

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

EDWARD H. TARBELL, CHARLES V. )  
JACKSON, BRIAN G. LAMSON, GAY )  
LANTZ, OPAN PAAR, and HERBERT )  
RUSTRUM, )

Petitioners, )

LUBA No. 90-094

vs. )

JEFFERSON COUNTY, )

FINAL OPINION  
AND ORDER

Respondent, )

and )

BRUCE BISCHOF and LELAND BEAMER, )

Intervenors-Respondent. )

Appeal from Jefferson County.

G. Kenneth Shiroishi, Portland, filed the petition for review and argued on behalf of petitioners. With him on the brief was Dunn, Carney, Allen, Higgins & Tongue.

Bill Hanlon, Madras, represented respondent.

Robert S. Lovlien, Bend, filed a response brief and argued on behalf of intervenors-respondent.

KELLINGTON, Chief Referee; HOLSTUN, Referee; SHERTON, Referee, participated in the decision.

AFFIRMED

06/18/91

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

1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioners appeal an order of the Jefferson County  
4 Court approving a conditional use permit for a home  
5 occupation.

6 **MOTION TO INTERVENE**

7 Bruce Bischof and Leland Beamer move to intervene on  
8 the side of respondent. There is no objection to the  
9 motion, and it is allowed.

10 **MOTION TO FILE REPLY BRIEF**

11 Pursuant to OAR 661-10-039, petitioners move for leave  
12 to file a reply brief.<sup>1</sup>

13 Neither respondent nor intervenors-respondent  
14 (intervenors) object to petitioners' motion, and the motion  
15 is allowed.

16 **FACTS**

17 The subject property is located along the Deschutes  
18 River approximately one half mile downstream from the Pelton  
19 Dam and across the Deschutes River from the Confederated  
20 Tribes of Warm Springs Reservation. The subject property is  
21 .41 acres in size and is zoned Rural Residential (RR).  
22 Adjacent properties are also zoned RR, and are used for

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<sup>1</sup>OAR 661-10-039 provides:

"A reply brief may not be filed unless permission is first  
obtained from the Board. A reply brief shall be confined  
solely to new matters raised in the respondent's brief. \* \* \*"

1 residential purposes.

2       Intervenors are the applicants below and the owners of  
3 the subject property. Intervenors are not, however, and do  
4 not propose to be, the residents of the property. The  
5 residents of the property are the Jordans. The Jordans plan  
6 to operate the home occupation on behalf of themselves and  
7 intervenors.<sup>2</sup> However, it is not disputed that if the  
8 Jordans stopped residing on the subject property,  
9 intervenors would seek another resident to live on the  
10 subject property and to operate the home occupation.

11       The application describes the nature of the proposed  
12 home occupation as follows:

13       "We propose to provide a low impact quality  
14 fishing retreat for small groups of fishermen -  
15 numbering not greater than six - offering lodging,  
16 meals, and guided fishing trips - primarily from  
17 the Warm Springs Bridge.

18       "In addition to those activities listed [above],  
19 supervised limited fishing activities will take  
20 place on the property site. An occasional fly  
21 casting course and entomology course are proposed.

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<sup>2</sup>In addition to being the residents of the subject property, the proposal envisions that the Jordans may share in the profits from the operation of the proposed home occupation. Petition for Review 5. Specifically, the application states the relationship of the residents to the proposal as follows:

"The primary resident will be a year round resident who considers the dwelling his home. He will have a lease/rent arrangement with the owners and if conditions are right may have the option of becoming a part owner of the propert[y]. He will supervise and direct the activities as well as serve as the protector of the property and the surrounding area."  
Record 222.

1 Minimal restricted boat launch activities may  
2 occur at a designated site. Fly fishing courses  
3 for 4-H groups as well as retreat opportunities  
4 for senior citizens will be offered to Jefferson  
5 County inhabitants." Record 217, 218.

6 The planning commission denied intervenors'  
7 application. Intervenors appealed to the county court. The  
8 county court approved the application, and this appeal  
9 followed.

10 **FIRST ASSIGNMENT OF ERROR**

11 "The property and home are being used principally  
12 to operate a commercial enterprise and only  
13 incidentally as a home."

14 Jefferson County Zoning Ordinance (JCZO) 304B provides  
15 that a home occupation may be conditionally permitted in the  
16 RR zoning district. JCZO 105 defines "Home Occupation" as  
17 follows:

18 "Any lawful occupation carried on by a resident of  
19 a dwelling as an accessory use within the same  
20 dwelling, or in an accessory building on the same  
21 or adjacent property, with limited retail sales or  
22 sales accessory to a service, and employing no  
23 full-time employees except members of the  
24 immediate family." (Emphasis supplied.)

25 JCZO 603C provides:

26 "When permitted as a conditional use, home  
27 occupation shall be subject to the following  
28 limitations:

29 "1. The home occupation is to be secondary to the  
30 main use of the property as a residence and  
31 shall be conducted only by the resident of  
32 such dwelling within the same dwelling \* \* \*

33 "\* \* \* \* \* ." (Emphasis supplied.)

1           Petitioners do not challenge the county's findings  
2 supporting the challenged decision, neither do they  
3 challenge the evidentiary support for the challenged  
4 decision. Petitioners challenge only the county's legal  
5 conclusion that the "residents" of a home occupation need  
6 not be the owners of the property. Petitioners argue the  
7 Jordans -- the residents of the property -- will reside at  
8 the property only to operate the home occupation.  
9 Petitioners contend that under these circumstances, as a  
10 matter of law, the main use of the property is as a home  
11 occupation rather than as a residence. Petitioners argue  
12 the county incorrectly interpreted JCZO 105 and 603C to  
13 authorize a nonowner occupied home occupation use of the  
14 property.

15           We disagree with petitioners' analysis of JCZO 105 and  
16 603. Nothing in JCZO 105 or 603C suggests the county may  
17 not grant an owner of property a conditional use permit for  
18 a home occupation simply because the "residents" of such  
19 home occupation are not the owners, or because such  
20 residents would likely not be invited by the owners to live  
21 on the property if they were not willing to operate the home  
22 occupation. JCZO 105 and 603C require a home occupation be  
23 carried on by a "resident" of the dwelling. The JCZO says  
24 nothing about whether such "resident" must be an owner of  
25 the property. Essentially, JCZO 105 and 603C require that a  
26 home occupation be operated in the home of the "resident" of

1 a dwelling, and that the "main" use of the property be as  
2 such resident's home. We see nothing in the JCZO which  
3 makes a resident's underlying legal relationship with the  
4 owners of the property on which they reside, a basis in  
5 itself to disqualify the resident from conducting a home  
6 occupation.

7 The Jordans will make the subject property their home,  
8 and they will have no other residence. They will be  
9 "residents" of the property regardless of the presence of  
10 patrons of the home occupation. Further, the county found  
11 the proposed home occupation will be secondary to the  
12 Jordans' residential use of the property, and petitioners do  
13 not challenge that finding. Under these circumstances,  
14 there is no basis to conclude the proposed use does not  
15 constitute a home occupation simply because it is to be  
16 conducted by residents who are not the property owners.

17 The first assignment of error is denied.

18 **SECOND ASSIGNMENT OF ERROR**

19 "As nonresident owners, the Bishofs and the  
20 Beamers do not come within the class of the  
21 intended beneficiaries of the county's home  
22 occupation ordinance, and inasmuch as they have  
23 advanced no other basis upon which they may  
24 lawfully come before the county, their application  
25 can be given no legal effect. Absent standing,  
26 the county was without jurisdiction to hear and  
27 determine the Bishofs' and the Beamers'  
28 application."

29 Petitioners contend the county lacked jurisdiction to  
30 approve intervenors' application because intervenors did not

1 have standing to file the application. Specifically,  
2 petitioners argue intervenors did not have standing to file  
3 the application for a conditional use permit for a home  
4 occupation because intervenors will not be the residents of  
5 the property conducting the home occupation.

6 Nothing to which we are cited in the JCZO prohibits a  
7 property owner from filing an application for a conditional  
8 use permit for a home occupation. Indeed, the JCZO provides  
9 to the contrary. JCZO 604 provides in relevant part:

10 "The procedure for taking action on a conditional  
11 use application shall be as follows:

12 "A. A property owner may initiate a request for a  
13 conditional use by filing an application with  
14 the planning department \* \* \*

15 "\* \* \* \* \*."

16 Because JCZO 604 specifically contemplates that a  
17 property owner may file an application for a conditional use  
18 permit, intervenors (who are the property owners) had  
19 standing to file an application for, and seek county  
20 approval of, the conditional use permit for a home  
21 occupation.

22 The second assignment of error is denied.

23 **THIRD ASSIGNMENT OF ERROR**

24 "Inasmuch as the premises is a nonconforming  
25 structure, any change in its use must be approved  
26 by the county in strict conformance with the  
27 provisions of article 5 of the county's zoning  
28 ordinance."

29 Petitioners state the dwelling in which the proposed

1 home occupation will occur is a nonconforming structure  
2 because it is within 100 feet of the high water mark of the  
3 Deschutes River. As we understand it, petitioners argue  
4 that because the proposed dwelling is a nonconforming  
5 structure under JCZO 501A and B, it is subject to county  
6 regulations applicable to nonconforming uses as well.<sup>3</sup>  
7 Petitioners state the county erroneously failed to apply the  
8 standards applicable to nonconforming uses to the proposed  
9 home occupation.

10 Intervenors argue petitioners may not raise these

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<sup>3</sup>JCZO 501A provides the following:

"\* \* \* Subject to the provisions of this section, a nonconforming use or structure may be continued, but may not be altered or extended except in accordance with subsections B and C of this section. The extension of a nonconforming use to a portion of a structure which was arranged or designed for the nonconforming use at the time of passage of this ordinance is not an enlargement or expansion of a nonconforming use. A nonconforming structure which conforms with respect to use may be altered later or extended if the alteration or extension does not cause the structure to deviate further from the standards of this ordinance."

JCZO Section 501B provides in relevant part:

"A proposal for the alteration of a nonconforming use or structure, except an alteration necessary to comply with a lawful requirement, use or structure shall be considered a contested case pursuant to ORS 215.402(1). For the purposes of this section, alteration of a nonconforming use includes:

- "(1) A change in use of no greater adverse impact to the neighborhood; and
- "(2) A change in the structure or physical improvements of no greater adverse impact to the neighborhood.

"\* \* \* \* \*"



1 issues regarding the applicability of the regulations  
2 relating to nonconforming uses because those issues were not  
3 raised below with sufficient specificity such that the  
4 county could respond to them. ORS 197.763(1), 197.835(2);  
5 Boldt v. Clackamas County, \_\_\_ Or LUBA \_\_\_ (LUBA No. 90-147,  
6 March 12, 1991).<sup>4</sup>

7 In their reply brief, petitioners cite portions of the  
8 record to establish these issues were raised below.

9 We have reviewed those portions of the written record  
10 cited by petitioners. We believe the statements in the  
11 record are adequate to put the county on notice that  
12 petitioners believed the county's regulations regarding  
13 nonconforming uses apply to approval of a home occupation  
14 proposed to be located in a nonconforming structure.

15 However, we disagree with petitioners' analysis of  
16 JCZO 501A and 501B. Nothing in these JCZO provisions  
17 suggest that simply because a structure may be  
18 nonconforming, the use of the structure is subject to

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<sup>4</sup>ORS 197.763(1) provides:

"An issue which may be the basis for an appeal to the board shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised with sufficient specificity so as to afford the governing body \* \* \* an adequate opportunity to respond to each issue."

ORS 197.835(2) provides:

"Issues [in an appeal before the board] shall be limited to those raised \* \* \* before the local hearings body as provided by ORS 197.763. \* \* \*"

1 regulations applicable to changes in nonconforming uses.  
2 These provisions of the JCZO distinguish between  
3 nonconforming uses and structures and establish different  
4 criteria for changing nonconforming uses and nonconforming  
5 structures. The established use of the structure in this  
6 case is a residential use permitted in the RR zoning  
7 district. Accordingly, there is no nonconforming use of the  
8 property, and the county did not err in failing to apply the  
9 regulations applicable to nonconforming uses to the  
10 proposal.

11 The third assignment of error is denied.

12 The county's decision is affirmed.