

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.

30
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.¹

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.)

¹Goal 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.²

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 6.³ However, petitioners do not attempt to

²For 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)).

³The 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 215.296.⁴

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."

⁴ORS 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

"(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.⁵

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.

⁵The 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.