

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. 96-166  
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.

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

35  
36           HANNA, Chief Referee, participated in the decision.

37  
38                   AFFIRMED                                   02/27/97

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 the county's amendment of its  
4 comprehensive plan to include the subject property as a 1B  
5 site on its Goal 5 inventory.<sup>1</sup>

6 **MOTION TO INTERVENE**

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

10 **FACTS**

11 This is the third time this matter is before us.  
12 In O'Rourke v. Union County, 29 Or LUBA 303, 306 (1995)  
13 (O'Rourke I) we described the facts, in part, as follows:

14 "On August 8, [1994], intervenor-respondent R-D  
15 Mac, Inc. (intervenor), applied for a conditional  
16 use permit to move its existing aggregate  
17 extraction and processing operation, including a  
18 shop, office, scales, concrete and asphalt batch  
19 plants, rock crushers and stock piles, to the  
20 subject property. \* \* \* Intervenor's application  
21 narrative also requested that the site be added to  
22 the County's '1-B' inventory of Goal 5 resources."  
23 (Footnote omitted.)

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<sup>1</sup>Goal 5 (Open Spaces, Scenic and Historic Areas, and Natural Resources) requires that local governments inventory certain resources. As we have previously explained, "[a]fter a local government completes the first step of gathering information on the location, quality and quantity of resources, it may choose not to include a site on its Goal 5 inventory, to delay the Goal 5 process because of inadequate information, or to include a site on its Goal 5 inventory. OAR 660-16-000(5). These three choices are often referred to as "1A," "1B" and "1C" decisions, respectively." Larson v. Wallowa County, 23 Or LUBA 527, 537 (1992), rev'd on other grounds 116 Or App 96 (1992).

1           The county denied the conditional use permit.  However,  
2   the county approved the comprehensive plan amendment, and on  
3   November 2, 1994, adopted an ordinance to amend the  
4   comprehensive plan to include the subject site as a 1B site  
5   on the county's Goal 5 inventory.  On appeal to LUBA  
6   petitioners argued that the county failed to establish that  
7   the plan amendment complied with Goals 3 (Agricultural  
8   Land), 5, 6 (Air, Water and Land Resources Quality) and 9  
9   (Economic Development).

10  We remanded the county's decision, stating:

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

23           On remand, the county conducted additional proceedings,  
24   limited to the issues on remand.  The county then adopted  
25   supplemental findings and conclusions, and an ordinance that  
26   again amended its comprehensive plan.  Petitioners appealed  
27   that ordinance and, in O'Rourke v. Union County, \_\_\_ Or LUBA  
28   \_\_\_ (LUBA No. 95-188, May 20, 1996) (O'Rourke II), we  
29   remanded for the second time, stating:

30           "While a listing as a 1B site itself may not allow  
31   mining of the property, listing adds the site to  
32   the Goal 5 inventory.  Under ORS 215.298(2),

1        inventoried sites, including those not yet subject  
2        to the Goal 5 significance review process, are  
3        available to be mined under a conditional use  
4        permit. Generally, a conditional use permit  
5        application is not reviewed for compliance with  
6        the goals. The time to apply the goals to  
7        potential uses allowed in a zone is at the plan  
8        amendment stage. The county has not yet applied  
9        the goals to the proposed plan amendment. Because  
10       petitioner appealed only the application of Goals  
11       3, 6 and 9, we remand for consideration of only  
12       those goals. (footnote omitted) O'Rourke II at  
13       slip op 8.

14        After the second remand, the county made additional  
15        findings and adopted the challenged decision. This appeal  
16        followed.<sup>2</sup>

17        **FIRST AND SECOND ASSIGNMENTS OF ERROR**

18        Petitioners argue under both of these assignments of  
19        error that the plan amendment does not sufficiently address  
20        Goals 3 and 6.<sup>3</sup> However, petitioners do not attempt to

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<sup>2</sup>For the first time at oral argument petitioners argued that the county's approval includes a tax lot that was not included in intervenor's application. Petitioners have waived the right to raise this alleged defect as an error, and if, as petitioners seem to suggest, this alleged defect is jurisdictional, we have insufficient information to raise it on our own motion (e.g. we do not know if the application was amended and we will not search the record to develop the necessary information. See ORS 197.835(4)).

<sup>3</sup>The arguably relevant portion of Goal 3 states:

"Agricultural lands shall be preserved and maintained for farm use, consistent with existing and future needs for agricultural products, forest and open space and with the state's agricultural policy expressed in ORS 215.243 and 215.700. \* \* \* Counties may authorize farm uses and those nonfarm uses defined by commission rule that will not have significant adverse effects on accepted farm and forest practices." (Emphasis added.)

1 explain how listing the subject site as a potential  
2 aggregate resource violates either Goal 3 or 6. Rather,  
3 petitioners argue:

4 "There is substantial evidence in the record that  
5 mining aggregate on the R-D Mac site will  
6 adversely affect nearby agricultural lands and  
7 will pollute the groundwater and deplete or reduce  
8 the groundwater supply to neighboring properties."  
9 (Emphasis added.) Petition for Review 4.

10 Petitioners' argument addresses generally the effects  
11 of a mining operation rather than what the county actually  
12 approved. Listing the subject site as a potential aggregate  
13 resource neither permits mining nor allows an aggregate  
14 operation.

15 Much of petitioners' argument appears to address the  
16 analysis necessary to meet the requirements of ORS 215.296.<sup>4</sup>

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Nonfarm uses on agricultural lands, including aggregate operations, are allowed under ORS 215.283.

The arguably relevant portions of Goal 6 states:

"All waste and process discharges from future development, when combined with such discharges from existing developments shall not threaten to violate, or violate applicable state or federal environmental quality statutes, rules and standards. With respect to the air, water and land resources of the applicable air sheds and river basins described or included in state environmental quality statutes, rules, standards and implementation plans, such discharges shall not (1) exceed the carrying capacity of such resources, considering long range needs; (2) degrade such resources; or (3) threaten the availability of such resources."

<sup>4</sup>ORS 215.296(1) states:

"A use allowed under ORS 215.213 (2) or 215.283 (2) may be approved only where the local governing body or its designee finds that the use will not:

1 To the extent petitioners argue that the county must ensure  
2 that actual aggregate operations do not negatively affect  
3 surrounding agricultural activities and water resources, if  
4 a conditional use permit is issued, these issues must be  
5 addressed at that time to demonstrate compliance with ORS  
6 215.296. See Tognoli v. Crook County, \_\_\_ Or LUBA \_\_\_ (LUBA  
7 No. 95-074, January 3, 1996), slip op 8.

8 In approving the plan amendment, the county's analysis  
9 and findings of potential effects of an aggregate operation  
10 on surrounding lands are sufficient to support a 1B listing.  
11 Because the basis for such a listing is that the county has  
12 inadequate information to make a more complete analysis,  
13 further analysis would be mere speculation. See Salem Golf  
14 Club v. City of Salem, 28 Or LUBA 561, 583 (1995).

15 The first and second assignments of error are denied.

16 **THIRD ASSIGNMENT OF ERROR**

17 Petitioners argue that "the presence of an aggregate  
18 mining operation with a waste disposal site \* \* \* so close  
19 to the LaGrande Airport \* \* \* may cause a shut down of the  
20 airport, or, at least loss of federal funds to the airport  
21 [resulting in a] devastating effect on the economy of the

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

"(b) Significantly increase the cost of accepted farm or  
forest practices on surrounding lands devoted to farm or  
forest use.

1 County and would violate Goal 9[.]" Petition for Review 10.  
2 Petitioners support this argument by referencing a Federal  
3 Aviation Administration (FAA) order that sets forth  
4 standards for waste disposal sites.<sup>5</sup>

5 Petitioners have not established that the FAA order has  
6 any bearing on the proposed plan amendment to list the  
7 subject site as a 1B site in the county's Goal 5 inventory  
8 or that the proposed plan amendment violates Goal 9.

9 The third assignment of error is denied.

10 The county's decision is affirmed.

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<sup>5</sup>The background section of the FAA order states, in part:

"Landfills, garbage dumps, sewer or fish waste outfalls and other similarly licensed or titled facilities used for operations to process, bury, store or otherwise dispose of waste, trash and refuse will attract rodents and birds. Where the dump is ignited and produces smoke, an additional attractant is created. All of the above are undesirable and potential hazards to aviation since they erode the safety of the airport environment." O'Rourke I Record 52.