or 1967, moved away, and did not thereafter resume operations. Furthermore, many of [petitioner's] evidentiary submittals comprise testimony from individuals who had no connection whatsoever with the facility in the 1960s or early 1970s.
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> "One such affidavit * * * declares that 'I have [ridden] at the Damascus Rev 'N Ride since its inception in 1961. To the best my knowledge, it has never been closed or been out of operation for more than a short time in all of those years.' That sort of testimony underscores a pivotal point—or, rather, a pivotal gap in evidence—made significant only because of the peculiar manner in which the track facilities have been used. The testimony at the July hearing and other comments that appear in the record confirm, and the Hearings Officer so finds, that the go-kart facility has always been available for use for individuals—literally; the facility had no locked gate that impedes entry, and racers have historically used the track whenever they so desired, even with no supervisory personnel present (to collect user fees or otherwise) and even under conditions that did not distinguish between authorized use by business invitees and unauthorized trespassory use by whomever. Under the particular circumstances of this matter, the Hearings Officer does not equate that sort of usage as necessarily characteristic or indicative of a business that had been 'open' or 'continued' as such, particularly in light of unrebutted testimony that the owners during the late 1960s (the Joneses) had not been present on the subject property during a two-year period in the late 1960s to run or 'continue' the business." Record 22-23.

[11]ZDO 1304.01 provides:

that the county erred by failing to provide an opportunity for an appeal of the hearings officer's decision to the board of county commissioners.

Apparently, under a prior version of ZDO 1206.06, the county considered requests for confirmation of nonconforming uses as "interpretations" which, under ZDO 1304.01, may be reviewed by the board of county commissioners. However, as the county points out, ZDO 1206.06 was amended one month prior to the date the application that led to the disputed decision was filed with the county. As amended, ZDO 1206.06 does not provide that requests for verification of a nonconforming use are to be processed as an "interpretation." Petitioner does not dispute that an appeal to the board of county commissioners is not available for verification decisions under ZDO 1206.06. Nevertheless, petitioner argues that, because there was some confusion about whether her application was considered to be an "interpretation," the county should be estopped from taking the position that no appeal of the disputed decision to the board of county commissioners was available.

For purposes of this assignment of error, we assume without deciding that we could remand the county's decision, based on an equitable estoppel argument. See Sparks v. City of Bandon, 30 Or LUBA 69, 73 (1995) (questioning whether LUBA has authority to reverse a land use decision based on equitable estoppel); Pesznecker v. City of Portland, 25 Or LUBA 463, 466 (1993) (same); Lemke v. Lane County, 3 Or LUBA 11, 15, n 2 (1981) (same). We explained the elements of estoppel in Crone v. Clackamas County, 21 Or LUBA 102, 108 (1991):

> "In order for there to be estoppel by conduct there must
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> > "'(1) be a false representation; (2) it must be made with knowledge of the facts, (3) the other party must have been ignorant of the truth; (4) it must have been made with the

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"The decision of the Land Use Hearings Officer shall be the final decision of the County, except, in the case of an application for an Interpretation, the Board of County Commissioners may review the decision of the Land Use Hearings Officer on an appeal. * * *"

> intention that it should be acted upon by the other party; (5) the other party must have been induced to act upon it.' Coos County v. State of Oregon, 303 Or 173, 180-81, 743 P2d 1348 (1987) (quoting from Oregon v. Portland Gen. Elec. Co., 52 Or 502, 528, 95 P 722 (1908))."

Petitioner's estoppel argument is without merit. We agree the county that it is questionable whether there were any "false" representations concerning the nature of the application in this matter. At least one of the county's references to the application as an "interpretation" occurred before ZDO 1206.06 was amended and, for that reason, was correct. The other identified references to the application as an "interpretation," while technically incorrect, do not amount to a "false" statement that could provide the basis for an estoppel in the circumstances presented in this appeal. In addition, we have no way of knowing if the county staff persons making the erroneous references knew that the references to the application as an "interpretation" were incorrect. Neither does petitioner demonstrate that the persons making those erroneous references did so with the required intention that petitioner act in some particular manner. Finally petitioner does not identify how she was in fact induced to act in this matter any differently than she would have acted had she known that the application was not viewed as an "interpretation."

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

ZDO 1305.02(D)(2) provides:

> "[Appeals of planning director decisions] shall be reviewed by the Land Use Hearings Officer under [ZDO] 1301-1304 * * *."

Petitioner argues that ZDO 1301-1304 requires that the hearings officer's review be de novo and that the following language in the hearings officer's decision indicates that he failed to conduct the required de novo review:

> "It seems plain enough by the sheer breadth of the language in ZDO 1301 to 1304 that the Hearings Officer has the authority to review appeals anew, as if there had been no underlying decision—in effect, according no significance to

> the initial Planning Director decision. However, this Hearings Officer believes that the County's administrative decisions should be accorded a more meaningful or substantive status, and accordingly interprets and applies the review procedures in ZDO 1301 to 1304 as enabling him to accord considerable deference to (or be guided by) the findings, conclusions, and reasoning in the Planning Director's decision—at least in the absence of some compelling reason to disagree with the Planning Director's analysis or otherwise alter the result of the decision." Record 15-16.

For purposes of this assignment of error we assume, without deciding, that ZDO 1301 to 1304 requires that the hearings officer conduct a de novo review.[12] The county argues that, if the hearings officer's decision in this matter is read as a whole, it is clear that notwithstanding the above-quoted language in the hearings officer's decision, the hearings officer nevertheless conducted a de novo review. Although the question is a close one, we agree with the county.

It is not entirely clear whether the above quoted language from the hearings officer's decision actually takes the position that he is not required to conduct a de novo review.[13] Moreover, immediately after the hearings officer questions whether the applicant should be allowed to submit new evidence, the hearings officer expressly states he does not reject the new evidence that was submitted by the petitioner. Additionally, the hearings officer's detailed findings at pages 21-25 of the record demonstrate that the hearings officer conducted a detailed review and critique of the evidence submitted by the applicant and the applicable ZDO criteria. Although the hearings officer's earlier statements can be read to suggest that

[12]We also need not decide whether petitioner's assignment of error is sufficient to implicate ORS 215.416(11)(a), which applies to "permit" decisions, as that term is defined by ORS 215.402(4). ORS 215.416(11)(a) clearly requires that the county provide an opportunity for a "de novo appeal" when the county initially renders a "permit" decision without providing a hearing.

[13]The above quoted language stating that the hearings officer believes he should "defer" to the planning director can be read to suggest he is conducting something other than a de novo review, but the hearings officer also characterizes his review as being "guided by" the planning director's "findings, conclusions and reasoning." It is less clear that using the planning director's decision as a "guide" means the hearings officer failed to conduct a de novo review.

the hearings officer was not conducting a de novo review, we are persuaded by his subsequent findings that he, in fact, did so in this appeal.

The fourth assignment of error is denied.

The county's decision is affirmed.