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

THRIVE HOOD RIVER,
Petitioner,

vs.

HOOD RIVER COUNTY,
Respondent,

and

MEADOWS NORTH, LLC,
Intervenor-Respondent.

LUBA No. 2022-104

FINAL OPINION
AND ORDER

Appeal from Hood River County.

Jesse A. Buss filed the petition for review and reply briefs and argued on behalf of petitioner. Also on the briefs was Willamette Law Group, PC.

Christopher D. Crean filed the respondent's brief and argued on behalf of respondent. Also on the brief was Beery, Elsner & Hammond, LLP.

Dana L. Krawczuk filed the intervenor-respondent's brief and argued on behalf of intervenor-respondent. Also on the brief were Merissa A. Moeller and Stoel Rives LLP.

ZAMUDIO, Board Member; RUDD, Board Member, participated in the decision.

RYAN, Board Chair, did not participate in the decision.

REMANDED 07/14/2023

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

Opinion by Zamudio.

NATURE OF THE DECISION

Petitioner appeals a county board of commissioners decision approving a conditional use permit (CUP) to operate a bed and breakfast as a home occupation in an existing structure on land zoned Forest (F-1).

FACTS

Meadows North, LLC (intervenor), applied for a CUP to operate a bed and breakfast as a home occupation in an existing structure, which the county refers to in its decision as the Log Home, and which has four bedrooms, a kitchen, a dining area, and a living room. Intervenor proposes to lease one of the bedrooms to a caretaker tenant on a year-round basis. The caretaker tenant would be intervenor's employee and their residential use of the Log Home would be limited to one bedroom. Record 705, 718.[1] Intervenor proposes to use the other three bedrooms, the kitchen, dining area, and living room as part of the bed and breakfast use. Record 705.

The planning director approved the application without a hearing. Petitioner appealed the planning director's decision to the planning commission. The planning commission held a *de novo* hearing on the application. At the conclusion of the initial hearing, the planning commission continued the hearing and kept the record open for new evidence and rebuttal. At the conclusion of the

[1] All record citations in this decision are to the Amended Record.

continued hearing, a planning commissioner moved to reverse the planning director's decision. Three planning commissioners voted in favor of the motion, and two planning commissioners voted against the motion.

Section G(1) of the planning commission's bylaws provides:

> "Four members of the Planning Commission shall constitute a quorum. *No action of the Planning Commission shall be valid unless there is an affirmative vote of at least 4 members*. In cases of a tie vote, the decision shall be deemed a denial of the motion before the Planning Commission." (Emphasis added.)

Because the motion to reverse the planning director's decision did not receive the affirmative vote of at least four planning commissioners, the planning commission issued an order affirming the planning director's decision (planning commission order).

Petitioner appealed the planning commission order to the board of commissioners (the board). The board held a public hearing on the application, considered existing evidence in the record, did not accept new evidence, and did accept new argument. The board issued a decision approving the application. This appeal followed.

FIRST ASSIGNMENT OF ERROR

In the first assignment of error, petitioner argues that the board lacked authority to review the planning commission order. We will reverse or remand a decision where the local government "[e]xceeded its jurisdiction." ORS 197.835(9)(a)(A).

A. First Subassignment of Error

Petitioner argues that the planning commission order is "not a valid decision" and, thus, the board lacked jurisdiction to review it. Petition for Review 17. First, petitioner argues that the planning commission's order is invalid because the three-to-two vote had the legal effect of reversing the planning director's decision, not affirming it. Second, petitioner argues that the planning commission's order is invalid because the planning commission erred in concluding that section G(1) of the planning commission's bylaws applies to quasi-judicial proceedings and that, if it does, then the planning commission violated other portions of its bylaws requiring a substantive decision on the merits of intervenor's application. Third, petitioner argues that, even if the planning commission's three-to-two vote did not have the legal effect of reversing the planning director's decision, that does not mean that it had the legal effect of affirming the planning director's decision. Petitioner argues that because the planning commission order suffered from these errors, it was invalid and the board lacked jurisdiction to review it.

Petitioner appealed the planning commission order in *Thrive Hood River v. Hood River County*, ___ Or LUBA ___ (LUBA No 2022-084, July 14, 2023) (*Thrive I*).[2] The county moved to dismiss that appeal, arguing that petitioner

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[2] In a final opinion and order issued this same date, we dismiss that appeal. *Thrive Hood River v. Hood River County*, ___ Or LUBA ___ (LUBA No 2022-084, July 14, 2023).

failed to exhaust local remedies for purposes of ORS 197.825(2)(a) and that the planning commission order was not a "final" decision for purposes of ORS 197.015(10)(a)(A). In responding to the county's motion and arguing that it did not fail to exhaust local remedies, petitioner presented arguments identical to those above. We reject them again here for the same reasons and conclude again here that the board had authority to review the planning commission order for lawfulness in substance or procedure. Hood River County Zoning Ordinance (HRCZO) 61.10(G).[3]

We further agree with the county that even if the planning commission committed a procedural error, petitioner has not established any prejudice to petitioner's substantial rights because petitioner appealed the order to the board and the board issued a decision on the merits. For example, petitioner argues that the planning commission's conclusion that four votes were required to overturn

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[3] HRCZO 61.10(G) provides, in relevant part:

> "The Board may modify, affirm, reverse or remand the hearings body's order. The Board shall reverse or remand the initial hearings body's order only if it finds:
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> "1. The order to be unlawful in substance or procedure, but error in procedure shall not be cause for reversal or remand unless the Board shall find that substantial rights of the petitioning party were prejudiced thereby and defects in the content of the notice required by this section but not asserted at or prior to the commencement of the hearing before the Planning Commission[.]"

the planning director's decision impermissibly shifted the burden of proof to petitioner while intervenor inarguably bears the burden to prove that applicable criteria are satisfied. Petition for Review 22. Importantly, the planning commission decision is not subject to our review. We review petitioner's arguments that *the board* erred in approving the application. Any asserted planning commission error provides no basis for reversal or remand in this appeal. Petitioner does not argue that the *board* impermissibly shifted the burden of proof to petitioner. Indeed, the board specifically found that that "*the applicant has carried its burden of proof* to demonstrate that the approved bed and breakfast use satisfies all applicable approval criteria[.]" Record 11 (emphasis added). Petitioner challenges that finding on other grounds in the fourth assignment of error. Petition for Review 38. The first subassignment of error provides no basis for reversal or remand and is denied.

B. Second Subassignment of Error

In the second subassignment of error, petitioner argues that the board lacked jurisdiction to review the planning commission order because the order is not a "valid" action of the planning commission for purposes of section G(1) of the planning commission bylaws. Petitioner also argues that the board lacked jurisdiction to review the planning commission order because, according to petitioner, the order is a unilateral action of the planning commission chair. Petitioner presented identical arguments in *Thrive I*. We concluded that the planning commission order is not a unilateral action of the planning commission

chair. We also concluded that the relevant HRCZO provisions do not limit the board of commissioners to reviewing only *valid* actions of the planning commission. For the reasons explained in *Thrive I*, we reject petitioner's arguments here and, again, we conclude that the board had jurisdiction to review the planning commission order.

The second subassignment of error is denied.

The first assignment of error is denied.

SECOND AND THIRD ASSIGNMENTS OF ERROR

In the second and third assignments of error, petitioner argues that the county failed to provide the *de novo* appeal of the planning director's decision made without a hearing, as required by ORS 215.416(11)(a)(A) and (D), which allow a local decision maker to approve or deny a permit without a hearing if the local government provides a local *de novo* appeal. ORS 215.416(11)(a)(E) provides the procedure for the required *de novo* hearing.[4]

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[4] ORS 215.416(11)(a) provides, in part:

> "(A) The hearings officer or such other person as the governing body designates may approve or deny an application for a permit without a hearing if the hearings officer or other designated person gives notice of the decision and provides an opportunity for any person who is adversely affected or aggrieved, or who is entitled to notice under paragraph (c) of this subsection, to file an appeal.
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> "* * * * *

Petitioner argues that the county failed to provide petitioner the required *de novo* hearing because the planning commission order is not a decision on the merits of whether the application satisfies the applicable criteria. Petitioner argues that the board's decision on the merits of the application does not render that error harmless because the board reviewed the planning commission decision on the evidentiary record before the planning commission.

> "(D) An appeal from a hearings officer's decision made without hearing under this subsection shall be to the planning commission or governing body of the county. An appeal from such other person as the governing body designates shall be to a hearings officer, the planning commission or the governing body. In either case, the appeal shall be to a de novo hearing."
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> "* * * * *
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> "(E) The de novo hearing required by subparagraph (D) of this paragraph shall be the initial evidentiary hearing required under ORS 197.797 as the basis for an appeal to [LUBA]. At the de novo hearing:
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> "(i) The applicant and other parties shall have the same opportunity to present testimony, arguments and evidence as they would have had in a hearing under subsection (3) of this section before the decision;
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> "(ii) The presentation of testimony, arguments and evidence shall not be limited to issues raised in a notice of appeal; and
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> "(iii) The decision maker shall consider all relevant testimony, arguments and evidence that are accepted at the hearing."

Petitioner cites *Hayden Island, Ltd. v. City of Portland*, 46 Or LUBA 439 (2004) (*Hayden Island*), in support of its argument. There, the applicant sought adjustments to several applicable standards. The city's bureau of development services (BDS) approved the adjustments without a hearing, and opponents appealed the BDS decision to the city's adjustment committee, which held a *de novo* hearing on the application. At the conclusion of the hearing, a committee member moved to allow the appeal and reverse the BDS decision. Two committee members voted in favor of the motion, and two committee members voted against the motion. A provision of the city's zoning ordinance provided that, where four members of the adjustment committee are present, three votes are required to take action on a motion. In addition, one of the adjustment committee's procedural rules provided that (1) a tie vote results in a failure of the motion and (2) failure to pass a motion to allow an appeal has the legal consequence of denying the appeal. Because the motion to allow the appeal received a tie vote, the city issued an order signed by the adjustment committee chair denying the appeal and affirming the BDS decision.

The petitioner appealed the adjustment commission's order to LUBA. We explained that the statutory requirements for a *de novo* hearing "implicitly require that the reviewing body that is assigned the responsibility for providing the *de novo hearing* must make a *decision* at the conclusion of the hearing." *Hayden Island*, 46 Or LUBA at 443-44 (emphasis in original) (applying ORS 227.175(10)(a)(A) and (D), the city analog to ORS 215.416(11)(a)(A) and (D)).

We further explained that "[a] tie vote that adopts no position one way or the other *on the merits* of the local appeal of the height adjustment and completely defers to the BDS decision based on an adjustment committee procedural rule is not *de novo* review." *Id.* at 444 (emphasis added). We concluded that, "[i]n relying on its rule to give its tie vote the legal effect of denying the appeal of the height adjustment, the adjustment committee failed to provide the *de novo* appeal that is required." *Id.* at 445.

Under *Hayden Island*, ORS 215.416(11)(a)(A) and (D) require not only that the local government body or delegated individual conducting the *de novo* hearing allow new evidence and argument in the local appeal, but also that the review body make a decision *on the merits* of the local appeal. Petitioner argues that, in relying on section G(1) of the planning commission's bylaws to conclude that the planning commission's three-to-two vote had the legal effect of affirming the planning director's decision, the planning commission did not make a decision on the merits of the local appeal, and the county therefore failed to provide the *de novo* appeal that is required by ORS 215.416(11)(a)(A) and (D).

The county initially responds that the planning commission did make a decision on the merits of the local appeal and that it therefore did provide the *de novo* appeal that is required by ORS 215.416(11)(a)(A) and (D). We reject that argument. As we implied in *Hayden Island*, a decision on the merits of an application is a decision based on findings of compliance (or noncompliance) with applicable approval criteria, including applicable submission and procedural

requirements. The planning commission did not decide whether intervenor's application complies with any applicable approval criteria. The planning commission order is not a decision on the merits of petitioner's local appeal.

The county and intervenor (together, respondents) also argue that *Hayden Island* is distinguishable. Respondents observe that, whereas the adjustment committee was the final decision maker in *Hayden Island*, the planning commission is not the final decision maker here. Instead, the board is the final decision maker. Respondents observe that, while the board did not accept new evidence, it accepted new argument and made a decision on the merits of petitioner's local appeal based on the evidence in the record before the planning commission. We understand respondents to argue, even if the planning commission erred by not issuing a decision on the merits of the application, that procedural error was cured by the board's review of the record and subsequent decision on the merits of the application. We agree.

We will reverse or remand a decision where the local government "[f]ailed to follow the procedures applicable to the matter before it in a manner that prejudiced the substantial rights of the petitioner[.]" ORS 197.835(9)(a)(B). "[T]he 'substantial rights' of parties that may be prejudiced by failure to observe applicable procedures are the rights to an adequate opportunity to prepare and submit their case and a full and fair hearing." *Kopacek v. City of Garibaldi*, ___ Or LUBA ___, ___ (LUBA No 2020-094, Feb 11, 2021) (slip op at 7) (quoting *Muller v. Polk County*, 16 Or LUBA 771, 775 (1988)).

Petitioner argues that the planning commission was required to issue a decision on the merits and the planning commission's three-to-two vote should have resulted in the denial of intervenor's application. A party's substantial rights do not include the right to a particular result. *Muller*, 16 Or LUBA at 772-73. Petitioner was not entitled to a planning commission decision denying the application.

For an initial decision made without a hearing, ORS 215.416(11)(a) requires (1) the right to file a local appeal and receive a *de novo* hearing, (2) an opportunity to present testimony, arguments, and evidence, and (3) after the *de novo* hearing, a decision on the merits of whether the application satisfies the applicable criteria. Here, those requirements were fulfilled by different bodies: The planning commission hearing provided petitioner an opportunity to present testimony, arguments, and evidence, and the board decided that the application satisfies the applicable criteria based on the arguments presented to the board and the evidentiary record before the planning commission. Petitioner does not argue or demonstrate that the county's procedure deprived petitioner of an adequate opportunity to prepare and submit its case. Petitioner does not argue that petitioner tried to submit new evidence to the board or that additional evidence would have affected the board's decision on the merits. Petitioner also does not contend that it objected to the board's on-the-record review. Absent any showing of prejudice to its substantial rights, petitioner has not established any basis for reversal or remand. ORS 197.835(9)(a)(B).

The second and third assignments of error are denied.

FOURTH ASSIGNMENT OF ERROR

We begin by setting out the applicable criteria. A home occupation involving a bed and breakfast facility in an existing dwelling is a conditional use in the F-1 zone and subject to HRCZO Article 56. Bed and breakfast facilities are approvable as "an accessory use within a single family dwelling." HRCZO 56.00. HRCZO 56.50(B) provides that bed and breakfast facilities "shall be *clearly incidental, accessory and subordinate* to residential use." (Emphasis added.)

In the F-1 zone, bed and breakfast facilities are a conditional use home occupation and, thus, subject to the home occupation standards at HRCZO 53.30. HRCZO 56.20(A)(6). "A home occupation * * * is a *secondary use, incidental, accessory or subordinate* to the residential uses or the existing building." HRCZO 53.30(A)(2) (emphasis added).

The term "secondary" is not defined in the HRCZO. As used in the HRCZO, "incidental" means "[s]econdary and minor in significance and bearing a reasonable relationship with the primary building or use." HRCZO 1.160. "Accessory use" means "[a] use that is incidental and subordinate to the primary use of a property." *Id.* "Subordinate" means "[s]econdary to, derived or resulting from, and dependent upon a principal building or principal use." *Id.*

Bed and breakfast facilities must be "located in a building designed and occupied as a single-family dwelling" and the primary use must remain a single-family dwelling. HRCZO 56.50(A), 56.10(A). A "single family dwelling" is "[a]

detached building containing one dwelling unit." HRCZO 56.10(D). A "dwelling unit" is "[o]ne or more rooms designated for occupancy by one family and not having more than one cooking facility." HRCZO 56.10(C). A "family" is "[o]ne or more persons, related or unrelated, living together as a single integrated household in a dwelling unit. For purposes of this definition, an 'integrated household' functions as a united group and often shares household responsibilities and activities, such as living expenses, chores, and eating meals together." HRCZO 1.160.

To summarize those standards and definitions, a bed and breakfast is a home occupation that must be secondary, minor in significance, and dependent upon the principal residential use of a single-family dwelling.

The board concluded that the bed and breakfast use of the Log Home will be "secondary," "incidental," "accessory," and "subordinate" to the residential use. The board interpreted the defined terms and the undefined term "secondary" "collectively to require a fact-specific inquiry into whether, here, the residential use or the bed and breakfast use of the Log Home will predominate." Record 12. The board concluded that the residential use of the existing structure will predominate over the bed and breakfast use for the following reasons: (1) a caretaker tenant will reside in the existing structure on a year-round basis, whereas the bed and breakfast use will occur for approximately six months of the year; (2) only three bedrooms will be authorized for the bed and breakfast use; (3) longer-term tenants may reside in those three bedrooms; and (4) the exterior

of the structure will retain its character as that of a single-family dwelling. Record 12-13.

Petitioner argues that the board misconstrued the applicable HRCZO provisions and that the board's conclusion that the residential use will predominate is not supported by substantial evidence. For reasons explained below, we defer to the board's interpretation of its own code except with respect to the board's focus on the comparison of frequency of use. Furthermore, we agree with petitioner that the board's conclusion that the residential use will predominate is not supported by substantial evidence.

A. Construction of Law

Petitioner argues that the board misconstrued the terms "secondary," "incidental," "accessory," and "subordinate." First, petitioner argues that the board impermissibly collapsed those terms into one "predominates" inquiry. Second, petitioner argues that the county impermissibly focused on the relative frequency and duration of the bed and breakfast use as compared to the residential uses.

We are required to affirm a governing body's interpretation of its own comprehensive plan provision or land use regulation unless the interpretation is inconsistent with the provision or regulation's express language, purpose, or underlying policy—that is, we must affirm such an interpretation if it is plausible. ORS 197.829(1); *Siporen v. City of Medford*, 349 Or 247, 259, 243 P3d 776

(2010) (applying ORS 197.829(1)).[5] We are required to affirm the county's plausible interpretation, even if petitioner presents, or we conceive of, a stronger interpretation. *See Mark Latham Excavation, Inc. v. Deschutes County*, 250 Or App 543, 554-55, 281 P3d 644 (2012) ("The existence of a stronger or more logical interpretation does not render a weaker or less logical interpretation 'implausible' under the *Siporen* standard.").

The interpretive issue under this fourth assignment of error concerns only the application of HRCZO provisions. The board found that HRCZO 53.30(A) implements ORS 215.448(1)(a), which governs home occupations in forest zones and requires that the home occupation "be operated by a resident or employee of a resident of the property on which the business is located[.]" *See* Record 15. The

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[5] ORS 197.829(1) provides:

> "[LUBA] shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government's interpretation:
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> "(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
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> "(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
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> "(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or
>
> "(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements."

county may establish additional reasonable conditions of approval for the establishment of a home occupation. ORS 215.448(2). While portions of HRCZO 53.30(A) mirror and implement ORS 215.448, that statute does not contain the terms "secondary," "incidental," "accessory," and "subordinate." Petitioner does not assert that those terms implement state law or that the county's interpretation of those terms is contrary to state law, including ORS 215.448. Accordingly, we review the county's interpretation of the HRCZO terms applying *Siporen* deference.

1. "Predominates"

Petitioner argues that the board misconstrued HRCZO 53.30(A) and HRCZO 56.50(B) in failing to separately inquire whether the bed and breakfast use will be "secondary," "incidental," "accessory," and "subordinate" to the residential use and, instead, collapsing those terms into a single "predominates" inquiry.

The county responds that LUBA previously upheld a governing body interpretation collapsing "accessory," "incidental," and "subordinate" into a single inquiry in *Kaplowitz v. Lane County*, 74 Or LUBA 386 (2016), *aff'd*, 285 Or App 764, 398 P3d 478 (2017). In *Kaplowitz*, the subject property was zoned Impacted Forest Land (F-2) and developed with a residence and a horse barn/arena. The applicant sought to convert a portion of the horse barn/arena into a "sanctuary" as a use that would have been accessory to the residence. The county's code allowed "[u]ses and development accessory to existing uses and

development" in the F-2 zone, and it defined "accessory" to mean "[i]ncidental, appropriate and subordinate to the main use of a tract or structure," but it did not define "incidental," "appropriate," or "subordinate." *Kaplowitz*, 285 Or App at 766 n 2.

> "The county interpreted [the definition of 'accessory'] as requiring consideration of the size of the accessory use in relation to the size of the permitted residence, as well as an examination of the intensity of the use of the accessory structure as weighed against the intensity of the use of the residence. The county also concluded that an 'appropriate' use required a comparison of the degree of the impact on the neighborhood from the use of the accessory structure and the residence. The county determined that a relevant consideration for whether an accessory use is 'subordinate' to a residential use is that the use is residential—and not commercial—in character. Finally, the county concluded that an 'incidental, appropriate and subordinate' accessory use in the forestland zone is one that is confined to use by residents of the tract and their guests, and not open to general use by the public." *Id.* at 775.

The board of commissioners approved the application. On appeal, the petitioner argued that the board of commissioners misconstrued "incidental," "appropriate," and "subordinate." We explained that dictionary definitions of those terms were not particularly helpful in that context and that the question of whether the sanctuary use would have been "incidental," "appropriate," and "subordinate" to the residential use was obviously subjective. Because we could not say that the board of commissioners' interpretations were inconsistent with the commonly understood meaning of the relevant terms, we affirmed those interpretations under ORS 197.829(1) and *Siporen*. On judicial review, the Court

of Appeals affirmed our decision and concluded that we properly deferred to the county's interpretation.

The board of commissioners in *Kaplowitz* applied at least some the relevant terms separately. In that sense, *Kaplowitz* is not on all fours with the present appeal. However, like the dictionary definitions in *Kaplowitz*, the HRCZO definitions quoted above are not particularly helpful in distinguishing among the applicable terms. Petitioner observes that the HRCZO definitions of "incidental" and "subordinate" are different; however, petitioner does not explain why the board's single "predominates" inquiry fails to capture any of those differences and is thus inconsistent with the express language of the applicable HRCZO regulations. Petitioner also does not develop any argument that the board's interpretation is inconsistent with the provisions' purpose or underlying policy. We will not develop arguments for petitioner. *Deschutes Development v. Deschutes Cty.*, 5 Or LUBA 218, 220 (1982). Absent a more developed argument, we cannot say that the board's interpretation is not plausible because it collapses relevant terms into one predominates inquiry.[6]

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[6] In *York v. Clackamas County*, 79 Or LUBA 278, 286-89 (2019), we held that the local government *did* err in collapsing the terms "limits" and "impairs" into a single "substantially worse" inquiry. The decision maker in *York* was a hearings officer, not the governing body. Accordingly, we did not review the interpretations under ORS 197.829(1) and *Siporen*.

2. Relative Frequency of the Uses

Petitioner also argues that the board misconstrued HRCZO 53.30(A) and HRCZO 56.50(B) in concluding that the bed and breakfast use will be "incidental" and "subordinate" to the residential use because intervenor proposed to employ a caretaker tenant year-round, while the bed and breakfast use would be limited to approximately six months of the year. Petitioner argues that the county impermissibly focused on the relative duration of the uses. Petitioner argues that the Court of Appeals rejected a similar interpretation of the terms "incidental" and "subordinate" in *Friends of Yamhill County v. Yamhill County*, 301 Or App 726, 458 P3d 1130 (2020).

In *Friends of Yamhill County*, the court interpreted ORS 215.283(4)(d)(A), which allows a county to authorize certain "agritourism or other commercial events or activities" on land zoned for exclusive farm use if they are "incidental and subordinate to existing commercial farm use of the tract." 301 Or App at 728. After examining various treatises, prior LUBA decisions, the context provided by other subsections of the statute, and the legislative history of the statute, the court concluded:

"[T]he legislature intended the phrase 'incidental and subordinate to

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In *Friends of Yamhill County v. Yamhill County*, 301 Or App 726, 735, 458 P3d 1130 (2020), the court observed that, "[a]lthough frequency is one factor in comparing the main and accessory uses, the related concepts of 'incidental' and 'subordinate' reflect a conclusion about *predominant* use in light of many relevant factors[.]" (Emphasis added.)

> existing commercial farm use of the tract' to carry its established, technical meaning in the context of Oregon's land-use laws. The inquiry involves a consideration of any relevant circumstances, including the nature, intensity, and economic value of the respective uses, that bear on whether the existing commercial farm use remains the predominant use of the tract.
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> "* * * [T]he text, context, and legislative history of ORS 215.283(4)(d)(A) does not preclude a county from relying on a comparison of the number of days of activities, but frequency is only one factor." *Friends of Yamhill County*, 301 Or App at 739.

We agree with petitioner that the county misconstrued the terms "secondary," "incidental," "accessory," and "subordinate" by focusing primarily on the frequency of residential use as compared to bed and breakfast use. Even though "secondary," "incidental," "accessory," and "subordinate" can plausibly be collapsed into one "predominates" inquiry, that inquiry cannot plausibly be limited to comparing only the frequency of use. Instead, the county must consider other factors such as the nature, intensity, and economic value of the respective uses.

B. Substantial Evidence

Petitioner argues that the board's conclusion that the residential use will predominate over the bed and breakfast use is not supported by substantial evidence. Instead, according to petitioner, the record overwhelmingly demonstrates that the bed and breakfast use is the primary proposed use, and any residential use is subordinate to that use. We agree for reasons explained below.

We will remand a decision that is not supported by substantial evidence in the whole record. ORS 197.835(9)(a)(C); OAR 661-010-0071(2)(b). Substantial

evidence is evidence a reasonable person would rely on in making a decision. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993). In reviewing the evidence, LUBA may not substitute its judgment for that of the local decision maker. Rather, LUBA must consider all the evidence to which it is directed and determine whether, based on that evidence, a reasonable local decision maker could reach the decision that it did. *Younger v. City of Portland*, 305 Or 346, 358-60, 752 P2d 262 (1988).

The board's findings rely heavily on the terms of a draft caretaker tenant lease (draft lease) to support of the board's conclusion that the bed and breakfast use will be secondary, incidental, accessory, and subordinate to a primary residential use. Petitioner observes that the draft lease requires the caretaker tenant to operate the bed and breakfast, provides that the draft lease is to be construed as a commercial lease, and limits the residential use of the existing structure to one bedroom, while the remainder of the structure is required to be available for "the regular operation of lodging, restaurant, and bar business." Petition for Review 40 (quoting Record 705). Petitioner argues that the draft lease is evidence that the caretaker tenant is merely an employee of the bed and breakfast and any residential use is subordinate to the bed and breakfast use. In other words, the residential use is merely "derived," "resulting from," and "dependent upon" the bed and breakfast use. HRCZO 1.160 (defining "subordinate"). We agree. This is a case of the tail wagging the dog.

Petitioner also observes that the challenged approval contains no conditions of approval that limit the bed and breakfast use to six months of the year, require that a caretaker reside in the existing structure on a year-round basis, or require that longer-term tenants be allowed to reside in the three bedrooms identified as those to be used for the bed and breakfast use. We understand petitioner to argue that, even if the board did not err in focusing on the relative frequency of the bed and breakfast and residential uses, the board's conclusion is not supported by substantial evidence because the relative frequency of the uses is not memorialized in conditions of approval. Again, we agree.

The board's decision incorporated by reference the planning director's decision. Record 5. In turn, the planning director's decision states that "the proposed B&B shall operate as described in [intervenor's] written description and depicted on [intervenor's] approved site plan and floor plans, dated April 4, 2022." Record 29. Respondents do not point us to anything in that referenced written description that would limit the frequency of the bed and breakfast uses or require that the Log Home be available for longer-term rental during any period.

We observe that intervenor's written description of the use includes the following statement:

> "From late October to early May the Log Home will be used as a long-term rental for our team at Mt. Hood Meadows and Cooper Spur with a caretaker living on site and team members renting out the other rooms for 6+ months. During the months of early May to

> late October our caretaker will continue to live in the Log Home full time and the other bedrooms will be rented out as a Bed and Breakfast during those months." Record 1009.

Before the planning commission, intervenor proposed a condition of approval that would have expressly limited the bed and breakfast use to 180 days annually. Before the board, petitioner argued that this proposed condition of approval would not ensure that the bed and breakfast use is "incidental, accessory, and subordinate" to the residential use of the Log Home. The board chose not to modify the planning director's decision as affirmed by the planning commission's order and, thus, did not adopt the proposed condition of approval. Record 13 n 5.

Uncontradicted representations from an applicant can constitute substantial evidence. *See King v. Deschutes County*, 77 Or LUBA 339, 345-46 (2018) (evidence submitted by applicant accepted as substantial where petitioner can point to nothing in the record to that calls it into question); *see also Pete's Mtn. Home Owners Assoc. v. Clackamas County*, 55 Or LUBA 287, 313 (2007) (finding an unchallenged representation in a staff report as evidence a reasonable person would rely on). An approval is limited by the use proposed in the application. A condition of approval to ensure that the use is so limited might not be necessary if that limitation is clearly part of the proposal. However, when a local government relies on an applicant's voluntary limitations on a proposed use to find that approval criteria are satisfied, those limitations must be memorialized in conditions of approval. More than testimony by the applicant expressing

willingness to provide such features is required. *M & T Partners, Inc. v. City of Salem*, 80 Or LUBA 221 (2019), *aff'd*, 302 Or App 159, 460 P3d 117 (2020); *Kaplowitz*, 74 Or LUBA at 386; *Sellwood-Moreland Improvement League v. City of Portland*, 68 Or LUBA 213 (2013); *Culligan v. Washington County*, 57 Or LUBA 395, 401-02 (2008); *Penland v. Josephine County*, 29 Or LUBA 213 (1995).

The fourth assignment of error is sustained, in part.

FIFTH ASSIGNMENT OF ERROR

A. Resident Requirement

HRCZO 53.30(A) provides, in part, that a home occupation use "shall be operated * * * by a resident of the property on which the home occupation is located." ORS 215.448(1)(a) governs home occupations in forest zones and requires that the home occupation "be operated by a resident or employee of a resident of the property on which the business is located[.]" The county may establish additional reasonable conditions of approval for the establishment of a home occupation. ORS 215.448(2).

The board found that a caretaker tenant is a "resident" of the Log Home for purposes of operating the bed and breakfast home occupation use. The board interpreted "resident" within the meaning of HRCZO 53.30(A) by relying on the definitions of "resident" and "residential use" in HRCZO 1.160. Record 13-15. HRCZO 1.160 defines "resident" as follows: "A person who lives somewhere permanently or on a long-term basis. *As it applies to short-term rentals*, the word

resident is intended to mean a person who occupies their domicile, as defined in this Ordinance." (Emphasis added.) HRCZO 1.160 defines "domicile" as "[a] person's fixed, permanent, and principal home for legal purposes where the person intends to remain and to which, if absent, the person intends to return." In addition, it defines "residential or residential use" as follows: "The occupancy of a dwelling unit on a non-transient basis. Uses where tenancy is arranged on a transient basis of less than 30 days are not considered residential."

The board concluded that the proposed bed and breakfast home occupation will be operated by a "resident" of the subject property. The board observed that, under the HRCZO definition of "residential," tenancies of less than 30 days are not residential. Record 14. Because the draft lease is for a term of 30 days, and because a condition of approval provides that the executed lease "shall stipulate a term of at least 30 days," the board of commissioners concluded that the caretaker tenant will be a "resident" of the property who will operate the proposed bed and breakfast home occupation. Record 14-15.

Petitioner argues the board misconstrued the term "resident" as defined in the HRCZO and that there is not substantial evidence to support a finding that a caretaker tenant living in the Log Home under the draft lease is a resident. Because the county code implements ORS 215.448(1)(a), we do not defer to the county's interpretation of the term "resident." *See Kenagy v. Benton County*, 115 Or App 131, 134-36, *rev den*, 315 Or 271 (1992) (LUBA does not defer to the

governing body's interpretation of a local provision that implements and adopts state statutory language).[7]

1. The board did not misconstrue the term "resident" as used in the HRCZO.

Petitioner argues that, rather than relying on the HRCZO definition of "residential or residential use" to conclude that an occupant is a "resident" if they occupy property for at least 30 days, the board should have relied on the HRCZO definitions of "resident" and "domicile" to conclude that an occupant is a "resident" if they occupy property on a more fixed, permanent basis. Petitioner argues that, while the caretaker's use of the existing structure might be "residential," in the sense that the caretaker will occupy the subject property for at least 30 days under the draft lease and the condition of approval, that does not mean that the caretaker is a "resident."

The county responds that the board did not rely exclusively on the definition of "residential or residential use" but, rather, interpreted that definition as being consistent with the HRCZO definition of "resident": "A person who

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[7] Petitioner develops no argument under ORS 215.448(1)(a). Accordingly, we address only petitioner's argument that the county's interpretation of "resident" misconstrues that term as used in the county code and express no opinion as to whether the county's interpretation of the term "resident" misconstrues that term as used in ORS 215.448(1)(a) or is inconsistent with that statute. *See Green v. Douglas County*, 63 Or LUBA 200, 223-24, *rev'd and rem'd on other grounds*, 245 Or App 430, 263 P3d 355 (2011) (observing that county's decision appeared to violate ORS 215.448(1)(a) but not addressing that issue because petitioners do not assign error under ORS 215.448(1)(a)).

lives somewhere permanently or on a long-term basis. As it applies to short-term rentals, the word resident is intended to mean a person who occupies their domicile, as defined in this Ordinance." HRCZO 1.160. The county points out that the HRCZO definition of "resident" incorporates the definition of "domicile" only "as it applies to short-term rentals." *Id.* The HRCZO distinguishes between short-term rental home occupations, which are governed by HRCZO 53.40 to 53.68, and bed and breakfast facilities, which are governed by HRCZO Article 56, and because intervenor proposes the latter use, the county argues that the HRCZO definition of "domicile" is irrelevant. The HRCZO defines "resident" for purposes of the bed and breakfast home occupation by the length of occupation and refers to domicile only to define "resident" for purposes of short-term rental regulation, which is not at issue here. Petitioner has not established that the county erred in interpreting the term "resident" as used in HRCZO 53.30(A).

2. The record contains substantial evidence that the caretaker tenant will be a resident.

Petitioner also argues that the board's conclusion that the proposed bed and breakfast home occupation will be operated by a "resident" of the subject property is not supported by substantial evidence because the draft lease requires the caretaker tenant to operate the bed and breakfast and provides that the draft lease is to be construed as a commercial lease. Petitioner argues that, as a result of those provisions, the draft lease is exempt from the provisions of ORS chapter

90, which governs residential tenancies. ORS 90.110(7). Petitioner argues that respondents cannot have it both ways by considering the caretaker to be a "resident" of the subject property while simultaneously depriving the caretaker of the landlord-tenant protections afforded by state law.

The board of commissioners addressed and rejected that argument:

> "The [b]oard acknowledges that [the draft caretaker's lease] provides that it is a 'commercial lease' that is not subject to 'residential landlord/tenant acts or laws,' and other provisions of the [draft caretaker's lease] address 'commercial' activities—*e.g.*, * * * the employee caretaker's rights and duties to operate the bed and breakfast. However, these terms do not change the fact that, before operating the bed and breakfast, [intervenor] must execute—and the Planning Department must approve—a lease that authorizes (and, in fact, requires) the employee caretaker to live in the Log Home for at least 30 days. This fact renders the employee caretaker a 'resident,' as the [b]oard interprets HRCZO 1.160, 53.30(A), and 56.50(D)." Record 15.

The county reiterates those arguments on appeal.

We agree with the county that whether the lease is characterized as a residential lease subject to ORS chapter 90 or a commercial lease exempt therefrom is irrelevant for purposes of determining whether the caretaker will be a "resident" of the subject property for purposes of HRCZO 53.30(A). Based on the draft lease and the condition of approval requiring intervenor to submit an executed lease for county approval before operating the bed and breakfast, a reasonable person could conclude that the caretaker will occupy the subject property for at least 30 days and would therefore be a "resident" of the subject

property for purposes of HRCZO 53.30(A). Accordingly, we conclude that the county's decision on this point is supported by substantial evidence.

B. Owner or Lessee Requirement

An applicant for a bed and breakfast use must present written evidence that the single-family dwelling in which a bed and breakfast will operate is "owner or lessee occupied." HRCZO 56.50(C). The board concluded that that requirement is satisfied because the caretaker tenant will be a lessee. The HRCZO does not define "lessee." The board interpreted HRCZO 56.50(C) to require that:

> "1. There be a signed written lease between the owner/lessor and the lessee, which establishes a long-term residential agreement between the parties;
>
> "2. The lessee/operator must comply with the HRCZO Article 1 definitions of a 'resident' and 'residential use'; and
>
> "3. The lessee/operator must reside in the dwelling where the bed and breakfast facility is located." Record 17.

Based on the draft lease and the condition of approval requiring intervenor to submit an executed lease for county approval before operating the bed and breakfast, the board concluded that there will be a signed written lease between intervenor and the caretaker, which will establish a long-term residential agreement between the two.

Petitioner argues that the board's conclusion that the caretaker will be a "lessee" is not supported by substantial evidence. Petitioner argues that because the draft lease requires the caretaker to operate the bed and breakfast, no landlord-tenant relationship will exist between intervenor and the caretaker, meaning that

the caretaker will not be a "lessee." In support of that proposition, petitioner cites *Montgomery v. Howard Johnson Inn, Gresham*, 228 Or App 315, 208 P3d 503 (2009).

Montgomery concerned whether occupancy which was conditioned on employment was subject to ORS chapter 90. That case did not concern whether occupancy which is conditioned on employment can create a lessor-lessee relationship as a general matter. We agree with the county that whether the lease is subject to ORS chapter 90 is irrelevant for purposes of determining whether the caretaker tenant will be a "lessee" for purposes of HRCZO 56.50(C). Based on the draft lease and the condition of approval requiring intervenor to submit an executed lease for county approval before operating the bed and breakfast, a reasonable person could conclude that the caretaker tenant will be a "lessee" of the existing structure. Accordingly, we conclude that the county's decision on this point is supported by substantial evidence.

The fifth assignment of error is denied.

The county's decision is remanded.