BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

CENTRAL OREGON LANDWATCH,
Petitioner,

vs.

DESCHUTES COUNTY,
Respondent,

and

PINE FOREST DEVELOPMENT, LLC,
Intervenor-Respondent.

LUBA No. 2016-065

FINAL OPINION
AND ORDER

Appeal from Deschutes County.

Paul D. Dewey, Bend, filed the petition for review and argued on behalf of petitioner.

No appearance by Deschutes County.

Steven Hultberg, Bend, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief was Radler White Parks & Alexander LLP.

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

HOLSTUN, Board Chair, concurring.

REMANDED 12/06/2016

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 county approval of an expansion to an existing destination resort.

REPLY BRIEF

Petitioner moves to file a reply brief to address waiver challenges in intervenor-respondent's (intervenor's) brief. There is no opposition to the motion, and it is allowed.

FACTS

In 2006, the county approved a conceptual master plan (CMP) for the Caldera Springs destination resort (Caldera), on a 390-acre tract. As approved, Caldera includes 320 single-family residence homesites, and a number of recreational facilities. To satisfy statutory requirements that a destination resort provide at least 150 "overnight lodging units," which can consist of "individually owned units," Caldera relies upon 38 privately-owned cabins, which each have three to five bedrooms, providing a total of approximately 150 bedrooms. Each cabin bedroom has a separate bathroom and an outside entrance in addition to an entrance from the bedroom to the inside of the cabin. In this opinion, we refer to these cabin bedrooms as "lockoff rooms."

Intervenor proposes to expand the Caldera resort onto an adjacent 614-acre parcel that was formerly in federal ownership. The parcel has a base zone of Forest (F-2), and is subject to several combining (or overlay) zones,

including a Wildlife Area (WA) Combining Zone for deer migration and a Destination Resort (DR) Combining Zone, which makes the property eligible to site a destination resort. The DR zone was applied to the expansion area in 2011, after intervenor acquired the parcel from the U.S. Forest Service.

Deschutes County Code (DCC) 18.113.025 authorizes the county to approve an expansion of an existing destination resort, either because (1) the expansion meets all applicable criteria without consideration of the existing resort, or (2) the entire development viewed as a whole (expansion plus existing) satisfies all applicable criteria.[1] As discussed below, DCC provisions, based on Statewide Planning Goal 8 (Recreation) and ORS 215.435 *et seq*., impose a number of standards and qualifications on establishment of a

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[1] DCC 18.113.025 provides:

> "Expansion proposals of existing developments approved as destination resorts shall meet the following criteria:
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> "A. Meet all criteria of DCC 18.113 without consideration of any existing development; or
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> "B. Meet all criteria of DCC 18.113 for the entire development (including the existing approved destination resort development and the proposed expansion area), except that as to the area covered by the existing destination resort, compliance with setbacks and lot sizes shall not be required.
>
> "If the applicant chooses to support its proposal with any part of the existing development, applicant shall demonstrate that the proposed expansion will be situated and managed in a manner that it will be integral to the remainder of the resort."

destination resort. Among the goal and statute-based requirements are that the destination resort provide at least 150 overnight lodging units and that the ratio of residential dwellings to overnight lodging units not exceed 2.5 to 1.

In 2015, intervenor applied to the county to modify the Caldera CMP, in order to expand the resort onto the adjacent 614-acre parcel, using the second approach authorized by DCC 18.113.025. The proposed expansion would occupy 490 acres of the 614-acre parcel, and would include up to 395 new single-family dwellings, bringing the total of single-family dwellings in the resort as a whole to a maximum of 715. Intervenor also proposed to increase the existing ratio of dwellings to overnight lodging units from 2:1 to 2.5:1. To avoid exceeding the maximum ratio of residential dwellings to overnight lodging units required by law, intervenor proposed to construct an additional 95 overnight lodging units, which would be provided in the same way as the existing Caldera resort, *i.e.*, individually owned cabins that each include three to five lockoff rooms, with each individual lockoff room counted as a separate overnight lodging unit.

To address the requirements of the WA Combining Zone, for deer migration, intervenor proposed retaining 125 acres of the parcel in an undeveloped state.

The hearings officer conducted several hearings on the application. At the final December 15, 2015 hearing, petitioner and others submitted new testimony and evidence. The hearings officer left the record open for seven

days, until December 22, 2015, for additional testimony and evidence, limited to the issues raised in the new materials petitioner and others submitted on December 15, 2015. On December 22, 2015, petitioner submitted additional testimony and evidence regarding the issues that petitioner raised in its December 15, 2015 submittals. The hearings officer rejected the December 22, 2015 submittal, concluding that it did not constitute a response or rebuttal to the December 15, 2015 submittals.

The hearings officer issued a decision approving the expansion on April 15, 2016. Petitioner appealed the hearings officer's decision to the county board of commissioners, which in an order dated May 11, 2016, exercised its discretion under the DCC to decline to hear the appeal, and refunded 80 percent of the appeal fee. This appeal followed.

SIXTH ASSIGNMENT OF ERROR

We first address petitioner's argument that the hearings officer committed procedural error in rejecting evidence petitioner submitted during the proceedings below.

As noted, at the final December 15, 2015 hearing before the hearings officer, petitioner submitted a 23-page letter with 71 pages of attachments. Intervenor requested the opportunity to review the submissions and provide a response. The hearings officer granted the request, and left the record open for seven days, until December 22, 2015, for additional testimony and evidence, limited to the issues raised in the new materials submitted on December 15,

2015. On December 22, 2015, intervenor provided its response. On the same date, petitioner submitted a letter with attachments, providing additional testimony and evidence regarding the same issues petitioner raised in its December 15, 2015 submittals. The hearings officer rejected petitioner's December 22, 2015 submittal, stating that the submittal merely "reiterates prior arguments and augments rather than providing rebuttal testimony," and thus "does not comply with the Hearings Officer's instructions[.]" Record 26.

On appeal, petitioner argues that the December 22, 2015 submittal complied with the hearings officer's instructions, because it addressed the "issues raised" in petitioner's December 15, 2015 submittal. According to petitioners, the hearings officer did not expressly limit submittals to a response or rebuttal of the testimony submitted at the December 15, 2015 hearing.

Intervenor responds that petitioner failed to identify the alleged procedural error as an issue in its local appeal to the county board of commissioners, and thus petitioner failed to exhaust that issue, as required by *Miles v. City of Florence*, 190 Or App 500, 79 P3d 382 (2003). On the merits, intervenor argues that the hearings officer clearly limited new testimony and evidence to responses to the testimony and evidence submitted at the December 15, 2015, and did not intend to allow petitioner or other parties to simply augment their earlier testimony.

We agree with intervenor on both points. On waiver, petitioner replies that the exhaustion/waiver doctrine in *Miles* does not apply when the local

appeal review body exercises its discretion to decline to hear the appeal, as the board of commissioners did in this case, pursuant to DCC 22.32.035.[2] However, we have applied the *Miles* exhaustion/waiver doctrine even in circumstances where the governing body declined to review the appeal of the lower body. *See Wellet v. Douglas County*, 62 Or LUBA 372, 377 (2010) (the purpose of *Miles* exhaustion/waiver is not met where the petitioner was required, but did not, identify specific issues on local appeal that the governing body declined to review, because if the governing body had had notice of the issue, it might have chosen to accept review and address the issue). We

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[2] DCC 22.32.035, entitled "Declining Review" states in relevant part:

> "* * * [W]hen there is an appeal of a land use action and the Board of County Commissioners is the Hearings Body:
>
> "A. The Board may on a case-by-case basis or by standing order for a class of cases decide at a public meeting that the decision of the lower Hearings Body of an individual land use action or a class of land use action decisions shall be the final decision of the County.
>
> "B. If the Board of County Commissioners decides that the lower Hearings Body decision shall be the final decision of the County, then the Board shall not hear the appeal and the party appealing may continue the appeal as provided by law. In such a case, the County shall provide written notice of its decision to all parties. The decision on the land use application becomes final upon mailing of the Board's decision to decline review.
>
> "C. The decision of the Board of County Commissioners not to hear a land use action appeal is entirely discretionary."

understand petitioner to argue, nonetheless, that *Miles* is limited to circumstances where the appeal body's review is limited to the record of the underlying decision maker. Petitioner notes that under DCC 22.32.27(B), the board of commissioners has the option of conducting its review *de novo*.[3]

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[3] DCC 22.32.27(B) provides in relevant part:

> "1. Review before the Board, if accepted, shall be on the record except as otherwise provided for in DCC 22.32.027.
>
> "2. The Board may grant an appellant's request for a de novo review at its discretion after consideration of the following factors:
>
> "a. Whether hearing the application de novo could cause the 150-day time limit to be exceeded; and
>
> "* * * * *
>
> "c. Whether the substantial rights of the parties would be significantly prejudiced without de novo review and it does not appear that the request is necessitated by failure of the appellant to present evidence that was available at the time of the previous review; or
>
> "d. Whether in its sole judgment a de novo hearing is necessary to fully and properly evaluate a significant policy issue relevant to the proposed land use action.
> "* * * * *
>
> "3. Notwithstanding DCC 22.32.027(B)(2), the Board may decide on its own to hear a timely filed appeal de novo.
>
> "4. The Board may, at its discretion, determine that it will limit the issues on appeal to those listed in an appellant's notice

Petitioner argues that it is possible that the board of commissioners, if it had elected to hear the appeal, might have chosen to hold a *de novo* hearing at which petitioner might have raised new issues not raised in the notice of appeal, including potentially the procedural error identified in this assignment of error.

However, that chain of speculation is insufficient to demonstrate that the *Miles* exhaustion/waiver doctrine does not apply in the present case, to limit the issues on appeal to LUBA to those identified in the local appeal. One could just as easily speculate, as intervenor does, the county board might have elected to hear the local appeal if petitioner had identified in the local notice the procedural issue it now seeks to raise for the first time before LUBA, and that issue might have been addressed locally and a resolution reached prior to seeking LUBA's review, thus fulfilling a central purpose of the exhaustion requirement at ORS 197.825(2)(a). Instead, as intervenor notes, petitioner stated in the notice of appeal that the primary issues are of state law, and requested that the county board *not* hear the appeal. Record 11-12, 94.

In any case, we also agree with intervenor on the merits that the hearings officer clearly intended the seven-day open record period to allow the parties to respond or rebut the arguments and evidence submitted at the December 15, 2015 hearing, not to augment those arguments and evidence. The hearings

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of appeal or to one or more specific issues from among those listed on an applicant's notice of appeal."

officer's rejection of petitioner's attempt to augment its earlier testimony was entirely consistent with his instructions, and does not represent procedural error.

The sixth assignment of error is denied.

FIRST ASSIGNMENT OF ERROR

As noted, DCC 18.113.025, adopted in 1992, provides that the county may approve an expansion of an existing destination resort, if either (1) the expansion meets all stand-alone requirements for a destination resort, or (2), the expansion, considered with the existing destination resort facilities, meets all requirements for a destination resort. *See* n 1. Intervenor sought approval for the expansion under the second approach set forth in DCC 18.113.025(B).

Petitioner argues that ORS 197.435 to 197.467, the statutes governing destination resorts, do not authorize approval of an expansion of a destination resort, where that expansion does not independently meet all requirements for a destination resort. In effect, petitioner argues that the second option provided in DCC 18.113.025(B) is inconsistent with ORS 197.435 to 197.467. According to petitioner, the only option consistent with ORS 197.435 to 197.467 is to approve the expansion as a stand-alone destination resort, such that the expansion area independently complies with all standards necessary to establish a new destination resort.

Petitioner first argues that the destination resort statute sets out standards only for approving a "proposal for a destination resort," and that nothing in the

statute purports to authorize approving an expansion to an existing destination resort. We understand petitioner to contend that some *express* statutory authority is needed to authorize expansion an existing destination resort on resource land, and that there is no basis to read the statute to *implicitly* authorize such an expansion. That is particularly the case, we understand petitioner to argue, where the proposed expansion consists almost entirely of new residential dwellings, as in the present case.[4] Petitioner argues that the proposed expansion constitutes what is essentially a new rural residential subdivision on resource land, land on which rural residential development is otherwise prohibited without an exception to the resource goals. To the extent expansion of an existing resort is implicitly authorized at all by the destination resort statute, petitioner argues that the statute should be narrowly construed not to allow an expansion that consists almost entirely of residential development not otherwise allowed in the F-2 zone.[5]

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[4] As discussed in the second assignment of error, intervenor proposed 65 to 85 new overnight lodging units in the expansion area, in addition to the proposed 395 new residential dwellings. Intervenor's site plan also depicts two open areas that could be used to site additional recreational amenities in the expansion area. However, intervenor did not propose, and the county did not approve or require, any additional recreational amenities.

[5] The methodology for interpreting a statute is set out in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993), as modified by *State v. Gaines*, 346 Or 160, 172, 206 P3d 1042 (2009). Under *PGE* as modified, the initial and often dispositive steps in interpreting a statute is to examine the text and context and legislative history, if any, to determine the

Intervenor responds under petitioner's interpretation of the destination resort statute, an existing resort could not be expanded or modified in any way, for example by adding new recreational amenities, unless the expansion independently satisfied all destination resort standards.[6] Intervenor argues that a far better reading of the destination resort statute is that the statute implicitly allows expansion of an existing resort, if the expanded resort continues to meet all applicable standards, which is exactly what DCC 18.113.025(B) requires. Intervenor argues that the expanded resort complies with all applicable standards, and the expanded resort as a whole could have been approved in 2006 as a two-phase resort development. If a two-phase resort with the same total number of dwellings, lodging units and recreational amenities proposed

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intent of the legislature. Only if legislative intent remains unclear is it necessary to resort to general maxims of statutory construction in resolving the remaining ambiguity. In the present case, no party cites to any legislative history, or argues that determining the legislature's intent requires analysis beyond text and context.

[6] Intervenor also responds that the first assignment of error is an impermissible collateral attack on DCC 18.113.025, which was adopted in 1992 and is presumably acknowledged to comply with Statewide Planning Goal 8. The hearings officer adopted a finding that DCC 18.113.025 is deemed acknowledged with both Goal 8 and the destination resort statute. Record 38. Petitioner challenges that finding, arguing that acknowledgment does not shield a local code provision from review for inconsistency with an applicable statute. *Jouvenat v. Douglas County*, 58 Or LUBA 378, 381 (2009). For purposes of this opinion, we assume that petitioner is correct that the presumed acknowledgment of DCC 18.113.025(B) as complying with Goal 8 does not mean that DCC 18.113.025(B) is also deemed to comply with the destination resort statute.

here could have been approved in 2006, intervenor argues, the proposed expansion of the existing resort should be viewed as consistent with, and authorized by, the destination resort statutes.

We mostly agree with intervenor. Petitioner is correct that express statutory or goal-based authority would be necessary to approve residential development on rural resource land, such as the proposed 395 single family dwellings, without taking an exception to several otherwise applicable statewide planning goals. However, ORS 197.450 expressly allows for the "siting of a destination resort" on rural lands without taking an exception to applicable statewide planning goals, if the resort is in accordance with all applicable statutes.[7] While residential development within a destination resort is not *required* by Goal 8 or any statute (and indeed would otherwise be prohibited by several goals and statutes), the goal and statute allow such development as part of a destination resort, subject to limitations, including that the ratio of residential dwellings to overnight lodging unit not exceed 2.5 to 1. However, nothing in the goal or statute limits the maximum number of residential dwellings, overnight lodging units, recreational amenities provided

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[7] ORS 197.450 provides:

> "In accordance with the provisions of ORS 30.947, 197.435 to 197.467, 215.213, 215.283 and 215.284, a comprehensive plan may provide for the siting of a destination resort on rural lands without taking an exception to statewide planning goals relating to agricultural lands, forestlands, public facilities and services or urbanization."

by a destination resort, or the maximum size of such a resort. Further, the destination resort statute expressly contemplates that destination resorts may be approved in phases. *See* ORS 197.465(3) (requiring that in phased developments recreational amenities intended to serve a phase must be constructed prior to sales of residential units in that phase). While the Caldera resort was not initially approved as a multi-phase development, we believe that it would elevate form over substance to read the destination resort statute as allowing (1) a resort to be developed in two or more phrases, but (2) prohibiting expansion of an existing resort that would offer exactly the same balance of uses and visitor-oriented accommodations that could have been approved in a multi-phase development.

A critical caveat to the foregoing is that the expanded resort, viewed as a whole, must meet or continue to meet all applicable standards, as we understand DCC 18.113.025 to require.[8] As we explain below under the

[8] We understand petitioner to suggest that if the destination resort statutes allow a county to approve an expansion of an existing resort, the county must evaluate whether the expanded resort, viewed as a whole, complies with all applicable standards, including cumulative impacts of existing and proposed development on, for example, designated wildlife resources. Petition for Review 18-19. We understand petitioner to argue that because the county would have to evaluate the impacts of all phases of a multi-phase resort in originally approving such a resort, the county would similarly have to evaluate the cumulative impacts of an expanded resort as a whole, and could not simply evaluate the impacts of the expansion in isolation. While we tend to agree with that argument, petitioner does not argue *on appeal* that the county failed to evaluate the cumulative impacts of the expanded resort, viewed as a whole, or assign error to such a failure, if any. Accordingly, we do not reach this issue.

second assignment of error, we conclude that the proposed expanded resort (1) does not provide at least 150 overnight lodging units, and (2) exceeds the 2.5 to 1 ratio of residential dwellings to overnight lodging units. However, for present purposes we reject petitioner's categorical argument that the destination resort statute does not authorize *any* expansion at all of an existing resort.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

As noted, ORS 197.445(4) requires that a destination resort provide at least 150 units of overnight lodging, and further that the ratio of residential dwellings to overnight lodging units cannot exceed 2.5 to 1.[9] ORS

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[9] ORS 197.445(4)(b) provides:

> "On lands in eastern Oregon, as defined in ORS 321.805:
>
> "(A) A total of 150 units of overnight lodging must be provided.
>
> "(B) At least 50 units of overnight lodging must be constructed prior to the closure of sale of individual lots or units.
>
> "(C) At least 50 of the remaining 100 required overnight lodging units must be constructed or guaranteed through surety bonding or equivalent financial assurance within five years of the initial lot sales.
>
> "(D) The remaining required overnight lodging units must be constructed or guaranteed through surety bonding or equivalent financial assurances within 10 years of the initial lot sales.

197.435(5)(b) defines "overnight lodging" in relevant part as "permanent, separately rentable accommodations that are not available for residential use, including hotel or motel rooms, cabins and time-share units."[10] "Individually owned units" may be considered overnight lodging units if they are available

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> "(E) The number of units approved for residential sale may not be more than 2-1/2 units for each unit of permanent overnight lodging provided under this paragraph.
>
> "(F) If the developer of a resort guarantees the overnight lodging units required under subparagraphs (C) and (D) of this paragraph through surety bonding or other equivalent financial assurance, the overnight lodging units must be constructed within four years of the date of execution of the surety bond or other equivalent financial assurance."

[10] ORS 197.435(5)(b) provides, in relevant part:

> "Overnight lodgings" means:
>
> "* * * * *
>
> "(b) With respect to lands in eastern Oregon, as defined in ORS 321.805, permanent, separately rentable accommodations that are not available for residential use, including hotel or motel rooms, cabins and time-share units. Individually owned units may be considered overnight lodgings if they are available for overnight rental use by the general public for at least 38 weeks per calendar year through a central reservation system operated by the destination resort or by a real estate property manager, as defined in ORS 696.010. Tent sites, recreational vehicle parks, manufactured dwellings, dormitory rooms and similar accommodations do not qualify as overnight lodgings for the purpose of this definition."

for rental a prescribed amount of weeks per year. *Id.* "[D]ormitory rooms and similar accommodations do not qualify as overnight lodgings[.]" *Id.*

Petitioner argued below that the proposal expansion is inconsistent with the requirements to provide at least 150 overnight lodging units, and the requirement not to exceed the 2.5 to 1 ratio of residential units to overnight lodging units, because the individual lockoff rooms in the 38 existing Caldera cabins and those proposed in the expansion do not qualify as separate "overnight lodging" units as defined by ORS 197.435(5)(b), in part because the lockoff rooms constitute "dormitory rooms and similar accommodations." According to petitioner, each of the 38 individually owned Caldera cabins and each of the proposed individually owned cabins in the expansion area may qualify as an overnight lodging unit, but the individual lockoff rooms that are part of each cabin do not. The hearings officer rejected the argument, which petitioner renews on appeal. For the reasons that follow, we agree with petitioner that the Caldera lockoff rooms cannot be counted as separate overnight lodging units as defined at ORS 197.435(5)(b).

Intervenor responds initially that petitioner's argument is an impermissible collateral attack on the 2006 decision approving the Caldera resort. We partially agree with intervenor. While petitioner cannot in this appeal challenge the existing Caldera resort's compliance with the applicable

standards,[11] it can certainly challenge the proposed accounting of similar cabins and lockoff rooms in the expansion area. Further, because intervenor proposed to count each of the lockoff rooms contained within the 38 Caldera cabins toward the total of overnight lodging units needed to ensure that the expanded resort as a whole continues to provide the minimum 150 overnight lodging units and does not exceed the 2.5 to 1 ratio between residential dwellings and overnight lodging units, we believe petitioner can challenge that proposal, and argue that the existing Caldera lockoff rooms cannot be counted for those purposes.

Intervenor next argues that LUBA has already held that lockoff rooms can constitute "overnight lodging units," citing *Gould v. Deschutes County*, 54

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[11] Petitioner argues that the 2006 decision approving the Caldera resort did not, in fact, approve counting lockoff rooms toward the requirement to provide 150 overnight lodging units, and not to exceed the 2.5:1 ratio. Petitioner cites language in the 2006 decision describing the required 150 overnight lodging units as consisting of a "combination of cottages, attached units and condominiums. Some of the single-family homesites will also be eligible for overnight rental." Record 447. Petitioner argues that the Caldera resort, as built and operated, does not in fact include any cottages, attached units or condominiums used as overnight lodging units, and instead relies solely on the purported rental of lockoff rooms in 38 individually owned cabins to satisfy the requirement to provide 150 overnight lodging units and to avoid exceeding the maximum ratio. We understand petitioner to suggest that the built Caldera resort is not consistent with what was approved in the 2006 decision. If that suggestion is correct, petitioner or the county could presumably file an enforcement action in a suitable forum to seek enforcement of the 2006 decision. However, for present purposes, we agree with intervenor that petitioner cannot, in this appeal, directly challenge the 2006 decision or any alleged noncompliance with that decision.

Or LUBA 205, 216-23, *rev'd on other grounds*, 216 Or App 150, 171 P3d 1017 (2007). In *Gould*, LUBA sustained in part challenges to a proposal that involved the use of cottages, each with two lockoff units, to count toward the resort's total of overnight lodging units.[12] Specifically, the petitioner challenged a finding that the county could ignore as speculative a notation on the proposed plan that the lockoff capability would be removed in the future. The petitioner argued that a condition of approval or similar mechanism was required to ensure that the lockoff units remain in place. We ultimately concluded that the finding was harmless error. *Id.* at 223. However, no party argued in *Gould* that the proposed lockoff units did not qualify as overnight lodging units as defined at ORS 197.435(5)(b), and we did not address or resolve that issue. Accordingly, *Gould* does not assist intervenor.

Intervenor also argues that nothing in the destination resort statute requires that overnight lodging units be grouped in any particular manner, or prohibits combining multiple overnight lodging units into a single structure. Intervenor notes that a 150-room hotel would satisfy the requirement to provide at least 150 overnight lodging units, and argues that providing a total of 150

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[12] Our decision in *Gould* did not describe the nature of the cottages or the lockoff units, and it is not clear how similar or dissimilar the lockoff units at issue in *Gould* are to the lockoff rooms at issue in this appeal. We do not intend our analysis below to foreclose the possibility that there may be different types of lodging that can be described as lockoff units *and* that can also qualify as "individually owned units" within the meaning of ORS 197.435(5)(b).

lockoff rooms in 38 individually owned cabins is no different than providing 150 hotel rooms in a single structure, for purposes of ORS 197.435(5)(b).

However, that argument cannot be squared with the text of the applicable statutes. Under the first sentence of ORS 197.435(5)(b), overnight lodging units can include hotel or motel rooms, cabins and time-share units, which presumably can (but need not) be owned and rented by the resort operator. The second sentence of ORS 197.435(5)(b) addresses the subset of overnight lodging units that are "individually owned units," and provides in part that "[i]ndividually owned units may be considered overnight lodgings if they are available for overnight rental use * * *" (emphasis added.) The pronoun "they" refers to "individually owned units," and clearly it is the "individually owned units" that must "available for overnight rental use." In other words, an individually owned "unit" that may be counted as an overnight lodging unit must be a unit that is "individually owned." The proposed lockoff rooms are not "units" of any kind and are not individually owned, or even capable of being individually owned. They are simply bedrooms in a larger structure, a cabin, which is the only unit in the present case that is "individually owned."

This relatively straightforward reading of ORS 197.435(5)(b) has support in the context provided by ORS 197.445(9)(c), which requires the resort operator to file an annual accounting of overnight lodging units. ORS 197.445(9)(c) provides in relevant part that "[f]or a resort counting individually owned units as qualified overnight lodging units," the report must detail "the

number of weeks that each overnight lodging unit is available for rental to the general public as described in ORS 197.435."[13] It is reasonably clear under ORS 197.445(9)(c) that where a developer relies upon individually owned units to qualify as overnight lodging units, what is counted toward satisfying overnight lodging requirements are the "individually owned units." Again, a lockoff room in a Caldera-style cabin is not, and cannot be, an individually owned unit of any kind. The only "unit" here capable of being "individually owned" is the cabin itself.

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[13] ORS 197.445(9) provides:

> "When making a land use decision authorizing construction of a destination resort in eastern Oregon, as defined in ORS 321.805, the governing body of the county or its designee shall require the resort developer to provide an annual accounting to document compliance with the overnight lodging standards of this section. The annual accounting requirement commences one year after the initial lot or unit sales. The annual accounting must contain:
>
> "(a) Documentation showing that the resort contains a minimum of 150 permanent units of overnight lodging or, during the phase-in period, documentation showing the resort is not yet required to have constructed 150 units of overnight lodging.
>
> "(b) Documentation showing that the resort meets the lodging ratio described in subsection (4) of this section.
>
> "(c) For a resort counting individually owned units as qualified overnight lodging units, the number of weeks that each overnight lodging unit is available for rental to the general public as described in ORS 197.435."

Any remaining doubt on this point is removed by the last sentence of ORS 197.435(5)(b), which provides that "dormitory rooms and similar accommodations do not qualify as overnight lodgings[.]" Petitioner argues that separately renting out individual bedrooms in a house with a shared common area and kitchen is functionally the same as renting sleeping rooms in a dormitory or similar accommodation that provides common facilities. Intervenor offers no response to petitioner's arguments regarding the "dormitory room" exclusion in ORS 197.435(5)(b). We agree with petitioner that there appears to be no functional distinction between the Caldera lockoff room approach and providing dormitory rooms or similar accommodations that offer individual sleeping rooms with shared common areas and kitchen facilities. We conclude that the proposed lockoff rooms are similar, at least, to dormitory rooms, and for that reason alone do not qualify as separate overnight lodging units.

We understand intervenor to acknowledge that the Caldera lockoff rooms are rarely if ever separately rented, and instead the common practice, encouraged by the way overnight lodgings at Caldera are marketed, is for a single family or extended family to rent all the lockoff rooms in a cabin, and hence effectively rent the entire cabin.[14] The practice of renting an individually

[14] Much of the second assignment of error is taken up with petitioner's argument that the manner in which the 38 existing Caldera cabins are marketed and typically rented as a single unit means that the individual lockoff rooms are not actually "available" for overnight rental use within the meaning of ORS

owned cabin as one overnight lodging unit is, of course, entirely consistent with the requirements of the statute discussed above. However, as petitioner argues, under that approach the existing resort does not provide the minimum number of 150 overnight lodging units, or only reaches that number in a purely nominal sense. The practical reality is that the existing resort provides only 38 *separate* overnight lodging units, and the proposed expansion would not add many more.

On this point, we believe that the legislative findings identifying the policies served by the destination resort statute, at ORS 197.440, offers useful context. ORS 197.440 provides, in relevant part:

> "The Legislative Assembly finds that:
>
> "(1) It is the policy of this state to promote Oregon as a vacation destination and to encourage tourism as a valuable segment of our state's economy; [and]
>
> "(2) There is a growing need to provide year-round destination resort accommodations to attract visitors and encourage them to stay longer. The establishment of destination resorts will provide jobs for Oregonians and contribute to the state's economic development[.]"

These policies focus on providing facilities and accommodations to attract tourists. One of the main vehicles for accommodating the needs of tourists under the destination resort statute is providing qualified overnight lodging. Hence, Goal 8 and the destination resort statute impose several requirements

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197.435(5)(b). Given our disposition of the remainder of the second assignment of error, we need not and do not address this argument.

intended to ensure a minimum number of overnight lodging units, and that the ratio of residential units to overnight lodging units does not exceed a prescribed limit. The hearings officer described the proposed Caldera approach as one that "finesse[s]" the statutory requirements, and that seems an accurate observation. Record 57. The proposed Caldera approach minimizes the *actual* number of *separate* overnight lodgings available for tourist accommodations. At best, that approach *nominally* provides 150 separate overnight lodging units, which does not seem consistent with the policies set out in ORS 197.440, to attract and accommodate tourists, at least compared to an approach that would actually provide 150 or more separate, qualified overnight lodging units.

The second assignment of error is sustained.

THIRD ASSIGNMENT OF ERROR

DCC 18.113.060(A)(2) requires a destination resort to provide (1) a visitor-oriented eating establishment for at least 100 persons, and (2) meeting rooms that provide seating for at least 100 persons. The hearings officer relied upon the existing facilities at Caldera Resort to conclude that the proposed expansion complies with DCC 18.113.060(A)(2), stating:

> "In connection with the initial development of Caldera Springs, the applicant constructed the Lakehouse and Zeppa Bistro which, together, provide visitor eating establishments and meeting rooms for at least 100 persons. * * *" Record 57.

Petitioner argues that a finding that the existing facilities, *together*, provide for seating for "at least 100 persons" is not sufficient to establish compliance with DCC 18.113.060(A)(2), which requires provision of an eating establishment

and meeting facilities that *each* provide at least 100 seats, for a total of at least 200 seats. We understand petitioner to argue that to the extent the hearings officer interpreted DCC 18.113.060(A)(2) to allow a single 100-seat facility to satisfy the requirements for a 100-seat visitor eating establishment and a 100-seat meeting room, the hearings officer misconstrued the applicable law. We also understand petitioner to argue that to the extent the hearings officer found that the Caldera resort provides two separate 100-seat facilities, the finding is not supported by substantial evidence.

Intervenor responds that the hearings officer was mistaken to the extent that the hearings officer suggested that the Lakehouse and Zeppa Bistro together only provide 100 seats. According to intervenor, the only evidence in the record on this point is clear that the Lakehouse and the Zeppa Bistro are two separate facilities that each provide at least 100 seats. Record 16 (describing the 2006 site plan approval of "eating establishments for at least 100 persons" and "meeting rooms for at least 100 persons") Record 1790 (listing separate development costs for the Lake House and Zeppa Bistro).

We agree with intervenor. While the hearings officer could have been clearer on this point, the statement that the Lakehouse and Zeppa Bistro together provide at least 100 seats does not state or necessarily imply that the two facilities do not *each* provide at least 100 seats. All the evidence cited to us on this point suggests that the two facilities are separate and each provides at least 100 seats. Importantly, petitioner cites no evidence to the contrary. To

the extent the hearings officer's findings are inadequate on this point, it appears that the record "clearly supports" a finding of compliance with DCC 18.113.060(A)(2). ORS 197.835(11)(b).[15]

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

DCC 18.113.070(D) requires a finding that "[a]ny negative impact on fish and wildlife resources will be completely mitigated so that there is no net loss or net degradation of the resource." Consistently with ORS 197.467, DCC 18.113.120(A) requires that a destination resort must preserve with a conservation easement any resource site on the property designated for protection in the county's comprehensive plan.[16]

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[15] ORS 197.835(11)(b) provides:

> "Whenever the findings are defective because of failure to recite adequate facts or legal conclusions or failure to adequately identify the standards or their relation to the facts, but the parties identify relevant evidence in the record which clearly supports the decision or a part of the decision, the board shall affirm the decision or the part of the decision supported by the record and remand the remainder to the local government, with direction indicating appropriate remedial action."

[16] DCC 18.113.120(A) provides:

> "If a tract to be used as a destination resort contains a resource site designated for protection in an acknowledged comprehensive plan pursuant to open spaces, scenic and historic areas and natural resource goals, that tract of land shall preserve the resource site by conservation easement sufficient to protect the resource values of the resource site in accordance with ORS 271.715 to 271.795."

Approximately 392 acres of the proposed expansion tract is designated a Deer Migration Corridor (DMC) in the county's inventory of significant resource sites, pursuant to Statewide Planning Goal 5. Under the DCC, a destination resort is allowed on lands designated DMC (although not on other lands designated as higher priority for deer migration). Intervenor submitted a wildlife habitat evaluation and mitigation plan (HEP) to demonstrate compliance with DCC 18.113.070(D), and proposed to retain approximately 120 acres of the property undeveloped to protect wildlife habitat. The Oregon Department of Fish and Wildlife (ODFW) ultimately signed off on the proposed mitigation, and the hearings officer relied on the HEP and ODFW's sign-off to conclude that the destination resort satisfied the DCC 18.113.070(D) "no net loss" standard. However, the hearings officer found that DCC 18.113.120, requiring a conservation easement, did not apply, because the DCC expressly allows a destination resort on DMC-designated lands.

On appeal, petitioner challenges the findings and evidence supporting the conclusion that the DCC 18.113.070(D) "no net loss" standard is met, arguing that the HEP evaluated only impacts on wildlife habitat and not on migration routes. Petitioner also challenges the conclusion that DCC 18.113.120(A) does not apply to require a conservation easement for the 392 acres of the property designated under Goal 5 as a deer migration corridor.

Intervenor responds that petitioner failed to raise both issues by failing to identify them as issues in its local appeal to the county board of commissioners, citing *Miles v. City of Florence*, 190 Or App 500, 506, 79 P3d 382 (2003). In reply, petitioner repeats its arguments, rejected above, that the exhaustion/waiver principle in *Miles* does not apply because the county board might have held a *de novo* appeal proceeding at which petitioner might have raised new issues. We reject that argument again.

Petitioner also argues that the appeal statement did raise issues regarding impacts on wildlife, with citation to DCC 18.113.070.[17] Record 104.

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[17] Petitioner's appeal statement states, in relevant part:

> "The piecemeal development approach pursued by Pine Forest Development, whereby subdivisions can be indefinitely added to destination resorts, is not consistent with the statutory, rule and code assumptions that the effects of a destination resort need to be considered upfront as a whole. An example is the impact on wildlife habitat where there was no attempt to provide a comprehensive wildlife management plan for the effects of the now-proposed 1,000+ acre resort. The same applies to the requirement wildlife management plan.
>
> "The Hearings Officer states that the expansion wildlife plan 'refines the initial CMP [Conceptual Master Plan]. That is twice wrong. There has been no application to amend the original CMP other than to add the expansion. The wildlife report also addresses only the expansion and does not address whatever wildlife plan, if any, was done for Caldera and does not address the cumulative effects of the 1,000 acre resort. The Hearings Officer also erred in finding that this expansion application satisfied the destination resort standards of DCC 18.113.060 and 18.113.070 including, but not limited to, the overnight lodging and investment requirements,

According to petitioner, the arguments at Record 104 are sufficient to identify the issues that petitioner now raises on appeal to LUBA, for purposes of *Miles*. We disagree with petitioner. The arguments at Record 104 do not mention the "no net loss" standard or the requirement to apply a conservation easement to Goal-5 protected resources, and thus do not give fair notice of the issues that petitioner now raises on appeal. Accordingly, petitioner failed to exhaust administrative remedies for those issues, and the issues are thus beyond LUBA's scope of review.

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

DCC 18.113.025(B) requires that a proposed expansion supported by an existing destination resort must "be situated and managed in a manner that it will be integral to the remainder of the resort." *See* n 1.

Petitioner argued below that the expansion consists of hundreds of dwellings located some distance from the central core of the Caldera resort, where tourist and recreational amenities are clustered, and therefore the expansion will not be situated and managed in a manner that will be integral to the remainder of the resort. However, the hearings officer adopted no finding that the proposed expansion is situated and will be managed in a manner that is

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where he relied on what had been provided in the Caldera Resort." Record 104.

integral to the remainder of the resort. Petitioner argues that the findings are therefore inadequate.

Intervenor responds that, notwithstanding the hearing officer's failure to address the "integral" language, the evidence in the record "clearly supports" a finding that the requirement is met, pursuant to ORS 197.835(11)(b). *See* n 15. Intervenor cites to testimony from the applicant that the expansion will be integrated into the Caldera resort, and that the expansion area will include two smaller resort core areas where the applicant intends to provide additional resort amenities.

We disagree with intervenor that the record includes evidence that "clearly supports" a finding of compliance with the "integral" language in DCC 18.113.025(B). It is not appropriate for LUBA to exercise its authority under ORS 197.835(11)(b) when the applicable approval standard is subjective or requires LUBA to weigh conflicting evidence. *Waugh v. Coos County*, 26 Or LUBA 300, 307-08 (1993). Whether the expansion is situated and managed in a manner that is "integral" to the remainder of the resort is a subjective standard, and the record includes conflicting, if not diametrically opposed, testimony on that point. Remand is necessary for the county to evaluate compliance with the "integral" requirement in the first instance.

The fifth assignment of error is sustained.

SEVENTH ASSIGNMENT OF ERROR

ORS 215.422(1) provides that a county governing body may prescribe fees to defray the cost incurred in acting upon an appeal from a hearings officer, but that the "amount of the fee shall be reasonable and shall be no more than the average cost of such appeals or the actual cost of the appeal[.]"

The county required petitioner to pay a $5,395 fee to appeal the hearings officer's decision to the county board of commissioners. Because the county commissioners ultimately declined to hear the appeal, the county refunded 80 percent of the appeal to petitioner, and retained 20 percent, or $1,079.

In this assignment of error, petitioner first argues that the county's decision violates ORS 215.422(1)(c), which authorizes the county to impose a local appeal fee to defray only the costs of "acting upon an appeal[.]" According to petitioner, the statute does not authorize the county to impose any appeal fees where the county declines to conduct an appeal.

We reject petitioner's argument. ORS 215.422(1)(c) authorizes the county to impose fees to defray the cost of "acting upon an appeal." Petitioner reads ORS 215.422(1)(c) to authorize any imposition of fees only if the county *accepts* an appeal. However, the language of the statute does not limit imposition of appeal fees to situations where a county accepts an appeal, and petitioner has not explained why a considered decision whether or not to hear a local appeal, and hence make an underlying decision the county's final decision, is not "acting upon an appeal" for purposes of ORS 215.422(1)(c).

Second, petitioner argues that a $1,079 fee for deciding whether to act on a local appeal is not "reasonable" within the meaning of ORS 215.422(1)(c). Petitioner recognizes that LUBA and the Court of Appeals have held that in an as-applied challenge to an appeal fee, the petitioner has the burden of providing evidence sufficient to establish that the appeal fee is not "reasonable," if the local regulations provide an opportunity to present such evidence. *Young v. Crook County*, 224 Or App 1 197 P3d 48 (2008). However, petitioner argues that the board of commissioners provided no opportunity for petitioner to submit evidence that the fee is unreasonable because it declined to review the decision.

Intervenor responds that petitioner has failed to establish that the appeal fee is unreasonable. Intervenor points out that in its appeal statement petitioner specifically requested that the county board *not* hear the local appeal or, if it did hear the appeal, to conduct review *on the record* before the hearings officer, rather than conduct an evidentiary hearing. Record 93.

We agree with intervenor that, because the county's local appeal regulations provide an opportunity to request a *de novo* evidentiary review, petitioner was required to seek that opportunity by raising the issue in the local appeal filing *and* requesting that the county board conduct an evidentiary proceeding at which petitioner could submit evidence to establish a *prima facie* case that the appeal fee violates ORS 215.422(1)(c). Not only did petitioner fail to make that effort, petitioner affirmatively requested that the county board

not hear the appeal at all, and not conduct an evidentiary proceeding if the appeal was heard. Petitioner has made no effort to substantiate its claim that a $1079 appeal fee is unreasonable, and we cannot say as a matter of law that it is. *Young*, 224 Or App at 5-6.

Accordingly, petitioner's arguments under this assignment of error do not provide a basis for reversal or remand.

The seventh assignment of error is denied.

The county's decision is remanded.

Holstun, Board Chair, concurring.

I agree with the majority's denial of the seventh assignment of error on the merits. This case is yet another example of the legal and practical difficulties that must be overcome to successfully seek LUBA review of challenges to local appeal fees, based on existing LUBA and appellate court precedent. However, for the reasons expressed in my dissenting opinion in *Willamette Oaks, LLC v. City of Eugene*, 63 Or LUBA 75, 109-10, *rev'd and rem'd* 245 Or App 47, 261 P3d 85, *rev den* 351 Or 586 (2011), I believe city and county decisions to adopt or impose the local permit appeal fees authorized by ORS 227.180(1)(c) (cities) and ORS 215.422(1)(c) (counties) qualify as "fiscal decisions," which are not subject to review by the Land Use Board of Appeals. I therefore believe the appropriate disposition of the seventh assignment of error in this appeal would be to reject that assignment of error as

beyond LUBA's scope of review, without considering the merits of that assignment of error.