

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3

4
5 CAMPERS COVE RESORT, LLC,
6 *Petitioner,*

7
8 vs.

9
10 JACKSON COUNTY,
11 *Respondent,*

12
13 and

14
15 SOUTHERN OREGON CITIZENS FOR
16 RESPONSIBLE LAND USE PLANNING,
17 SANDY SPEASL and SHELLEY MORRISON,
18 *Intervenors-Respondents.*

19 MAR 31 '10 AM 10:05 LUBA

20 LUBA No. 2009-117

21
22 FINAL OPINION
23 AND ORDER

24
25 Appeal from Jackson County.

26
27 Roger Alfred, Portland, filed the petition for review and argued on behalf of the
28 petitioner. With him on the brief was Perkins Coie LLP.

29
30 G. Frank Hammond, Medford, Jackson County Counsel, filed the response brief and
31 argued on behalf of respondent.

32
33 Pamela Hardy, Bend, filed the response brief and argued on behalf of the intervenors-
34 respondents.

35
36 Sydnee B. Dreyer, Medford, filed a brief on behalf of amici curiae Jim Salyer, Jodi
37 Salyer, Gary Whittle, Sandi Whittle, Carl Sieg, Jeanette Sieg, Jim Hill, Charlene Hill, John
38 Mytinger, Angie Mytinger, Jeff Feyerman, Jill Feyerman, Rob Collins, Dea Collins, Tom
39 Hazel, Felicia Hazel, Walter Wilkins, Annette Wilkins, Michael Schooler, Robin Schooler,
40 Jeffrey Wells, Julia Wells, Mike Mahar, and Mary Mahar.

41
42 BASSHAM, Board Chair; HOLSTUN, Board Member; RYAN, Board Member,
43 participated in the decision.

44
45 AFFIRMED

03/31/2010

1
2 You are entitled to judicial review of this Order. Judicial review is governed by the
3 provisions of ORS 197.850.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23

NATURE OF THE DECISION

Petitioner appeals a county nonconforming use determination that verifies the scope and extent of a lakeside resort, but denies requested alterations and expansions.

FACTS

Petitioner is the owner and operator of Hyatt Lake Resort, which is located in the Cascade-Siskiyou National Monument area approximately 21 miles east of the City of Ashland. Hyatt Lake Resort has been in operation adjacent to Hyatt Lake since the mid-1950s. Prior to the adoption of zoning in the 1970s, the facility included tent sites, a number of pull-through recreational vehicle (RV) sites, 22 of which had full electric, water and sewer hook-ups, some with only electric and water, several rental cabins without kitchens, a dock, a sewage treatment system, and other related uses. The resort is located in a forest resource area subject to Statewide Planning Goal 4 (Forest Lands). Under the applicable goals, comprehensive plan and land use regulations, a campground with full hookups is not a permitted use.

In 2007, petitioner applied for a ministerial Type I review to obtain building permits to install 22 “park model” RV units, with decks and stairs, to be installed on 22 campground spaces with full hookups. A “park model” RV unit is a factory-manufactured structure of not more than 400 square feet that is designed to be placed on wheels and pulled to a set up location by tractor rig. The county issued the requested building permits, apparently in the belief that allowing park model RVs to be installed on the 22 pull-through sites did not constitute an alteration or expansion of the nonconforming use. Following issuance of the 22 building permits, a corporation associated with petitioner sold a number of park model RVs

1 to third parties, and petitioner allowed them to be installed on the 22 RV sites with full
2 hookups, subject to a lease agreement with an initial 25-year term.¹

3 In its 2007 application, petitioner also sought building permits for various additional
4 structures and uses, including installation of additional park model RVs, but county staff
5 concluded that a nonconforming use verification and expansion/alteration analysis was
6 required to support the requested additional structures and uses. In 2008, petitioner filed a
7 discretionary “Type III” nonconforming use verification and expansion application, seeking
8 approval of a restaurant, bait shop, fish cleaning station, dump station, fuel pumps,
9 maintenance building dock, pit toilets, three single family dwellings, shower/laundry
10 building, playground, equine facilities, cabanas and garages for the park model RVs, and new
11 sewer connections to 13 existing RV sites. Of particular relevance here is that petitioner
12 sought verification or expansion for a total of 35 RV sites with full hook ups, to be occupied
13 with park model RVs.

14 County staff issued a notice of tentative decision that approved most of the requested
15 non-RV site uses, including a nonconforming use verification of 22 existing full hook-up RV
16 sites and 13 existing water and electric RV hook-up sites.² The staff decision also approved
17 an expansion of the 13 water and electric RV sites to include sewer connections and
18 installation of 13 new park model RVs. Both petitioner and intervenors appealed the staff
19 decision to the county hearings officer. Petitioner’s appeal sought the approval of additional
20 sites and other buildings not at issue here. Intervenors appealed the staff approval of the
21 nonconforming use verification itself.

¹ Amici curiae are the owners of a number of these park model RVs.

² The staff decision found that there was a valid nonconforming use for only two of the three requested single-family dwellings, and denied the verification request for a playground and equine facilities. None of those determinations are at issue in this appeal. The hearings officer denied the proposed cabanas and garages. That also is not at issue in this appeal.

1 The hearings officer affirmed the staff decision regarding most of the non-RV site
2 aspects of the decision and those aspects are not at issue in this appeal. Regarding the 13 RV
3 sites that staff approved for installation of additional park model RVs with full hook ups, the
4 hearings officer reversed the staff decision, concluding that the proposed expansion/alteration
5 did not comply with code criteria for the expansion/alteration of a nonconforming use, citing
6 concerns regarding fire safety and water quality.

7 Regarding the 22 RV sites with already installed park model RVs pursuant to the
8 2007 building permits, the hearings officer concluded that the nature and extent of the lawful
9 nonconforming use did not include installation of park model RVs on those 22 sites. The
10 hearings officer also concluded that installation of park model RV units with full hook-ups
11 on the existing RV sites at the resort would require exceptions to Goal 4, Goal 11 (Public
12 Facilities), and Goal 14 (Urbanization).

13 Petitioner then appealed the hearings officer's decision to LUBA. The primary issue
14 that the parties focus on in this appeal is the correctness and effect of the hearings officer's
15 conclusions with respect to the 22 park model RVs installed on the site pursuant to the 2007
16 building permit approvals.

17 **FIRST AND SECOND ASSIGNMENTS OF ERROR**

18 Petitioner argues that the hearings officer lacked authority to render any decision with
19 respect to the 22 park model RVs installed pursuant to the 2007 building permits. According
20 to petitioner, the hearings officer's conclusions with respect to those 22 park model RVs are
21 essentially impermissible collateral attacks on the 2007 building permits, which petitioner
22 contends are final, unappealed land use decisions.

23 **A. Authority**

24 We do not understand petitioner to dispute that the hearings officer properly
25 conducted a non-conforming use verification and determination regarding the 22 RV *sites*
26 that are occupied by park model RVs under the 2007 building permits. It is clear from the

1 record that both the county and petitioner understood that the 2008 application requested (1)
2 a verification of the historic nonconforming uses and structures on the property, and (2)
3 expansion or alteration of the nonconforming use in certain respects. A nonconforming use
4 verification necessarily determines the nature and extent of historical uses that existed on the
5 date the use became nonconforming. Changes in the nature or extent of uses that occur after
6 that date are not part of the lawful nonconforming use, although those changes in use may or
7 may not have some other lawful basis to exist. Changes in the nature, extent or intensity of a
8 nonconforming use that occur after the date the use became nonconforming will require
9 evaluation and approval as alterations, in order to be lawful. Thus, petitioner's
10 nonconforming use application required the county to determine the nature and extent of the
11 use of the 22 RV sites as of the date the use became nonconforming.³ In doing so, the
12 hearings officer necessarily distinguished uses that existed as of that date from changes that
13 occurred after that date, such as installation of the park model RVs. To the extent petitioner
14 argues that the hearings officer lacked authority to conclude that the park model RVs are not
15 part of the lawful nonconforming use of the 22 RV sites at issue, we disagree.

16 **B. Collateral Attack**

17 The more difficult question is petitioner's argument that the hearings officer's
18 subsequent analysis of the lawfulness of the 22 park model RVs constitutes a collateral attack
19 on the 2007 building permits. The hearings officer engaged in a lengthy discussion of park
20 model RVs in general and the lawfulness of installing park model RVs served by full
21 hookups in a forest zone campground. In conducting that analysis, the hearing officer
22 discussed at length the 22 full hookup sites on which park model RVs had already been

³ The parties appear to agree that the most recent critical date is 1998, when administrative rules implementing Goal 4 were amended to prohibit providing sewer, water and electric hookups to individual campground sites in forest zones.

1 installed, pursuant to the 2007 building permits. The hearings officer acknowledged the
2 problem created by the 2007 building permit approvals:

3 “Here the analysis is burdened and confused by several facts: the County did
4 not object to the Applicant’s installation of the first 22 park models and
5 allowed the construction of extensive decks and garages as accessory
6 structures without having considered all of the criteria central to the
7 verification and expansion of a nonconforming use. This action tends to give
8 all of the park models and associated improvements an air of legitimacy, and it
9 allowed the owner to proceed without fully understanding the legal context of
10 his development activities. * * *” Record 18.

11 The hearings officer then discussed the nature of park model RVs in general, compared to
12 other types of RVs, and the lawfulness of installing fully serviced park model RVs at the
13 proposed density (approximately 10 units per acre) on rural, resource land. Some of the
14 analysis discusses and ultimately rejects petitioner’s proposal to condition occupancy of the
15 22 installed park model RVs, which was apparently offered intended to address staff concerns
16 regarding Goal 14. Ultimately, the hearings officer concluded with respect to the 22 installed
17 park model RVs that:

18 “* * * Case law establishes that a park model development such as that at the
19 Resort is not temporary or seasonal and that permanent occupancy of spaces
20 by park models is not consistent with the historic use of the Resort. The
21 absence of a proper analysis of the new development in comparison to the
22 established nonconforming use, results in the conclusion that the [2007]
23 authorization of the 22 park models that have already been installed was not
24 proper. Those units constitute at least an alteration of the nonconforming
25 use.” Record 25.

26 The hearings officer then turned to the question of whether installation of park model
27 RVs could be approved as an alteration of the nonconforming use. This part of the analysis
28 appears to focus, at least initially, on petitioner’s proposal to expand or alter the historic
29 nonconforming use to (1) provide sewer connections to the 13 existing partial hookup RV
30 sites and (2) install park model RVs on those 13 sites. The staff decision approved those
31 expansions/alterations, after a legal analysis of the lawfulness of those proposals, and
32 concluding that the sewer connection and installation of park model RVs on the 13 sites

1 would be lawful if made subject to certain conditions, including a limit on the duration of
2 occupancy. The hearings officer disagreed with the staff's legal analysis, and ultimately
3 denied the proposed sewer connection and installation of park model RVs on the 13 sites,
4 because the hearings officer concluded those alterations would cause a "greater adverse
5 impact" on the surrounding neighborhood than the historic nonconforming RV campground
6 use. As discussed below, under Jackson County Land Development Ordinance (LDO)
7 11.2.1, the county can approve an alteration to a lawful nonconforming use upon a finding
8 that the alteration causes no greater adverse impact to the neighborhood than the original
9 nonconforming use.

10 Although it is not entirely clear, the hearings officer apparently viewed the legal
11 analysis of the lawfulness of the proposed installation of park model RVs on the 13 sites to
12 apply equally to the already installed 22 park model RVs. In a later section of the decision
13 captioned "Compliance with Statewide Planning Goals," the hearings officer found:

14 "The parties devoted considerable effort with respect to the issue of whether
15 the park model development is required to apply for exceptions from Goals 4,
16 11 and 14. The conclusions of this Decision support the Opponent's claim
17 that such exceptions are required. The development has urban density; it is
18 residential and the sewer system that serves it requires a Construction
19 Installation permit and is a Community System, and it is located in a forest
20 zone.

21 "Accordingly, the Applicant must file for exceptions to Goals 4, 11 and 14 for
22 the 22 park model units that have already been installed at the Resort."
23 Record 39.

24 Petitioner does not appear to dispute the merits of the hearings officer's analysis
25 regarding the legal necessity for goal exceptions to install fully-serviced park model RVs on
26 rural forest land at the density proposed here. Petitioner argues, however, that the hearings
27 officer erred in requiring petitioner to file for exceptions to Goals 4, 11 and 14 for the 22
28 already installed park model units. According to petitioner, that conclusion and similar
29 statements regarding the 22 installed units are in essence collateral attacks on the validity and

1 finality of the 2007 building permits. Petitioner argues that the 2007 building permits are
2 final land use decisions that cannot be appealed now, or challenged in the course of the
3 present nonconforming use application.

4 The county responds that the above-quoted conclusion is merely *dictum*, and notes
5 that the actual conclusions of law and the specific orders and conditions set out at the end of
6 the hearings officer's decision say nothing about the 22 installed park model RVs.
7 Intervenor's respond in relevant part that the hearings officer merely determined that not all of
8 the land use approvals required for the 22 disputed park model RVs have yet been applied for
9 and obtained, and the hearings officer did not purport to invalidate or revoke the 2007
10 building permits.

11 The county is correct that the conclusions of law and the order and conditions sections
12 of the decision do not refer to the 22 installed park models at all, and the only park model
13 units mentioned in those sections are the 13 units rejected on the partial hookup sites. Record
14 40-42. However, it is reasonably clear based on the hearings officer's analysis of the
15 proposal to install 13 new park model RVs on the partial hook up sites that the hearings
16 officer believed (1) the 2007 building permit applications should have triggered a
17 nonconforming use verification review similar to that required for the 13 new park model
18 RVs, (2) had such a review been conducted, staff should have concluded that the proposed
19 installation of 22 park model RVs is properly viewed as an alteration or change in use from
20 one type of nonconforming use to another, and finally, (3) such installations would require
21 exceptions to Goals 4, 11 and 14. In short, it is clear that the hearings officer believed that
22 the 2007 building permits should not have been issued, and were issued in error, or at least
23 issued prematurely.

24 Given the hearings officer's expressed views on those points, it is not surprising that
25 petitioner believed it necessary to appeal the hearings officer's decision to LUBA and either

1 challenge the hearings officer’s authority and ability to make those views binding or to obtain
2 a ruling from LUBA that those views are *dicta*, and not binding on petitioner or the county.

3 Although it is a close question, we agree with the county that the hearings officer’s
4 statements regarding the 22 installed park model RVs are most accurately understood as non-
5 binding *dicta*, and not as a final binding decision regarding the validity of the 2007 building
6 permits. The legal analysis leading up to those statements was required in any event to
7 resolve petitioner’s application to site 13 new park model RVs on the partial hookup sites.
8 The hearings officer appeared to believe that the legal reasoning supporting his conclusion
9 that the 13 new park model RVs could not lawfully be approved as alterations also applied to
10 the 22 units installed in 2007. However, nowhere in the decision does the hearings officer
11 purport to invalidate or revoke the 2007 building permits, or make any binding dispositions
12 regarding the 22 installed park model units. Significantly, as noted, the “conclusions of law”
13 section and the “orders” section of the decision, which sets out a number of conditions, make
14 no mention of the 22 installed units. In the “orders” section, the hearings officer makes very
15 specific dispositions of the various elements of the nonconforming use verification and
16 alteration application, including the proposed 13 new park model RVs. If the hearings officer
17 intended to make some binding disposition with respect to the 22 installed park model RVs,
18 the hearings officer presumably would have set it forth in the orders section, or imposed
19 some condition with respect to the 22 units. The complete absence of such language in the
20 orders or conditions sections strongly suggests that the hearings officer did not intend his
21 legal analysis in the body of the decision to constitute binding dispositions regarding the 22
22 installed park model units.

23 Viewed in this light, the above-quoted statement that petitioner “must file for
24 exceptions to Goals 4, 11 and 14 for the 22 park model units that have already been installed
25 at the Resort” is best understood as an advisory statement of the hearings officer’s views on
26 what should be done in the future to resolve the legal uncertainties identified in the decision.

1 We do not understand that statement or similar statements to constitute a binding
2 determination that the 2007 building permit decisions are invalid, or understand the decision
3 to require petitioner to file applications for goal exceptions, as opposed to some other means
4 of resolving any legal uncertainties. Those statements provide no basis for reversal or
5 remand. *See Chackel Family Trust, LLC v. City of Bend*, 53 Or LUBA 385, 399 (2007)
6 (advisory statements in hearings officer’s decision regarding compliance with future permit
7 applications are harmless error, where the statements play no role in the decision before the
8 hearings officer and have no binding or presumptive effect on other decisions).

9 **C. Nonconforming Use Criteria**

10 Petitioner also argues under the first assignment of error that the hearings officer erred
11 in concluding that petitioner’s application to *expand* the nonconforming use should instead be
12 viewed as a *change* in the nonconforming use, as those terms are used in the county’s
13 nonconforming use regulations.

14 LDO 11.2.1 governs alterations of nonconforming uses, and includes provisions on
15 “alteration,” “change in use,” and “expansion or enlargement.”⁴ LDO 11.2.1 presumably

⁴ LDO 11.2.1 provides in pertinent part:

“An alteration of a nonconforming use may include a change in the use that may or may not require a change in any structure or physical improvements associated with it. An application for an alteration of a nonconforming use must show either that the use has nonconforming status, as provided in Section 11.8, or that the County previously issued a determination of nonconforming status for the use and the use was not subsequently discontinued as provided in Section 11.2.2. A nonconforming use, once modified to a conforming or less intensive nonconforming use, may not thereafter be changed back to any less conforming use.

“A) Change in Use

“Applications to change a nonconforming use to a conforming use are processed in accordance with the applicable provisions of the zoning district. (See Chapter 6.) Applications to change a nonconforming use to another, no more intensive nonconforming use are processed as a Type 2 review. The application must show that the proposed new use will have no greater adverse impact on the surrounding neighborhood.

“B) Expansion or Enlargement

1 implements ORS 215.130(5) and (9), which permit “alterations” of a lawful nonconforming
2 use, and defines “alteration” as either a change in the use of no greater adverse impact to the
3 neighborhood, or a change in the structure or physical improvements of no greater adverse
4 impact to the neighborhood. The statute does not distinguish between different kinds of
5 alteration. Under LDO 11.2.1, the same basic criterion applies to alterations, changes in use,
6 and expansions; in each case, the applicant must show that the change will have no greater
7 adverse impacts on the surrounding neighborhood. However, for a change in use from one
8 nonconforming use to another nonconforming use, LDO 11.2.1(A) additionally limits the
9 new nonconforming use to one “no more intensive” than the old nonconforming use.

10 Petitioner cites to a passage in which the hearings officer discusses the proposal to
11 provide sewer connections and install 13 new park model RVs on the 13 partial hookup sites,
12 at Record 26. In that passage, the hearings officer explains that he views the proposed park
13 model installation not as a mere expansion for purposes of LDO 11.2.1(B)(1)(b) or (c), but
14 rather a change in one type of nonconforming use (seasonal, temporary occupancy of RV
15 campground sites, served by partial utilities) to a different nonconforming use (semi-
16 permanent high-density residential development, served by full utilities), and therefore a

-
- “1) A nonconforming use, other than a single-family dwelling (see Section 11.4), aggregate, mining, or rural industrial use operation (see subsection (C) below), may not be expanded or enlarged except as provided under (2) below. For purposes of this Section, to ‘expand’ or ‘enlarge’ means:
- “a) To replace a structure, in which a nonconforming use is located, with a larger structure;
 - “b) To alter the use in a way that results in more traffic, employees, or physical enlargement of an existing structure housing a nonconforming use; or
 - “c) An increase in the amount of property being used by the nonconforming use.
- “2) Limited expansion of a nonconforming use may be approved, through a Type 3 review, provided such expansion includes improvements to the existing use to a degree that the existing use, including the proposed expansion, complies with or is more in conformance with the development standards of Chapter 9, and will have no greater adverse impacts on the surrounding neighborhood.”

1 change in use subject to LDO 11.2.1(A). The hearings officer went on to conclude that the
2 proposed change in use fails under LDO 11.2.1(A), because it is obviously “more intensive”
3 than the old use and also has “greater adverse impacts to the neighborhood,” based on fire
4 safety and water quality impacts.

5 Petitioner does not explain why the hearings officer is obligated to characterize the
6 application in the same way as petitioner characterized it in the application, or apply the
7 approval criteria that petitioner believes are applicable. It is not at all clear to us that the
8 hearings officer erred in viewing the proposal as changing from one type of nonconforming
9 use to another. In any case, even if the hearings officer erred in proceeding under LDO
10 11.2.1(A), one of the reasons he denied the requested 13 new park model RVs was because
11 the application did not show, as LDO 11.2.1(A) requires, that the change “will have no
12 greater adverse impact on the surrounding neighborhood.” As noted, under both
13 ORS 215.130(9) and LDO 11.2.1, all types of alterations, expansions and changes to
14 nonconforming uses must satisfy the “no greater adverse impacts on the surrounding
15 neighborhood” standard. That basis for denial applies equally under LDO 11.2.1(A) or (B).
16 As discussed below, petitioner does not challenge the hearings officer’s dispositive finding
17 that the proposed 13 new park model units have a greater adverse impact on the surrounding
18 neighborhood than the historic nonconforming use. Therefore, even if the hearings officer
19 erred in applying LDO 11.2.1(A) instead of (B), it would be a harmless error.

20 **D. Conclusion**

21 For the reasons set out above, we disagree with petitioner that the hearings officer’s
22 decision collaterally attacks or invalidates the 2007 building permits. As far as we can tell,
23 nothing in the decision orders the applicant to take any action with respect to the 22 installed
24 park model RVs, or changes the legal status of those 22 units. Those units retain whatever
25 legal status they have under the 2007 building permits. The hearings officer clearly believed
26 that the 2007 building permits were issued improperly, or at least prematurely, and that goal

1 exceptions will ultimately be necessary to make installation of those units fully lawful.
2 However, we do not understand the hearings officer's decision to make any binding
3 dispositions with respect to the 22 installed units, and the ultimate fate of those 22 units is not
4 resolved by this decision. It is probably most accurate to say that the hearings officer, as a
5 consequence of his analysis of the 13 proposed new park model RVs, brought to light a
6 potential legal uncertainty regarding the 22 installed units that was always present. As we
7 note in discussing the third assignment of error, the county may be called upon to resolve that
8 legal uncertainty at some point, but the challenged decision does not do so.

9 The first and second assignments of error are denied.

10 **THIRD ASSIGNMENT OF ERROR**

11 Under the third assignment of error, petitioner argues that even if the hearings
12 officer's conclusions regarding the 22 park model RVs are correct, it has "vested right" to
13 continue occupancy of the 22 full hookup sites with the installed park model RVs under the
14 reasoning in *Clackamas County v. Holmes*, 265 Or 193, 508 P2d 190 (1973), given the fact
15 that the county issued the building permits and petitioner and amici expended considerable
16 funds in reliance on those building permits.

17 That theory was not presented to the hearings officer, and the hearings officer made
18 no vested rights determination. It may be that petitioner will advance that theory, or a similar
19 theory, in an application for a vested rights determination, or in proceedings initiated by
20 petitioner, amici, or the county. At some point in the future, the county may be called upon
21 to resolve the issue of whether the 22 installed park model units may lawfully remain on
22 those sites under one or more legal theories, but the challenged decision does not address or
23 resolve that question, and we decline to resolve it in the first instance.

24 We do not reach the third assignment of error.

1 **FOURTH ASSIGNMENT OF ERROR**

2 Petitioner argues that the hearings officer committed procedural error by accepting
3 and relying upon new evidence submitted by opponents regarding water quality impacts,
4 which was improperly submitted during an open record period that was limited to rebuttal
5 evidence.

6 The disputed evidence is a letter at Record 347-50 from a consultant retained by the
7 opponents to evaluate potential wastewater and septic impacts on Hyatt Lake, which is
8 adjacent to the resort. The hearings officer cited the letter in concluding that the “prospect of
9 sewage pollution [from park model development] is an adverse impact which is greater than
10 that posed by the historic RV park nonconforming use.” Record 33.

11 The letter is dated July 27, 2009, but was date-stamped as received by the county on
12 July 28, 2009, one day after the close of the first open record period, which was open for
13 submission of any relevant evidence. Petitioner contends that the letter was technically
14 submitted on the first day of the second open record period, which was limited by the
15 hearings officer’s order to evidence and arguments rebutting submittals made during the first
16 open record period, which ended July 27, 2009. Because the letter is not rebuttal of any
17 evidence submitted during the first open record period, petitioner argues, the hearings officer
18 erred in accepting and relying on the letter.

19 We assume without deciding that the July 27, 2009 letter includes new evidence and
20 is not limited to rebuttal of evidence submitted during the first open record period. We also
21 assume that it was improperly accepted during the second open record period that was limited
22 to rebuttal evidence. Even with those assumptions, petitioner has not established that any
23 procedural error on that point prejudiced its substantial rights or warrants reversal or remand.
24 ORS 197.835(9)(a)(B). As intervenors point out, the hearings officer relied in part of the
25 July 27, 2009 letter to conclude that park model development would likely cause greater
26 adverse impacts on Hyatt Lake from wastewater and septic discharges, compared to the

1 historical RV campground use. Record 31-33. However, intervenors note, the hearings
2 officer also concluded that “[f]ire is the potential adverse impact of greatest concern,” and
3 devoted several pages of findings leading to the conclusion that park model development
4 significantly increases the risk of fire over the historical RV campground use. Record 34-36.
5 The hearings officer appears to have denied the proposed 13 new park model units for that
6 reason alone.

7 Petitioner does not challenge the findings at Record 34-36 or explain why those
8 findings are not a sufficient basis to conclude that the 13 new park model units cannot be
9 approved as lawful alterations to the historic nonconforming use. Accordingly, even if the
10 hearings officer erred in considering the July 27, 2009 letter, that letter had a bearing only on
11 water quality impacts, not fire safety. In this circumstance, petitioner has not established that
12 any procedural error in considering the July 27, 2009 letter prejudiced its substantial rights,
13 and petitioner’s arguments under this assignment of error do not provide a basis for remand.

14 The fourth assignment of error is denied.

15 **FIFTH ASSIGNMENT OF ERROR**

16 In his general legal analysis of the lawfulness of installing park model RVs on sites
17 historically used as an RV campground, the hearings officer states at one point that “[p]ark
18 models are not recreational vehicles for purposes of land use planning.” Record 22. Citing
19 *Baxter v. Coos County*, 58 Or LUBA 624 (2009) (*Indian Point II*) and *Oregon Shores*
20 *Conservation Coalition v. Coos County*, 55 Or LUBA 545, *aff’d* 219 Or App 429, 182 P3d
21 325 (2008) (*Indian Point I*), the hearings officer ultimately concluded that “[c]ase law
22 establishes that a park model development such as that at the Resort is not temporary or
23 seasonal and that permanent occupancy of spaces by park models is not consistent with the
24 historic use of the Resort.” Record 25.

25 Petitioner challenges the statement that “[p]ark models are not recreational vehicles
26 for purposes of land use planning,” arguing that that statement is too broad, that the *Indian*

1 *Point* cases are distinguishable, and that park model RVs are properly considered
2 “recreational vehicles” for all purposes, including land use planning. Petitioner notes that the
3 state building code defines park model RVs as “recreational vehicles,” and that the Oregon
4 Department of Health, the state agency responsible for licensing RV parks, treats park model
5 RVs as recreational vehicles.

6 We see no obvious connection between how the state building code defines
7 recreational vehicle, and how the *use* of a recreational vehicle is treated under Oregon’s
8 statewide planning goals, administrative rules, and implementing land use planning
9 regulations. Goals 3, 4, 11 and 14 singly and together limit how recreational vehicles of any
10 kind can be used on rural land. The hearings officer’s point seems to be that, given the
11 nature, construction and intended use of park model RVs, such recreational vehicles are more
12 likely to be used in ways that are prohibited by Goals 3, 4, 11 or 14 than other types of
13 recreational vehicles. That much we do not understand petitioner to dispute. The record
14 reflects that park model RVs are typically transported by semi-trailer rig to the site and are
15 permanently or semi-permanently installed on foundations at the site, much like a small
16 manufactured dwelling. It seems significant that installation of a park model RV requires a
17 building permit. In that respect, and others, park model RVs differ from a self-propelled or
18 pull-behind recreational vehicle typically used for RV camping. The latter are easily capable
19 of being used in compliance with land use restrictions, such as that in OAR 660-006-
20 0025(4)(e)(A), that limit campgrounds on forest lands to “overnight temporary use for
21 vacation, recreational or emergency purposes” and that limit vehicle occupancy of a campsite
22 to 30 days. Park model RVs, by virtue of their construction and semi-permanent installation,
23 are not easily capable of being used in compliance with such restrictions.

24 In any case, while the hearings officer’s statement that park model RVs are not
25 “recreational vehicles” for purposes of land use planning may not be technically accurate,
26 petitioner has not established that any inaccuracy warrants reversal or remand. The hearings

1 officer denied the proposed 13 park model RVs because he concluded they would create
2 more adverse impacts than the historic nonconforming use, not because he believed they did
3 not qualify as “recreational vehicles.” Petitioner’s arguments under this assignment of error
4 do not provide a basis for reversal or remand.

5 The fifth assignment of error is denied.

6 The county’s decision is affirmed.