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 on remand from the Court of Appeals.

Paul D. Dewey, Bend, represented petitioner.

David Doyle, County Counsel, Bend, represented respondent.

Steven Hultberg, Bend, represented intervenor-respondent.

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

REMANDED 07/12/2017

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

Opinion by Holstun.

INTRODUCTION

This appeal concerns intervenor-respondent's (Pine Forest's) proposal to expand the Caldera Springs Resort, a destination resort. The existing Caldera Springs Resort is located on a 390-acre tract. Caldera Springs Resort includes 320 single-family residence home sites and recreational facilities. ORS 197.445(4) requires that a destination resort must provide "150 separate rentable units for overnight lodging," and that residences offered for sale may not exceed 2.5 residences for each such overnight lodging unit (OLU). The existing Caldera Springs Resort relies on 38 privately owned "cabins" to satisfy those requirements. The bedrooms in each of those 38 cabins have their own bathroom and an outside lockable entrance, in addition to a lockable entrance from the inside of the cabin. Caldera Springs Resort was approved in 2006 by counting the approximately 150 bedrooms in those 38 privately owned cabins as 150 separate rentable OLUs. Those OLUs are sometimes referred to as lock-off rooms.

The expansion proposes to rely on those existing 150 OLUs in the existing 38 cabins and approximately ten more that have already been approved to expand the resort onto 490 more acres. The expansion would be made up of up to 395 new single-family homes to be offered for sale, and an additional 95 OLUs to satisfy the ORS 197.445(4) maximum 2.5 residences to OLU ratio. Those 95 OLUs, like the OLUs for the existing Caldera Springs resort, would

be provided by 95 bedroom lock-off rooms, located in an unspecified number of cabins to be constructed as part of the expansion.

ISSUES

Our initial decision in this matter remanded a hearings officer's decision approving the proposed expansion. *Central Oregon Land Watch v. Deschutes County*, 74 Or LUBA 540 (2016). On appeal, our decision was reversed and remanded by the Court of Appeals. *Central Oregon Land Watch v. Deschutes County*, 285 Or App 267, ___ P3d ___ (2017). In this opinion we will refer to our initial decision as *Caldera I* and to the Court of Appeals' decision as *Caldera II*.

The focus of this appeal has narrowed to two issues. One of those issues is not disputed, and, depending on our resolution of the other issue, will require remand to the hearings officer.[1] The parties dispute how LUBA should resolve the other issue. Petitioner argues LUBA should resolve that issue by concluding that the existing 150 lock-off rooms do not qualify as OLUs, and that resolving that issue in that way will make it unnecessary for LUBA to resolve the other issue because the request for approval of the proposed

[1] In *Caldera I*, LUBA concluded the hearings officer failed to find "the proposed expansion will be situated and managed in a manner that it will be integral to the remainder of the resort," as required by Deschutes County Code (DCC) 18.113.025(B). LUBA also concluded that the evidentiary record did not clearly support a finding of compliance with that "integral" standard, so that the hearings officer's failure to make the required finding could not be overlooked under ORS 197.835(11)(b).

expansion would have to be denied. Intervenor argues LUBA should remand this matter to the hearings officer to consider both issues—(1) whether the lock-off rooms qualify as OLUs and (2) whether the proposal complies with the DCC 18.113.025(B) "integral" requirement.

As already noted, ORS 197.445(4) requires that destination resorts provide at least 150 OLUs and not include more than 2.5 times as many residences as OLUs.[2] A related statute, ORS 197.435(5)(b), defines the term

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[2] ORS 197.445 provides in part:

> "A destination resort is a self-contained development that provides for visitor-oriented accommodations and developed recreational facilities in a setting with high natural amenities. To qualify as a destination resort under ORS 30.947, 197.435 to 197.467, 215.213, 215.283 and 215.284, a proposed development must meet the following standards:
>
> "* * * * *
>
> "(4) Visitor-oriented accommodations including meeting rooms, restaurants with seating for 100 persons and 150 separate rentable units for overnight lodging shall be provided.
>
> "* * * * *
>
> "(b) On lands in eastern Oregon, as defined in ORS 321.805:
>
> "(A) A total of 150 units of overnight lodging must be provided.
>
> "* * * * *
>
> "(E) The number of units approved for residential sale may not be more than 2-1/2 units for each

"[o]vernight lodgings" to include individually owned units "if they are available for overnight rental use by the general public for at least 38 weeks per calendar year * * *."[3] Whether the lock-off rooms qualify as OLUs, as defined by ORS 197.435(5)(b), and can be relied upon to satisfy the ORS 197.445(4) requirement for "150 separate rentable units for overnight lodging" is the disputed issue on remand from the Court of Appeals.

THE COURT OF APPEALS' DECISION

A. LUBA's Interpretation of ORS 197.435(5)(b)

In hopes of simplifying the remand issue, we discuss our analysis of the ORS 197.435(5)(b) definition of OLUs in *Caldera I* and the Court of Appeals' analysis in support of its disagreement with LUBA's analysis in *Caldera II*

> unit of permanent overnight lodging provided under this paragraph."

[3] ORS 197.435(5)(b)defines "[o]vernight lodgings" as follows:

> "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."

only briefly. We then turn directly to what we understand the Court of Appeals to have directed LUBA to do on remand.

The Court of Appeals concluded that LUBA erroneously construed ORS 197.435(5)(b) to require that the "[i]ndividually owned units" described in the second sentence of that statute must be "separately" owned. *See* n 3. Under the Court of Appeals' interpretation of the second sentence in ORS 197.435(5)(b), "individually owned units" simply "means not owned by the resort." *Caldera II*, 285 Or App at 287-88. Under the Court of Appeals' interpretation of ORS 197.435(5)(b), neither the resort-owned OLUs described in the first sentence nor the privately owned OLUs described in the second sentence must be *separately* owned. The Court of Appeals concluded:

> "LUBA misconstrued ORS 197.435(5)(b) in determining that the lock-off rooms do not qualify as overnight lodgings and that a correct interpretation of the statute requires a remand to LUBA for further proceedings, including, possibly, a remand to the county for further fact-finding." *Id*. at 283.

It is important at this point to emphasize that while the Court of Appeals held that LUBA's misconstruction of ORS 197.435(5)(b) required remand to LUBA—because LUBA's initial decision relied on that misconstruction to remand the appealed decision to the county—the Court of Appeals did not hold that LUBA's ultimate conclusion (that the cabin lock-off rooms do not qualify individually as OLUs and cannot be relied upon to comply with ORS 197.445) was necessarily incorrect. The Court of Appeals directed LUBA to revisit the

issue of whether the lock-off rooms can be considered separate OLUs, under a correct interpretation of the relevant statutes.

B. The Correct Interpretation of the Relevant Statutes

We begin by setting out what we understand the Court of Appeals' correct interpretation to be. As the Court of Appeals interprets ORS 197.435(5)(b), the first sentence of that statute simply does not apply in this case. The court gave several reasons for reaching that conclusion. *Caldera II*, 285 Or App at 285-88. As earlier noted, the Court of Appeals concluded the first sentence applies to resort-owned units, not privately owned units. The Court of Appeals concluded:

> "[T]he lock-off rooms do not qualify as overnight lodgings units under the first sentence of the definition. That is, they are bedrooms that are in a single-family home that is available [part-time] for residential use." *Id.* at 291.

The Court of Appeals also rejected Pine Forest's argument that the lock-off rooms are indistinguishable from hotel or motel rooms. *Id*. at 288-90. And the Court of Appeals rejected LUBA's conclusion that that the lock-off rooms are like dormitory rooms, which are expressly excluded from the ORS 197.435(5)(b) definition of overnight lodgings by the last sentence of the statute. *Id*. at 291-92; s*ee* n 3. After reaching those conclusions, the court stated "[t]he remaining issue is whether the lock-off rooms qualify as overnight lodging units under the second sentence of ORS 197.435(5)(b) * * *." *Id* at 292. The Court of Appeals then identified some "factors" that do or do not

have a bearing on the answer to that question. *Id*. We discuss those factors below before attempting to answer the question.

1. The Lock-Off Rooms Must Actually be Separate Units

Pine Forest argued to the Court of Appeals that the individual lock-off rooms in the cabins qualified as "separately rentable accommodations." *Caldera II*, 285 Or App at 292. The Court of Appeals concluded the quoted language from the first sentence of ORS 197.435(5)(b) is simply irrelevant.[4] *Id*. The Court of Appeals then noted that ORS 197.445(4), which requires a minimum of 150 OLUs and imposes 2.5 to 1 maximum ratio of residences to OLUs requires the OLUs to be "separate rentable units," which the Court of Appeals concluded is different than the "separately rentable accommodations" referenced in the first sentence of ORS 197.435(5)(b):

> "[T]he focus on 'separate' shifts from availability and the reservation service to a more concrete, factual determination of whether the rentable unit is actually a *separate* unit. Further, we note that 'separate' means 'not shared with another: INDIVIDUAL, SINGLE' or 'existing by itself : AUTONOMOUS, INDEPENDENT.' Webster's at 2069." *Id.* at 293.

We understand the Court of Appeals to be saying whether the lock-off rooms are separate rentable units is a question of fact that has little or nothing to do

[4] The Court of Appeals explained that Pine Forest was incorrectly relying "on the factual premise that, so long as a unit is made available through a reservation system, it is immaterial whether they are, in fact, separately rented." *Id.* at 292

with whether the lock-off rooms are simply made available for rent individually.

As we understand the Court of Appeals' first factor, the hearings officer must find that the lock-off rooms are actually separate units, as a matter of fact. We tend to agree with the Court of Appeals that the lock-off rooms are more accurately viewed as "bedrooms that are in a single-family home that is available for [part-time] residential use." *Caldera II*, 285 Or App at 291 (footnote omitted). Certainly the hearings officer made no factual determination that the separately rentable cabin lock-off rooms are actually separate units rather than bedrooms in a single cabin unit. And even if the hearings officer had made such a finding, the evidentiary record includes almost no evidence that the lock-off rooms are accurately viewed as individual units.[5] Based on the current record and proposal, the first factor supports a finding that the lock-off rooms in the cabins are not properly viewed as "units," even though they qualify as individually (privately) owned.

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[5] The record includes a letter from the managing director of Sunriver Resort. Record 345. In that letter he claims cabin units "can be rented separately or together with other units in the same Caldera Cabin," but he also concedes that "[a]s shown by the annual report already in the record, guests at Caldera Springs prefer to rent all the units in a cabin." *Id*. The latter part of that statement is a bit of an understatement because the annual report discloses that during the reporting period *only* entire cabins were rented and there was not a single instance where an individual lock-off room was rented. Record 625-28. As far as we can tell, there is no evidence in the record that any individual cabin lock-off room has ever been rented as a unit, separately from the other lock-off rooms in a cabin.

2. The History of Goal 8

In describing the second factor, the Court of Appeals noted the adoption history of Goal 8 (Recreational Needs) informed its analysis.[6] In reviewing that history the Court of Appeals quoted from a memorandum signed by the Department of Land Conservation and Development (DLCD) Director, which states that language that now appears in amended form in the second sentence of ORS 197.435(5)(b) "was meant to count individually owned *homes* in 'some very limited circumstances.'" *Caldera II*, 285 Or App at 293. The Court of Appeals goes on to acknowledge that because the word "units" rather than the word "homes" is used in the second sentence of ORS 197.435(5)(b) the statute can "allow accommodation types that are not homes," but the Court of Appeals went on to find:

> "we deem it significant that that allowance was meant to be a stringent requirement. Certainly, the allowance was not intended to encompass a definition of overnight lodging that was susceptible to, as the hearings officer described it, being 'finessed.'"[7] *Id.* at 293-94.

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[6] The Goal 8 definitions of "Overnight Lodgings" and "Large Destination Resort" include substantially identical language as ORS 197.435(5)(b) and ORS 197.445(4).

[7] The "finessed" language that the Court of Appeals referenced appears in the hearings officer's decision which concludes Pine Forest has established at least a colorable claim that the lock-off rooms qualify as OLUs:

> "Caldera Springs has interpreted the state definition of '[o]vernight lodging' in a way that turns a large single family residence into a 'cabin', and a five bedroom five bath house into

We are not sure what to make of this factor. DLCD apparently was concerned that privately owned houses or condominiums should be counted as OLUs, provided those houses or condominiums are "available for overnight rental use" for a substantial part of the year. DLCD apparently was not thinking of individual bedrooms in those houses or condominiums as OLUs. In any event, under the second factor, it is clear that the Court of Appeals did not agree with the hearings officer's view that arguable, technical compliance with the requirement that OLUs must actually be separate rentable units for overnight lodging is sufficient. Rather, the evidentiary record must establish that the lock-off rooms are in fact separate rentable units for overnight lodging. This factor, like the first factor, supports a conclusion that the existing and proposed lock-off rooms do not qualify as OLUs.

3. Destination Resort Statute (ORS 197.440) Policies

Under this factor, the Court of Appeals stated it was persuaded by LUBA's point that the destination resort statutes seek to ensure the minimum number of overnight lodging units are actually available to tourists seeking to use the destination resort facilities and that the 2.5 residence to OLU ratio be preserved. The Court of Appeals appears to have agreed with LUBA that the

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five 'rentable units.' With the addition of the separate entrance for each bedroom and at least the colorable claim to allowing each room to be rented individually, Caldera Springs appears to have finessed DCC 18.113.060 in a way that minimally satisfies the 150 separate rentable unit standard." Record 57-58.

approach proposed by Pine Forest and approved by the hearings officer only nominally provides 150 OLUs "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." *Caldera II*, 285 Or App at 294.

Therefore, the third factor, like the first two factors, supports a conclusion that the lock-off rooms in the existing 38 cabins are not properly viewed as 150 separate OLUs.

DECISION

The above factors easily lead us to conclude the hearings officer's findings that the existing Caldera Springs Resort cabin lock-off rooms each qualify as OLUs are inadequate. And if the cabins that may be constructed in the future to preserve the 2.5 residence to OLU ratio will follow the same model, they similarly will be inadequate to qualify each bedroom as an OLU.

The more difficult question is whether the proposal could be conditioned or modified so that the cabin lock-off rooms would qualify as separate "units" within a cabin. The Court of Appeals, with the benefit of legislative history regarding the statues, was unwilling to go so far as to say the overnight rental "units" defined ORS 197.435(5)(b) and required by ORS 197.445(4) cannot be lock-off rooms in a single-family vacation residence. We therefore are unwilling to adopt that reading of the statutes as well. Nevertheless, given the factors articulated by the Court of Appeals and discussed above, we have

difficulty imagining what conditions or modifications might allow the individual cabin lock-off rooms, as currently proposed, to qualify as the individual "units" described in ORS 197.435(5)(b) and ORS 197.445(4). The only thing that is clear is that cabin bedrooms that, are in theory separately rentable and happen to have their own bathroom and lockable inside and outside entrances, but for which there is no evidence have ever been rented separately from the other bedrooms in the cabin, are not appropriately viewed as individual "units." Something more will be required to ensure that they are *in fact* individual units.

For the reasons set out above, we again sustain petitioner's second assignment of error. Our decision in *Caldera I* that sustained petitioner's fifth assignment of error challenge under the DCC 18.113.025(B) "integral" standard was not affected by the Court of Appeals' decision in *Caldera II*.

The county's decision is remanded.