

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

3
4 CAROL LEE,
5 *Petitioner,*

02/28/19 PM 1:17 LUBA

6
7 vs.

8
9 MARION COUNTY,
10 *Respondent,*

11
12 and

13
14 ROBERT J. GUNN, JANA R. GUNN,
15 RUSSELL WARNER, SHELLY WARNER,
16 WILLIAM L. GAVAN, and JOAN A. GAVAN,
17 *Intervenors-Respondents.*

18
19 LUBA No. 2018-137

20
21 FINAL OPINION
22 AND ORDER

23
24 Appeal from Marion County.

25
26 Jill F. Foster, Salem, filed the petition for review and argued on behalf of
27 petitioner. With her on the brief was Churchill Leonard Lawyers.

28
29 Scott A. Norris, Marion County Legal Counsel, Salem, filed a response
30 brief and argued on behalf of respondent.

31
32 Robert J. Gunn and Jana R. Gunn, Salem, filed a response brief and Robert
33 J. Gunn argued on his own behalf.

34
35 William L. Gavan and Joan A. Gavan, Salem, represented themselves.
36 William L Gavan filed a joint response brief on his own behalf.

1 Russell Warner and Shelly Warner, Salem, represented themselves.
2 Shelley Warner filed a joint response brief on her own behalf.

3
4 RYAN, Board Chair; BASSHAM, Board Member; ZAMUDIO, Board
5 Member, participated in the decision.

6
7 AFFIRMED

02/28/2019

8
9 You are entitled to judicial review of this Order. Judicial review is
10 governed by the provisions of ORS 197.850.

1 Opinion by Ryan.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a decision by the board of county commissioners
4 denying an application for a conditional use permit to operate a bed and breakfast
5 inn.

6 **MOTIONS TO INTERVENE**

7 Robert J. Gunn and Jana R. Gunn, Russell Warner and Shelly Warner,
8 William L. Gavan and Joan A. Gavan separately move to intervene on the side
9 of the respondent. No party opposes the motions and they are allowed.

10 **REPLY BRIEF**

11 Petitioner moves for permission to file a reply brief to respond to
12 arguments and responses raised in the response brief. No party opposes the
13 motion. The reply brief is allowed.

14 **FACTS**

15 In December 2017, petitioner purchased a 9.4-acre property that is zoned
16 Special Agriculture (SA). The subject property is also located in a sensitive
17 groundwater overlay zone. The SA zone is a county zone that implements
18 Statewide Planning Goal 3 (Agricultural Lands) and ORS 215.283 (uses
19 permitted in areas zoned for exclusive farm use). Marion County Code (MCC)
20 17.137.010 (“The SA zone is intended to be a farm zone consistent with ORS
21 215.283”). The subject property includes an 18,000-square foot dwelling
22 (Marion County dwelling) originally built in 1992 that includes seven bedrooms,

1 each with an *en suite* bathroom, two guest apartments that each contain separate
2 bedrooms, kitchen facilities and bathrooms. The dwelling also includes an
3 exercise room, indoor swimming pool, single-lane bowling alley, dance hall, and
4 a commercial kitchen. Record 7-8, 538.

5 In April 2018, petitioner applied for a conditional use permit to operate a
6 “bed and breakfast inn” in the dwelling.¹ Petitioner proposed to make all seven
7 bedrooms available for rent for the bed and breakfast inn, with a limit of not more
8 than five bedrooms being rented at any one time, while petitioner would occupy
9 one of the guest apartments described above. In the application and in testimony
10 at the hearings before the hearings officer and the board of county
11 commissioners, petitioner clarified that she planned to allow the bed and
12 breakfast guests to use the unique amenities of the house, including the exercise
13 room, swimming pool, single-lane bowling alley and dance hall.

14 Petitioner also owns a home in Lake Oswego, Oregon, and petitioner
15 initially provided the address for her Lake Oswego home on the conditional use

¹ MCC 17.110.108 defines “bed and breakfast inn” to mean “a single-family dwelling where lodging and a morning meal for guests only are offered for compensation, having no more than five sleeping rooms for this purpose. An establishment where more than one meal per day is offered shall not be deemed a bed and breakfast inn. An establishment with more than five sleeping rooms shall be deemed a hotel. Unless specifically listed as a permitted or conditional use, a bed and breakfast inn is considered a home occupation. Weddings, receptions, group meetings, conferences and similar activities are not allowed as secondary uses, accessory uses or temporary uses in association with a bed and breakfast inn.”

1 permit application. Record 537. Sometime later, petitioner crossed out the Lake
2 Oswego address and wrote the address of the Marion County dwelling on the
3 application. Petitioner testified that she spends “a couple of days a week” at her
4 Lake Oswego home but that the Marion County dwelling is her residence. Record
5 9. Petitioner also provided a copy of her driver’s license that lists the Marion
6 County dwelling.

7 The county planning director approved the application with conditions,
8 and opponents appealed the decision to the county hearings officer. The hearings
9 officer denied the application, and petitioner appealed that decision to the board
10 of county commissioners. The board of county commissioners held a hearing on
11 the application and at the conclusion of the hearing, voted to deny the application.
12 Thereafter, the board of county commissioners adopted a decision denying the
13 application on several bases that we discuss in more detail below. This appeal
14 followed.

15 **INTRODUCTION**

16 The board of county commissioners denied the application because it
17 concluded that the application failed to satisfy three applicable approval criteria.
18 First, the board of county commissioners concluded that petitioner’s proposal did
19 not qualify as a “bed and breakfast inn” under the MCC 17.110.108 definition of
20 that use. *See* n 1. Petitioner challenges that conclusion in her first assignment of
21 error. Second, the board of county commissioners also concluded that petitioner’s
22 proposal did not qualify as a “home occupation” under the MCC 17.110.270

1 definition of “home occupation.” Petitioner challenges that conclusion in her
2 second assignment of error. Finally, the board of county commissioners
3 concluded that the application failed to satisfy the MCC 17.137.060(C)(1)
4 conditional use requirement that a bed and breakfast inn be operated by a resident
5 of the dwelling. Petitioner challenges that conclusion in her third assignment of
6 error.

7 Where a local government denies a land use application on multiple
8 grounds, LUBA will affirm the decision on appeal if at least one basis for denial
9 survives all challenges. *Wal-Mart Stores, Inc. v. Hood River County*, 47 Or
10 LUBA 256, 266, *aff’d*, 195 Or App 762, 100 P3d 218 (2004); *Weyerhaeuser v.*
11 *Lane County*, 7 Or LUBA 42, 46 (1982). For the reasons explained in more detail
12 below, we deny the second and third assignments of error. Because we deny the
13 second and third assignments of error, the county’s decision must be affirmed. In
14 that circumstance, LUBA typically does not address challenges directed at other,
15 alternate, bases for denial.

16 However, the appeal can be decided within the statutory deadline for
17 issuing our final opinion, and resolution of all issues may be useful if in the future
18 petitioner chooses to file a new application for a similar use. We therefore also

1 resolve the issues presented in the first assignment of error, so that the parties
2 will have a complete resolution by LUBA of the appeal.²

3 **SECOND AND THIRD ASSIGNMENTS OF ERROR**

4 We briefly set out the provisions of the MCC that apply to a bed and
5 breakfast inn in the SA zone before turning to petitioner’s second and third
6 assignments of error. Petitioner’s second and third assignments of error present
7 overlapping issues and we address them here together.

8 **A. Subordinate Use**

9 MCC 17.137 contains the regulations governing uses in the SA zone.
10 Conditional uses, including “commercial uses” such as a “bed and breakfast inn”
11 are allowed in accordance with the provisions of MCC 17.137.050. *See* n 1. MCC
12 17.137.050(D)(1) allows “[h]ome occupations, including bed and breakfast inns,
13 subject to the criteria in MCC 17.137.060(C)[.]” MCC 17.110.270 defines
14 “[h]ome occupation” to mean, in relevant part:

15 “any business or professional activity engaged in the production of
16 income by a resident of a dwelling or dwelling unit *as a subordinate*
17 *use of the building and its premises*, and in conformance with the
18 provisions of this title. A home occupation may include a limited
19 home occupation, conditional home occupation or a home
20 occupation in a resource zone.” (Emphasis added.)

² In ORS 197.835(11)(a) the legislature has directed that LUBA decide all issues “when reversing or remanding a land use decision” if it can do so within the statutory deadline for issuing its final opinion. There is no such statutory directive when LUBA is affirming a land use decision.

1 While not an approval standard in the typical sense, MCC 17.110.270 includes
2 language that operates to distinguish between business operations that can be
3 approved under the home occupation standards at MCC 17.137.060 and those
4 that cannot.³

5 The board of county commissioners found that petitioner failed to
6 demonstrate that the proposed use of the dwelling as a bed and breakfast inn, a
7 commercial use in the SA zone, is a subordinate use of the dwelling compared to
8 petitioner's residential use of the dwelling. The board of county commissioners
9 concluded that petitioner's proposal to occupy one of the guest apartments while
10 allowing the remainder of the 18,000-square foot dwelling and all of its amenities
11 to be used by bed and breakfast guests rendered her residential use of the dwelling
12 "secondary to the proposed business activity." Record 9. Accordingly, the board
13 of county commissioners concluded that the proposal was not a "home

³ The county has apparently chosen to regulate home occupations more stringently than ORS 215.448. The limitations contained within the MCC 17.110.270 definition of "home occupation" do not appear in ORS 215.448. We note that under ORS 215.448(1) the county "may allow," but is not required to allow, home occupations "in any zone." ORS 215.448(2) provides in relevant part that "[t]he governing body of the county or its designate may establish additional reasonable conditions of approval for the establishment of a home occupation under subsection (1) of this section." Petitioner does not argue that the requirement that a home occupation be "a subordinate use" of the dwelling is not an "additional reasonable condition of approval" for the establishment of a home occupation or that the requirement is inconsistent with ORS 215.448, or otherwise argue that the county lacks the authority to require a "home occupation" to be a "subordinate use" of the dwelling.

1 occupation” as defined in MCC 17.110.270. In reaching that conclusion, the
2 board of county commissioners also considered petitioner’s testimony that she
3 spends a “couple of days a week” in her Lake Oswego home and accordingly
4 occupies the dwelling on a somewhat limited basis to support its decision that the
5 proposed use of the dwelling as a bed and breakfast was not subordinate to the
6 residential use of the dwelling.⁴ Petitioner challenges that board of county
7 commissioners’ conclusion in the second assignment of error.

⁴ The board of county commissioners found:

“MCC 17.110.270 defines ‘home occupation’ as ‘any business or professional activity engaged in for production of income by a resident of a dwelling or dwelling unit as a subordinate use of the building and its premises, and in conformance with the provisions of this title.’

“At the hearing before the hearings officer on June 21, 2018, Ms. Lee testified under oath that she was living on the subject property. At that time neighbors were skeptical of the claim, stating Ms. Lee has been seen on the property only once in six months of ownership. Ownership does not imply residency, and Ms. Lee listed a Lake Oswego address on the application form before it was crossed out and the [Marion County dwelling] address added. When asked at the hearing before the board if she purchased this home as a primary residence or second home she indicate[d] that she bought it to use as a primary home. She went on to explain that she has a business in Portland and stays in the home in Lake Oswego a couple days a week. She was unable to recall when she moved into the house and when she had the address on her driver’s license changed.

“At the hearing before the board, neighbors once again testified that, since Ms. Lee had purchased the property, no persons other than

1 At the outset, we note that petitioner does not specify the standard of
2 review under which LUBA should review petitioner’s challenges to the county’s
3 decision.⁵ After reviewing the arguments presented in support of the second

landscapers have been observed on the property. Applicant acknowledged that she has not resided in the home until very recently.

“Applicant stated she will reside in one of the apartments located within the dwelling when she opens her business. However, given the neighbors’ testimony in conflict with Ms. Lee’s testimony regarding how frequently she resides at the home in Salem, and the fact that Ms. Lee continues to own a home in Lake Oswego where she stated she stays for closer proximity to her Portland businesses, the board is not convinced that Ms. Lee has or actually will reside in the Salem home with any regularity. MCC 17.110.270 defines a ‘home occupation’ as *[a]ny business or professional activity engaged in for production of income by a resident of a dwelling or dwelling unit as a subordinate use of the building and its premise * * *. Applicant’s residence in a guest apartment in the dwelling, while allowing guests full access to the balance of the 18,000 square foot home, is secondary to the proposed business activity.* The board finds that the proposed use, as described by the applicant, is not subordinate to applicant’s use of the dwelling premises as a residence. In addition, the board interprets the code to require that a home occupation must be operated by a current resident of a dwelling, not a future resident.

“Based on the evidence in the record as a whole the board finds that the criterion in MCC 17.137.060 (C) (1) required for the conditional use permit to establish a bed and breakfast inn as a home occupation is not met.” Record 9 (emphases in original).

⁵ OAR 661-010-0030(4)(d) provides in relevant part that “[e]ach assignment of error must state the applicable standard of review.”

1 assignment of error, we understand petitioner to argue that the board of county
2 commissioners improperly construed the MCC 17.110.270 requirement that, in
3 order for a business or commercial use to qualify as a home occupation, the home
4 occupation use of the dwelling be “a subordinate use” of the dwelling. Challenges
5 to the board of county commissioners’ evidentiary conclusions are also
6 embedded in petitioner’s arguments, which we treat as arguments that the
7 decision is not supported by substantial evidence in the whole record.⁶ According
8 to petitioner, petitioner’s occupancy of one of the guest apartments, while
9 allowing the bed and breakfast guests to use the entire dwelling along with their
10 rented bedroom, does not mean that the bed and breakfast use fails to be “a
11 subordinate use” of the dwelling, because petitioner remains able to use the entire
12 dwelling and all of its amenities along with the bed and breakfast guests. Also
13 according to petitioner, the evidence in the record supports only a conclusion that
14 petitioner resides at the dwelling, and therefore her residential use of the dwelling
15 is the primary use.

16 We understand the board of county commissioners to have concluded that
17 (1) the conflicting evidence presented regarding whether or how often petitioner
18 occupies the dwelling, (2) petitioner’s proposal to occupy one of the guest

⁶ ORS 197.835(9)(a)(D) provides that LUBA shall reverse or remand a land use decision if the local government “[i]mproperly construed the applicable law.” ORS 197.835(9)(a)(C) provides that LUBA shall reverse or remand a land use decision if the local government “[m]ade a decision not supported by substantial evidence in the whole record.”

1 apartments, which is small in relation to the total size of the dwelling, and (3)
2 petitioner’s proposal to allow the bed and breakfast guests use of the amenities
3 of the dwelling, all rendered her residential use of the dwelling “secondary to the
4 proposed business activity.” Record 9. Although the board of county
5 commissioners’ decision does not include an express interpretation of the term
6 “subordinate,” an implied interpretation can be fairly easily understood from the
7 findings in support of the decision and is adequate for review. *Alliance for*
8 *Responsible Land Use v. Deschutes County*, 149 Or App 259, 266-67, 942 P2d
9 836 (1997). *See* n 4.

10 We conclude that the board of commissioners properly construed and
11 applied the term “subordinate” as used in MCC 17.110.270 to the evidence
12 presented to it to conclude that petitioner’s proposal did not propose a
13 “subordinate use” of the primary residential use of the dwelling. “Subordinate”
14 is not defined in the MCC, but *Webster’s Third New Int’l Dictionary* 2277
15 (unabridged ed 2002) defines the adjective form of “subordinate” in relevant part
16 as “**1:** to place in a lower order or class; make or consider as of less value or
17 importance.” The term “subordinate” evokes the familiar land use distinction
18 between primary and secondary or accessory uses, and requires evaluation of
19 whether the residential use will remain the primary use of the property in the
20 event the home occupation occurs, and whether the home occupation is no more
21 than a secondary or subordinate use. *Jacobs v. Clackamas County*, 73 Or LUBA
22 262, 283-84 (2016).

1 Here, the county evaluated whether petitioner’s limited residential use of
2 the dwelling is the primary use of the property, and concluded that it is not. The
3 county also evaluated whether, even if petitioner’s limited residential use of the
4 property during each week and her occupancy of a guest apartment within the
5 larger dwelling qualifies as a primary residential use of the property, allowing
6 bed and breakfast guests to access the several thousand square feet of the
7 remainder of the dwelling beyond their rented rooms means that the home
8 occupation is more than a subordinate use. The board of county commissioners
9 concluded that the proposal to allow guests full access to all common parts of the
10 dwelling rendered the bed and breakfast use of the dwelling, and not petitioner’s
11 use of the dwelling, the dwelling’s primary use. That conclusion is consistent
12 with the board of county commissioners’ understanding of the plain meaning of
13 the word “subordinate” as it modifies the word “use” in the phrase “subordinate
14 use,” and is supported by substantial evidence in the record.

15 **B. Operated By a Resident of the Dwelling**

16 MCC 17.137.060(C) provides additional criteria for home occupations, as
17 relevant here:

18 “Notwithstanding MCC 17.110.270 and 17.120.075, home
19 occupations, including the parking of vehicles in conjunction with
20 the home occupation, including bed and breakfast inns, are subject
21 to the following criteria:

- 22 “1. A home occupation or bed and breakfast *shall be operated by*
23 *a resident of the dwelling on the property* on which the
24 business is located. Including the residents, no more than five

1 full-time or part-time persons shall work in the home
2 occupation ('person' includes volunteer, nonresident
3 employee, partner or any other person)." (Emphasis added.)⁷

4 The board of commissioners also found that the application failed to satisfy MCC
5 17.137.060(C)(1), which requires that a "home occupation or bed and breakfast
6 shall be operated by a resident of the dwelling on the property on which the
7 business is located." The board of commissioners concluded that the evidence in
8 the record failed to establish that the bed and breakfast will be operated by a
9 resident of the dwelling, because the board of commissioners doubted that
10 petitioner is a "resident of the dwelling," within the meaning of MCC
11 17.137.060(C)(1).⁸ In the third assignment of error, petitioner argues that board
12 of county commissioners' conclusion is not supported by substantial evidence in
13 the record.

⁷ MCC 17.110.270 is quoted above in our discussion of the second assignment of error.

MCC 17.120.075 contains use and development standards for conditional use home occupations. MCC 17.120.075(F), which intervenors Robert Gunn and Jana Gunn cite in their response brief, provides that "[t]he total floor area of buildings on the subject property devoted to a home occupation shall not exceed 500 square feet in a residential zone, except in the AR zone where 1,500 square feet is the maximum." Intervenor-Respondents (Gunn) Response Brief 15. As far as we can tell, the county did not apply any of the use and development standards in MCC 17.120.075 to petitioner's application.

⁸ The Board explained, "the board is not convinced that [petitioner] has or actually will reside in the [Marion County dwelling] with any regularity." Record 9.

1 The board of commissioners based its decision on the evidence in the
2 record provided by petitioner regarding her lack of occupancy of the Marion
3 County dwelling on several nights of the week, which was also supported by
4 testimony from opponents that the dwelling does not appear to be occupied when
5 viewed from the road or neighboring properties. The board of commissioners
6 placed limited value on petitioner's driver's license, and the amended application
7 listing the Marion County dwelling as petitioner's address, and placed more value
8 on her conflicting testimony that she continues to spend "a couple of days a
9 week" in Lake Oswego, along with neighbors' testimony that called into question
10 the credibility of petitioner's other evidence that she resides at the dwelling. We
11 cannot say that we have a basis in the present case to overturn the board of county
12 commissioners' decision regarding its ultimate evidentiary determination that
13 petitioner failed to satisfy her burden of proof to establish that the home
14 occupation would be operated by a resident of the dwelling. *Sanders v.*
15 *Clackamas County*, 10 Or LUBA 231, 237 (1984) (LUBA is not authorized to
16 second guess the judgments made by local decision makers with respect to the
17 credibility of evidence presented at land use hearings).

18 For the reasons set forth above, the second and third assignments of error
19 are denied.

20 **FIRST ASSIGNMENT OF ERROR**

21 As explained above, we address the arguments presented in the first
22 assignment of error in order to fully resolve the issues presented in this appeal.

1 The subject dwelling is not a typical single-family dwelling. It includes a
2 total of nine bedrooms, three kitchens, and amenities that are not typically found
3 in a single-family dwelling.

4 We quote the definition of “[b]ed and breakfast inn” at MCC 17.110.108
5 again here:

6 “A single-family dwelling where lodging and a morning meal for
7 guests only are offered for compensation, having no more than five
8 sleeping rooms for this purpose. An establishment where more than
9 one meal per day is offered shall not be deemed a bed and breakfast
10 inn. An establishment with more than five sleeping rooms shall be
11 deemed a hotel. Unless specifically listed as a permitted or
12 conditional use, a bed and breakfast inn is considered a home
13 occupation. Weddings, receptions, group meetings, conferences and
14 similar activities are not allowed as secondary uses, accessory uses
15 or temporary uses in association with a bed and breakfast inn.”

16 In evaluating whether petitioner’s proposal meets the definition of “bed and
17 breakfast inn” in MCC 17.110.108, the board of county commissioners
18 concluded that petitioner’s proposal to make seven of the bedrooms in the
19 dwelling available for rental, even though only five would be rented at any one
20 time, was not consistent with the MCC 17.110.108 definition of a “bed and
21 breakfast inn” as “a single-family dwelling where lodging and a morning meal
22 for guests only are offered for compensation, having no more than five sleeping
23 rooms for this purpose.” In her first assignment of error, petitioner argues that the
24 board of county commissioners could have approved petitioner’s proposed use
25 of all seven bedrooms as rented rooms but conditioned the approval on no more
26 than five rooms being used at one time. Petition for Review 11.

1 We understand the board of county commissioners to have concluded that
2 MCC 17.110.108 limits guests' use of the dwelling to their sleeping quarters and
3 an area of the dwelling in which to eat the single morning meal that is allowed
4 by the code definition of a bed and breakfast inn.⁹ In her first assignment of error,

⁹ The board of county commissioners found:

“In the written and oral testimony, applicant stated that the bed and breakfast inn will be operated by Ms. Lee in the existing dwelling. The dwelling contains seven bedrooms in addition to two separate apartments, and also has many amenities such as exercise room, swimming pool, dance hall and bowling alley.

“Ms. Lee initially stated that the upstairs contains seven bedrooms, each with its own bathroom, and that five of these rooms would be used for the bed and breakfast. It would be advertised as a high end bed and breakfast. She later testified that she was not sure what the rents would be, nor was she sure which of the seven bedrooms would be used. In fact, she stated that each bedroom has its own character and that all seven bedrooms would be made available for guests to choose from. She indicated that she was planning to reside in one of the two guest apartments in the house which contains a kitchen, bedroom and bathroom, and the guests would have access to all other areas of the house.

“The board relies on the plain meaning of the code definition of bed and breakfast as being a place ‘where lodging and a morning meal for guests only are offered for compensation, having no more than five sleeping rooms for this purpose’ and further that ‘[a]n establishment with more than five sleeping rooms shall be deemed a hotel.’ At the hearing the applicant requested that her guests have access to the dwelling amenities which include an exercise room, swimming pool, dance hall and bowling alley. As MCC 17.110.108 limits bed and breakfasts to offering lodging and morning meal, and having no more than five sleeping rooms, the criteria as to the

1 petitioner challenges that interpretation of MCC 17.110.108 as inconsistent with
2 the express language of the provision. Petitioner argues that the use of the phrase
3 “a single-family dwelling” in the beginning of the definition of “bed and
4 breakfast inn” implies that bed and breakfast guests may access all areas of the
5 dwelling in addition to their sleeping quarters. Petition for Review 9-10.

6 At the outset, we note that in its response brief, the county takes the
7 position that the board of county commissioners interpreted MCC 17.110.108 as
8 categorically precluding approval of a home occupation bed and breakfast inn in
9 a single-family dwelling that has more than five bedrooms. Response Brief 10-
10 11. However, we do not see that interpretation in the county’s decision, and the
11 county does not provide a citation to any place in the decision where that
12 interpretation is contained. Accordingly, we do not consider whether that
13 interpretation would be required to be affirmed under ORS 197.829(1).¹⁰ *See*

number of rooms and available amenities for conditional use as a
bed and breakfast have not been met.” Record 7-8.

¹⁰ ORS 197.829(1) requires LUBA to affirm a local governing body’s
interpretation of a land use regulation unless LUBA determines the
interpretation:

- “(a) Is inconsistent with the express language of the
comprehensive plan or land use regulation;
- “(b) Is inconsistent with the purpose for the comprehensive plan
or land use regulation;
- “(c) Is inconsistent with the underlying policy that provides the
basis for the comprehensive plan or land use regulation; or

1 *Munkhoff v. City of Cascade Locks*, 54 Or LUBA 660 (2007) (interpretations of
2 a local code provision offered for the first time in a response brief at LUBA are
3 not interpretations made by the local government).

4 The county also responds that the board of county commissioners’
5 interpretation of MCC 17.110.108 as applied to petitioner’s proposal is not
6 inconsistent with the express language of the provision, and must be affirmed.
7 ORS 197.829(1)(a). We generally agree with the county on that point, with the
8 exception discussed below.

9 The definition of “bed and breakfast inn” is inartfully worded, but attempts
10 to numerically constrain the use of bedrooms in a single-family dwelling for
11 commercial bed and breakfast purposes. Numerically, the MCC limits the
12 number of bedrooms for the purpose of lodging and a morning meal for
13 compensation to no more than five bedrooms in a single-family dwelling. The
14 board of county commissioners reasonably concluded that petitioner’s proposal
15 to make seven bedrooms available to rent was inconsistent with that numerical
16 limitation. The board of county commissioners was under no affirmative
17 obligation to develop conditions of approval that might permit approval of a
18 proposed development, as an alternative to denial of development that the local

“(d) Is contrary to a state statute, land use goal or rule that the
comprehensive plan provision or land use regulation
implements.”

1 government finds does not comply with applicable criteria. *Simonson v. Marion*
2 *County*, 21 Or LUBA 313, 325 (1991).

3 However, nothing in MCC 17.110.108 contains a qualitative limit on bed
4 and breakfast guests' use of the remainder of the single-family dwelling. The
5 definition provides simply that "lodging and a morning meal for guests only are
6 offered for compensation." Similarly, no qualitative limit on guests' use of other
7 areas of the property is present in the statement that "[a]n establishment with
8 more than five sleeping rooms shall be deemed a hotel," which, again, focuses
9 on the numerical limit. Accordingly, to the extent the board of county
10 commissioners interpreted the definition of "bed and breakfast inn" in MCC
11 17.110.108 to preclude use by bed and breakfast guests of other areas of a single-
12 family dwelling that could otherwise numerically qualify as a bed and breakfast
13 inn, that interpretation is inconsistent with the express language of MCC
14 17.110.108. Unlike the "subordinate use" limitation in MCC 17.110.270, MCC
15 17.110.108 does not include any qualitative limits on use of the dwelling and its
16 premises. Because petitioner's proposal to make available the entire dwelling for
17 guests is not constrained by anything contained in MCC 17.110.108, the board of
18 county commissioners incorrectly concluded, based on that aspect of the
19 proposal, that the proposed use did not qualify as a bed and breakfast inn.

20 As explained above, because petitioner's proposal to make seven
21 bedrooms available for rent exceeded the numerical limit on the allowed number

1 of bedrooms, the board of county commissioners correctly concluded that the
2 proposal did not qualify as a “bed and breakfast inn.”

3 The first assignment of error is sustained in part. However, for the reasons
4 we explain above, our sustaining a portion of the first assignment of error does
5 not require remand of the decision, because we have denied the remaining
6 assignments of error that challenge the board of county commissioners’ other
7 bases for denial.

8 The county’s decision is affirmed.