

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 LARRY O'ROURKE, DEBRA O'ROURKE,)
5 RICHARD McDANIEL, and TERRANCE)
6 GANDY,)
7)
8 Petitioners,)

9)
10 vs.)

11) LUBA No. 95-188
12 UNION COUNTY,)
13) FINAL OPINION
14 Respondent,) AND ORDER
15)

16 and)

17)
18 R-D MAC, INC.,)
19)
20 Intervenor-Respondent.)

21
22
23 Appeal from Union County.

24
25 D. Rahn Hostetter, Enterprise, filed the petition for
26 review and argued on behalf of petitioners. With him on the
27 brief was Mautz Baum Hostetter & O'Hanlon.

28
29 No appearance by respondent.

30
31 Paul R. Hribernick, Portland, filed the response brief
32 and argued on behalf of intervenor-respondent. With him on
33 the brief was Black Helterline.

34
35 HANNA, Referee; GUSTAFSON, Referee, participated in the
36 decision.

37
38 REMANDED 05/20/96

39
40 You are entitled to judicial review of this Order.
41 Judicial review is governed by the provisions of ORS
42 197.850.

1 Opinion by Hanna.

2 **NATURE OF THE DECISION**

3 Petitioners appeal an ordinance amending the June 1984
4 Union County Land Use Plan supplement (1984 plan supplement)
5 to add a 129-acre site to the Mineral and Aggregate
6 Resources inventory.

7 **MOTION TO INTERVENE**

8 R-D Mac, Inc. (intervenor), the applicant below, moves
9 to intervene in this proceeding on the side of respondent.
10 There is no objection to the motion, and it is allowed.

11 **FACTS**

12 This is the second time this matter is before us. The
13 facts were set forth in O'Rourke v. Union County, 29 Or LUBA
14 303, 306 (1995) (O'Rourke I) as follows:

15 "On August 8, 1984, intervenor-respondent R-D Mac,
16 Inc. (intervenor), applied for a conditional use
17 permit to move its existing aggregate extraction
18 and processing operation, including a shop,
19 office, scales, concrete and asphalt batch plants,
20 rock crushers and stock piles, to the subject
21 property. * * * Intervenor's application
22 narrative also requested that the site be added to
23 the County's '1-B' inventory of Goal 5 resources."
24 (Footnote omitted.)

25 The county denied the conditional use permit request.
26 However, on October 19, 1994, the county approved the
27 comprehensive plan amendment, and on November 2, 1994, the
28 county adopted an ordinance to amend the comprehensive plan.
29 On appeal in O'Rourke I, petitioners argued that the county
30 failed to establish that the amendment complied with the

1 goals. We summarized petitioners' argument stating, "had the
2 county considered the goals, it would have found that Goals
3 3 (Agricultural Land), 5, 6 (Air, Water and Land Resources
4 Quality) and 9 (Economic Development) are applicable to the
5 challenged decision." O'Rourke I at 316-17. We remanded,
6 stating:

7 "Here, the county adopted no findings of
8 compliance with the goals, other than Goal 5. We
9 are unable to determine that Goals 3, 6 and 9 do
10 not apply to the subject plan amendment as a
11 matter of law. It is the local government's
12 obligation to explain in its findings why arguably
13 applicable goal standards need not be addressed.
14 The county erred by failing to explain in its
15 decision why Goals 3, 6 and 9 do not apply to the
16 proposed plan amendment or why the amendment
17 complies with these goals. (citations omitted)
18 O'Rourke I at 319.

19 On remand, the county conducted additional proceedings,
20 limited to the issues remanded. On August 16, 1995, the
21 county adopted supplemental findings and conclusions, and an
22 ordinance amending its comprehensive plan. This appeal
23 followed.

24 **FIRST ASSIGNMENT OF ERROR**

25 Petitioners contend that the county erred when it
26 refused to accept and consider, as part of the record,
27 evidence offered by petitioners addressing Goal 12
28 (Transportation). Petitioners argue that during the
29 proceedings leading to O'Rourke I, the county refused to
30 consider any goals. They argue that the remand proceeding
31 leading to the challenged decision was their first

1 opportunity to raise the application of the goals, and that
2 the county improperly restricted their arguments to the
3 application of Goals 3, 6 and 9. Petitioners contend that
4 their argument in O'Rourke I applied to all goals, and that
5 they specified Goals 3, 6 and 9 only as examples of
6 applicable goals which must be reviewed.

7 Intervenor responds that petitioners' argument is
8 outside the scope of the remand, since the remand order was
9 limited to consideration of the application of Goals 3, 6
10 and 9.

11 When a local government limits its remand proceedings
12 to issues that were the basis for LUBA's remand, issues that
13 were not raised in the first appeal, and are not within the
14 scope of the issues that were the basis for LUBA's remand,
15 cannot be raised in a subsequent appeal to LUBA.¹ Wilson
16 Park Neigh. Assoc. v. City of Portland, 27 Or LUBA 106,
17 aff'd 129 Or App 33, rev den 320 Or 453 (1994).

18 The question presented is whether our remand in
19 O'Rourke I was limited to consideration of goals 3, 6 and 9,
20 or whether our specific mention of those goals was merely an
21 example of the potentially applicable goals. Petitioners
22 acknowledge that they did not raise the applicability of any
23 goals other than Goals 3, 6 and 9 at the original county

¹A city may expand the scope of its remand hearing beyond the scope of the remand, but it is not required to do so. Schatz v. City of Jacksonville, 113 Or App 675, 680, 835 P2d 923 (1992)

1 proceeding that led to O'Rourke I. However, petitioners
2 argue that during the original proceeding, the county
3 declined to consider the applicability of any goals and that
4 therefore, according to petitioners, they were not able to
5 raise the applicability of any specific goals during the
6 proceeding. Petitioners now contend that they raised the
7 applicability of Goals 3, 6 and 9 in O'Rourke I only as
8 examples of possibly applicable goals, and that our remand
9 order provided them the opportunity to raise issues
10 regarding compliance with all goals. However, petitioners
11 do not point to any language in their original petition for
12 review to support this contention.

13 We determined in O'Rourke I that the county erred when
14 it failed to explain the applicability or non-applicability
15 of Goals 3, 6 and 9. On remand, the county was authorized
16 to restrict its inquiry to those three goals.

17 The first assignment of error is denied.

18 **SECOND ASSIGNMENT OF ERROR**

19 Petitioners contend that the county erred when it
20 refused to accept and consider, as part of the record,
21 intervenor's application for a conditional use permit to
22 move its operation to the same site which is the subject of
23 this appeal. Petitioners provide no authority for their
24 contention that the record in another proceeding should be
25 included as evidence in this proceeding. Furthermore, as
26 intervenor responds, petitioners have not explained how this

1 assignment of error is within the scope of the issues that
2 were the basis for LUBA's remand.² Wilson Park, supra, 27
3 Or LUBA at 127.

4 The second assignment of error is denied.

5 **THIRD ASSIGNMENT OF ERROR**

6 Petitioners make two arguments in this assignment of
7 error.

8 **A. Goal 5**

9 Petitioners contend that the county failed to adopt
10 findings of fact sufficient to support its decision and,
11 consequently, made a decision not supported by substantial
12 evidence in the whole record when it amended its plan to
13 include intervenor's site in its Goal 5 inventory as a 1B
14 site. Petitioners argue that the challenged decision does
15 not find that there is insufficient information regarding
16 resource location, quantity and quality of the resource
17 necessary to designate the site as a 1B site. Furthermore,
18 petitioners argue that the county has sufficient information
19 available to it to make a determination of the site's
20 significance.

²At oral argument, petitioners attempted to connect the applicability of Goals 3, 6 and 9 to the conditional use permit application. Petitioners did not make this argument in the petition for review. LUBA will not address issues which are raised by petitioners for the first time at oral argument, and are not included in the assignments of error and supporting argument required to be included in the petition for review. OAR 661-10-030(3)(b); DLCD v. Douglas County, 28 Or LUBA 242 (1994); Bouman v. Jackson County, 23 Or LUBA 628 (1992); Ward v. City of Lake Oswego, 21 Or LUBA 470 (1991).

1 In O'Rourke I we considered whether the county properly
2 identified the subject property as a 1B site for purposes of
3 Goal 5. We explained the resource site listing process, as
4 follows:

5 "OAR 660-16-000(1)-(4) require a local government
6 to analyze the location, quality and quantity of a
7 Goal 5 resource sites, and to determine their
8 relative significance. OAR 660-16-000 provides
9 that 'based on data collected, analyzed and
10 refined by the local government,' as described in
11 OAR 6600-16-00(5)-(4), the local government has
12 three options--(1) to include the site on the Goal
13 5 inventory and complete the Goal 5 planning
14 process; (2) not to include the site on its Goal 5
15 inventory; and (3) to delay the Goal 5 planning
16 process. The delay option [is] generally referred
17 to as the 1B option * * *." Id. at 311.

18 We continued to describe the process:

19 "Construing all parts of OAR 660-16-000 together,
20 it is clear that the analysis of resource
21 location, quality and quantity and determination
22 of site significance mandated by OAR 660-1-000(1)-
23 (4) are required to be completed only if the 1A
24 (do not put on inventory) or 1C (place on
25 inventory and complete Goal 5 process) options are
26 chosen. The 1B option is to be used where the
27 available information 'indicates the possible
28 existence of a resource site,' but is not
29 sufficient to perform the analysis required by OAR
30 660-16-000(1)-(4).

31 "Consequently, the county is not required to make
32 a significance determination regarding the subject
33 site at this time, and its decision to list the
34 subject site on its inventory as a 1B site need
35 only be supported by evidence in the record that
36 would allow a reasonable person to conclude it is
37 possible the site is an aggregate resource site. *
38 * * This is precisely the situation in which use
39 of a 1B option is appropriate." Id. at 313.

40 Intervenor responds correctly that this Goal 5 issue

1 was decided in O'Rourke I and cannot be raised again. Beck
2 v. City of Tillamook, 313 Or 148, 153 (1992), Eckis v. Linn
3 County, 22 Or LUBA 27, 39, aff'd 110 Or App 309 (1991).

4 This subassignment of error is denied.

5 **B. Evidence that Extraction Will Violate Goals 3, 6 and**
6 **9**

7 Petitioners argue that there is evidence in the record
8 that mining on the subject property will pollute ground
9 water and deplete or reduce the ground water supply on
10 neighboring properties. Petitioners contend that such
11 consequences would violate Goals 3 and 6, and, as a
12 consequence, apparently affect Goal 9 values. Accordingly,
13 petitioners conclude that the findings do not adequately
14 address Goals 3, 6 and 9.

15 Intervenor responds that the county found that Goals 3,
16 6 and 9 are not applicable to the challenged decision
17 because, as determined in O'Rourke I, there is insufficient
18 information regarding location, quantity and quality of the
19 resource to determine the site's significance under Goal 5.
20 Intervenor contends that a mere listing of the property as a
21 possible Goal 5 resource does not allow a specific use of
22 that property; nor does listing itself affect the values
23 protected under Goals 3, 6 and 9.

24 While a listing as a 1B site itself may not allow
25 mining of the property, listing adds the site to the Goal 5

1 inventory.³ Under ORS 215.298(2), inventoried sites,
2 including those not yet subject to the Goal 5 significance
3 review process, are available to be mined under a
4 conditional use permit. Generally, a conditional use permit
5 application is not reviewed for compliance with the goals.
6 The time to apply the goals to potential uses allowed in a
7 zone is at the plan amendment stage. The county has not yet
8 applied the goals to the proposed plan amendment. Because
9 petitioner appealed only the application of Goals 3, 6 and
10 9, we remand for consideration of only those goals.

11 This subassignment of error is sustained.

12 The third assignment of error is sustained, in part.

13 The county's decision is remanded.

³OAR 660-16-000(5)(b) states that "the local government should only include the [1B] site on its comprehensive plan inventory as a special category." See Zippel v. Josephine County, 27 Or LUBA 11, 32-33, 128 Or App 458, rev den 320 Or 272 (1994) and Larson v. Wallowa County, 23 Or LUBA 527, 537, rev'd on other grounds 116 Or App 96 (1992) (discussing 1B sites as part of the local government's Goal 5 inventory.)