BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

STAFFORD INVESTMENTS, LP,
Petitioner,

vs.

CLACKAMAS COUNTY,
Respondent.

LUBA No. 2018-003

FINAL OPINION
AND ORDER

Appeal from Clackamas County.

Michael C. Robinson, Portland, filed the petition for review and argued on behalf of petitioner. With him on the brief was Garrett H. Stephenson and Schwabe, Williamson & Wyatt, PC.

Nathan K. Boderman, Clackamas County Counsel, Oregon City, filed the response brief and Nathan K. Boderman and Jennifer Ann Trundy, Certified Law Student, argued on behalf of respondent.

BASSHAM, Board Member; RYAN, Board Chair; ZAMUDIO, Board Member, participated in the decision.

AFFIRMED 10/26/2018

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioner appeals a board of county commissioners' decision denying its application to change the comprehensive plan designation and zoning map designation of petitioner's property to allow for rural commercial uses.

MOTION TO FILE REPLY BRIEF

Petitioner moves to file a reply brief to address a new matter raised in the county's response brief. There is no opposition to the motion or brief and the motion is allowed.

MOTION TO TAKE OFFICIAL NOTICE

Petitioner requests that the Board take official notice of (1) a May 16, 2018 Order by the Land Conservation and Development Commission (LCDC), (2) a consolidation and case management order from the Court of Appeals regarding appeals of the same May 16, 2018 LCDC order, and (3) Ordinance 06-2017, a county ordinance designating urban reserve areas. Petition for Review 17-18. There is no opposition to the request, and it is granted.

FACTS

The subject property is a five-acre parcel located on SW Stafford Road adjacent to the I-205/SW Stafford Road interchange. The subject property, and the adjoining property north of the highway, are designated rural residential on the county comprehensive plan map and zoned Rural Residential/Farm-Forest 5-acre minimum (RRFF-5). The property is developed with a single-family

residence and several outbuildings associated with farm and non-farm uses that petitioner conducts on the property. One of the uses currently conducted on the property is a commercial landscape supply, contracting and maintenance business, which is not an allowed use in the RRFF-5 zone.

The subject property has a mixed history of residential, farm and commercial uses. In 1987 the county approved a home occupation permit for an electrical contractor business operated from the dwelling, including a shop to warehouse materials. This home occupation permit expired in 1993. In 1997, a plant nursery was established as an allowed farm use on the property. The then-property owner applied to the county for a conditional use permit to allow the storage, weathering and retail sales of landscaping rock in conjunction with the plant nursery. The proposed activity would occupy approximately two percent of the property. The hearings officer denied the application as unnecessary, because the hearings officer concluded that incidental sales of landscape supply materials is an allowed accessory use to the primary nursery use. In September 1997, following the hearings officer's decision, the property owner apparently established on the property the commercial landscape supply, contracting and maintenance business that petitioner currently operates from the property.

In 2006 and 2007, the county granted temporary permits to allow the Oregon Department of Transportation (ODOT) to store equipment and supplies on the subject property for a highway maintenance project. The county had

granted similar temporary permits in the 1980s to store equipment for the construction of I-205.

In 2008, the county cited petitioner, the current property owner, for conducting an unlawful commercial business on the property. However, the violation file was closed based on a so-called "10-year policy," under which the county chose not proceed with enforcement actions against illegal uses that had been in existence at least 10 years. In 2009, the county board of commissioners repealed the 10-year policy. In 2014, the county again cited petitioner for operating a commercial business on the property. In response, petitioner filed the present applications for a comprehensive plan amendment from Rural to Rural Commercial and zone change from RRFF-5 to Rural Commercial (RC).

The subject property is located in an area that has been proposed as an urban reserve, known as Area 4C (Borland). The county and the regional government Metro designated Area 4C (Borland) as an urban reserve area in 2010, but that designation was later remanded along with other Stafford area urban reserves. *Barkers Five, LLC v. LCDC*, 261 Or App 259, 362–63, 323 P3d 368 (2014). On May 23, 2017, the county adopted a new decision on remand, Ordinance No. 06-2017, that again designated Area 4C (Borland) as an urban reserve area. On June 23, 2017, petitioner submitted its plan amendment and zone change applications to the county. On July 24, 2017, the county forwarded Ordinance No. 06-2017 to LCDC for review and approval.

In the proceedings on petitioner's plan amendment and zone change applications, county staff recommended denial based on the fact that the subject property is located within the Area 4C (Borland) urban reserve area designated by the county in Ordinance No. 06-2017, and a comprehensive plan policy prohibits plan or zoning amendments in urban reserve areas. The county board of commissioners agreed with that argument, and on December 14, 2017, issued the county's final decision, denying the applications in part based on noncompliance with the comprehensive plan policy that prohibits plan or zoning amendments in designated urban reserve areas.

The county's decision also identifies two other bases for denial. The second is Clackamas County Comprehensive Plan (CCCP) Policy 4.LL.3 (Policy 4.LL.3), which in relevant part allows areas that have an "historical commitment to commercial uses" to be designated Rural Commercial. The commissioners concluded that petitioner failed to demonstrate that the subject property had been "historically committed to commercial uses," as the commissioners interpreted that term. The third basis for denial is failure to demonstrate compliance with the Transportation Planning Rule (TPR), at OAR 660-012-0060, adopted by LCDC to implement Statewide Planning Goal 12.

On appeal, petitioner challenges the three bases for denial, in three assignments of error, which we address in turn.

FIRST ASSIGNMENT OF ERROR

Petitioner argues that the county erred in denying the plan amendment and zone change application based on the belief that the subject property was, at the time the county made its decision, within a designated urban reserve area. According to petitioner, an urban reserve designation does not become final until LCDC has reviewed and approved the ordinance designating the urban reserve area, and the appeal period for that LCDC approval has passed. OAR 660-025-0160(8). Because LCDC did not issue its approval of the county's urban reserve designation until May 16, 2018, and LCDC's order is currently on appeal, petitioner argues that pursuant to OAR 660-025-0160(8) the urban reserve designation has not yet become final, and certainly was not final at the time the county issued its decision in the present case, on December 14, 2017.

The county agrees with petitioner that pursuant to OAR 660-025-0160(8) the county's urban reserve designation was not final at the time the county made its decision, and therefore is not a valid basis for denying petitioner's application. However, the county argues that this error does not warrant remand, because the county identified two other bases for denial, and because one or both of those bases for denial can be affirmed on appeal, the county's decision must be affirmed.

We agree with the county that the conceded error with respect to the urban reserve designation does not warrant remand, if the county's decision identifies other bases for denial that are affirmed on appeal. *Kine v. Deschutes County*, 75

Or LUBA 407, 414 (2017). At oral argument, for the first time petitioner argued to the contrary that even if LUBA affirms one or both of the remaining bases for denial, LUBA should remand the decision to the county to reevaluate whether the remaining bases for denial, standing alone, continue to warrant denial. Petitioner contends that the commissioners' belief that the subject property was located within an urban reserve area with a final designation was the primary reason why the commissioners chose to reject petitioner's application. Without that primary reason for denial, petitioner suggests, the commissioners might well choose to change their interpretations and evidentiary conclusions regarding whether the subject property is "historically committed to commercial uses" and whether petitioner's TPR analysis is sufficient to demonstrate compliance with the TPR.

OAR 661-010-0040(1) provides that LUBA "shall not consider issues raised for the first time at oral argument." This new theory for why remand is warranted that petitioner raised for the first time at oral argument is a new issue not raised in the briefs, and therefore one we cannot consider. Even if the issue had been briefed, nothing in the findings or decision suggests that the commissioners viewed only one basis for denial to be valid or substantial. If that were the case, it is difficult to understand why the commissioners chose to adopt three separate, independent bases for denial, even though only one was necessary.

The first assignment of error is sustained. However, as discussed below, we reject petitioner's second assignment of error and affirm the county's

conclusion that petitioner failed to establish that the property has an historical commitment to commercial uses. Because a decision denying an application must be affirmed if there is at least one valid basis for denial, petitioner's arguments under the first assignment of error do not provide a basis for reversal or remand.

SECOND ASSIGNMENT OF ERROR

CCCP Policy 4.LL.3 provides, in relevant part:

> "Areas may be designated Rural Commercial when either the first or both of the other criteria are met:
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> "(1) Areas shall have an historical commitment to commercial uses; or
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> "(2) Areas shall be located within an Unincorporated Community; and
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> "(3) The site shall have direct access to a road of at least a collector classification."

The subject property is not located within an unincorporated community, so petitioner argued to the county that the property can be designated Rural Commercial because it is part of an area that has "an historical commitment to commercial uses." Petitioner argued that both the subject property and the surrounding area have an historical commitment to commercial uses, citing several existing commercial uses in the surrounding area. The county commissioners disagreed, first considering and rejecting petitioner's arguments that the surrounding area is committed to commercial uses. Record 20. Alternatively, the commissioners rejected petitioner's argument that "areas"

refers to both property proposed for redesignation and the surrounding area. The commissioners adhered to an interpretation of "areas" that they had adopted in an earlier case involving a similar comprehensive plan policy governing designation to Rural Industrial, to the effect that the term "areas" as used in Policy 4.LL.3 refers only to the land proposed for designation as Rural Commercial, not the surrounding area. *Id.* (citing *Ooten v. Clackamas County*, 70 Or LUBA 338 (2014)).[1]

Finally, the commissioners rejected petitioner's arguments that the land uses on the subject property from the mid-1980s to the present constituted "an historical commitment to commercial uses." According to the county, temporary uses, such as the temporary storage of construction materials by ODOT during highway projects, cannot "commit" the property to commercial uses. Record 21. Further, the commissioners concluded that commercial uses that are subordinate

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[1] The findings state, in relevant part:

> "Further, for the purposes of assessing a potential zone change on a specific property and applying the Plan policy requiring an 'area' to have an historical commitment to a specific type of use, the Board of County Commissioners has historically found that the appropriate 'area' for consideration is the subject property or properties. In *Ooten v. Clackamas County* (LUBA No. 2014-069) [LUBA] confirmed this interpretation, noting that LUBA must defer to the County Commissioners' interpretation of their own codes unless it is implausible and that the Board's interpretation of 'area' to include only the subject property(ies) is not implausible nor inconsistent with any express language in the county's Plan or land use regulations." Record 20–21.

to a primary residential or resource use of the property, such as the expired home occupation permit for an electrical contractor residing in the dwelling, or the retail sales of landscape rock as an incidental use to the primary nursery use, by their categorical nature cannot "commit" the property to commercial use. *Id.* Finally, the county concluded that the landscape supply, contracting and maintenance business that has operated on a portion of the subject property since 1997 is an illegal use and, as such, does not constitute an "historical commitment" of the property to commercial use, within the meaning of Policy 4.LL.3(1). *Id.*

A. Adequacy of Findings Regarding the Meaning of "Areas"

Under the first subassignment of error, petitioner does not argue, at least directly, that the commissioners' interpretation of the term "areas" in Policy 4.LL.3 is reversible under the deferential standard of review at ORS 197.829(1) that we must apply to a governing body's interpretation of local land use legislation.[2] However, petitioner argues that the county's findings addressing

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[2] ORS 197.829(1) provides:

> "[LUBA] shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government's interpretation:
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> "(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
>
> "(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation; [or]

Policy 4.LL.3 are inadequate, because the findings do not explain why it is appropriate to rely on the interpretation adopted in *Ooten*, which involved the same term "areas" but as used in a different context. Petitioner also argues that the findings are inadequate because they do not address petitioner's argument that the term "areas" is plural and thus can be read to encompass both the property proposed for redesignation and the surrounding area.

The county responds, and we agree, that petitioner has not demonstrated that the commissioners' findings regarding the meaning of "area" as used in Policy 4.LL.3 are inadequate. That the findings fail to discuss the potential contextual differences between the rural industrial and rural commercial designation standards does not mean that the county cannot rely on *Ooten* as some authority or precedent for interpreting the term "areas" as used in rezoning criteria to refer only to the property being considered for rezoning.[3] Neither during the proceedings below nor on appeal has petitioner identified any contextual differences suggesting that the term "areas" as used in Policy 4.LL.3

> "(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation[.]"

[3] The county's response brief notes that the commissioners had adopted, and LUBA affirmed, a similar interpretation of an identically-worded standard that applies to rezoning property to community commercial. *Swyter v. Clackamas County*, 40 Or LUBA 166, 174–75 (2001) (interpreting the phrase "[a]reas having an historical commitment to commercial uses" as used in CCCP Commercial Policy 7.0 to refer only to the properties proposed for rezoning).

should be interpreted differently than the same term as used in similar rezoning standards.

Finally, we disagree with petitioner that the findings are inadequate for failure to explicitly address petitioner's textual argument that the term "areas" is plural and could encompass both the property(ies) being considered for rezoning and surrounding properties. Petitioner does not cite any authority suggesting that the county has an obligation to adopt specific findings addressing arguments regarding alternative interpretations put forth by the parties below, or explaining why the county chose not to adopt those alternative interpretations.

The first subassignment of error is denied.

B. Historical Commitment to Commercial Uses

The county evaluated the historic uses of the subject property and concluded that those uses did not demonstrate a historical commitment to commercial use, after concluding that (1) temporary commercial uses, (2) incidental or accessory commercial uses to permitted residential or farm uses on the property, and (3) the current unlawful commercial uses on the property are not sufficient to demonstrate "historical commitment" of the property to commercial use.

Under the second subassignment of error, petitioner challenges those findings, arguing that the county erred in focusing on how commercial uses of the property are categorized under the applicable zoning, as temporary or permanent uses, or accessory or primary uses, or as permitted or unpermitted

uses. According to petitioner, the relevant question under Policy 4.LL.3 is how long and extensively the property has been used for any commercial use, regardless of how the use is categorized in the land use code or whether it is a lawful or unlawful use in the current zone. In this regard, petitioner argues that the "historical commitment" inquiry is akin to a nonconforming use verification, and argues, in an echo of the revoked "10-year policy," that unlawfully established commercial uses that have existed for more than 10 years on the property should be sufficient to constitute historical commitment to commercial uses. Petitioner faults the county for failing to adopt findings or interpretations specifying how long a commercial use must exist on the property before it results in commitment to commercial uses. Petitioner contends that under any interpretation of Policy 4.LL.3, the 20 to 30 year period of time that some commercial uses have operated on the property should be sufficient to demonstrate a historic commitment to commercial use.

The county responds that the key term here is "commitment," which commissioners understood to require an inquiry into the nature of the historic uses on the property, and a determination of whether commercial uses have constrained the scope of uses on the property such that going forward only commercial uses are feasible. Under that interpretation, the county argues, the commissioners reasonably concluded that temporary uses and incidental or accessory uses to primary residential or farm uses are not the kind of uses that can "commit" the property to commercial uses within the meaning of Policy

4.LL.3. The county notes that the approval criteria for a temporary use requires that the use not result in the permanent commitment of the land. Similarly, the findings note that a home occupation permit must be "*clearly subordinate to the residential use*[.]" Record 21 (emphasis in original). Further, the county found that the sales of landscape rock involved only two percent of the property and that use was an incidental component of a primary farm nursery use, and therefore did not commit the property to commercial use. Record 21–22.

We agree with the county that the commissioners' findings embody a narrow interpretation of what kind of uses can "commit" a property to commercial use, to exclude consideration of temporary uses and uses incidental to the primary uses allowed in the existing zone. Petitioner challenges that narrow interpretation, but has not demonstrated that the commissioners' interpretation of what constitutes "commitment" is inconsistent with the express language, purpose or policy underlying Policy 4.LL.3. Petitioner's challenge consists primarily of positing its own interpretation. However, the question is not whether petitioner's interpretation is a permissible or even a better interpretation of Policy 4.LL.3. The question is whether the commissioners' interpretation is "implausible." *Siporen v. City of Medford*, 349 Or 247, 243 P3d 776 (2010). We cannot say that the commissioners' understanding of the term "commitment" is implausible, and accordingly affirm it.

Under that interpretation, the county found that the landscape contracting and maintenance business that has illegally operated on the property since 1997

is the "only documented commercial use on the property," meaning apparently the only identified commercial use of the property that is a primary use rather than a temporary or incidental use, and therefore the only commercial use that could "commit" the property to commercial uses. Record 22. However, the county found:

> "[T]his business is not operating legally on the property and the only thing known about the scale of the business is that it is not operating on the entire property, as there are several other legal uses on the property. Therefore, this illegal commercial use does not constitute an 'historical commitment' of the property to a commercial use." Record 22.

Petitioner argues that the county erred in considering whether the landscape contracting and maintenance business was lawfully established, but does not explain why. Petitioner cites no code or comprehensive plan language or other authority suggesting that the county must ignore whether a commercial use was lawfully established or not, in determining whether that use has "committed" the property to commercial use, and thus warrants rezoning the property to a commercial zone.

The most focused argument petitioner makes on this point is to argue that in its decision that was appealed to LUBA in *Ooten*, the county rezoned a portion of a property to Rural Industrial based in part on consideration of industrial uses that had not been lawfully established. Petitioner argues that the county should adopt a similar approach in interpreting Policy 4.LL.3. However, the industrial use at issue in *Ooten* was a lawfully established nonconforming use, that had been

expanded or altered after the industrial use had been lawfully established, without obtaining the county approval required under state and local law for an expansion or alteration. The county considered the scope of both the lawful industrial nonconforming use and the unapproved expansion for purposes of determining whether a portion of the property had been historically committed to industrial use. The expanded component of the industrial use was unlawful only because it had not obtained county approval, not because it was not potentially allowed in the existing RRFF-5 zone as part of a lawful nonconforming use. The present case does not involve a lawful nonconforming use on any part of the subject property, and the entire commercial use at issue is an unlawfully established use that cannot be verified or approved as a lawful use. Petitioner has not demonstrated that the county's approach in *Ooten* undermines or is inconsistent with its interpretation of Policy 4.LL.3 in the present case.

The above-quoted county finding also cites the lack of information regarding the extent of the landscape supply, contracting and maintenance business, noting that the business does not occupy the entire property, as there are several other legal uses on the property. This observation reflects the commissioners' apparent view that the entire property cannot be "committed" to commercial uses if other permitted or approved uses exist on the property. This view appears to be consistent with the county's approach in *Ooten*, where the county approved rezoning only the portion of the property that was actually occupied by the nonconforming industrial use. In the present case, petitioner

seeks to rezone the entire property to Rural Commercial, based on a commercial use that occupies an unknown portion of the property, and notwithstanding existing permitted or approved uses that occupy the remainder. The county essentially rejected that approach, under its narrow understanding of "commitment." Petitioner has not demonstrated that that interpretation is reversible under ORS 197.829(1).

Finally, petitioner complains that the county's findings are inadequate because the county failed to determine how many years a commercial use must exist before it can constitute an historical commitment to commercial use. Petitioner argued below that the county should adopt the position that 10 years is a sufficient length of time to constitute "historical commitment," based on analogy to the 10-year lookback period that is a feature of verifying a nonconforming use under ORS 215.130. The findings do not address this issue.

However, under the commissioners' interpretation of Policy 4.LL.3 affirmed above, it is not necessary to determine in the present case how many years the landscape supply, contracting and maintenance business has existed on the property, or the minimum period of time necessary for a commercial use to "commit" the property to commercial use. The commissioners found that the landscape supply, contracting and maintenance business did not "commit" the property to commercial use, for two reasons that have nothing to do with how long the use has existed on the property. Essentially, the commissioners implicitly rejected petitioner's proffered position and analogy to nonconforming

uses. Accordingly, the county did not need to determine in the present case what the minimum period of time is necessary to commit property to commercial use.

The second subassignment of error is denied.

C. Evidence Supporting a Finding of Historical Commitment

Finally, under the third subassignment of error, petitioner argues that under its interpretations of Policy 4.LL.3 the record includes substantial evidence demonstrating that the subject property, either viewed as part of a larger area or in itself, has an historical commitment to commercial uses. However, petitioner's evidentiary arguments are premised on our rejecting the commissioners' interpretations regarding the meaning of "areas" and "commitment," which we have affirmed. Accordingly, petitioner's arguments do not provide a basis for reversal or remand.

The third subassignment of error is denied.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

The third basis for denial identified by the county is noncompliance with the TPR, at OAR 660-012-0060, which generally requires that a comprehensive plan or zoning map amendment that would significantly affect an existing or planned transportation facility must include measures to offset the significant effect. A common means of evaluating whether a zoning map amendment significantly affects a transportation facility, and hence whether mitigation is required, is to compare the "reasonable worst-case" development scenarios under

the existing and the proposed zoning. *See Ooten*, 70 Or LUBA 338, 340-41 (2014); *Mason v. City of Corvallis*, 49 Or LUBA 199, 220 (2005). If the reasonable worst-case development scenario under the proposed zoning is not more traffic-intensive than the reasonable worst-case development scenario under the existing zoning, or the development potential can be "capped" in some way to keep traffic generation levels at or below the reasonable worst-case development scenario under the existing zone, then the local government can conclude without more that the proposed amendment does not "significantly affect" a transportation facility within the meaning of the TPR. *Ooten*, 70 Or LUBA at 340-41; *Mason*, 49 Or LUBA at 220.

In the present case, petitioner submitted a traffic study to demonstrate that, if traffic generation is capped as proposed, the worst-case development scenario under the proposed Rural Commercial zoning would not exceed the traffic generation expected of the worst-case development scenario in the existing RRFF-5 zoning, which the traffic study identified as a "Recreational Community Center," which is apparently a subset of the use category "Recreational Uses, Government Owned."

The traffic facility at issue is the I-205/Stafford Road interchange adjacent to the subject property, which is owned and maintained by ODOT. During the proceedings below, ODOT submitted testimony that a government-owned recreation center is not a "reasonable" development scenario for a privately-owned parcel in the RRFF-5 zone. The commissioners concurred, noting that

permitted uses of privately-owned property in the RRFF-5 zone typically involve residential or farm/forest uses, and that while it is theoretically possible that a governmental body could buy, lease or condemn the property in order to build a government-owned recreational facility, that scenario is sufficiently unlikely that it does not represent a "reasonable" worst-case development scenario for purposes of the TPR. Record 24. Because the only use allowed in the RRFF-5 zone that the traffic study evaluated for comparison was a government-owned recreational center, the commissioners concluded that the traffic study failed to demonstrate that the proposed amendments would not "significantly affect" the I-205/Stafford Road interchange.

On appeal, petitioner challenges the commissioners' conclusion that a government-owned recreational center is not a "reasonable" worst-case scenario. According to petitioner, while it may be unlikely that a governmental body would ever buy, lease or condemn the property for a recreational center, the "reasonable worst-case" scenario evaluation is an abstract inquiry based on the most-traffic-intensive permitted use listed in the existing zoning. Petitioner argues that that abstract inquiry does not take into account that the most-traffic-intensive use of the property is a use category limited to governmental entities, or the likelihood that a governmental entity would acquire the property to build that particular use.

The county responds that an evaluation of which permitted uses listed in the RRFF-5 zone represents the "reasonable worst-case" development scenario requires more than an abstract inquiry into which listed use category can

theoretically generate the most traffic. According to the county, the commissioners properly considered the improbability that the subject property could be acquired by a governmental agency in order to develop a publicly owned recreational center. The county found that that scenario is not a "reasonable option." Record 24.

We need not and do not resolve the parties' dispute under this assignment of error. LUBA must affirm the county's decision to deny petitioner's application, as long as at least one basis for denial is affirmed. *Kine*, 75 Or LUBA at 414. We have rejected petitioner's challenges to the county's second basis for denial, under CCCP Policy 4.LL.3. Accordingly, LUBA's resolution of the third assignment of error would not change the disposition of this appeal, and would therefore constitute an advisory opinion. For that reason, we do not reach the third assignment of error.

The county's decision is affirmed.