BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

RESOURCES NORTHWEST, INC.,
and KEN HICK,
Petitioners,

vs.

CLATSOP COUNTY,
Respondent.

LUBA No. 2012-010

FINAL OPINION
AND ORDER

Appeal from Clatsop County.

Ty K. Wyman, Portland, filed the petition for review and argued on behalf of petitioners. With him on the brief was Dunn Carney Allen Higgins and Tongue LLP.

Blair J. Henningsgaard, Astoria, filed the response brief and argued on behalf of respondent.

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

REMANDED 05/29/2012

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

Petitioners appeal a county decision that concludes that petitioners' recreational vehicle (RV) park violates county land use laws.

MOTION TO DISMISS

On June 15, 2011, the county entered a "Compliance Order" in which the county planning department found numerous land use law violations at petitioners' RV park and ordered petitioners to correct the violations. Record 145-51. Petitioners appealed that planning department decision to the county hearings officer. On December 16, 2011, the county hearings officer entered a second "Compliance Order" in which he found numerous land use law violations at petitioner's RV park and ordered petitioners to correct the violations. Record 112-18. On December 28, 2011 petitioners filed a "Notice of Appeal" in which petitioners sought board of county commissioner review of the December 16, 2011 hearings officer's decision. The Clatsop County zoning ordinance is called the Clatsop County Land and Water Development and Use Ordinance (LWDUO). Under LWDUO 2.230(4), review by the board of county commissioners is at the board of county commissioners' discretion.[1] On January 25, 2012 the board of county commissioners adopted Resolution and Order 2012010031, in which it summarily denied review. Record 4. Petitioners then appealed to LUBA. The notice of intent to appeal that petitioners filed with LUBA identifies the appealed decision as "Resolution and Order #2012010031."

[1] LWDUO 2.230(4) provides:

> "At its discretion, the reviewing body may, after considering the application and appeal, and finding that the facts therein stated do not warrant further hearing, summarily affirm the action and deny the appeal. The Board of Commissioners, if it believes the matter warrants review, may limit an appeal or review to a review of the record and a hearing for receipt of oral arguments regarding the record, or may accept new evidence and testimony. If new evidence is to be received, a hearing shall be conducted pursuant to this article."

The petition for review assigns error to the hearings officer's December 16, 2011 decision. Respondent moves to dismiss this appeal and alternatively moves to strike the petition for review because it seeks review of the hearings officer's December 16, 2011 decision, whereas the decision identified in petitioners' notice of intent to appeal is the board of commissioners' January 25, 2012 resolution declining to review the hearings officer's December 16, 2011 decision.

Under ORS 197.825(2)(a), LUBA's jurisdiction "[i]s limited to those cases in which the petitioner has exhausted all remedies available by right before petitioning [LUBA] for review[.] While review by the board of commissioners under LWDUO 2.230(4) is discretionary with the board of commissioners, petitioners are given a right under the LWDUO to *seek* board of commissioners' review and it is therefore a remedy that is available by right that must be exhausted before appealing to LUBA. Petitioners timely sought review by the board of commissioners, and that request for review was summarily denied by the board of commissioners, as is allowed under LWDUO 2.230(4). The board of commissioners' January 25, 2012 decision denying review had the legal effect of making the December 16, 2011 hearings officer's decision the county's final decision in this matter.

Petitioners' notice of intent to appeal probably should have (1) identified the decision on appeal as the December 16, 2011 hearings officer's decision, and (2) explained that the hearings officer's decision became the county's final decision when the board of commissioners denied petitioner's appeal on January 25, 2012. However, the county clearly understood that petitioners were not challenging the board of commissioners decision not to hear the appeal, because deciding whether to accept or deny the appeal is entirely within the board of commissioners' discretion, and there would be no legal basis for petitioners to challenge the board of commissioners' exercise of discretion under LWDUO 2.230(4) not to consider petitioners' appeal. The county submitted a complete record, including the record of the proceedings before the hearings officer. Any technical error petitioners may have

committed in identifying the decision on appeal is likely a function of the ORS 197.825(2)(a) exhaustion of remedies requirement, which can easily result in confusion about the precise identity of the decision on appeal. That technical pleading error on petitioners' part, if it was error, prejudiced no party's substantial rights and provides no basis to dismiss this appeal or strike the petition for review. *See Hilliard v. Lane County Commrs*, 51 Or App 587, 595, 626 P2d 905 (1981) (LUBA may not invoke "technical requirements of pleading having no statutory basis").

Respondent's motion to dismiss and alternative motion to strike are denied.

FACTS

A. The Nonconforming RV Park

The facts in this case are unclear and in dispute. Sometime in the 1950s, petitioners' predecessor began using the subject 4.18-acre property as a RV park. That RV park use has evolved over the years to include both RVs and a number of mobile homes. The current legal status of those RVs and mobile homes is the central issue in this appeal.

There are approximately 90 RVs and mobile homes on the subject property today. The subject property has a water system and a septic system. Most or all of the mobile homes are connected to both the water and septic systems and at least some of those mobile homes are currently occupied as long term residences. Some of the RVs are also connected to the water and septic systems, and at least some of those RVs apparently are being used as long term residences as well. Other RVs are located on RV sites that are connected to the water system but are not connected to the septic system. Many if not all of the RV sites that are not connected to the septic system are occupied on a temporary basis and are not used as residences.

The LWDUO was first applied to the subject property in 1980, and the subject property was zoned Tourist Commercial (TC). The TC zone generally allows RV parks, but RV parks are not allowed in the Clatsop Plains planning area. Record 128. Because the

subject property is located in the Clatsop Plains planning area, the RV park on the subject property is not allowed under LWDUO. Even if the subject TC-zoned property was not located in the Clatsop Plains planning area, and thus potentially allowable under the property's TC zoning, the RV park on the subject property does not comply with a number of requirements that are imposed on RV parks by the Clatsop County Standards Document (CCSD) S3.552. [2] For example, S3.552(1) only permits one mobile home in an RV park, for

[2] CCSD S3.552 sets out "Standards and Requirements" for RV parks, which are set out below.

"The following standards and requirements shall govern the application of a park in an area in which it is permitted:

"(1) Duration of Occupancy. No recreation vehicle shall remain the park for more than thirty (30) days in any sixty (60) day period. No habitable vehicle, which is not a recreation vehicle, shall be allowed in the park for any period with the exception of one mobile home unit for the exclusive use of the park manager and/or caretaker.

"(2) Size, Density, Lot Dimension and Setbacks.

"(A) Size. Minimum total acreage shall not be less than five (5) acres.

"(B) Density. Maximum recreational vehicle spaces per gross acre shall not exceed ten (10) spaces.

"(C) The minimum lot area for any recreation vehicle or travel trailer space shall not be less than 3,500 square feet.

"(D) The minimum lot width shall be forty (40) feet.

"(E) The minimum lot length shall be seventy (70) feet.

"(F) The minimum distance between recreation vehicles, and a public street, arterial or highway right-of-way shall be sixty (60) feet.

"(G) The minimum distance between recreation vehicles and all property lines shall be ten (10) feet.

"(H) The minimum distance between recreation vehicles and other like units shall be twenty- five (25) feet.

"(I) The minimum distance between recreation vehicles and public services buildings shall be twenty-five (25) feet.

"(J) No recreation vehicle site or structure shall be placed closer than 30 feet to perennial streams or lakes (high water mark) or other bodies of water.

a "park manager and/or caretaker," and limits occupancy of RVs to 30 days in any 60 day period. Petitioners' RV park includes a number of mobile homes and some or all of the mobile homes and some RVs apparently are being occupied in excess of the 30-day occupancy limit. CCSD S3.552(2)(B) limits density to 10 RV spaces per gross acre. Petitioners' RV park exceeds that density. Under CCSD S3.552(2)(B) the minimum area for RV sites is 3,500 square feet. It appears that none of the sites in petitioners' RV park satisfy that requirement. CCSD S3.552(2)(J) requires that RVs be setback at least 30 feet from streams. A number of RVs and mobile homes apparently violate that setback requirement.

B. The June 15, 2011 Compliance Order

Following complaints about petitioners' use of the property, the county initiated an enforcement action. That enforcement action resulted in a Compliance Order, dated June 15, 2011. Because that Compliance Order was appealed and replaced by the county hearings officer's Compliance Order, the details of the initial Compliance Order are not critical. But several aspects of that Compliance Order are worth mentioning at this point. The initial Compliance Order found petitioner had a nonconforming use right to continue use of the subject property as an RV park, but only "at the level and intensity that existed at the adoption of the LWDUO in September 1980." Record 129. The Compliance Order also found "[t]hat no more than 14 motor home or recreational vehicle spaces" can be provided. *Id.* at 130.[3] But the planning department's Compliance Order also found that "[t]here is no evidence that the property was used for permanent residential housing or at levels beyond

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> "(K) The space provided for a recreation vehicle shall be covered with crushed gravel, or paved with asphalt, concrete or similar material and be designed to provide run-off of surface water. The part of the space which is not occupied by the recreation vehicle, or not part of an outdoor patio, need not be paved or covered with gravel provided the area is landscaped or otherwise treated to prevent dust."

[3] Although unclear, the county apparently based the limit of 14 on "Aerial photographs from the 1980s [that] show no more than 14 dwelling spaces as developed." Record 127.

those currently provided for recreational vehicle parks LWDUO S3.550 *et seq*. in September 1980." Record 129. The Compliance Order goes on to list a number of things that petitioners must do to bring the RV park into compliance with the current CCSD S3.552 standards that apply to RV parks and gives petitioner 60 days to submit a tentative plan to bring the park into compliance with the CCSD S3.552 standards. Record 130-31.

To summarize, the initial planning department Compliance Order found that although petitioner's RV park is located in the Clatsop Plains planning area, which does not allow RV parks, petitioners have a nonconforming use right to use the subject property as a RV park. But the initial Compliance Order found that petitioners' nonconforming use right is limited to 14 RVs and the spaces for those RVs and petitioners' operation of the RV park must comply fully with the current CCSD standards that apply to RV parks. The initial Compliance Order gave petitioners six months to limit the RV park to 14 RVs and bring the park into compliance with current CCSD S3.552 standards for RV Parks.[4]

C. The Hearings Officer's Decision

Petitioners appealed the initial planning department Compliance Order to the county hearings officer. We address petitioners' challenge to the hearings officer's Compliance Order later in this opinion. Before turning to that challenge, we briefly describe the statutes that govern and limit county regulation of nonconforming uses. ORS 215.130(5) provides that "[t]he 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." As permitted by ORS 215.130(10)(a), the county has adopted land use regulations that allow a property owner to "prove the existence, continuity, nature and extent of the use only for the 10-year period

[4] Assuming the initial Compliance Order's lack of reference to mobile homes was intentional, the mobile homes on the subject property would have to be removed, the number of sites would have to be reduced to 14 and those 14 sites would have to comply with the size, density, setback and other requirements of CCSD S3.552(2) standards and occupancy of those 14 RV sites would be limited to the 30-day occupancy limit imposed by CCSD S3.552(1).

immediately preceding the date of application" and such proof 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."[5] In this case, that means that if petitioners can prove that an RV park of the nature and extent of the RV park that exists on the subject property today has continuously existed on the subject property for the past 10 years, *i.e.* since 2001, then petitioners will have created a rebuttable presumption that an RV park of that nature and extent has continually existed on the site since 1980, the date the park became nonconforming.

The hearings officer found that petitioners met their burden to show that the RV park that occupies the subject property today was in existence 10 years ago and thus petitioners have created the rebuttable presumption authorized by ORS 215.130(10)(a) that the RV park that exists on the subject property today existed in 1980 and has continued to the present.

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[5] ORS 215.130 provides in relevant part:

> "(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. * * *
>
> "* * * * *
>
> "(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 verifying 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;
> >
> > "* * * * *
>
> "(11) For purposes of verifying a use under subsection (5) of this section, a county may not require an applicant for verification to prove the existence, continuity, nature and extent of the use for a period exceeding 20 years immediately preceding the date of application."

That finding is problematic, however, because the hearings officer cites only a 1995 appraisal of the subject property as the basis for his conclusion that petitioners have established a rebuttable presumption that the existing RV park has had the same nature and extent since 1980. That appraisal was prepared for petitioners before they purchased the property and appears at Record 669-755. As we explain below, the RV park that is described in that 1995 appraisal differs somewhat from the RV park that exists on the subject property today.

The hearings officer then found that county staff submitted evidence that was sufficient to rebut the ORS 215.130(10)(a) presumption. The hearings officer found that petitioners only have a nonconforming use right to "a maximum of 16 mobile homes and 27 recreational vehicle sites." Record 116. The hearings officer went on to find that occupancy of those mobile home and recreational vehicle sites must comply with CCSD S3.552(1), which limits occupancy to 30 days in any 60 day period. The hearings officer also found that the mobile home and recreational vehicle occupied sites must also comply with the other setback, spacing, size and siting requirements in CCSD S3.552(2).

To summarize, the hearings officer found that petitioners have a nonconforming use right to a RV park with 16 mobile home sites and 27 RV sites, as opposed to the 14 RV sites that would have been allowed under the initial Compliance Order. But like the initial Compliance Order, the hearings officer determined that those RV and mobile home sites all must comply fully with the standards and requirements of CCSD S3.552. Under the hearings officer's Compliance Order, eleven of the existing 27 mobile homes would have to be removed and 39 of the existing 66 RVs would have to be removed. And the 16 mobile home sites and 27 RV sites would all be subject to the 30-day occupancy limit imposed by CCSD S3.552(1) and would also have to comply with the setback, spacing, size, and other requirements of CCSD S3.552(2).

ASSIGNMENTS OF ERROR

It would serve no purpose to attempt to decipher and specifically address petitioners' four assignments of error. Those assignments of error unnecessarily complicate the parties' dispute. We conclude, however, that those assignments of error and the argument that petitioners submit in support of those assignments of error establish that the county's decision must be remanded. Specifically, the hearings officer's conclusion that petitioners' nonconforming use is limited to a RV park with 16 mobile homes and 27 RV sites that fully comply with the current CCSD S3.552 RV park standards is inadequately explained in the hearings officer's findings, and the hearings officer's decision appears to be inconsistent with the evidence in the record.

A. The Hearings Officer's Findings Regarding the Rebuttable Presumption

As previously noted, the hearings officer found that petitioners submitted sufficient evidence to establish that petitioners' RV park was lawfully established and that petitioners evidence was sufficient to establish a rebuttable presumption under ORS 215.130(10)(a) that an RV park of the nature and extent that exists on the subject property today existed in 1980.[6] That finding strongly suggests the hearings officer failed to appreciate the nature and extent of the dispute between petitioners and the county concerning petitioners' nonconforming RV park use and erroneously applied the statute that governs resolution of that dispute. If the hearings officer's finding is read literally and in isolation, the hearings officer found that petitioners evidence was sufficient to establish a rebuttable presumption that the existing RV park existed in 1980. That, existing RV park apparently holds approximately 90 RVs and

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[6] The hearings officer's finding is set out below:

> "Now that lawfulness of the use has been established, the question is whether [petitioners have] been able to meet the burden imposed by the terms of ORS 215.130(10), to wit: whether the use of the [RV] Park for the purposes it is being used for today have been in existence for 10 years. [Petitioners have] met that burden and as such, reap[] the benefit of the statutory rebuttable presumption." Record 116; footnote omitted.

mobile homes, many of which are used as long term residences in violation of the 30-day occupancy limit imposed by CCSD S3.552(1). Moreover, the existing RV and mobile home sites all violate at least some of the current RV site standards set out at CCSD S3.552(2).

The hearings officer's decision includes absolutely no explanation for finding such a rebuttable presumption. The only evidence the hearings officer cites to support that finding is the 1995 appraisal. Record 116, n 9. The 1995 appraisal is at best indirect evidence of what may have existed on the subject property between 2001 and 2011 and clearly does not support a finding that an RV park of the same nature and extent that exists on the site today also existed in 1995. The 1995 appraisal states that the RV park includes 79 spaces that range in size from 700 to 2,500 square feet in size. Record 719. According to the 1995 appraisal, 43 of those 79 spaces are "full hookups" (electric, water and septic hookups), and the remaining 36 spaces have only electric and water hookups. *Id*.

The 1995 appraisal also states that "[t]here are approximately 17 permanent mobile home spaces and 7 permanent RV spaces." We are not sure how to interpret that statement, but it may mean that in 1995 there were 17 mobile homes and 7 RVs on the subject property that were occupied for periods of time that exceed the 30 days allowed in any 60 day period allowed by CCSD S3.552(1). If so, that could mean that in 1995 the remaining spaces were used by RVs for shorter periods of time that comply with CCSD S3.552(1).

An additional lack of clarity or inconsistency in the hearings officer's rebuttable presumption findings concerns the setback, spacing, size and siting requirements of CCSD S3.552(2). A number of the existing RV park sites apparently violate some of those requirements. While the hearings officer appears to have found that the evidence that petitioners submitted is sufficient to establish a rebuttable presumption that the existing RV sites that violate the CCSD S3.552(2) standards existed in 1980, *see* n 6, the hearings officer

also found that petitioners submitted *no evidence* concerning the CCSD S3.552(2) standards.[7] Those findings appear to be inconsistent, leaving it unclear whether petitioners' rebuttable presumption extends to some or all of the CCSD S3.552(2) standards.

To summarize, we are faced in this appeal with a somewhat unusual circumstance. The hearings officer found that there is a rebuttable presumption under ORS 215.130(10)(a) that the RV park that exists on the subject property today existed in 1980. However, the only evidence that the hearings officer cites in support of that finding is the 1995 appraisal. In a number of respects the same evidence that the hearings officer relies on to support a rebuttable presumption to continue the existing RV park as a nonconforming either rebuts or is inconsistent with such a presumption.[8] And the hearings officer's findings concerning whether the rebuttable presumption extends to the setback, spacing, size and siting requirements of CCSD S3.552(2) are inconsistent, leaving the scope of the rebuttable presumption unclear. We turn now to petitioners' challenges to the hearings officer's findings regarding the county's rebutting evidence.

B. The County's Rebuttal Evidence

The county hearings officer adopted the following findings to identify the evidence that he relied on to conclude that the county carried its burden to rebut the presumption that an RV park of the nature and extent that exists on the subject property today also existed in 1980:

> "* * * I find that the County in fact meets its burden to show that the nature and extent of the use is not as [petitioners claim] but, rather, is of a much lower quantity more in line with the County's position.

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[7] In addressing CCSD S3.550, which includes the CCSD S3.552(2) standards, the hearing officer found "[n]o evidence by [petitioners] meeting that standard was introduced at the hearing and, as such, [petitioners have] failed to show [they are] not subject to the terms of [CCSD S3.550]." Record 117.

[8] The number of RVs and mobile homes is the clearest example. As noted there may be as many as 90 mobile homes and RVs currently on the site, whereas the 1995 appraisal showed only 79.

> "For example, Exhibit 15 is a nine page exhibit comprised of three separate documents from the Department of Environmental Quality (DEQ) in March and April of 1997, two of which are internal memoranda and the last, a letter to [Petitioners]. Each of these documents show[s] the Park to be approved only for 16 mobile homes and 27 'full hook-up RV spaces.' * * * This same numeric limitation is also described in Exhibit 11, another internal DEQ memorandum from December 1995.
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> "Further evidence supporting the lower thresholds is found in County Exhibits 7, 9, 15 and 17, all of which reflect the status for the Park during the mid-1990's. The exhibits—singly and collectively—show that the Park is allowed a maximum of 16 mobile homes and 27 recreational vehicles sites. [Petitioners] produced no evidence showing that [they have] obtained any required approvals or permits that would allow for an expanded number of sites from any state or local agency that would support its claim for 85 sites. As such, any use of the Park beyond the approved 16 mobile home and 27 recreational vehicle sites is not lawful." Record 116-17; footnote omitted.

The cited evidence is sufficient to rebut any presumption that the RV park as it currently exists has had the same continuous nature and extent since 1980, in at least some particulars. The current RV park apparently has more than 43 sites connected to the septic system; the cited evidence suggests that only 43 sites were connected to the septic system in the 1990s. The existing park currently also has more mobile homes than are reflected in the cited evidence. However, as explained below, the hearings officer's ultimate conclusions regarding the nature and extent of the verified nonconforming use are in some respects not supported by the record.

1. Dry Spaces

We agree with petitioners that the hearings officer appears to have conflated the issue of how many full service mobile home and RV sites *that are connected to the septic system* are included in the nonconforming RV park with the issue of how many total mobile home and RV sites are included in the nonconforming RV park. Exhibits 7, 9, 11, 15 and 17 all concern the onsite septic system. The number of mobile homes (17) plus the number of RVs (27) that the hearings officer found petitioners have right to continue to use as a nonconforming use (a total of 43) matches exactly the number of full hook up sites (sites

connected the septic system) that the 1995 appraisal stated the subject property had in 1995. On that point all of the evidence cited to us, including the 1995 appraisal and the county's evidence, are in agreement. But the hearings officer's decision gives no indication that the hearings officer appreciated that petitioners may have a nonconforming use right to approximately 36 "dry spaces" that have only electric and water hookups. Exhibit 15, which the hearings officer appears to have relied on most heavily, includes a drawing that shows those 36 "dry spaces" and appears to largely duplicate the drawing in the 1995 appraisal, which also shows those spaces. Record 440.

The evidence cited by the hearings officer appears to support a conclusion that petitioners do not have a nonconforming use right to allow RVs to occupy the 36 dry spaces and discharge sewage into the onsite septic system (or elsewhere onsite in violation of state environmental laws). But the evidence suggests those 36 dry spaces did exist in 1995 and petitioners may have a right to continue to use them as dry RV sites as a nonconforming use. The hearings officer needs to explicitly address whether petitioners have a nonconforming use right to continue to use the dry spaces that are not connected to the septic system.

2. The CCSD S3.552 Standards

The hearings officer's Compliance Order requires that "all recreational vehicles and mobile homes [on the subject property must be] used for the periods consistent with the terms of CC[SD] [S]3.552(1) and * * * sited such they comply with the terms of CC[SD] [S]3.552(2)(B) – (K)." Record 117. As already noted, many of the sites are currently being used for periods of time that violate CCSD 3.552(1), none of the sites comply with density or minimum lot area requirements of CCSD 3.552(2)(B) and (C), and many of the sites probably violate some of the other requirements of CCSD S3.552(2)(B) through (K). *See* n 2.

The 1995 appraisal appears to indicate that at least some of the 79 sites in the RV park were being occupied in 1995 for periods of time that exceed the 30-day limit imposed by CCSD S3.552(1) and did not comply with at least some of the CCSD S3.552(2) "Size,

Density, Lot Dimension, and Setbacks" standards. The hearings officer did not appear to appreciate that the 1995 appraisal shows that at least some sites were used in 1995 in a manner that violated some of the location, durational, size and other code requirements in CCSD S3.552. If so, petitioner may have a nonconforming use right to continue use of those sites despite their nonconformity.

For the reasons explained in this decision we agree with petitioners that the hearings officer's decision must be remanded so that the hearings officer can better explain the bases for his conclusions that petitioners' RV park must be limited to 16 mobile homes and 27 RVs and that all mobile home and RV sites must comply fully with the CCSD S3.552 occupancy and development standards.

The county's decision is remanded.