

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

3
4 FRIENDS OF YAMHILL COUNTY,
5 *Petitioner,*

6
7 vs.

8
9 YAMHILL COUNTY,
10 *Respondent,*

11
12 and

13
14 GRANGE HILL LLC,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2022-081

18
19 FINAL OPINION
20 AND ORDER

21
22 Appeal from Yamhill County.

23
24 Andrew Mulkey filed the petition for review and a reply brief and argued
25 on behalf of petitioner. Also on the brief was 1000 Friends of Oregon.

26
27 Jodi M. Gollehon filed a joint response brief and argued on behalf of
28 respondent.

29
30 Elaine Albrich filed a joint response brief and argued on behalf of
31 intervenor-respondent. Also on the brief was Davis Wright Tremaine LLP.

32
33 RUDD, Board Member; and ZAMUDIO, Board Member, participated in
34 the decision.

35
36 RYAN, Board Chair, did not participate in this decision.

37
38 AFFIRMED

12/27/2022

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

1 Opinion by Rudd.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a county board of commissioners' decision approving a
4 conditional use permit (CUP) to operate a bed and breakfast as a home occupation
5 on land zoned exclusive farm use.

6 **MOTION TO INTERVENE**

7 Grange Hill LLC (intervenor), the applicant below, moves to intervene on
8 the side of the county. The motion is unopposed and is granted.

9 **MOTION TO TAKE OFFICIAL NOTICE**

10 The county and intervenor (respondents) filed a joint response brief.
11 Included within the response brief is a request that we take official notice of the
12 purpose of the Oregon Structural Specialty Code (OSSC). Joint Response Brief
13 16 n 2. We may take official notice of documents that (1) constitute officially
14 cognizable law under ORS 40.090 and (2) have some relevance to issues on
15 appeal. *Tualatin Riverkeeper v. ODEQ*, 55 Or LUBA 688, 692 (2007).

16 The notice of intent to appeal was filed on September 8, 2022 and the
17 appeal is subject to our 2022 Rules of Procedure. Our 2022 Rules of Procedure
18 require that all motions be filed as a separate document and not included with any
19 other filing. OAR 661-010-0065(3); *see also* OAR 661-010-0046 (stating what
20 content is required of motions to take official notice, including that they "shall be
21 filed in writing and as a separate document and shall not be contained within a

1 brief or other filing.” OAR 661-010-0046(2)(a).¹ Respondents’ request was not
2 filed as a separate motion but as a footnote in the Joint Response Brief.
3 Respondents also did not include a copy of the document that they request we
4 take official notice of and instead provided a hyperlink. We have explained that
5 (1) we will not consider arguments contained in footnotes; and (2) that a
6 hyperlink is not sufficient to provide us with a document. *Landwatch Lane*
7 *County v. Lane County*, 77 Or LUBA 474, 484 (2018); *Oregon Shores*
8 *Conservation Coalition v. Coos County*, 75 Or LUBA 534, 540-41 (2017).

9 The motion to take official notice is denied.

10 **BACKGROUND**

11 The subject property is approximately 18.89 acres in size, contains high
12 value farmland and is planted with approximately 13 acres of grapes.² In May
13 2020, BW Vineyard received county approval to (1) construct a dwelling and (2)
14 operate a bed and breakfast home occupation within the dwelling, on the subject
15 property.

¹ Our rules also require that the petition for review include a table of contents and authorities. OAR 661-010-0030(2)(a). The table of authorities included in the petition for review lists only two of the cases and four of the statutes cited by petitioner. The table of authorities is used by LUBA in its review of the briefing in appeals and petitioner’s failure to provide a complete table of authorities makes LUBA’s review more difficult.

² The subject property also contains a well house and a pole building.

1 The subject property is zoned Exclusive Farm Use-40 (EF-40). ORS
2 215.203(1) provides that “[z]oning ordinances may be adopted to zone
3 designated areas of land within the county as exclusive farm use zones. Land
4 within such zones shall be used exclusively for farm use except as otherwise
5 provided in ORS 215.213, 215.283 or 215.284.”

6 “ORS 215.283 lists the uses that are allowed on EFU land, and a
7 county cannot allow uses that are not listed under the statute in an
8 EFU zone. * * *

9 “The uses listed in ORS 215.283(1) are authorized as of right, and
10 counties may not restrict those uses through additional local
11 standards. *Brentmar v. Jackson County*, 321 Or 481, 496, 900 P2d
12 1030 (1995). ORS 215.283(2) lists nonfarm uses and structures that
13 are conditionally authorized and that must satisfy ORS 215.296(1),
14 which we refer to as the farm impacts test. The farm impacts test
15 requires the local governing body or its designee to find that the use
16 will not:

17 ““(a) Force a significant change in accepted farm or forest practices
18 on surrounding lands devoted to farm or forest use; or

19 ““(b) Significantly increase the cost of accepted farm or forest
20 practices on surrounding lands devoted to farm or forest
21 use.” ORS 215.296(1).” *1000 Friends of Oregon v.*
22 *Clackamas County*, 320 Or App 444, 450, 514 P3d 553
23 (2022).

24 Permitted, ORS 215.283(1) type uses include, “[s]ubject to ORS 215.279,
25 primary or accessory dwellings and other buildings customarily provided in
26 conjunction with farm use.”³ ORS 215.283(1)(e). Conditionally allowed, ORS

³ORS 215.279 provides:

- 1 215.283(2) type uses include home occupations as provided in ORS 215.448.⁴
- 2 ORS 215.283(2)(i).

“In any rule adopted by the Land Conservation and Development Commission that establishes a farm income standard to determine whether a dwelling is customarily provided in conjunction with farm use on a tract, the commission shall allow a farm operator to satisfy the income standard by earning the required amount or more of farm income on the tract:

- “(1) In at least three of the last five years;
- “(2) In each of the last two years; or
- “(3) Based on the average farm income earned on the tract in the best three of the last five years.”

⁴ ORS 215.448 provides:

“(1) The governing body of a county or its designate may allow, subject to the approval of the governing body or its designate, the establishment of a home occupation and the parking of vehicles in any zone. However, in an exclusive farm use zone, forest zone or a mixed farm and forest zone that allows residential uses, the following standards apply to the home occupation:

- “(a) It shall be operated by a resident or employee of a resident of the property on which the business is located;
- “(b) It shall employ on the site no more than five full-time or part-time persons;
- “(c) It shall be operated substantially in:
 - “(A) The dwelling; or
 - “(B) Other buildings normally associated with uses permitted in the zone in which the property is located; and

1 The Land Conservation and Development Commission (LCDC) has
2 adopted rules implementing ORS 215.283. *See* OAR 660-033-0135. ORS
3 215.283 and OAR 660-033-0135 are implemented in Yamhill County Zoning
4 Ordinance (YCZO) Chapter 402. YCZO 402.03 provides, in part:

5 “The following residential uses shall be permitted in the Exclusive
6 Farm Use District subject to the standards and limitations set forth
7 in Section 402.09 and satisfaction of the criteria specified for each
8 use. Furthermore, the decision-making body may attach reasonable
9 conditions to approvals in order to [e]nsure compliance with
10 relevant criteria. * * *

11 “A. Principal dwelling customarily provided in conjunction with
12 farm use on high-value farmland, subject to the following
13 (Type A notice):

14 “1. The subject tract is currently employed for farm use,
15 and produced at least \$80,000 in gross annual income
16 from the sale of farm products in each of the last two

“(d) It shall not unreasonably interfere with other uses permitted
in the zone in which the property is located.

“(2) The 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.

“(3) Nothing in this section authorizes the governing body or its
designate to permit construction of any structure that would not
otherwise be allowed in the zone in which the home occupation is
to be established.

“(4) The existence of home occupations shall not be used as
justification for a zone change.”

1 years, or three of the last five years. In determining the
2 gross income, the cost of purchased livestock shall be
3 deducted from the gross income attributed to the tract.

4 “2. The dwelling will be occupied by a person or persons who
5 produced the commodities which grossed the income
6 in subsection (1) of this Section.

7 “3. Except for permitted seasonal farm worker housing, there
8 is no other dwelling on the subject tract.”

9 YCZO 402.04(I) conditionally allows a “Home occupation, subject to the
10 standards and limitations set forth in Section 1004” on land zoned EF-40. YCZO
11 1004 implements (and expands upon) ORS 215.448.

12 The dwelling proposed by BW Vineyard was approved for construction as
13 a principle dwelling in conjunction with farm use in application C-09-20, dated
14 May 11, 2020. Record 5-6. At the time the county approved the dwelling, the
15 county also approved a CUP authorizing BW Vineyard’s operation of a bed and
16 breakfast within the dwelling as a home occupation. “As described in the original
17 application for C-[]09-20, [BW Vineyard’s bed and breakfast was to] be a two-
18 story, single-family dwelling containing a dining area, living room, kitchen, one
19 resident bedroom suite, and nine guest bedrooms.” Record 5. The CUP included
20 a condition of approval providing that the CUP was personal to BW Vineyard
21 and that a subsequent owner wishing to operate a bed and breakfast in the
22 dwelling would be required to obtain land use approval to do so. Record 333.

1 Intervenor purchased the property before the dwelling was constructed. In
2 2022, intervenor began building a structure based upon the 2020 permit approval.

3 In addition,

4 “[intervenor] filed an application requesting conditional use
5 approval for a Home Occupation to allow a nine-guestroom County
6 Inn Bed and Breakfast (the ‘Bed and Breakfast’) in a single-family
7 dwelling. * * * [Intervenor], as the current owner of the Property,
8 s[ought] approval to operate the bed and breakfast as previously
9 authorized in C-09-20.” Record 5.

10 On May 16, 2022, the planning director issued a decision approving intervenor’s
11 home occupation CUP. On May 31, 2022, petitioner appealed the planning
12 director’s decision. On August 18, 2022, the board of county commissioners (the
13 board) affirmed the planning director’s decision.

14 This appeal followed.

15 **FIRST ASSIGNMENT OF ERROR**

16 **A. Background**

17 The board approved intervenor’s bed and breakfast home occupation as a
18 conditional use operating primarily in a dwelling. Petitioner’s first assignment of
19 error is that the board’s decision violates ORS 215.448 and YCZO 1004.01.
20 Petition for Review 5. We address petitioner’s four subassignments of error
21 below.

22 **B. Second Subassignment of Error**

23 ORS 215.448(1)(c) requires that a home occupation be operated
24 substantially in the dwelling or “[o]ther buildings normally associated with uses

1 permitted in the zone in which the property is located[.]” ORS 215.448(1)(c)(B).
2 ORS 215.448(3) provides that “[n]othing in this section authorizes the governing
3 body or its designate to permit construction of any structure that would not
4 otherwise be allowed in the zone in which the home occupation is to be
5 established.” Petitioner’s second subassignment of error is that the building being
6 constructed by intervenor is not a dwelling or other building allowed in the EFU
7 zone and that intervenor’s application therefore does not comply with the
8 requirement in ORS 215.448 that the home occupation be operated therein.
9 Petition for Review 31-32.

10 We will reverse or remand a land use decision if the local government
11 improperly construed the applicable law. ORS 197.835(9)(a)(D). In interpreting
12 a statute, we will consider the text and context, including context provided by
13 other parts of the same statute. *State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042
14 (2009); *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d
15 1143 (1993).

16 **1. Primary Dwelling in Conjunction with Farm Use**

17 Petitioner argues that in order to be a dwelling on EFU land, the building
18 must be of the type “customarily provided in conjunction with farm use” and
19 “established ‘in conjunction with farm use.’” Petition for Review 26 (quoting
20 ORS 215.283(1)(e), ORS 215.279). Petitioner argues that a permit to establish a
21 primary dwelling customarily provided in conjunction with farm use does not

1 allow a landowner to construct a building designed for transient occupancy by
2 overnight guests. Petition for Review 27.

3 Petitioner argues that the board erred as a matter of law because the
4 building does not meet the “design requirements” set out in ORS 215.283(1)(e)
5 for a primary dwelling in conjunction with farm use. Petition for Review 31. First,
6 petitioner argues that “[t]he statutory text does not contemplate that a ‘primary’
7 ‘dwelling’ authorized by ORS 215.283(1)(e) as anything other than a building
8 designed and used as a home or primary residence for a farm operator.” Petition
9 for Review 26. We agree with petitioner that the 2020 approval required that the
10 county determine that the dwelling would be “occupied by a person or persons
11 who produced the commodities that grossed the income[.]” OAR 660-033-
12 0135(4)(c); *see also* OAR 660-033-0135(1)(c); Petition for Review 24-28.
13 Respondents, however, advise that the 2020 approval contained “no condition
14 limiting the nature of the occupants for the dwelling, the size or scale of the
15 dwelling, the number of rooms or bedrooms the dwelling could have, or future
16 uses of the dwelling.” Joint Response Brief 21.

17 The legislature has shown that it knows how to limit the use of an approved
18 dwelling. For example, in the instance of temporary hardship dwellings, the ORS
19 215.283(2)(L) conditionally allows the use only

20 “for the term of a hardship suffered by the exiting resident or a
21 relative resident. Within three months of the end of the hardship, the
22 manufactured dwelling or recreational vehicle shall be removed or
23 demolished or, in the case of an existing building, the building shall

1 be removed, demolished or returned to an allowed nonresidential
2 use. The governing body or its designee shall provide for periodic
3 review of the hardship claimed under this paragraph. A temporary
4 residence approved under this paragraph is not eligible for
5 replacement under subsection (1)(p) of this section.”

6 There is not comparable language imposing a continuing limitation on the use of
7 a primary dwelling approved in conjunction with farm use as a home or primary
8 residence for a farm operator. The legislature could have but did not impose
9 limitations on the size or configuration of dwellings approved in conjunction with
10 farm use. We therefore proceed to consideration of whether the building is a
11 dwelling for purposes of ORS 215.448.

12 **2. ORS 215 Dwelling**

13 Petitioner maintains that the building in which the bed and breakfast will
14 operate is akin to a hotel or motel due to the number of guests to be
15 accommodated and the nature of construction, and therefore not an authorized
16 use of EFU land under ORS 215.283. Petition for Review 29. Petitioner explains
17 that

18 “The building would be designed to standards that apply to hotels
19 and motels ([OSSC occupancy group] R-1[]) that are not consistent
20 with the design standards that apply to dwellings for permanent
21 occupancy ([OSSC occupancy group] R-3[]). As a matter of law, the
22 applicant cannot construct the proposed building * * * pursuant to a
23 permit for a primary farm dwelling.” Petition for Review 31.

24 and

25 “To the extent that the county interprets its definition of ‘dwelling’
26 to allow a building designed for transient occupancy by more than
27 one family and up to 30 people who do not share any social or legal

1 relationship to qualify as a ‘dwelling’ in an exclusive farm use zone,
2 that interpretation conflicts with state law.” Petition for Review 24.

3 “Dwelling” is not defined in ORS 215. In *1000 Friends v. Clackamas*
4 *County*, the court considered the county’s amendment of its regulations to allow
5 short term rental use of dwellings on farm land. 320 Or App 444, 514 P3d 553
6 (2022). The court pointed to our statutory construction analysis of the term
7 “dwelling,” explaining that

8 “In reaching its decision to remand the county’s decision, LUBA
9 applied the statutory construction analysis set out in *P.G.E. Co. v.*
10 *Bureau of Labor and Industries*, 317 Or 606, 610-11, 859 P2d 1143
11 (1993) and *State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042
12 (2009) to determine the intent of the legislature. LUBA began with
13 the text:

14 “ORS Chapter 215 provides no generally applicable definition of
15 “dwelling” or “residence,” and we therefore look to the plain,
16 ordinary meaning of those words. “Dwelling” means “a
17 building or construction used for a residence” and “residence”
18 means “a building used as a home: DWELLING.” *Webster’s*
19 *Third New Int’l Dictionary* 706, 1931 (unabridged ed. 2002).
20 As the county points out, the term “dwelling,” considered
21 alone, does not necessarily require owner occupancy or
22 occupancy of a given duration. However, the term
23 “residence” refers to “a building used as a home,” and “home”
24 is defined not only as “a private dwelling: HOUSE” but also
25 as “the house and grounds with their appurtenances habitually
26 occupied by a family: one’s principal place of residence:
27 DOMICILE.” *Webster’s* at 1082. The various terms connote
28 a distinction between a building used as a “home” and a
29 building used as something other than a “home,” for example,
30 a hotel. [*1000 Friends of Oregon v. Clackamas County*, ____
31 Or LUBA ____, ____ (LUBA No 2021-003, Jan 24, 2022) (slip
32 op at 12).]” *Id.* at 451 (emphases and boldface omitted).

1 The Court of Appeals concluded that

2 “a ‘dwelling’ or ‘residence’ requires use as a home. A home is
3 occupied by a group of people sharing a household—not by
4 individuals and groups who share no social or legal relationship—
5 on a long-term or permanent basis—not in a transitory way. See
6 *Webster’s* at 1082 (defining ‘home’ as ‘the house and grounds with
7 their appurtenances habitually occupied by a family; one’s principal
8 place of residence: DOMICILE’). Cf. ORS 90.110(6) (excluding
9 ‘[v]acation occupancy’ from application of the Residential Landlord
10 Tenant Act); ORS 90.100(51) (defining ‘[v]acation occupancy’ as
11 ‘occupancy in a dwelling unit, not including transient occupancy in
12 a hotel or motel, that has all of the following characteristics: (a) The
13 occupant rents the unit for vacation purposes only, not as a principal
14 residence; (b) The occupant has a principal residence other than at
15 the unit; and (c) The period of authorized occupancy does not exceed
16 45 days.’).” *Id.* at 453-54 (emphasis added).

17 The board concluded that the building is a dwelling because it will be the
18 inn keeper’s residence and “each bedroom of the proposed structure can be
19 accessed from a shared hallway that shares common atmosphere with the rest of
20 the house, with common areas and living space on both floors, and that structure
21 meets the design standards from a single-family residence and the relevant
22 criteria.” Record 10. Petitioner maintains that the structure should not be deemed
23 a dwelling because it is designed to building code standards applicable to hotels.
24 Petitioner does not identify any provision in ORS 215 that states that the building
25 code standards applied to a structure determine what the structure is and we are
26 not aware of any.

27 In its reply brief, petitioner cites *Slavich v. Columbia County* in support of
28 its contention that the building code standards to which the structure is being built

1 indicate that it is not a dwelling or another type of structure allowed in the EFU
2 zone. 16 Or LUBA 704 (1988). In *Slavich* intervenors applied for a home
3 occupation conditional use permit to operate a day care/group home within a pole
4 barn on property zoned Single-Family Residential (R-10). The proposed
5 remodeling of

6 “the interior of the [pole barn], include[ed] removal of the hay loft
7 and horse stalls, paving of the dirt floor, and construction of an
8 office, bathroom, kitchen, baby room and sleep room. On the
9 exterior of the building, existing chicken coops [would] be removed,
10 the entrance improved, cedar siding added, and an attached, fenced-
11 in play area constructed. The proposed use [would] take place inside
12 the remodeled building, except for play periods for the children in
13 the adjacent play area.” *Id.* at 705 (citations omitted).

14 In *Slavich*, petitioner argued in part that the CUP violated the requirement in ORS
15 215.488 that the home occupation occur in the dwelling or a building normally
16 associated with uses permitted in the R-10 zone. We agreed with petitioner that
17 the proposed remodel converted the pole barn into a structure not allowed in the
18 zone. Here, petitioner argues that the CUP at issue involves construction of a
19 hotel or motel, a structure not allowed in the zone. However, unlike the case in
20 *Slavich*, the home occupation is not proposed in a building other than the dwelling
21 and the structure is consistent with the term “dwelling” for the reasons identified
22 by the board.

23 *1000 Friends of Oregon v. Clackamas County (Herkamp)* is instructive.
24 309 Or App 499, 483 P3d 706, *rev den*, 367 Or 347, 489 P3d 543 (2021).
25 *Herkamp* concerned an appeal of a county approval of a conditional use permit

1 to host events as a home occupation. The Court of Appeals concluded that
2 evidence in the record supported the hearing officer's determination that the
3 remodeling of a barn to add sound proofing, a dance floor, and a catering kitchen
4 to accommodate wedding events did not convert the barn into something other
5 than a barn. *Id.* at 512. The court concluded that nothing indicated "that the
6 building would no longer look like a barn, would no longer be useable as a barn,
7 or would lose its 'character' as a barn, [such] * * * that the building would not be
8 allowed in an EFU zone even where all of its other features are those of a barn."
9 *Id.*

10 The 2020 farm dwelling permit allows construction of a building with ten
11 bedrooms in the EFU zone. We have not been directed to any evidence that the
12 building code standards utilized or the number of bedrooms render the use of the
13 building as a residence impossible. Petitioner argues that the board's reading of
14 dwelling is inconsistent with state policies geared toward the preservation of
15 agricultural land. Petition for Review 28. Petitioner's argument does not,
16 however, recognize that the characterization of the building as a dwelling does
17 not automatically allow nonagricultural use of the property. Rather, intervenor's
18 application is subject to the farm impacts test and the conditional use permit and
19 home occupation approval criteria. The board's finding that the structure is a
20 dwelling is consistent with the above definitions of dwelling and state policy
21 protecting agricultural land. The board's approval of the CUP does not violate
22 state law.

1 The second subassignment of error is denied.

2 **C. First Subassignment of Error**

3 YCZO 1004.01(C) requires that “[t]he home occupation will be operated
4 substantially in the dwelling or in other buildings normally associated with uses
5 permitted in the zone in which the property is located.” Petitioner’s first
6 subassignment of error is that the board’s interpretation of YCZO 1004.01(C) is
7 inconsistent with its express language and, “as a matter of law,” intervenor cannot
8 operate overnight lodging as proposed. Petition for Review 9-10. Petitioner
9 argues that the county may not approve the home occupation CUP for the bed
10 and breakfast because the building in which the use will occur is not a “dwelling”
11 as defined by the YCZO. Petition for Review 10.

12 We will

13 “[A]ffirm a local government’s interpretation of its * * * land use
14 regulation unless [we determine] the local governments
15 interpretation:

16 “(a) Is inconsistent with the express language of the * * * land use
17 regulation;

18 “(b) Is inconsistent with the purpose for the * * * land use
19 regulation;

20 “(c) Is inconsistent with the underlying policy that provides the
21 basis for the * * * land use regulation; or

22 “(d) Is contrary to a state statute, land use goal or rule that the
23 * * * land use regulation implements.

24 “(2) If a local government fails to interpret a provision of its * * *
25 land use regulations, or if such interpretation is inadequate for

1 review, the board may make its own determination of whether the
2 local government decision is correct.” ORS 197.829.

3 We will also reverse or remand a decision involving the application of a land use
4 regulation if the decision is not in compliance with the applicable provisions of
5 the land use regulation. ORS 197.835(8).

6 The dwelling is an ORS 215.283(1) use and, as we explained in our
7 resolution of the second assignment of error, the county’s implicit interpretation
8 of dwelling is consistent with that statute. The county may, however, apply
9 restrictive conditions to home occupations allowed on EFU land under ORS
10 215.283(2)(i). “The nonfarm uses listed under ORS 215.283(2) may * * * be
11 subject to any local standards enacted pursuant to ORS 215.296(10).”⁵ *1000*
12 *Friends of Oregon*, 320 Or App at 450. We review the county board’s
13 interpretation of its own regulations under ORS 197.829(1) and are required to
14 affirm that interpretation so long as it is not inconsistent with the regulation’s
15 express language, purposes, or underlying policies—that is, if it is plausible.
16 *Siporen v. City of Medford*, 349 Or 247, 259, 243 P3d 776 (2010). The board’s
17 findings do not, however, explicitly interpret county code provisions allowing

⁵ ORS 215.296(10) provides:

“This section does not prevent a local governing body approving a use allowed under ORS 215.213 (2) or (11) or 215.283 (2) or (4) from establishing standards in addition to those set forth in subsection (1) of this section or from imposing conditions to ensure conformance with the additional standards.”

1 bed and breakfast uses in dwellings. In *Green v. Douglas County*, the court
2 explained:

3 “Lacking an adequate interpretation to which deference could be
4 owed, ORS 197.829(2) provides that ‘[LUBA] may make its own
5 determination of whether the local government decision is correct.’
6 As we noted in *Alliance for Responsible Land Use*:

7 “‘If the county decision does contain a reviewable interpretation of
8 the local provision, LUBA’s and our review would be subject
9 to the deferential standard of * * * ORS 197.829(1)(a)-(c).
10 However, if a local decision does not contain an interpretation
11 of an applicable local provision, or no interpretation that
12 suffices for review, then ORS 197.829(2) becomes
13 applicable. It provides: ‘If a local government fails to interpret
14 a provision of its comprehensive plan or land use regulations,
15 or if such interpretation is inadequate for review, [LUBA]
16 may make its own determination of whether the local decision
17 is correct.’

18 “‘We have interpreted the statute to mean that, when a local
19 governing body’s land use decision lacks an essential interpretation
20 of applicable local legislation—or lacks an interpretation that is
21 adequate for review—LUBA and, in turn, this court, may interpret
22 the legislation *ab initio* and independently, as part of the process of
23 reviewing the local government’s decision. * * * In such
24 circumstances, the deferential standard * * * of ORS 197.829(1) is,
25 of course, inapplicable, because there is no local interpretation to
26 which deference can be accorded.’ 149 Or App [259], 264-65[, 942
27 P2d 836 (1997), *rev dismissed as improvidently allowed*, 327 Or
28 555, 971 P2d 411 (1998)].

29 “‘However, as we stated in *Opp v. City of Portland*, 153 Or App 10,
30 14, 955 P2d 768, *rev den*, 327 Or 620, [971 P2d 412] (1998):

31 “‘The statute itself says that LUBA may make an independent
32 determination concerning the correctness of the local decision
33 in circumstances where the local government has failed to

1 interpret local legislation—at all or adequately for review—
2 that is pertinent to the decision. The statute makes the
3 reviewing body’s exercise of the interpretive authority
4 permissive rather than mandatory. It thereby gives LUBA and
5 the appellate courts the alternative of remanding the decision
6 to the local government to provide any essential interpretation
7 that the decision omits.” 245 Or App 430, 440-41, 263 P3d
8 355 (2011) (emphasis omitted); *but see 1000 Friends of*
9 *Oregon v. Linn County*, 306 Or App 432, 436, 475 P3d 121,
10 *rev den*, 367 Or 290, 477 P3d 407 (2020) (reviewing and
11 affirming an implicit interpretation under deferential standard
12 of review articulated in *Siporen*).

13 We exercise our discretion to interpret the code provisions relating bed and
14 breakfast uses to dwellings.

15 YCZO 202 defines “dwelling” as “[a] building containing *one (1) dwelling*
16 *unit designed and occupied by one family only*. The term dwelling includes a
17 manufactured dwelling but *does not include* a hotel, motel, travel trailer,
18 boarding, lodging or rooming house, private hospital, rest home or nursing home
19 or other *accommodations used for transient occupancy*.” (Emphases added.)

20 Petitioner argues

21 “Because the county’s definition of dwelling excludes
22 accommodations used for transient occupancy, a building used as a
23 bed and breakfast does not meet the definition of a ‘dwelling.’ Even
24 if the applicant’s proposed building could otherwise qualify as a
25 dwelling, the use of the building for a bed and breakfast means that
26 the building no longer meets the definition of ‘dwelling.’” Petition
27 for Review 11.

28 The county found that the proposed bed and breakfast will occur within a
29 dwelling, specifically, “[a] building containing one (1) dwelling unit designed for

1 and occupied by one (1) family only.” YCZO 202. YCZO 202 defines “dwelling
2 unit” as “[o]ne (1) room or rooms connected together, constituting an
3 independent housekeeping establishment designed and used for occupancy by
4 one (1) family, including dependent relatives and caretakers, and includes
5 permanent provisions for living, sleeping, cooking (limited to one kitchen only)
6 and sanitation (full bathroom).”

7 As respondents point out, the board incorporated the staff report in its
8 findings. Joint Response Brief 14-15; *see* Record 18. These findings include:

9 “The [b]oard relied on the staff report findings that each bedroom of
10 the proposed structure can be accessed from a shared hallway that
11 shares common atmosphere with the rest of the house, with common
12 areas and living space on both floors, and that structure meets the
13 design standards for single-family residence and the relevant
14 criteria.” Record 10.

15 Also:

16 “Staff notes that page one of the application narrative states the
17 following: ‘the bed and breakfast will be a two-story, single-family
18 dwelling containing a dining area, living room, kitchen, one resident
19 bedroom suite, and nine guest bedrooms.’ Based off this language,
20 staff believes that that there will be living space for the bed and
21 breakfast operator who will be an on-site resident. With conditions,
22 the request complies with criterion (A).” Record 17.

23 Conditions of approval include that “[t]he bed and breakfast will be operated by
24 an onsite resident of the proposed single-family dwelling.” Record 11.

25 We give deference to the board’s interpretation of its code where consistent
26 with the text and context. The board’s finding that the structure is a dwelling is

1 consistent with the text of the code which states that a dwelling unit includes
2 permanent provisions for living, sleeping, one kitchen, and a full bathroom.⁶

⁶ The YCZO 202 definition of “dwelling” includes a “manufactured dwelling.” “Manufactured dwellings” are also defined to include sleeping, sanitation and living facilities used for residential purposes, providing:

“MANUFACTURED HOME: Any of the following:

- “a. Residential trailer: a structure constructed for movement on the public highways that has *sleeping, cooking and plumbing facilities, that is intended for human occupancy, that is being used for residential purposes*, and that was constructed before January 1, 1962.
- “ b. Mobile home: a structure constructed for movement on the public highways *that has sleeping, cooking, and plumbing facilities, that is intended for human occupancy, that is being used for residential purposes*, and that was constructed between January 1, 1962, and June 15, 1976, and met the construction requirements of Oregon mobile home law in effect at the time of construction.
- “c. Manufactured home: a structure constructed for movement on the public highways that *has sleeping, cooking and plumbing facilities, that is intended for human occupancy, that is being used for residential purposes*, and that was constructed in accordance with federal manufactured housing construction and safety standards regulations in effect at the time of construction.
- “d. A manufactured home does not include any unit identified as a recreational vehicle by the manufacturer.” (Emphases added.)

1 The definition of dwelling also requires use for occupancy by one family
2 only. YCZO 202 defines “family” as “[o]ne or more persons related by blood,
3 marriage, legal adoption or legal guardianship plus not more than five (5)
4 additional persons, including foster and shelter care persons or, up to five (5)
5 unrelated persons, all living together as a single housekeeping unit.” Petitioner
6 argues that the building is not a dwelling because it will be occupied by multiple,
7 unrelated individuals who use the building for transient occupancy. Relatedly,
8 petitioner contends that, when used as a bed and breakfast, the building can
9 accommodate more unrelated individuals than can constitute a “family” as
10 defined in YCZO 202. Petition for Review 17-18. We agree with petitioner that
11 the county’s interpretation of “dwelling” is inconsistent with the plain language
12 of the county’s definition of “dwelling,” as a building that is “occupied by one
13 (1) family *only*” and excludes “accommodations used for transient occupancy.”
14 YCZO 202 (emphasis added). However, that conclusion is not dispositive for the
15 reasons explained below.

16 When interpreting code language, and “there are several provisions or
17 particulars, such construction is, if possible, to be adopted as will give effect to
18 all.” ORS 174.010. YCZO 201.01 provides that in interpreting the ordinance, the
19 “particular controls the general.” YCZO 201.01(A). “When a general provision
20 and a particular provision are inconsistent, the latter is paramount to the former
21 so that a particular intent controls a general intent that is inconsistent with the
22 particular intent.” ORS 174.020(2).

1 The definition of “dwelling” is general. The general intent of the county is
2 that transient occupancy is not allowed outright where a dwelling is allowed.
3 However, reading the YCZO as a whole, the limitations in the definition of
4 “dwelling” are inconsistent with the more specific intent of the county that single-
5 family dwelling may be used for a bed and breakfast as a home occupation.

6 YCZO 202 defines “bed and breakfast inn” as “[a] single family dwelling
7 where lodging is offered for compensation, having no more than nine (9) sleeping
8 rooms for the purpose. A bed and breakfast inn may offer a morning meal for
9 overnight guests only. A bed and breakfast inn is conducted within the residence
10 of the operator.”

11 YCZO 1012.00 sets out regulations for bed and breakfast facilities. YCZO
12 1012.01(A)(1) provides:

13 “A bed and breakfast is a single-family dwelling where lodging is
14 offered for compensation, having no more than nine (9) sleeping
15 rooms for this purpose. *Bed and breakfast operations that are*
16 *undertaken from within a residence shall be considered as home*
17 *occupations, and shall comply with the standards and limitations of*
18 *Section 1004. A bed and breakfast inn may offer a morning meal for*
19 *overnight guests only.” (Emphases added.)⁷*

20 YCZO 202 defines “home occupation” as:

21 “An activity involving off-site sales, the manufacture of a product

⁷ YCZO 1004.02 does not allow a bed and breakfast as a *minor* home occupation. Minor home occupations are regulated by YCZO 1004.02 and not subject to the standards regulating home occupations in YCZO 1004.01. Bed and breakfasts are therefore subject to the standards in YCZO 1004.01.]

1 *or the provision of a service* carried on in compliance with Section
2 1004 of this ordinance *by a resident of the property on which the*
3 *business is located.* “Home occupation” does not include the retail
4 sale of products unless such sales are secondary to the primary home
5 occupation use.” (Emphases added.)

6 The board found that

7 “The definition of a home occupation consists of an activity
8 involving the sale of a service carried on in compliance with Section
9 1004 of the YCZO *by a resident of the property* on which the
10 business is located. The applicant’s request is for the provision of
11 short-term lodging and a breakfast meal, from a single-family
12 dwelling.” Record 15 (emphasis added).

13 These code sections provide that bed and breakfasts may occur within dwelling
14 structures and distinguish the resident of the property from the guests to whom
15 the resident provides a service. The board’s interpretation of the term dwelling
16 gives effect to all provisions.

17 Petitioner urges us to give great weight to the building code standards to
18 which the structure is being built and then conclude that the structure is a motel
19 or hotel, uses not allowed in the EFU zone. Petition for Review 12-14. YCZO
20 202 defines “motel” as “[o]ne (1) or more attached or detached buildings
21 containing housekeeping or sleeping units designed and used for the temporary
22 accommodation of tourists or transients with off-street parking space for each
23 such unit.” The dictionary defines “hotel” as “a building of many rooms chiefly
24 for overnight accommodation of transients and several floors served by elevators,
25 usu[ally] * * * with a variety of compartments for eating, drinking, * * * and
26 group meetings[.]” *Webster’s Third Int’l Dictionary* 1094-95 (unabridged ed

1 2002). Because a bed and breakfast inn occurs in a dwelling, that is, a residence,
2 it is the “particular” and applicable type of lodging, and the “motel” and “hotel”
3 definitions are not applicable. Petitioner’s interpretation would require us to
4 disregard code sections specifically providing that bed and breakfast inns are uses
5 that occur within dwellings and involve providing a service to guests. We decline
6 to do so. The county did not err in concluding that the bed and breakfast will be
7 conducted within the operator’s dwelling, consistent with the YCZO.

8 The first subassignment of error is denied.

9 **D. Third Subassignment of Error**

10 Petitioner’s third subassignment of error is that the board may not approve
11 the home occupation because it will not occur in a dwelling and will not occur in
12 an “other building normally associated with uses allowed in the zone” as required
13 by ORS 215.448(1)(c)(B) and YCCZO 1004.01(C). Petitioner argues “To the
14 extent that the evidence in the record * * * could be used to provide an alternative
15 basis for approval, * * * this sub-assignment of error demonstrates why those
16 alternative bases are wrong as a matter of law.” Petition for Review 33.

17 Petitioner argues in part that the county’s findings related to what
18 constitutes a dwelling are inadequate. Petition for Review 32. Adequate findings
19 identify the relevant standard, the evidence relied upon, and why the evidence
20 leads to the conclusion as to whether the criterion is met. *Heiller v. Josephine*
21 *County*, 23 Or LUBA 551, 556 (1992). As discussed in our resolution of the first
22 subassignment of error, the county board identified the relevant criterion, bed and

1 breakfast inn operating within a dwelling, and the evidence it relied upon in
2 finding that the criterion are met.

3 Petitioner also argues

4 “To the extent that the county’s findings attempt to meaningfully
5 distinguish between [the terms dwelling, single-family dwelling, or
6 a single-family residence], the findings are inadequate. The findings
7 do not identify the applicable law, explain the factual difference
8 between the terms, or explain how the various terms dwelling, single
9 family dwelling, *etc.*, are meaningfully different than the term
10 ‘dwelling’ used in ORS 215.448(1)(c).” Petition for Review 33
11 (citation omitted).

12 Petitioner does not identify where in the findings it believes these terms were
13 misused and it appears to us that the board used the terms “dwelling,” “single-
14 family dwelling,” and “single-family residence” interchangeably. For the reasons
15 set out in our resolution of the first and second subassignments of error, the
16 county did not err in finding that the home occupation will occur in a dwelling.

17 Petitioner also argues that the bed and breakfast could not be approved
18 under certain provisions authorizing a bed and breakfast as a home occupation as
19 part of winery, cidery or brewery operations. “First, the applicant does not
20 operate a winery, cidery, or brewery on the tract. ORS 215.449(3)(f),
21 215.451(3)(f), 215.452(13), 215.453(12). For that reason, the applicant does not
22 qualify to build or operate a bed and breakfast under those provisions.” Petition
23 for Review 34. The board did not, however, purport to approve the home
24 occupation based upon a winery, brewery, or cider operation. Again, petitioner
25 does not provide a basis for reversal or remand.

1 Petitioner also argues that, although ORS 215.449 makes special provision
2 for bed and breakfasts at a farm brewery, a bed and breakfast is not a building
3 normally associated with a use allowed in the EFU zone.

4 Again, as respondents point out and as petitioner acknowledges, the board
5 did not find that the home occupation will occur in a building other than a
6 dwelling. Petition for Review 32; Joint Response Brief 22. Given that the board
7 did not make a decision on this basis, petitioner again does not identify a basis
8 for reversal or remand.

9 The third subassignment of error is denied.

10 **E. Fourth Subassignment of Error**

11 Petitioner’s fourth subassignment of error is that ORS 215.448(3) and
12 YCZO 1004.01(F) prohibitions on the construction of “any structure that would
13 not otherwise be allowed in the zone” is violated for the reasons set out in the
14 first, second, and third subassignments of error.⁸

15 We agree with respondents that the fourth subassignment of error is
16 derivative of the prior subassignments. Joint Response Brief 22. For the reasons
17 set out in our denial of the first, second, and third subassignments of error, this
18 subassignment of error is denied.

⁸ YCZO 1004.01(F) provides “A home occupation shall not be used to permit construction of any structure that would not otherwise be allowed in the zone in which the home occupation is established, nor shall a home occupation be used as justification for a zone change.”

1 The fourth subassignment of error is denied.

2 **SECOND ASSIGNMENT OF ERROR**

3 In its second assignment of error, petitioner argues that “the county’s
4 conclusion that the prior permit authorizes [intervenor’s] yet-to-be constructed or
5 proposed building [is] not supported by substantial evidence in the whole record.”
6 Petition for Review 42. We will reverse or remand a land use decision if the local
7 government made a decision not supported by substantial evidence in the whole
8 record. ORS 197.835(9)(a)(C). Substantial evidence is evidence that a reasonable
9 person would rely upon to make a decision. *Dodd v. Hood River County*, 317 Or
10 172, 179, 855 P2d 608 (1993).

11 The board found that the bed and breakfast use is allowed as a conditional
12 use within the EFU district because it will “be sited within a yet-to-be built home
13 that was approved as a principal dwelling in conjunction with farm use in C-09-
14 20, dated May 11, 2020.” Record 6. Petitioner argues that “[t]he evidence in the
15 record shows that the county issued a permit for a principal farm dwelling.
16 R[ecord] 141-142. However, the record does not contain evidence that the permit
17 approval remains valid or has been properly extended.” Petition for Review 42-
18 43.

19 County planning staff testified at the appeal hearing that the dwelling
20 application had been extended every year and remained valid. We agree with
21 respondents that planning staff testimony that the dwelling permit remained valid
22 was substantial evidence. Joint Response Brief 29. We have concluded,

1 previously, that testimony from a city planner that there may be feasible
2 development options for a site requiring less rock removal was substantial
3 evidence on which the planning commission could rely. *S. St. Helens LLC v. City*
4 *of St. Helens*, 71 Or LUBA 30, 42, *aff'd*, 271 Or App 680, 352 P3d 746 (2015).
5 A reasonable decision maker could rely on a statement by planning staff that the
6 dwelling permit had been renewed annually and remained valid.

7 Petitioner also argues that the board findings do “not identify the
8 applicable standards used to determine whether the proposed structure qualifies
9 as a dwelling or explain how the facts found demonstrate that those standards are
10 met.” Petition for Review 41. The relevant standards identified by the board were
11 the home occupation criteria set out in YCZO 1004.01, including that the home
12 occupation be operated substantially within the dwelling or other building
13 normally associated with uses in the zone. Record 8. The board incorporated by
14 reference findings in the staff report addressing compliance with YCZO 1004.01,
15 including that the structure was a dwelling. Record 9-10. YCZO 1004.01(C)
16 requires that “[t]he home occupation will be operated *substantially in the*
17 *dwelling* or in other buildings normally associated with uses permitted in the zone
18 in which the property is located.” (Emphasis added.) YCZO 1004.01(F) provides
19 that “[a] home occupation shall not be used to permit construction of any
20 structure that would not otherwise be allowed in the zone in which the home
21 occupation is established, nor shall a home occupation be used as justification for
22 a zone change.” The board found:

1 “Regarding the Home Occupation criteria of Section 1004.01, these
2 criteria are addressed in pages 5-9 of the staff report and those
3 findings are incorporated here by reference. The [b]oard
4 acknowledges [petitioner’s] arguments concerning whether the use
5 will occur within a single-family dwelling. Specifically,
6 [petitioner’s] argued that the structure was designed for transient
7 occupancy, and as such not a dwelling allowed in the EFU zone and
8 could not meet criteria (C) and (F). The [b]oard found that those
9 arguments under (C) and (F) were not convincing for the reasons
10 presented on the record by staff and applicant, and the [b]oard found
11 that applicant satisfies YCZO 1004.0[1] notwithstanding
12 [petitioner’s] arguments to the contrary. The [b]oard relied on the
13 staff report findings that each bedroom of the proposed structure can
14 be accessed from a shared hallway that shares common atmosphere
15 with the rest of the house, with common areas and living space on
16 both floors, and *that structure meets the design standards for single-*
17 *family residence* and the relevant criteria. In sum, the [b]oard agrees
18 with the incorporated findings and proposed conditions of approval
19 and finds that the criterion in YCZO 1004.01(A)-(P) are or can be
20 met.” Record 9-10 (emphasis added).

21 YCZO 202 defines a “dwelling” as containing a “dwelling unit” and a
22 “dwelling unit” as including the permanent provision of “living, sleeping,
23 cooking (limited to one kitchen only) and sanitation (full bathroom).” We agree
24 with respondents that read in context, the county board found that the design,
25 which contained one resident bedroom suite, along with the nine guest bedrooms,
26 a dining area, living room, and one kitchen, met the standards for a residence or
27 dwelling. Record 17; Joint Response Brief 26-27. We agree with respondents that
28 the findings identify the relevant criteria, explain that the county found the
29 structure is a dwelling, and are (1) adequate and (2) correct.

1 Petitioner also argues that the board does not explain how it differentiates
2 between bedrooms within a dwelling unit and sleeping units designed for
3 transient occupancy. Petition for Review 42. Petitioner argues that all the
4 bedrooms have attached bathrooms and are in fact individual units designed for
5 transient occupancy. We explained in our resolution of the first subassignment of
6 error that Oregon Structural Code, which is applicable to hotels and motels, is
7 not controlling. The conditions of approval include that a maximum of nine
8 guestrooms may be offered to guests and that the bed and breakfast will be
9 operated by an onsite resident of the single-family dwelling. Record 11.
10 Petitioner does not explain the relevance of which room is used as the inn keeper
11 bedroom. We will not develop petitioner's argument for it. *Deschutes*
12 *Development v. Deschutes Cty.*, 5 Or LUBA 218, 220 (1982).

13 The second assignment of error is denied.

14 The county's decision is affirmed.