

**FILED: August 29, 2012**

IN THE COURT OF APPEALS OF THE STATE OF OREGON

DEVIN OIL CO.,  
Petitioner,

v.

MORROW COUNTY;  
and LOVE'S TRAVEL STOPS & COUNTRY STORES, INC.,  
Respondents.

Land Use Board of Appeals  
2011107

A151098

Argued and submitted on June 07, 2012.

E. Michael Connors argued the cause for petitioner. With him on the brief was Hathaway Koback Connors LLP.

William K. Kabeiseman argued the cause for respondents. With him on the brief were Ryan M. Swinburnson and Garvey Schubert Barer.

Before Armstrong, Presiding Judge, and Brewer, Judge, and Duncan, Judge.

BREWER, J.

Affirmed.

1 BREWER, J.

2 On judicial review, petitioner Devin Oil Co., Inc., seeks reversal and  
3 remand of a final opinion and order of the Land Use Board of Appeals (LUBA). In that  
4 decision, LUBA upheld an order issued by respondent Morrow County that adopted a  
5 Limited Use (LU) overlay zone and approved the plan and zone change application of  
6 respondent Love's Travel Stops & Country Stores, Inc., (Love's) for the purpose of  
7 developing a travel center at a freeway exit on Interstate Highway 84. We affirm.

8 Petitioner owns property that is near the subject property, and it operates a  
9 business in Morrow County that will compete with the travel center that Love's seeks to  
10 develop. This case has a complicated procedural history that was well explained by  
11 LUBA in the decision under review:

12 "The challenged decisions are on remand from LUBA and the Court  
13 of Appeals. *Devin Oil Co. Inc. v. Morrow County*, 62 Or LUBA 247, *aff'd*  
14 241 Or App 351, 250 P3d 38 (2010), *rev den*, 350 Or 408, (2011) (*Devin I*).  
15 In our decision in *Devin I*, we described the subject property and proposed  
16 development as follows:

17 "The subject property is an undeveloped 49-acre parcel located at  
18 the junction of Interstate Highway 84 and Tower Road, five miles from the  
19 City of Boardman urban growth boundary, and near the Boardman Airport.  
20 The property is designated Industrial and zoned Space Age Industrial  
21 (SAI). On December 3, 2009, [Love's] filed an application seeking (1) a  
22 comprehensive plan map amendment from Industrial to Commercial, (2) a  
23 zoning map amendment from SAI to Tourist Commercial (TC), and (3)  
24 comprehensive plan text amendments to provide plan policies to support  
25 the TC zoning designation. The plan/zoning amendments are intended to  
26 permit [Love's] to seek approval for a 'travel center' on 12 acres of the  
27 subject property, consisting of truck and automobile fueling stations,  
28 convenience store, restaurant, and tire changing facility. The TC zone  
29 allows as outright permitted uses auto-oriented uses such as fueling  
30 stations, retail outlets, restaurants, and vehicle-repair services.'

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

11           "Petitioner appealed the county's May 5, 2010 decisions to LUBA.  
12 In [*Devin I*], LUBA remanded the county's decision on several grounds.  
13 Specifically, LUBA sustained petitioner's third assignment of error, which  
14 argued that the county cannot rely upon conditional zoning to limit the  
15 'uses, density, public facilities and services, and activities to only those that  
16 are justified in the exception,' as required by OAR 660-004-0018(4), but  
17 must instead use the county's Limited Use (LU) overlay zone, which was  
18 adopted for that specific purpose. We also sustained in part the sixth  
19 assignment of error, in which petitioner argued that there was not  
20 substantial evidence in the record to support the county's conclusion that, as  
21 limited by Condition 6, development of a travel center on the subject  
22 property under the TC zone would not 'significantly affect' Tower Road, for  
23 purposes of the Transportation Planning Rule (TPR) at OAR 661-010-  
24 0060.<sup>[1]</sup> Finally, under the seventh assignment of error, we remanded for  
25 the county to address several transportation-related issues under two local  
26 code standards that applied to the conditional use permit.

27           "On remand, the county applied the LU overlay zone to ensure  
28 compliance with OAR 660-004-0018(4). Among the conditions imposed  
29 under the LU overlay zone is a new Condition 6, which is worded almost  
30 identically to the former Condition 6 imposed on the zone change to TC:  
31 'This Limited Use overlay authorizes only the construction of a travel  
32 center or other use of similar density, configuration and type.' \* \* \* With  
33 respect to the TPR, on remand [*Love's*] submitted additional evidence,

---

<sup>1</sup> The TPR applies to all proposed comprehensive plan and zoning map amendments and ensures compliance with Goal 12 (Transportation). The TPR provides that, if a comprehensive plan or zoning map amendment would "significantly affect" a transportation facility within the meaning of the administrative rule, then the local government must adopt one or more of the measures set forth in OAR 660-012-0060(2) to mitigate the significant effect. OAR 660-012-0060(1).

1 based on which the county concluded that if development under the TC  
2 zone is limited to the proposed travel center then the zone change would  
3 not significantly affect any transportation facility within the planning  
4 period. Finally, the county addressed and found compliance with two local  
5 conditional use permit standards. The county's final decisions, on October  
6 26, 2011, again approved the plan/zone amendment and conditional use  
7 permit. These appeals followed."

8 *Devin Oil v. Morrow County*, \_\_\_ Or LUBA \_\_\_, (LUBA No 2011-107, March 7, 2012)

9 (slip op at 2-4).

10 On appeal to LUBA from the county's decision on remand, petitioner  
11 challenged the county's imposition of the LU overlay zone pursuant to Morrow County  
12 Zoning Ordinance (MCZO) 3.110, which provides, in relevant part:

13 "The purpose of the Limited Use Overlay Zone is to limit the list of  
14 permitted uses and activities allowed in the zone to only those uses and  
15 activities which are justified in the comprehensive plan 'reasons' exception  
16 statement under ORS 197.732(1)(c).<sup>[2]</sup> The Limited Use Overlay Zone is  
17 intended to carry out the administrative rule requirement for 'reasons'  
18 exceptions pursuant to OAR 660-14-018(3).

19 "A. Overlay Zone Requirements. When the Limited Use Overlay  
20 Zone is applied, the uses permitted in the underlying zone shall be limited  
21 to those uses and activities specifically referenced in the ordinance adopting  
22 the Limited Use Overlay Zone. The Limited Use Overlay Zone cannot be  
23 used to authorize uses other than those expressly provided in the underlying  
24 zone. \* \* \*

25 "The Limited Use Overlay Zone is to be applied through the plan  
26 amendment and rezoning process at the time the primary plan and zone  
27 designation is being changed. The ordinance adopting the overlay zone  
28 shall include findings showing that:

---

<sup>2</sup> A "reasons exception" allows the county to take an exception to strict compliance with certain Statewide Land Use Planning Goals if there are reasons that justify the exception. *See* ORS 197.732(2)(c).

1           "1. No other zoning district currently provided in the zoning  
2 ordinance can be applied consistent with the requirements of the 'reasons'  
3 exception statement because the zoning would allow uses beyond those  
4 justified by the exception;

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

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

9           As pertinent here, petitioner disputed the county's determination under  
10 MCZO 3.110(A)(3) that the LU overlay zone was required under the exception rule to  
11 limit the uses permitted in the TC zone. Petitioner argued that only the need to comply  
12 with the TPR rule, OAR 660-012-0060, requires that uses allowed in the TC zone be  
13 restricted. In a further assignment of error, petitioner challenged Condition 6 of the LU  
14 overlay zone. Petitioner argued that the phrase "other use of similar density,  
15 configuration and type" contained in that condition allows uses other than the proposed  
16 travel center and is therefore insufficient to ensure consistency with the TPR.

17           In affirming the county's decision, LUBA rejected those arguments and  
18 each of the other challenges that petitioner made to the county's decision. In particular,  
19 LUBA rejected petitioner's challenge to Condition 6 of the LU overlay zone on the  
20 ground that the substance of that challenge could have been, but was not, raised in the  
21 first appeal. On review, petitioner only assigns error to LUBA's rejection of the two  
22 arguments set out above. We address each in turn.

23           In its first assignment of error on review, petitioner asserts that

1 "LUBA erred by ignoring the County's findings and adopting its  
2 own independent conclusion regarding compliance with [MCZO] 3.110(A)  
3 (3), a conclusion that is inconsistent with the express language and purpose  
4 of MCZO 3.110(A)(3). The County determined that [Love's] satisfied  
5 MCZO 3.110(A)(3) because the LU overlay zone was 'required' to ensure  
6 compliance with Goal 12 and the TPR, but failed to adopt findings  
7 addressing uncontroverted evidence that [Love's] can comply by making  
8 the transportation improvements identified by its own traffic engineer.  
9 LUBA ignored the lack of findings and adopted its own independent  
10 conclusion that MCZO 3.110(A)(3) is satisfied. It is up to the county, not  
11 LUBA, to explain why MZCO 3.110(A)(3) is satisfied when it is  
12 undisputed that the LU overlay zone is not the only option available to  
13 comply with Goal 12 and the TPR.

14 "Moreover, LUBA's interpretation is inconsistent with the express  
15 language and purpose of MZCO 3.110(A)(3). LUBA's determination that  
16 the LU overlay zone is 'required' to comply with Goal 12 and the TPR even  
17 though it acknowledges that 'another option exists to ensure consistency' is  
18 the opposite of the plain language meaning of that term. LUBA's  
19 interpretation would render MCZO 3.110(A)(3) meaningless and is  
20 inconsistent with its purpose."

21 In light of the nature of those challenges, we review LUBA's order to  
22 determine if it is unlawful in substance or is not supported by substantial evidence. ORS  
23 197.850(9)(a), (c). In order to adequately address petitioner's arguments, we set out the  
24 county's findings on the criterion at issue in petitioner's first assignment of error:

25 "[Petitioner] argues that MCZO 3.110(A)(3), which requires  
26 findings showing that '[the overlay zone] is required under the exception  
27 rule (OAR 660, Division 4) to limit the uses permitted in the proposed zone'  
28 is not met because the overlay was imposed as a result of transportation  
29 inadequacies, not by the uses proposed. The [county] concludes that  
30 [petitioner] misses the point. As discussed above, the exception, which is  
31 not at issue in this remand, was taken to implement Goal 8. It did not take  
32 an exception to Goal 12, which is implemented through the Transportation  
33 Planning Rule ("TPR" OAR Division 660-012). OAR 660-004-0018(1)  
34 states that 'an exception to one goal or a portion of one goal do[es] not  
35 relieve a jurisdiction from remaining goal requirements and do[es] not  
36 authorize uses, densities, public facilities and services, or activities other  
37 than those recognized or justified by the applicable exception.' \* \* \* [A] re-

1 zoning to TC, without the LU overlay, would violate the TPR, and thus  
2 Goal 12. Because there was no exception to Goal 12, the County is required  
3 by OAR 660-004-0018(4)(a) to 'limit the uses, density, public facilities and  
4 services, and activities to only those that are justified in the exception.' In  
5 other words, it is the exception rule that requires the County to limit the  
6 uses because of transportation issues and, therefore, [the county] finds that  
7 MCZO 3.110(A)(3) is also satisfied.

8 "Moreover, LUBA's decision explains that it is both [OAR] Division  
9 660-004, as well as MCZO 3.110 that requires application of the LU  
10 overlay in cases where the primary zone does not already limit uses to the  
11 ones already proposed. Therefore, the [county] finds that the overlay is  
12 required by the exception rule (OAR Division 660-004)."

13 It is apparent from its findings that the county interpreted MCZO  
14 3.110(A)(3) to require (and by necessary implication, at least permit) consideration of all  
15 applicable statewide planning goal requirements, not merely those for which a reasons  
16 exception was taken. By contrast, LUBA understood petitioner to argue

17 "that MCZO 3.110(A)(3) must be interpreted to allow application of the LU  
18 overlay zone only if the overlay zone is required in order to satisfy the  
19 reasons exception, in this case to Goals 3 and 14. Because the county took  
20 no exception to Goal 12, petitioner argues, a desire to be consistent with  
21 Goal 12 cannot be the sole basis for applying the LU overlay zone to limit  
22 uses allowed in the TC zone. The above-quoted finding embodies a very  
23 different understanding of MCZO 3.110(A)(3). The county clearly  
24 understands MCZO 3.110(A)(3) to authorize application of the LU overlay  
25 zone where limiting uses allowed in the base zone is necessary in order to  
26 comply with statewide planning goal requirements, including goal  
27 requirements for which the county is not adopting an exception."

28 \_\_\_ Or LUBA at \_\_\_ (slip op at 10) (emphasis omitted). LUBA also observed that

29 "[p]etitioner does not even argue that that view of MCZO  
30 3.110(A)(3) conflicts with OAR 660-004-0018(1), and we do not see that it  
31 does. We see no error in employing the limitations on uses otherwise  
32 required by OAR 660-004-0018(1) to also ensure that development allowed  
33 under a reasons exception to one statewide planning goal is consistent with  
34 other statewide planning goals."

1 \_\_\_ Or LUBA \_\_\_ (slip op at 10-11).

2           The county specifically relied on the requirement in OAR 660-004-0018(1),  
3 which is part of the "exception" rule, that

4           "[e]xception[s] to one goal or a portion of one goal do not relieve a  
5 jurisdiction from remaining goal requirements and do not authorize uses,  
6 densities, public facilities and services, or activities other than those  
7 recognized or justified by the applicable exception."

8 MCZO 3.110(A)(3) requires a finding that the exception rule, OAR Chapter 660, division  
9 4, requires the uses to be limited at the site. The county expressly found such a  
10 requirement in OAR 660-004-0018(4)(a), which provides that,

11           "[w]hen a local government takes an exception under the 'Reasons'  
12 section of ORS 197.732(1)(c) and OAR 660-004-0020 through 660-004-  
13 0022, plan and zone designations must limit the uses, density, public  
14 facilities and services, and activities to only those that are justified in the  
15 exception."

16           In this case, the LU overlay zone that the county adopted expressly limited  
17 uses otherwise allowed in the TC zone, not merely to address Goal 12 concerns, but also  
18 to be consistent with the reasons exception that was taken to Goal 3. In the order that  
19 LUBA reviewed in this case, the county imposed through the LU overlay zone "the same  
20 conditions as were imposed through [its previous order]." In justifying an exception to  
21 Goal 3 in its previous order, the county had expressly indicated, among other things, that  
22 the transportation improvements that Love's was required to make would be sufficient so  
23 as not to interfere with harvest-time traffic requirements for an adjacent agricultural use.  
24 Having imposed that and other requirements, at least in part, to comply with Goal 3  
25 concerns, the county complied with MCZO 3.110(3), whether or not that ordinance

1 provision literally required the limitation of uses to be consistent with statewide goals,  
2 such as Goal 12, for which no exception was taken. Petitioner cites no authority, and we  
3 are aware of none, for the proposition that the county's approval of the LU overlay zone  
4 could not also include conditions that addressed other statewide planning goals, including  
5 Goal 12, for which no exception was taken.

6           Even if that were not so, however, we would reject petitioner's argument.  
7 Petitioner has never argued that the LU overlay zone was not necessary to limit uses to  
8 those justified in the reasons exception that was taken to Goals 3 and 14. To the contrary,  
9 in *Devin I*, the thrust of petitioner's argument in its third assignment of error before  
10 LUBA was that "the LU overlay zone is the exclusive means for the county to comply  
11 with OAR 660-004-0018(4) and limit uses to those justified in the reasons exception  
12 statement." 62 Or LUBA at 263. As LUBA observed in upholding that assignment of  
13 error in *Devin I*, the LU overlay zone is "the only [Morrow County Zoning Ordinance]  
14 provision that is expressly intended" for the purpose of ensuring compliance with OAR  
15 660-004-0018(4). *Id.* at 264. For that reason, LUBA concluded that, in the absence of  
16 "an already limited primary zone," the LU overlay zone must be used to ensure  
17 compliance with OAR 660-004-0018(4). *Id.* at 266. Petitioner invited that ruling from  
18 LUBA, and it stands on review in this case. For each of the foregoing reasons, we reject  
19 petitioner's first subargument.

20           In its second subargument, petitioner remonstrates that the evidentiary  
21 record compels the conclusion that improvements can be made that would support a

1 complete rezone of the subject property to TC without an LU overlay. Petitioner asserts  
2 that there was uncontroverted evidence in the record that Love's can comply with Goal 12  
3 and the TPR by making transportation improvements that its traffic engineer identified.

4 Based on that premise, petitioner asserts that

5 "LUBA erred by independently deciding this issue on appeal rather  
6 than remanding so the County can address it and adopt its own findings.  
7 The county's findings must address and respond to specific issues relevant  
8 to compliance with the applicable approval standards that were raised in the  
9 local proceedings. \* \* \* There is no question that the county's findings do  
10 not respond to this issue and that it is relevant to compliance with MCZO  
11 3.110(A)(3). LUBA's jurisdiction is limited to reviewing the county's  
12 decision, not making its own independent determination of compliance with  
13 the local regulations. ORS 197.835(1). It is up to the County, not LUBA,  
14 to explain why MCZO 3.110(A)(3) is satisfied when it is undisputed that  
15 the LU overlay zone is not the only option available to comply with Goal  
16 12 and the TPR."

17 The parties dispute at length whether petitioner's evidentiary assertion is  
18 correct. However, we need not detain ourselves with that issue because there is a  
19 dispositive flaw in petitioner's legal analysis. As discussed, MCZO 3.110(A)(3) is  
20 concerned with whether the LU overlay zone is required by the exception rule "to limit  
21 the uses permitted in the proposed zone." Conditioning a zone change to require  
22 construction of transportation improvements to accommodate traffic generated in an  
23 unrestricted TC zone would not "limit the uses permitted in the proposed zone" for  
24 purposes of the exceptions that were taken. Therefore, evidence in the record that  
25 another option exists to ensure consistency with the TPR does not undermine the county's  
26 decision to adopt the LU overlay zone to limit use, at least in part, to satisfy the reasons  
27 exceptions that were taken in this case. Accordingly, we reject petitioner's second

1 subargument in its first assignment of error.

2 In its second assignment of error, petitioner argues:

3 "LUBA erred in concluding that petitioner's second assignment of  
4 error challenging Condition 6 of the LU overlay zone decision is precluded  
5 on the grounds that it is a resolved issue. Petitioner's challenge of  
6 Condition 6 is an unresolved issue because Condition 6 is part of the new  
7 LU overlay decision adopted by the county in direct response to *Devin I*.  
8 LUBA's reliance on the similarity between Condition 6 and the condition of  
9 approval adopted for the County's original Plan/Zone Change Application  
10 decision ('Zone Change Condition') disregards the fact that *Devin I*  
11 invalidated the Zone Change Condition. Moreover, in *Devin I*, petitioner  
12 specifically challenged the Zone Change Condition on the grounds that it  
13 was insufficient to demonstrate compliance with the TPR and prevailed on  
14 that argument. LUBA's determination that Petitioner could have raised this  
15 issue in *Devin I* also disregards the fact that the County had to apply new  
16 approval criteria (MCZO 3.110) on remand. Finally, LUBA failed to  
17 consider the fact that Respondents waived the argument that this is a  
18 resolved issue because they never raised it below."

19 As did LUBA, we reject that argument. The exception rule, OAR Chapter  
20 660, division 4, required the county to limit the uses on the site. In *Devin I*, that  
21 limitation was accomplished through a condition of approval that provided as follows:

22 "6. This zone change is conditioned to allow only the construction of a  
23 travel center or other use of similar density, configuration and type."

24 In *Devin I*, petitioner made several challenges to the county's initial decision, but it did  
25 not challenge the substance of Condition 6 and whether it was sufficient to comply with  
26 OAR 660-004-0018(4). LUBA remanded the county's decision on the ground that the  
27 county had used the wrong mechanism to limit the uses on the site. As noted, LUBA  
28 concluded that the pertinent ordinance required use limitations such as the one imposed  
29 in this case to be imposed through an LU overlay.

30 On remand, the county followed LUBA's instructions and, after considering

1 the criteria in MCZO 3.110(A), adopted the following condition:

2 "6. This Limited Use overlay authorizes only the construction of a travel  
3 center or other use of similar density, configuration or type."

4 That condition is identical to the condition at issue in *Devin I*. The only practical  
5 difference between the two is that the current condition 6 is found in a LU overlay, rather  
6 than a condition of approval.

7 LUBA concluded that petitioner had waived its current challenge:

8 "Under [*Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678  
9 (1992)], a party at LUBA fails to preserve an issue for review if, in a prior  
10 stage of a single proceeding, that issue is decided adversely to the party or  
11 that issue could have been raised and was not raised. 313 Or at 154.  
12 Petitioner does not dispute that the issue of whether the language 'other use  
13 of similar density, configuration or type' is consistent with the TPR could  
14 have been raised in the earlier appeal. Petitioner's second assignment of  
15 error in *Devin I* challenged Condition 6 to the TC zone change and raised  
16 several issues regarding compliance with the TPR, but did not include any  
17 argument that the language 'other use of similar density, configuration or  
18 type' is inconsistent with or insufficient to comply with the TPR. LUBA  
19 sustained the second assignment of error in part, remanding for the county  
20 to accept additional evidence and adopt additional findings with respect to  
21 an issue that does not concern the question of what 'other use of similar  
22 density, configuration or type' means or whether that language is consistent  
23 with the TPR. The scope of the county's proceedings on remand with  
24 respect to the TPR was limited, and the specific evidentiary issue we  
25 remanded to the county was resolved on remand and is not pressed again on  
26 appeal. The issue that petitioner seeks to raise in the present appeal is an  
27 issue that could have been raised in the earlier appeal.

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

1 in an earlier appeal to advance new challenges to the language in the  
2 decision on remand, simply because that language is embodied in a  
3 nominally 'new' condition of approval. The issue raised in this assignment  
4 of error has been waived."

5 (Slip op at 13-14.)

6 Petitioner challenges LUBA's resolution of that issue on the ground that  
7 "LUBA's reliance on the similarity between Condition 6 and the Zone Change Condition  
8 disregards the fact that *Devin I* invalidated the Zone Change Condition."

9 The Supreme Court held in *Beck* that issues that LUBA decided in earlier  
10 proceedings, and upon which judicial review was not sought, are not subject to review in  
11 a judicial review of a subsequent LUBA order. 313 Or at 153. Thus, when LUBA  
12 remands a case for further proceedings, the parties are limited to "new, unresolved issues"  
13 relating to those remand instructions and cannot raise any "issues that LUBA affirmed or  
14 reversed on their merits." *Id.* In *McKay Creek Valley Association v. Washington County*,  
15 122 Or App 59, 64, 857 P2d 167 (1993), we held that "the overriding principle of *Beck* is  
16 that issues in land use cases must be brought to finality at the earliest possible  
17 opportunity." *See also Fisher v. City of Gresham*, 69 Or App 411, 414 n 1, 685 P2d 486  
18 (1984) ("It is clear that the legislative policy in land use cases is that 'time is of the  
19 essence in reaching final decisions in matters involving land use,' ORS 197.805, and that  
20 disputes involving land use decisions ought not be decided piecemeal in unending  
21 appeals.").

22 In this case, the phrasing of the limitation was unquestionably known at the  
23 time of the appeal in *Devin I*, and that phrasing was not changed on remand. There is no

1 doubt that the adequacy of the limitation could have been challenged in the first appeal.  
2 The fact that the same limitation was applied through a different mechanism does not  
3 alter the analysis. Nor is it determinative that new approval criteria were applied on  
4 remand. LUBA held in *Devin I* that the LU overlay was the proper mechanism to limit  
5 uses on the subject property. The adequacy of the limitation was not governed by the  
6 criteria set out in MCZO 3.110(A); those criteria focused on whether it was appropriate  
7 in the first instance to limit uses on the site. Issues pertaining to the adequacy of any  
8 required limitations were governed by the exception rule, OAR Chapter 660, division 4,  
9 and the remand required consideration of an entirely different set of criteria set out in  
10 MCZO 3.110(A).

11           Because petitioner's current challenge to the limitation that the county  
12 imposed could have been raised, but was not raised, in petitioner's first appeal in this  
13 case, petitioner waived its challenge to that limitation. Accordingly, we reject petitioner's  
14 second assignment of error.

15           Affirmed.