BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DEVIN OIL CO.,
Petitioner,

vs.

MORROW COUNTY,
Respondent,

and

LOVE'S TRAVEL STOPS &
COUNTRY STORES, INC.,
Intervenor-Respondent.

LUBA No. 2011-107

FINAL OPINION
AND ORDER

Appeal from Morrow County.

E. Michael Connors, Portland, filed the petition for review and argued on behalf of petitioner. With him on the brief was Hathaway Koback Connors LLP.

Ryan M. Swinburnson, Kennewick, Washington, filed a joint response brief and argued on behalf of respondent.

William K. Kabeiseman, Portland, filed a joint response brief and argued on behalf of intervenor-respondent. With him on the brief were Carrie A. Richter and Garvey Schubert Barer.

BASSHAM, Board Member; RYAN, Board Chair; HOLSTUN, Board Member, participated in the decision.

AFFIRMED 03/07/2012

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioner appeals two county decisions that approve comprehensive plan text and map amendments, a zone map amendment and a conditional use permit to allow a travel center.

REPLY BRIEF

Petitioner moves to file a reply brief to address several alleged new matters in the joint response brief. Intervenor-respondent (intervenor) objects to sections D and F of the reply brief, arguing that those sections respond to arguments in the response brief that are not "new matters" within the meaning of OAR 661-010-0039 (allowing a reply brief limited to responding to new matters raised in a response brief).

In our view, at least portions of sections D and F of the reply brief respond to arguments in the response brief that we believe are accurately characterized as new matters. No purpose would be served by attempts to identify and strike those brief portions of sections of D and F that arguably go beyond what is permitted in a reply brief under OAR 661-010-0039. The reply brief, including sections D and F, is allowed.

FACTS

The challenged decisions are on remand from LUBA and the Court of Appeals. *Devin Oil Co. Inc. v. Morrow County*, 62 Or LUBA 247, *aff'd* 241 Or App 351, 250 P3d 38 (2010), *rev den* 350 Or 408, __ P3d __ (2011) (*Devin I*). In our decision in *Devin I*, we described the subject property and proposed development as follows:

> "The subject property is an undeveloped 49-acre parcel located at the junction of Interstate Highway 84 and Tower Road, five miles from the City of Boardman urban growth boundary, and near the Boardman Airport. The property is designated Industrial and zoned Space Age Industrial (SAI). On December 3, 2009, intervenor filed an application seeking (1) a comprehensive plan map amendment from Industrial to Commercial, (2) a zoning map amendment from SAI to Tourist Commercial (TC), and (3) comprehensive plan text amendments to provide plan policies to support the TC zoning designation. The plan/zoning amendments are intended to permit

> intervenor to seek approval for a "travel center" on 12 acres of the subject property, consisting of truck and automobile fueling stations, convenience store, restaurant, and tire changing facility. The TC zone allows as outright permitted uses auto-oriented uses such as fueling stations, retail outlets, restaurants, and vehicle-repair services." 62 Or LUBA at 250 (footnote omitted).

The subject property is also located in the Airport Approach (AA) overlay zone, which requires a conditional use permit for development such as the proposed travel center. The plan/zoning amendments required a new reasons exception to statewide planning Goals 3 (Agricultural Land) and 14 (Urbanization) to rezone the property to allow tourist commercial uses such as the proposed travel center. On May 5, 2010, the county court approved the plan/zoning amendments based on the reasons exceptions. Among the conditions imposed on the plan/zone amendment was Condition 6, which provided that the amendment is conditioned to allow "only the construction of a travel center or other use of similar density, configuration and type." Record 14.

Petitioner appealed the county's May 5, 2010 decisions to LUBA. In *Devin Oil I*, LUBA remanded the county's decision on several grounds. Specifically, LUBA sustained petitioner's third assignment of error, which argued that the county cannot rely upon conditional zoning to limit the "uses, density, public facilities and services, and activities to only those that are justified in the exception," as required by OAR 660-004-0018(4), but must instead use the county's Limited Use (LU) overlay zone, which was adopted for that specific purpose. We also sustained in part the sixth assignment of error, in which petitioner argued that there was not substantial evidence in the record to support the county's conclusion that, as limited by Condition 6, development of a travel center on the subject property under the TC zone would not "significantly affect" Tower Road, for purposes of the Transportation Planning Rule (TPR) at OAR 661-010-0060. Finally, under the seventh assignment of error, we remanded for the county to address several transportation-related issues under two local code standards that applied to the conditional use permit.

On remand, the county applied the LU overlay zone to ensure compliance with OAR 660-004-0018(4). Among the conditions imposed under the LU overlay zone is a new Condition 6, which is worded almost identically to the former Condition 6 imposed on the zone change to TC: "This Limited Use overlay authorizes only the construction of a travel center or other use of similar density, configuration and type." Record 14. With respect to the TPR, on remand intervenor submitted additional evidence, based on which the county concluded that if development under the TC zone is limited to the proposed travel center then the zone change would not significantly affect any transportation facility within the planning period. Finally, the county addressed and found compliance with two local conditional use permit standards. The county's final decisions, on October 26, 2011, again approved the plan/zone amendment and conditional use permit. These appeals followed.

FIRST ASSIGNMENT OF ERROR

In three sub-assignments of error, petitioner challenges the county's imposition of the LU overlay zone, pursuant to Morrow County Zoning Ordinance (MCZO) 3.110(A), which sets out three criteria.[1] First, petitioner argues that the county erred in understanding the

[1] MCZO 3.110 provides, in relevant part:

> "The purpose of the Limited Use Overlay Zone is to limit the list of permitted uses and activities allowed in the zone to only those uses and activities which are justified in the comprehensive plan 'reasons' exception statement under ORS 197.732(1)(c). The Limited Use Overlay Zone is intended to carry out the administrative rule requirement for 'reasons' exceptions pursuant to OAR 660-14-018(3).
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> "A. Overlay Zone Requirements. When the Limited Use Overlay Zone is applied, the uses permitted in the underlying zone shall be limited to those uses and activities specifically referenced in the ordinance adopting the Limited Use Overlay Zone. The Limited Use Overlay Zone cannot be used to authorize uses other than those expressly provided in the underlying zone. * * *
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> The Limited Use Overlay Zone is to be applied through the plan amendment and rezoning process at the time the primary plan and zone designation is being changed. The ordinance adopting the overlay zone shall include findings showing that:
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> "1. No other zoning district currently provided in the zoning ordinance can be applied consistent with the requirements of the 'reasons' exception

words "zoning district" or "proposed zone" as used in MCZO 3.110(A)(1), (2) and (3) to mean the LU overlay zone rather than the new base zone being applied to the exceptions area, in this case the TC zone. In the second and third sub-assignment of error, petitioner challenges the county's alternative findings that assume petitioner is correct that "proposed zone" refers to the base TC zone, not the LU overlay zone. Specifically, petitioner disputes for purposes of MCZO 3.110(A)(2) the county's finding that the proposed zone is "best suited" to accommodate the desired uses, because the county failed to consider zones other than the TC zone that, petitioner contends, are better suited for the desired travel center use. Finally, petitioner disputes the county's finding under MCZO 3.110(A)(3) that the LU overlay zone is "required under the exception rule (OAR 660, Division 4) to limit the uses" permitted in the TC zone. According to petitioner, the reasons exception to Goals 3 and 14 was for general tourist commercial uses and those reasons exceptions do not require any particular limitation of uses allowed in the TC zone. Instead, petitioner argues, it is solely the need to comply with the TPR rule at OAR 660-012-0060 that requires that uses allowed in the TC zone be restricted. We address each sub-assignment in turn.

A. Misconstruction of Law.

As noted, the county interpreted references in MCZO 3.110(A)(1) to "zoning district" and references in MCZO 3.110(A)(2) and (3) to "proposed zone" to refer to the LU overlay zone. Petitioner challenges those interpretations, arguing that MCZO 3.110(A)(1) requires an evaluation of the county's base zoning districts, not the LU overlay district. Further,

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statement because the zoning would allow uses beyond those justified by the exception;

"2. The proposed zone is the best suited to accommodate the desired uses(s); and

"3. It is required under the exception rule (OAR 660, Division 4) to limit the uses permitted in the proposed zone."

petitioners argue that as used in MCZO 3.110(A)(2) and (3) "proposed zone" refers to the proposed base zone, here the TC zone.

The standard of review we apply to a governing body's interpretation of local regulations is whether the interpretation is consistent with the express language, purpose or underlying policy, or in shorthand, whether the interpretation is "plausible." ORS 197.829(1)[2]; *Siporen v. City of Medford*, 349 Or 247, 259, 243 P3d 776 (2010).

Turning first to MCZO 3.110(A)(1), that code provision requires a finding that "[n]o other zoning district currently provided in the zoning ordinance can be applied consistent with the requirements of the 'reasons' exception statement because the zoning would allow uses beyond those justified by the exception." *See* n 1. MCZO 3.110(A)(1) requires the county to answer a simple question: is there any current county zone that already allows *only* the uses justified in the exception? If so, the LU overlay zone is not justified, as far as MCZO 3.110(A)(1) is concerned. The county's initial findings include language that admittedly confuse this simple question, and can be understood to interpret MCZO 3.110(A)(1) to require the county to ask whether the *LU overlay zone* is limited to the uses justified in the reasons exception. Since the answer to that question will always be yes, that understanding of MCZO 3.110(A)(1) seems questionable, prompting petitioner's challenge.

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[2] ORS 197.829(1) provides, in relevant part:

> "[LUBA] shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government's interpretation:
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> "(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
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> "(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
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> "(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation[.]"

However, the county's subsequent findings embody a different understanding of MCZO 3.110(A)(1), one that evaluates base zones rather than the LU overlay zone. The findings discuss an example of a base zone that is already tailored to the uses justified in the reasons exception, and concludes in that circumstance that the LU overlay zone would not be appropriate. Turning to the present case, the county finds that "there is no existing zoning district that could be applied consistent with the requirements of the reasons exception that wouldn't also allow uses beyond those justified by the exception." Record 19. Therefore, the county concluded, it is appropriate to apply the LU overlay zone over the proposed TC base zone, as far as MCZO 3.110(A)(1) is concerned. The above findings embody an understanding of MCZO 3.110(A)(1) that is consistent with the express language of that code provision. Therefore, petitioner's challenge to the county's initial findings, which can be read to embody a different, problematic interpretation, does not provide a basis for reversal or remand.

Turning next to MCZO 3.110(A)(2), that standard requires a finding that "[t]he proposed zone is the best suited to accommodate the desired uses(s)[.]" Similarly, MCZO 3.110(A)(3) requires a finding that "[i]t is required under the exception rule (OAR 660, Division 4) to limit the uses permitted in the proposed zone." The county first interpreted "proposed zone" as used in MCZO 3.110(A)(2) and (3) to refer to the LU overlay zone rather than the proposed base zone. As petitioner argues, that interpretation is highly problematic. For one thing, the LU overlay zone does not "permit" any uses; it is a blank slate that, when applied, consists of whatever specific use limitations the county imposes as part of the plan/zone amendment process. Under the county's interpretation of MCZO 3.110(A)(3), for example, the county apparently undertakes to ask whether the exceptions rule requires the LU overlay zone to be imposed in order to limit the uses permitted in the LU overlay zone, which is nonsensical. We generally agree with petitioner that the county misconstrued "proposed zoning" as used in MCZO 3.110(A)(2) and (3) to mean the LU overlay zone rather

than the proposed base zone.[3] However, we need not engage in further analysis of the parties' dispute over the county's interpretation, because as noted above the county adopted alternative findings addressing MCZO 3.110(A)(2) and (3), which assume that the "proposed zone" being evaluated means the base zone being applied, in this case the TC zone. Because we reject below petitioner's challenges to those alternative findings, the county's interpretative error is harmless and provides no basis for reversal or remand.

B. MCZO 3.110(A)(2) Proposed Zone Best Suited to Accommodate the Desired Uses.

The county adopted alternative findings under MCZO 3.110(A)(2) addressing whether the proposed TC zone is best suited to accommodate the desired travel center. Petitioners argue that the county failed to adequately evaluate whether other base zones, such as the General Industrial (MG), Port Industrial (PI), and Rural Service Center (RSC) zones, would be better suited for the proposed travel center. Petitioner argues that under a broad interpretation of the uses allowed in the MG, PI and RSC zones, the proposed travel center would also be allowed in those zones. Further, petitioner argues that MG, PI or RSC zoning would be more compatible with the zoning of surrounding properties, which is largely industrial, than would the TC zone.

The county rejected that argument, noting that the reasons exception approved in *Devin I* was predicated on the need for additional tourist commercial facilities and specifically contemplated application of the TC zone. The county adopted findings concluding that the MG, PI or RSC zones could not be applied consistently with the reasons

[3] Petitioner also argues that in *Devin I*, LUBA interpreted MCZO 3.110(A) to the effect that "proposed zone" refers to the base or primary zoning district, and LUBA's interpretation to that effect governs the proceedings on remand, under the doctrine of law of the case. *Beck v. City of Tillamook*, 313 Or 148, 153, 831 P2d 678 (1992). We tend to agree with petitioner that the county's interpretation on remand is inconsistent with our discussion of MCZO 3.110(A) set out in *Devin I*, 62 Or LUBA at 264-65, and that the law of the case doctrine may well preclude the county from adopting a contrary interpretation on remand. However, we need not and do not reach that question.

exception, and for that reason alone the TC zone was "best suited" to accommodate the proposed travel center. Record 21.

Petitioner has not demonstrated that the findings at Record 21 are inadequate. Even assuming that the proposed travel center could be authorized under a broad interpretation of the uses allowed in the MG, PI or RSC zones, at best that would place those zones in parity with the TC zone, not demonstrate that those zones are "best suited" for the proposed travel center. Whether the MG, PI and RSC zones are more compatible with the *zoning* of surrounding property is not the question posed by MCZO 3.110(A)(2); the question is which zone is "best suited" for the desired use, *i.e.*, tourist commercial uses such as the proposed travel center. On this point, the county found that the reasons exception was justified based on the proposed contemplated application of the TC zone. That consideration alone is a sufficient basis to conclude that the TC zone is "best suited" to accommodate the proposed use, because no other zone would be consistent with the reasons exception. Petitioner has not demonstrated error in the county's findings addressing MCZO 3.110(A)(2).

C. MCZO 3.110(A)(3) It is Required by the Exception Rule to Limit the Uses Permitted in the Proposed Zone

Petitioner argued below MCZO 3.110(A)(3) is not met in this case because the need to apply the LU overlay zone to limit the uses allowed in the TC zone is not driven by the exception rule at OAR 660-004-0018(1) or the reasons exception to Goal 3, but rather by the need to avoid noncompliance with Goal 12 and the TPR rule at OAR 660-012-0060.[4] The county rejected that argument, finding:

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[4] We need not describe the complicated workings of the TPR here. In relevant part, OAR 660-012-0060(1) provides that a comprehensive plan amendment, including a zone change, that "significantly affects" a transportation facility by, among other things, allowing uses that will generate traffic at levels that will degrade or further degrade the performance of the facility below applicable performance standards within the planning period, the amendment can be approved only if certain measures are taken. In the present case, we understand the traffic studies to show that uses allowed in the unrestricted TC zone will "significantly affect" one or more transportation facilities within the county's 20-year planning period, but if the TC zone is restricted to allow only the proposed travel center, the zone change will not significantly affect any facility within the planning

> "As discussed above, the exception, which is not at issue in this remand, was taken to implement Goal 8. It did not take an exception to Goal 12, which is implemented through the [TPR]. OAR 660-004-0018(1) states that 'an exception to one goal or a portion of one goal do[es] not relieve a jurisdiction from remaining goal requirements and do[es] not authorize uses, densities, public facilities and services, or activities other than those recognized or justified by the applicable exception.' As discussed in the initial decision and at some length later in these findings, a re-zoning to TC, without the LU overlay, would violate the TPR, and thus Goal 12. Because there was no exception to Goal 12, the County is required by OAR 660-004-0018(4)(a) to 'limit the uses, density, public facilities and services, and activities to only those that are justified in the exception.' In other words, it is the exception rule that requires the County to limit the uses because of transportation issues and, therefore, this Court finds that MCZO 3.110(A)(3) is also satisfied." Record 22.

On appeal, petitioner repeats its argument that application of the LU overlay zone is not required by the exception rule itself, but rather by the need to comply with the TPR. We understand petitioner to argue that MCZO 3.110(A)(3) must be interpreted to allow application of the LU overlay zone only if the overlay zone is required in order to satisfy the reasons exception, in this case to Goals 3 and 14. Because the county took no exception to Goal 12, petitioner argues, a desire to be consistent with Goal 12 cannot be the sole basis for applying the LU overlay zone to limit uses allowed in the TC zone.

The above-quoted finding embodies a very different understanding of MCZO 3.110(A)(3). The county clearly understands MCZO 3.110(A)(3) to authorize application of the LU overlay zone where limiting uses allowed in the base zone is necessary in order to comply with statewide planning goal requirements, including goal requirements for which the county is *not* adopting an exception. Petitioner does not argue that that understanding of MCZO 3.110(A)(3) is implausible or inconsistent with the express language of MCZO 3.110(A)(3), its purpose or underlying policy. ORS 197.829(1). Petitioner does not even

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period. The county thus relied upon the limitations imposed on the zone change—in the initial decision the conditions imposed on the TC zone change, in the decision on remand the LU overlay zone with its Condition 6,—to avoid the "significantly affect" trigger and the need to take further action under the TPR. With limited exceptions discussed in this opinion, all issues of compliance with the TPR were resolved in *Devin I*.

argue that that view of MCZO 3.110(A)(3) conflicts with OAR 660-004-0018(1), and we do not see that it does. We see no error in employing the limitations on uses otherwise required by OAR 660-004-0018(1) to also ensure that development allowed under a reasons exception to one statewide planning goal is consistent with other statewide planning goals.

Additionally, petitioner argues that the county's finding that applying the LU overlay zone to limit uses allowed in the base TC zone is "required" to ensure consistency with the TPR is not supported by substantial evidence. According to petitioner, intervenor's traffic engineer concluded that the unrestricted TC zone could comply with Goal 12 and the TPR if certain additional transportation improvements were required as a condition of the rezone. Because the record shows that another option exists to ensure consistency with the TPR other than limiting allowed uses, petitioner argues, there is not substantial evidence supporting the county's conclusion that the LU overlay zone is "required," for purposes of MCZO 3.110(A)(3).

However, MCZO 3.110(A)(3) is concerned with whether the LU overlay zone is required by the exception rule "to limit the uses permitted in the proposed zone." Conditioning the TC zone change to require construction of transportation improvements to accommodate traffic generated by the *unrestricted* TC zone would do nothing to "limit the uses permitted in the proposed zone." Therefore, evidence in the record that another option exists to ensure consistency with the TPR, by conditioning the unrestricted TC zone instead of limiting allowed uses via the LU overlay zone, does not undermine the evidentiary sufficiency of the county's findings that the LU overlay zone is "required" to limit allowed uses for purposes of MCZO 3.110(A)(3).

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

As noted, Condition 6 of the LU overlay zone "authorizes only the construction of a travel center or other use of similar density, configuration and type." Condition 6 attached to

the LU overlay zone is substantively identical to the Condition 6 imposed on the TC zone change in the county's initial decision at issue in *Devin I*.

Under the second assignment of error, petitioner challenges Condition 6 of the LU overlay zone. Petitioner focuses on the language "other use of similar density, configuration and type," and argues that that language allows uses other than the proposed travel center and is therefore insufficient to ensure consistency with the TPR. According to petitioner, it is not clear what a "use of similar density, configuration or type" means, or any guarantee that such other uses would have not greater traffic impacts than the proposed travel center, which was the only specific use allowed in the TC zone that was evaluated in the traffic analysis supporting the county's findings on remand regarding the TPR. At a minimum, petitioner argues, the county is required to adopt findings explaining what "similar density, configuration and type" means, and why that language is sufficient to ensure that any use authorized under the LU overlay zone will be consistent with the TPR.

The county and intervenor (together, respondents) argue that the issue of whether the language "other use of similar density, configuration and type" potentially allows uses inconsistent with the TPR could have been raised in the appeal of the county's first decision, but was not, and that issue is therefore waived under the law of the case doctrine described in *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992). Respondents note that the second assignment of error in *Devin I* consisted of a challenge to Condition 6 attached to the TC zone change, which included the identical language "other use of similar density, configuration or type." According to respondents, petitioner could have argued in the appeal of the county's initial decision that the above-quoted language was overly broad or insufficient to ensure consistency with the TPR. Because that issue could have been raised during the initial appeal, but was not, respondents argue, petitioner cannot now raise that issue for the first time in the present appeal.

In the reply brief, petitioner argues that it is entitled to challenge Condition 6 imposed under the LU overlay zone, even if that condition is substantively identical to Condition 6 that was attached to the TC zone change, because it is a new condition.

We disagree. Under *Beck*, *supra*, a party at LUBA fails to preserve an issue for review if, in a prior stage of a single proceeding, that issue is decided adversely to the party or that issue could have been raised and was not raised. 313 Or at 154. Petitioner does not dispute that the issue of whether the language "other use of similar density, configuration or type" is consistent with the TPR could have been raised in the earlier appeal. Petitioner's second assignment of error in *Devin I* challenged Condition 6 to the TC zone change and raised several issues regarding compliance with the TPR, but did not include any argument that the language "other use of similar density, configuration or type" is inconsistent with or insufficient to comply with the TPR. LUBA sustained the second assignment of error in part, remanding for the county to accept additional evidence and adopt additional findings with respect to an issue that does not concern the question of what "other use of similar density, configuration or type" means or whether that language is consistent with the TPR. The scope of the county's proceedings on remand with respect to the TPR was limited, and the specific evidentiary issue we remanded to the county was resolved on remand and is not pressed again on appeal. The issue that petitioner seeks to raise in the present appeal is an issue that could have been raised in the earlier appeal.

In our view, that Condition 6 attached to the LU overlay zone is nominally a "new" condition does not alter the outcome under *Beck*. On remand, the county simply transferred all six conditions attached to the TC zone change to the LU overlay zone change, with no substantive changes. In particular, the language at issue in this assignment of error, "other use of similar density, configuration or type," is identical to that previously imposed, and serves the same function, to ensure consistency with the TPR. In such a circumstance, we do not believe that the law of the case doctrine articulated in *Beck* allows a party who could

have challenged that language in an earlier appeal to advance new challenges to the language in the decision on remand, simply because that language is embodied in a nominally "new" condition of approval. The issue raised in this assignment of error has been waived.[5]

The second assignment of error is denied

THIRD ASSIGNMENT OF ERROR

Conditional use permit standards MCZO 3.090(H) and 6.020(C) both require that the county find that the proposal will not exceed the "capacity" or "carrying capacity" of public facilities, including transportation facilities. In *Devin I*, LUBA remanded the county's initial decision to address the capacity standards and provide any necessary interpretation. On remand, the county interpreted "capacity" and "carrying capacity" to mean the number of vehicles the road can safely and efficiently carry, as determined under the county's adopted road and mobility standards. There is no challenge to that interpretation in this appeal.

In *Devin I*, LUBA also remanded on two issues relevant under MCZO 3.090(H) and 6.020(C): (1) to address testimony from petitioner's traffic engineer that a southbound left turn lane on Tower Road is warranted under county road standards to ensure safe access to the subject property, and (2) to address whether MCZO 3.090(H) and 6.020(C) require the county to take into account traffic impacts on Tower Road and nearby intersections that may result from a speedway use on nearby property that was approved some years ago, but has not yet been constructed.

A. Left Turn Lane

With respect to the left turn lane, on remand the county concluded based on evidence from intervenor's traffic engineer that a left-turn lane was not warranted or needed to satisfy

[5] Given this disposition, we need not address respondents' alternative argument that the issue presented under this assignment of error was waived under ORS 197.763(1), the "raise it or waive it" rule, because the issue was not raised with sufficient specificity during the proceedings on remand. We also do not address respondents' alternative responses on the merits.

safety concerns or the county's road or mobility standards. Record 7. However, because intervenor was willing to provide a left-turn lane, the county found that "a condition has been adopted imposing that requirement." *Id*. Additionally, in Section 1 of the order on remand, the county stated that the proposal "should be approved based on the findings and conclusions before us, including conditions to construct a left turn lane * * *." Record 3. However, the county did not explicitly amend the list of conditions previously imposed on the conditional use permit to add a condition requiring a left-turn lane.

Petitioner first argues that the county erred in failing to actually adopt a condition requiring construction of a left turn lane. Respondents argue, and we agree, that the above-quoted portions of the county's findings and order adequately embody an express condition requiring construction of left-turn lane. That the condition is not listed among the conditions previously imposed on the conditional use permit does not mean that no condition exists or the county failed to adopt any condition at all.

Petitioner next argues that the county erred in rejecting the testimony of its traffic engineer that a more detailed left turn warrant analysis is needed to quantify the "necessary queue storage length as well as necessary tapers and deceleration areas." Record 50. The county found, in relevant part:

> "* * * Devin's traffic engineer asserts that the applicant must do a 'quantification of the necessary queue storage length as well as necessary taper and deceleration areas.' The Court finds that the final engineering design of the left turn lane need not be determined in this manner. There is no argument or indication that the right-of-way is not long enough or wide enough to accommodate the necessary left turn lane, and the applicant will be required to build the left turn lane consistent with County road standards, which will determine the final engineering requirements of the left turn lane." Record 7 (footnote omitted).

In the omitted footnote, the county noted that the Tower Road right of way is 150 feet wide and concluded that "it is clear that the right of way is broad enough to accommodate the proposed turn lane." *Id.* n 2.

Petitioner first argues that the county erred in deferring a finding of compliance with the MCZO 3.090(H) and 6.020(C) carrying capacity standards to an engineering review process that does not provide for notice or opportunity for hearing. *Rhyne v. Multnomah County*, 23 Or LUBA 442, 447-48 (1992) (a local government may defer a finding of compliance with a discretionary permit approval criterion to a subsequent review proceeding, provided the proceeding affords notice and opportunity for a hearing). Respondents argue, and we agree, that the county did not defer a finding of compliance with MCZO 3.090(H) and 6.020(C) at all. It merely concluded that demonstrating compliance with MCZO 3.090(H) and 6.020(C) does not require a detailed engineering analysis for a left turn lane to determine engineering details such as queue storage length, tapers and deceleration distances. Petitioner does not explain why that view of the MCZO 3.090(H) and 6.020(C) is erroneous, and we do not see that it is. Petitioner's traffic engineer did not state or even suggest that a detailed engineering analysis to determine queue storage length, etc, must be completed and reviewed as part of the conditional use permit in order to determine compliance with MCZO 3.090(H) and 6.020(C). Even if he had, it is for the county to determine what "carrying capacity" means, and therefore what evidence is necessary to demonstrate compliance with MCZO 3.090(H) and 6.020(C) at the time of conditional use permit approval.

Petitioner's argument may be construed as an argument that, without a detailed engineering analysis, it is not known at this time whether a left turn lane can actually be constructed within the 150-foot wide Tower Road right-of-way. Petitioner specifically contends that the county's finding that "the right-of-way is broad enough to accommodate the proposed turn lane" is not supported by substantial evidence in the record. However, petitioner offers no reason to suspect that the 150-foot wide Tower Road right-of-way is not broad or long enough to accommodate adding a left-turn lane to the existing two-lane Tower Road improvements. It was petitioner's traffic engineer that suggested the left turn lane in the first place, and as the county noted there is no indication in the record from that traffic

engineer or anyone else that the right-of-way is not long enough or wide enough to accommodate the necessary left turn lane. A reasonable person could conclude based on the sizeable width of the right-of-way, and the absence from the record of any concern to the contrary, that the right of way can accommodate the left-turn lane required as a condition of approval. Finally, if for some unforeseen reason a left turn lane cannot be constructed within the right-of-way, the condition of approval discussed above requiring intervenor to construct a left turn lane will adequately ensure that development will not go forward under the conditional use permit unless the condition is modified, or some other solution is reached. This sub-assignment of error is denied.

B. Speedway Traffic

As explained in *Devin I*, some years ago the county approved a large regional speedway in the vicinity of the subject property, which has not yet been built and perhaps may never be built. *See Doherty v. Morrow County*, 44 Or LUBA 141 (2003). If developed the speedway would impact a number of intersections, including the Tower Road/I-84 intersection that the proposed travel center will use. Petitioner's traffic engineer took the position that MCZO 3.090(H) and 6.020(C) require the county to take the speedway's future traffic impacts on that intersection into account, in assessing the capacity of the transportation system. The county's findings on this point were confusing, and we remanded to the county to either take the speedway event traffic into account in determining capacity or explain why speedway traffic need not be considered.

On remand, the county adopted the following interpretation of MCZO 3.090(H) and 6.020(C):

> "* * * [T]he Court interprets MCZO 3.090(H) and 6.020(C) to not require an analysis of planned future uses that may never be built. Although the speedway has been approved, it has not been built and testimony in the record indicates that the developer does not have the funding to actually build the facility. Unlike the [TPR], the County's code does not require consideration to the planning horizon or that it necessarily address all planned uses. The

> provisions at issue in the County's zoning ordinance require an evaluation of the current capacity of the County's system and, because the speedway has not been built, this application need not consider impacts that do not yet exist and may never actually occur. Devin's traffic engineer cites to the [county's Traffic Impact Analysis or TIA] Guidelines to suggest that 'planned changes in land use within the study area' must be addressed. However, those guidelines do not control the language of the MCZO, which does not provide any indication that an applicant must anticipate any and all development. Moreover, the speedway has already been required to mitigate its impacts; thus, it is not appropriate to require a new applicant to mitigate problems that are not of that applicant's making. Thus, the Court interprets its code to not require analysis of approved, but unbuilt, developments when there is evidence that the approved development may not be built." Record 7-8.

Petitioner challenges the county's interpretation that MCZO 3.090(H) and 6.020(C) are concerned with *current* capacity and do not require evaluation of planned future uses that may never be built. First, petitioner argues that that interpretation is inconsistent with LUBA's remand for the county to take into account speedway traffic in determining the travel center's impact on the transportation system's carrying capacity. However, we did not hold in *Devin I* that MCZO 3.090(H) and 6.020(C) require the county to take speedway traffic into account. We remanded the decision to the county to either consider the impact of the speedway event traffic on capacity "or explain why it need not be considered." 62 Or LUBA at 277. The above-quoted finding represents the county's choice to "explain why it need not be considered," a choice our remand allowed.

Petitioner's only challenge to the merits of the county's explanation is to argue that the county's interpretation of MCZO 3.090(H) and 6.020(C) is inconsistent with the county's adopted "Traffic Impact Analysis Guidelines," which as the title suggests provides guidelines for traffic impact analyses. The Guidelines state that background traffic volumes should include "[p]lanned changes in land use within the study area resulting from approved development yet to be built and/or fully occupied." Petition for Review App 35. However, in the above-quoted finding the county rejected petitioner's argument that the Guidelines require consideration of the speedway traffic, noting that the Guidelines are only guidelines

and do not control the meaning of MCZO 3.090(H) and 6.020(C). Petitioner contends that the Guidelines are mandatory, but fails to demonstrate that the county's interpretation of the relationship between the Guidelines and the MCZO is inconsistent with the language, purpose or underlying policy of any relevant county legislation. We cannot say that it is implausible to view a "guideline" to be non-mandatory, or that consideration of the Guidelines undermines the county's interpretation of MCZO 3.090(H) and 6.020(C) to the effect that the carrying capacity standard is concerned only with current conditions. *See Downtown Community Assoc. v. City of Portland*, 80 Or App 336, 722 P2d 1258 (1986) (statutory definitions of "Goals" and "Guidelines" recognize a distinction between mandatory and advisory planning measures.

The county went on to adopt alternative findings that, even considering capacity as taken up by the speedway's traffic if the speedway is ever built, the travel center does not exceed the carrying capacity of the county's transportation system. Petitioner challenges those findings as inadequate and not supported by the record. However, given that we have sustained the county's primary conclusion that MCZO 3.090(H) and 6.020(C) do not require consideration of the speedway traffic impacts on capacity, petitioner's challenges to the county's alternative findings do not provide a basis for reversal or remand even if they are inadequate or lack adequate evidentiary support.

This sub-assignment of error is denied.

The third assignment of error is denied.

The county's decision is affirmed.