



1 Opinion by Sherton.

2 NATURE OF THE DECISION

3 Petitioner appeals Columbia County Order No. 10-88  
4 approving a conditional use permit for operation of a  
5 "day care/group home" as a home occupation.

6 MOTION TO INTERVENE

7 Don and Donna Kosterow filed a motion to intervene,  
8 alleging they were the applicants in the proceeding before  
9 respondent Columbia County (county) and are aggrieved or have  
10 interests adversely affected by the county's decision.

11 There is no opposition to the motion. ORS 197.830(5)(b)(A)  
12 and OAR 661-10-050(1) provide that the applicant who initiated  
13 the appealed action before the local government may intervene  
14 in and be made a party to the LUBA review proceeding.

15 The motion to intervene is granted.

16 FACTS

17 Intervenors-respondent Don and Donna Kosterow (applicants)  
18 applied to the county for a conditional use permit to operate a  
19 "day care/group home" as a home occupation on property they own  
20 in the Single-Family Residential (R-10) zoning district. The  
21 subject property is comprised of three tax lots totaling 2.25  
22 acres. The property contains the applicants' dwelling, a  
23 mobile home occupied by the applicants' daughter-in-law and a  
24 pole building with metal siding, described by the county as  
25 either a barn or shed.

26 The applicants propose to remodel the existing pole

1 building for use as the proposed day care center/group home.  
2 Record 118. The remodeling will include radical changes to the  
3 interior of the building, including removal of the hay loft and  
4 horse stalls, paving of the dirt floor, and construction of an  
5 office, bathroom, kitchen, baby room and sleep room. Record  
6 47, 51. On the exterior of the building, existing chicken  
7 coops will be removed, the entrance improved, cedar siding  
8 added, and an attached, fenced-in play area constructed.  
9 Record 46, 51. The proposed use will take place inside the  
10 remodeled building, except for play periods for the children in  
11 the adjacent play area. Record 51.

12 The Columbia County Planning Commission's October 12, 1987  
13 approval of the conditional use permit, with conditions, was  
14 appealed to the board of commissioners by both petitioner and  
15 applicants. On January 20, 1988, the board of commissioners  
16 denied both appeals and approved the permit with modified  
17 conditions. This appeal followed.

18 FIRST ASSIGNMENT OF ERROR

19 "Columbia County erred in granting a Conditional Use  
20 Permit that would permit the operation of a Home  
21 Occupation which would not be exclusively confined to  
the interior of the building."

22 Petitioner points out that the R-10 zone allows "[h]ome  
23 occupations in accordance with ORS 215.448" as a conditional  
24 use. Columbia County Zoning Ordinance (CCZO) 703.1.  
25 Furthermore, the ordinance states that the definition of home  
26 occupation " \* \* \* shall follow that set out in ORS 215.448."

1 CCZO 100.37. Petitioner argues that the conditional use permit  
2 violates the statute and CCZO because it is inconsistent with  
3 the provision of ORS 215.448(1)(c) permitting a home occupation  
4 only if it:

5 "Will be operated in:

6 "(A) The dwelling; or

7 "(B) Other buildings normally associated with  
8 uses permitted in the zone in which the property  
is located; \* \* \* "

9 Petitioner contends the permit violates ORS 215.448(1)(c)  
10 because children will be allowed to play outside the remodeled  
11 barn. According to petitioner, this means the proposed use  
12 will not satisfy the statutory requirement that a home  
13 occupation be conducted entirely in a building.

14 Neither the county nor the applicants have appeared in this  
15 proceeding. The county's order contains no findings addressing  
16 the county's interpretation of ORS 215.448(1)(c) or application  
17 of the statute to the facts of this case. Furthermore, the  
18 county's decision places no limitations on the size of the play  
19 area or the amount of time children at the day care center may  
20 spend outside the building.

21 The statute and, by reference, the county ordinance clearly  
22 require that a home occupation be conducted in the dwelling or  
23 other buildings. Such a requirement is consistent with other  
24 statutory provisions which limit the potential impacts of home  
25 occupations, such as a limitation on the number of persons  
26 employed and a requirement that the home occupation not

1 interfere with existing uses on nearby land or other uses  
2 permitted in the zone. See ORS 215.448(1)(b) and (d).

3 We agree with petitioner that a day care center/group home  
4 use which includes an unlimited amount of activity by children  
5 and staff outside of existing buildings is contrary to ORS  
6 215.448(1)(c) and the CCZO.

7 The first assignment of error is sustained.

8 SECOND ASSIGNMENT OF ERROR

9 "Columbia County erred in granting a Conditional Use  
10 Permit that would allow respondents to change the  
11 characteristics of an existing barn by remodeling it  
12 so that it can be used for the operation of a Home  
13 Occupation known as a 24-hour day care facility."

14 Petitioner argues the conditional use permit violates ORS  
15 215.448(1)(c)(B) and the CCZO because it would allow a home  
16 occupation in a building not normally associated with uses  
17 permitted in the R-10 zone. Petitioner concedes that the  
18 existing pole building is the type of building typically found  
19 in the R-10 zone. However, petitioner contends that the  
20 extensive remodeling proposed by the applicants will change the  
21 building to one not typically found in the R-10 zone.

22 Petitioner argues a home occupation must be incidental to  
23 the principle use of the property. Petitioner further argues  
24 that if the home occupation is conducted in an accessory  
25 building, rather than the dwelling, it must be incidental to  
26 use of that accessory building. According to petitioner, it is  
not permissible to change the structure and character of the  
accessory building to something which would not otherwise be

1 allowed in the R-10 zone. Such change, even if limited to  
2 alterations to the interior of the structure, would also  
3 violate CCZO 218, which provides:

4 "Conversion of Buildings: The conversion of the use or  
5 occupancy of any building \* \* \* shall be permitted  
6 only within a district in which a new building of  
7 similar occupancy would be permitted under this  
8 ordinance, and only when the resulting occupancy will  
9 comply with the requirements governing new  
10 construction and use in such district."

11 The county's decision interprets the statute to mean that  
12 as long as a building is not rendered significantly larger than  
13 or different in appearance from other accessory buildings  
14 typically found in the zone, "it doesn't matter what remodeling  
15 is done on the interior." Record 16. The county's  
16 interpretation relies primarily on the argument that if  
17 remodeling existing buildings for home occupations is not  
18 permitted, the purpose of allowing home occupations will be  
19 defeated, since some remodeling almost always will be  
20 required.<sup>1</sup>

21 ORS 215.448(1)(c) requires a home occupation to be operated  
22 in the dwelling or a building normally associated with uses  
23 permitted in the subject zone. This provision of the statute  
24 is silent as to whether remodeling of such buildings to  
25 accommodate the home occupation may be allowed. However, ORS  
26 215.448(3) provides:

27 "Nothing in this section authorizes the governing body  
28 or its designate to permit construction of any  
29 structure that would not otherwise be allowed in the  
30 zone in which the home occupation is to be  
31 established."

1           The proposed remodeling of the existing pole building  
2 would radically change its nature, to the point that its  
3 interior would retain none of its present characteristics  
4 as a barn or shed. As remodeled, the structure would no  
5 longer constitute a building normally accessory to the  
6 uses permitted in the R-10 zone. We conclude allowing  
7 such extensive alterations to the existing structure is  
8 prohibited by ORS 215.448(1)(c)(B) and (3).<sup>2</sup> To say  
9 otherwise would be to allow indirectly that which is  
10 prohibited by ORS 215.448(3).<sup>3</sup>

11           The second assignment of error is sustained.

12           The county's decision is reversed.

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1 FOOTNOTES

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4 The county's decision contains the following finding and analysis concerning the interpretation and application of ORS 215.448(1)(c)(B):

5 "Finding No. 3. The home occupation will be operated  
6 in a building normally associated with uses permitted in the zone in which the property is located.

7 "Analysis. The building in question is a pole  
8 building with metal siding which could be called a barn or shed. There doesn't seem to be any question  
9 that it is the type of building typically found in the area. \* \* \* It is true that the building will be  
10 radically improved on the inside by the remodeling. In addition, some cedar siding and remodeling will  
11 occur on the exterior plus the construction of a small, fenced-in play area.

12 "The question is: What is the purpose of the  
13 requirement of ORS 215.448(1)(c)(B) that [the home occupation] be in a building normally associated with  
14 permitted uses in the zone? As a barn it is probably a grandfathered use in the R-10 zone. As a shed, it  
15 is an accessory structure, a permitted use in the R-10 zone. If remodeling isn't permitted, the purpose of  
16 allowing home occupations would probably be defeated since in almost all cases some remodeling will be  
17 required. The best guess as to the meaning of the statute is that as long as the building isn't  
18 significantly larger than other accessory structures or grandfathered uses typically found in that zone,  
19 and not significantly different in appearance, it doesn't matter what remodeling is done on the  
20 interior." Record 15-16.

21 2

22 It would also appear to violate the "Conversion of Buildings" provisions of CCZO 218, quoted supra.

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24 We point out that our decision in this case does not  
25 mean that no remodeling of existing buildings is allowed under ORS 215.448, only that ORS 215.448 prohibits  
26 remodeling to such an extent that the building could not be newly constructed in the zoning district.