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BEFORE THE LAND USE BOARD OF APPEALS  
OF THE STATE OF OREGON

CHARLA RICHARDS-KREITZBERG, )  
SUSANN KALTWASSER, JOHN PROHODSKY,) )  
MARK HESLINGA, PAM KNIFFIN, ) )  
SUZANNE STAUSS, NANCY GRAF, MARIE ) )  
WYLLIE, MARJ JORDAN, and SAVE THE ) )  
GREENWAY, ) LUBA No. 95-230  
 )  
Petitioners, ) FINAL OPINION  
 ) AND ORDER  
vs. )  
 )  
MARION COUNTY, )  
 )  
Respondent. )

Appeal from Marion County.

Wallace W. Lien, Salem, filed the petition for review and argued on behalf of petitioners.

Jane Ellen Stonecipher, Assistant County Counsel, Salem, filed the response brief and argued on behalf of respondent.

HANNA, Chief Referee; LIVINGSTON, Referee, participated in the decision.

REMANDED 10/02/96

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

1 Opinion by Hanna.

2 **NATURE OF THE DECISION**

3 Petitioners appeal the board of commissioners'  
4 (commissioners) approval of a conditional use permit  
5 allowing a yard waste processing facility.

6 **FACTS**

7 The Marion County Solid Waste Management Department  
8 proposes a yard waste composting facility, recycling depot  
9 for materials incidentally mixed with the yard waste and  
10 compost sale facility on 21 acres of a 165-acre parcel. A  
11 portion of the 165-acre parcel is zoned Public and  
12 controlled by Marion County Urban Zoning Ordinance (UZO)  
13 chapter 16. The other portion is zoned Urban Transition and  
14 controlled by UZO chapter 13. An adjacent parcel is the  
15 current site of a demolition materials landfill. The  
16 hearings officer described the site and surrounding property  
17 as follows:

18 "The area east and southeast of the parcel is  
19 owned by the City of Salem with the majority being  
20 used for farm crops and to serve as a buffer  
21 between Minto-Brown Park and the landfill. The  
22 Willamette River is north of the [subject]  
23 property. Farm lands and a gravel extraction site  
24 are west. There are farm lands and natural  
25 riparian woodlots to the south.

26 " \* \* \* \* \*

27 "The proposed site has been compromised from the  
28 original land form by the years of operation as  
29 the municipal landfill and the consequent added  
30 fill material. The present topography and  
31 drainage of the area is a result of the capping of

1 the former landfill. Additionally the area is  
2 protected by a dike designed to protect the entire  
3 landfill." Remand Record 12.<sup>1</sup>

4 On July 7, 1995 the commissioners denied an appeal of a  
5 hearings officer's approval of the facility. On June 21,  
6 1995 the commissioners denied petitioners' request for  
7 reconsideration of their decision. Petitioners appealed to  
8 LUBA. At the request of the parties, on October 20, 1995,  
9 LUBA remanded the case to the county. On October 25, 1995,  
10 the commissioners adopted an amended order, adding 14  
11 conditions that had been inadvertently omitted from the  
12 first order.<sup>2</sup> This appeal followed.

13 **FIRST ASSIGNMENT OF ERROR**

14 Petitioners contend that:

15 "[t]here is an inherent bias and predisposition in  
16 this case where the local government makes a  
17 decision that a certain course of action is  
18 necessary, and then applies to itself when it is  
19 determined that a quasi-judicial land use permit  
20 is necessary in order to implement its prior  
21 decision." Petition for Review 7.

22 As petitioners characterize the local proceedings,  
23 several county employees presented the application to the  
24 commissioners and then, in their role as county staff,  
25 provided advice and counsel to the commissioners on aspects

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<sup>1</sup>References to the original record are "Record." References to the record on remand are "Remand Record."

<sup>2</sup>The amended order references the conditions that were a part of the hearings officer's order.

1 of the application.<sup>3</sup>

2 In response, the county relies on Pend-Air Citizens'  
3 Comm. v. City of Pendleton, 29 Or LUBA 362, 367 (1995) in  
4 which we considered a similar challenge and stated:

5 "When alleging bias, the burden is on petitioner  
6 to establish its existence. Petitioner must  
7 establish that the decision makers were incapable  
8 of making a decision based on the evidence and  
9 arguments before them due to bias, or the decision  
10 makers prejudged the application and did not reach  
11 a decision by applying relevant standards based on  
12 the evidence and argument presented. \* \* \*  
13 Speculation and postulation on the part of  
14 petitioner is insufficient." (Footnotes omitted.)

15 Petitioners speculate concerning contacts that could  
16 have occurred between staff and the commissioners and  
17 postulate that because the commissioners had a role in  
18 initiating the proposal, they were unable to make a decision  
19 contrary to that proposal.<sup>4</sup> Petitioners have not shown that  
20 the commissioners were incapable of making a decision based  
21 on the evidence and arguments before them due to bias, or  
22 that the commissioners prejudged the application and did not  
23 reach a decision by applying relevant standards based on the  
24 evidence and argument presented.

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<sup>3</sup>Petitioners also suggest that the commissioners could have employed alternatives to avoid deciding the issues themselves, such as using a hearings officer. The county responds that the fact that it was the applicant as well as the decision maker, does not require it to adopt an alternative procedure. In any case, the county did use a hearings officer to make the initial decision.

<sup>4</sup>In our order on motion for evidentiary hearing in this case, we described in detail petitioners' speculation and postulation.

1 The first assignment of error is denied.

2 **SECOND ASSIGNMENT OF ERROR**

3 Petitioners argue that following our remand to the  
4 county, they were impermissibly excluded from the October  
5 25, 1995 proceedings in which the commissioners adopted the  
6 challenged decision. Petitioners argue that:

7 "The initial order was flawed in that it did not  
8 discuss or adopt any conditions of approval that  
9 were referred to throughout the findings and  
10 conclusions. \* \* \* It was assumed that Petitioners  
11 would have an opportunity to comment on and  
12 present argument, even if not evidence itself, on  
13 the nature, scope and extent of conditions that  
14 should be attached if the use were allowed to be  
15 implemented." Petition for Review 13.

16 The county responds that, unlike in the cases relied on  
17 by petitioners, Morrison v. City of Portland, 70 Or App 437,  
18 689 P2d 1027 (1984) (the decisional criteria needed  
19 clarification) and Friends of Metolius v. Jefferson County,  
20 28 Or LUBA 591 (1995)(county adopted interpretive findings  
21 on remand), in this instance "the board did not adopt any  
22 new findings or impose any new conditions. It merely  
23 adopted a written order that correctly reflected the  
24 decision it had already made by including the conditions it  
25 had already adopted." Respondent's Brief 8. The county  
26 characterizes its action as correcting an error in its  
27 written order.

28 It is well established that procedures required during  
29 an initial proceeding need not be repeated on remand. See  
30 East Lancaster Neigh. Assoc. v. City of Salem, 30 Or LUBA

1 147 (1995), aff'd 139 Or App 333 (1996). When the county  
2 corrected the error in its decision, it was not required to  
3 follow the procedures that were required during the initial  
4 proceeding.

5 The second assignment of error is denied.

6 **THIRD ASSIGNMENT OF ERROR**

7 The county conditionally allowed the facility under UZO  
8 chapters 13 and 16, under which solid waste disposal sites  
9 are conditional uses. UZO 32.10(1)(c) defines a solid waste  
10 disposal site as:

11 "[L]and used for the disposal or handling of waste  
12 or solid wastes, including, but not limited to,  
13 dumps, landfills, sludge lagoons, sludge treatment  
14 facilities, disposal sites for septic tank pumping  
15 or cesspool cleaning service, composting plants,  
16 salvage sites, incinerators for solid waste  
17 delivered by the public or by a franchised  
18 collector or franchised transporter of solid  
19 waste. \* \* \*"

20 Petitioners argue that the facility approved by the county  
21 is not one allowed by the definition of a solid waste  
22 facility site. Petitioners reason that a composting plant  
23 allowed by the ordinance requires some sort of manufacturing  
24 process and because the proposed facility does not require a  
25 manufacturing process, the facility is not allowed under the  
26 definition.

27 The county responds that petitioners did not raise this  
28 issue below, and under ORS 197.763(1) and 197.835(3) are  
29 precluded from raising it now. Petitioners acknowledge  
30 that, in the initial proceedings, they made only a general

1 reference that the proposed use was inappropriate for the  
2 area.

3 ORS 197.763(1) states:

4 "An issue which may be the basis for an appeal to  
5 the Land Use Board of Appeals shall be raised not  
6 later than the close of the record at or following  
7 the final evidentiary hearing on the proposal  
8 before the local government. Such issues shall be  
9 raised and accompanied by statements or evidence  
10 sufficient to afford the governing body, planing  
11 commission, hearings body or hearings officer, and  
12 the parties an adequate opportunity to respond to  
13 each issue."

14 Petitioners' general statement that the proposed use is  
15 inappropriate for the area, did not raise the issue of  
16 whether the definition of solid waste disposal site includes  
17 a yard waste composting facility sufficiently to afford the  
18 governing body an adequate opportunity to respond to that  
19 issue. Petitioners have waived their right to raise this  
20 issue.

21 The third assignment of error is denied.

22 **FOURTH ASSIGNMENT OF ERROR**

23 Petitioners make thirteen subassignments of error in  
24 which they identify criteria for which they allege the  
25 county either failed to make findings or made inadequate  
26 findings. The county responds that it made findings on all  
27 relevant criteria, although it did not always parrot the  
28 code language in its findings. Furthermore, the county  
29 points out that under ORS 197.835(11)(b) LUBA can look to  
30 the evidence identified by the county and make its own

1 determination.

2           ORS 215.416(9) sets forth the requirements relative to  
3 findings in a challenged decision, and states:

4           "Approval or denial of a permit, expedited land  
5 division or limited land use decision shall be  
6 based upon and accompanied by a brief statement  
7 that explains the criteria and standards  
8 considered relevant to the decision, states the  
9 facts relied upon in rendering the decision and  
10 explains the justification for the decision based  
11 on the criteria, standards and facts set forth."

12 The Supreme Court has explained further the findings  
13 requirement, stating:

14           "No particular form is required, and no magic  
15 words need be employed. What is needed for  
16 adequate judicial review is a clear statement of  
17 what, specifically, the decision-making body  
18 believes, after hearing and considering all the  
19 evidence, to be the relevant and important facts  
20 upon which its decision is based. Conclusions are  
21 not sufficient." Sunnyside Neighborhood v.  
22 Clackamas Co. Comm., 280 Or 3, 21 (1977)  
23 (Sunnyside).<sup>5</sup>

24           More recently, in Eckis v. Linn County, 19 Or LUBA 15  
25 (1990), we emphasized that the governing body must explain  
26 why the facts it found demonstrate that the relevant  
27 criteria have been met.

28           With respect to the application of ORS 197.835(11)(b),  
29 in the absence of adequate findings, we are required to  
30 affirm any part of a challenged decision where a party

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<sup>5</sup>Although ORS 215.416(9) has been amended since Sunnyside was decided, Sunnyside remains the foundation for interpreting the statutory findings requirement.

1 identifies evidence in the record that "clearly supports"  
2 the decision.<sup>6</sup> "Where the relevant evidence in the record  
3 is conflicting, or provides a reasonable basis for different  
4 conclusions, such evidence does not 'clearly support' the  
5 challenged decision." Waugh v. Coos County, 26 Or LUBA 300,  
6 307 (1993). Moreover, where the application of the  
7 standards at issue require the exercise of considerable  
8 judgment by the local government, it is less likely that  
9 evidence will "clearly support" a decision that the  
10 standards are met under ORS 197.835(11)(b). Id. at 308.

11 **A. Suitability for Proposed Use**

12 The challenged decision identifies UZO 40.02(b) as an  
13 applicable approval criterion. The essential requirement of  
14 this criterion is that the subject property be suitable for  
15 the proposed use considering its natural features.  
16 Specifically, it requires that "the parcel is suitable for  
17 the proposed use considering such factors as size, shape,  
18 location, topography, soils, slope stability, drainage and  
19 natural features."

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<sup>6</sup>ORS 197.835(11)(b) provides:

"Whenever the findings are defective because of failure to recite adequate facts or legal conclusions or failure to adequately identify the standards or their relation to the facts, but the parties identify relevant evidence in the record which clearly supports the decision or a part of the decision, the board shall affirm the decision or the part of the decision supported by the record and remand the remainder to the local government, with direction indicating appropriate remedial action."

1           Petitioners contend that the county has not made an  
2 adequate finding under UZO 40.02(b) because the county does  
3 not create a nexus between its description of the subject  
4 property's natural features and its suitability for the  
5 proposed use.

6           In several different places, the decision describes and  
7 evaluates the natural features of the subject parcel. The  
8 challenged decision then finds "[t]he property is suitable  
9 for the proposed use." Remand Record 14.

10          The challenged decision adequately explains the finding  
11 that considering the natural features of the subject  
12 property, it is suitable for the proposed use.

13          This subassignment of error is denied.

14           **B. Surrounding Properties**

15          UZO 40.02(c) requires "[t]he proposed use, as  
16 conditioned, will not substantially limit, impair, or  
17 preclude the use of surrounding properties for uses  
18 permitted in the applicable zone."

19          Petitioners refer to the process set forth in Still v.  
20 Marion County, 22 Or LUBA 331 (1991) used to interpret  
21 administrative rules regulating the siting of dwellings on  
22 exclusive farm use lands, and argue that UZO 40.02(c) must  
23 be interpreted in a like manner. Petitioners provide no  
24 legal authority to support their argument that a county code  
25 provision must be applied in the same manner as an unrelated  
26 administrative rule that regulates a different subject in a

1 wholly different manner, simply because the two share  
2 similar language in some respects.

3 The challenged decision describes and evaluates the  
4 effect of the proposal on surrounding property as required  
5 by UZO 40.02(c). No more is required.

6 This subassignment of error is denied.

7 **C. and D. Development Standards**

8 Petitioners argue that the county failed to address the  
9 development standards of UZO chapters 13, 16 and 27.

10 The county responds that development standards are not  
11 approval criteria that must be met for a conditional use,  
12 and states further:

13 "MCUZO §40.01, which governs approval of  
14 conditional uses clearly distinguish[s] between  
15 the two:

16 'Uses listed as Conditional Uses in a zone  
17 classification or otherwise identified as a  
18 conditional use in this ordinance may be  
19 approved if the procedures in Chapters 36 and  
20 37 are followed and if findings can be made  
21 that the criteria in Section 40.02 and the  
22 zone have been satisfied. Conditional uses  
23 shall be established and maintained in  
24 accordance with the applicable development  
25 standards in the zone and in Chapters 23  
26 through 34, and any conditions imposed as  
27 part of the approval." (Emphasis added)  
28 Respondents Brief 15.

29 The county argues, and we agree, that the code  
30 distinguishes between conditional use standards and  
31 development standards. We read the emphasized phrase of UZO  
32 40.01 to specify that compliance with conditional use

1 standards does not excuse compliance with development  
2 standards. The conditions imposed in the challenged  
3 decision, specifically (a) through (d) and (g) through (l),  
4 require compliance with development standards. Petitioners'  
5 general allegation of noncompliance does not establish that  
6 these conditions are insufficient to meet any code  
7 requirement.

8 These subassignments of error are denied.

9 **E. and F. Traffic Findings**

10 Petitioners contend that the county merely recited the  
11 evidence pertaining to traffic considerations and do not  
12 make findings and conclusions. Additionally, petitioners  
13 argue that UZO 13.02(a) requires an evaluation of road  
14 capacity that is not addressed in the decision.<sup>7</sup>

15 The county points to its evaluation in the challenged  
16 decision of evidence relating to traffic considerations.  
17 The findings in the challenged decision are adequate to  
18 address the standard of UZO 13.03(a) that "the use will not  
19 increase traffic beyond the capacity of existing roads."

20 These subassignments of error are denied.

21 **G. Solid Waste Findings**

22 UZO 32.10(2)(c) requires that "[s]urface water drainage  
23 shall be adequate to prevent flooding, health hazards or

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<sup>7</sup>Petitioners' reference to UZO 13.02(a) is apparently a scrivener's error. UZO 13.03(a) is the provision that addresses the subject of petitioners' assignment of error.

1 pollution of surface or ground waters."

2       Petitioners argue that the county merely relied on a  
3 Department of Environmental Quality determination instead of  
4 reaching its own conclusion. To the contrary, as identified  
5 by respondent, the challenged decision sets forth the  
6 evaluation required by UZO 32.10(2)(c).

7       This subassignment of error is denied.

8       **H. Screening**

9       UZO 32.10(2)(a) requires that "[s]ites shall be  
10 screened from view from adjoining developed properties and  
11 public streets."

12       Petitioners interpret this provision to require a  
13 sight-obscuring barrier around the perimeter of the entire  
14 subject property and not just the facility. The county  
15 responds that the ordinance does not require the barrier  
16 urged by petitioners. It points to the challenged decision  
17 as well as the record to demonstrate that the screening of  
18 the composting facility required by the imposition of a  
19 condition is adequate to meet the requirement of UZO  
20 32.10(2)(a).

21       In Mazeski v. Wasco County, 28 Or LUBA 159 (1994), we  
22 addressed a similar argument pertaining to visual screening  
23 of a proposed use, and stated that, given the discretionary  
24 nature of such a code provision, the local government was  
25 not required to establish that the conditions imposed will  
26 mitigate all visual impacts.

1           The conditions imposed by the challenged decision that  
2 require screening of the proposed use are sufficient to meet  
3 the requirement of UZO 32.10(2)(a).

4           This subassignment of error is denied.

5           **I. Adequate Access**

6           UZO 32.10(2)(b) requires "[t]he primary access to the  
7 disposal area and unloading areas shall have all weather  
8 surface adequate for delivery vehicles." Petitioners  
9 complain that the county's findings do not describe the  
10 adequacy of the all weather surface. The county responds  
11 that its findings are adequate; particular words are not  
12 required.

13           The challenged decision states, "Applicants' proposal  
14 includes an all weather surface for the primary access to  
15 the disposal area and unloading areas for delivery  
16 vehicles." Remand Record 19. Record 106, 344.

17           The challenged decision acknowledges that the access  
18 road has an all weather surface, but it does not explain why  
19 the all weather surface of the access road is adequate for  
20 delivery vehicles as required by UZO 32.10(2)(b).

21           This subassignment of error is sustained.

22           **J. Incorrect Reference**

23           Petitioners state "The statement [in the challenged  
24 decision] relating to noise and other impacts is inadequate  
25 in that it makes reference to the wrong criterion."

26           The county describes the incorrect reference as a

1 scrivener's error and states "[p]etitioners find no fault  
2 with the findings except that the last paragraph contains an  
3 incorrect reference to the criterion (c) instead of  
4 criterion (d)." Respondent's Brief 11.

5 Petitioners do not argue that the findings are  
6 inadequate to address the actual criterion.<sup>8</sup>

7 This subassignment of error is denied.

8 **K. Compatibility**

9 Petitioners argue that in complying with UZO 20.05(8)  
10 (Willamette River Greenway criteria), the county  
11 impermissibly relied on its general discussion of  
12 compatibility with surrounding areas. Petitioners state of  
13 the challenged decision, that "the word 'compatibility' or  
14 any derivative thereof is never used." Petition for Review  
15 28.

16 The county responds that the evidence in the record to  
17 which it points clearly supports the county's conclusion  
18 that the compatibility requirement of UZO 20.05(8) is met.

19 UZO 20.05(8) requires that "[t]he proposed development,  
20 change or intensification of use [be] compatible with  
21 existing uses on the site and the surrounding area." The  
22 challenged decision finds facts sufficient to address this  
23 standard, albeit in language somewhat different from that  
24 contained in UZO 20.05(8), when it describes the lack of

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<sup>8</sup>Neither do petitioners allege nor does it appear that they were misled in any way.

1 interference from past uses with the neighboring properties  
2 and the lesser intensity of the proposed use.

3 The challenged decision adequately addresses the  
4 requirements of UZO 20.05(8).

5 This subassignment of error is denied.

6 **L. Site/River Relationship**

7 UZO 20.05(13) requires that "\* \* \* structures shall be  
8 located 30 feet or more upland from the ordinary high water  
9 line \* \* \*." Petitioners point out that the findings do not  
10 identify the proposed site as "upland" and do not address  
11 the location of the ordinary high water line.

12 The challenged decision states:

13 "The site is located within the identified 100-  
14 year Floodplain and the Greenway of the Willamette  
15 River. The Federal Emergency Management Agency  
16 (FEMA) map (Community Panel 410154 250 D)  
17 identifies the flood elevation on the subject  
18 property as being 145 feet Mean Sea Level (MSL).  
19 Information supplied by the applicant indicates  
20 that all of the parcel, except a narrow strip near  
21 the river is above the Floodplain and the proposed  
22 processing facility would be located at an  
23 elevation of 146-165 MSL." Remand Record 23.

24 However, there is evidence in the record that, over the  
25 years, the site has been elevated, to a height above the  
26 100-year flood level. Record 246. It is axiomatic that if  
27 the site is above the 100-year flood level, it is above the  
28 ordinary high water line. However, that conclusion does not  
29 establish that any structures will be located 30 feet upland

1 of the ordinary high water line.<sup>9</sup>

2 This subassignment of error is sustained.

3 **M. Erosion**

4 UZO 20.05(9) states, "Areas considered for development,  
5 change or intensification of use which have erosion  
6 potential shall be protected from loss by appropriate means  
7 which are compatible with the provisions of the Greenway  
8 Management Zone." Petitioners identify two elements,  
9 "appropriateness" and "compatibility," as elements not  
10 addressed in the county's findings.

11 As stated above, no specific or magic words need be  
12 employed for findings to adequately support a decision.  
13 Sunnyside, supra, 280 Or at 21. The challenged decision  
14 describes and evaluates the existing and proposed erosion  
15 protection, and without using the words "appropriateness"  
16 and "compatibility," concludes that the proposed use will be  
17 in compliance with UZO 20.05(9).

18 This subassignment of error is denied.

19 The fourth assignment of error is sustained, in part.

20 **FIFTH ASSIGNMENT OF ERROR**

21 Petitioners argue in three subassignments of error that  
22 the challenged decision is not in compliance with the Salem

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<sup>9</sup>Additionally, we are unable to determine if the 30 foot requirement pertains to elevation or distance from the ordinary high water line.

1 Area Comprehensive Plan or land use regulations.<sup>10</sup>

2 **A. UZO 40.02(c)**

3 UZO 40.02(c) requires that "[t]he proposed use, as  
4 conditioned, will not substantially limit, impair, or  
5 preclude the use of surrounding properties for uses  
6 permitted in the applicable zone."

7 Petitioners argue that allowing the facility in such  
8 close proximity to a park will conflict with park use.  
9 "Petitioner's [sic] strongly urge that Respondent's  
10 conclusions on this criteria are wrong, and violate MCZO  
11 §40.02." Petition for Review 31.<sup>11</sup>

12 Allegations that are no more than a disagreement with  
13 the local government's ultimate conclusion in its findings,  
14 provide no basis for reversal or remand of the challenged  
15 decision. McGowan v. City of Eugene, 24 Or LUBA 540, 546  
16 (1993).

17 The county's findings are adequate to demonstrate that  
18 the proposed use conforms to the requirements of UZO  
19 40.02(c).

20 This subassignment of error is denied.

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<sup>10</sup>Petitioners contend that this argument is a challenge to the adequacy of the findings and is not a substantial evidence challenge. We will address it as such.

All three subassignments of error refer to the UZO. However, the third subassignment of error also refers to the Salem Area Comprehensive Plan.

<sup>11</sup>Essentially, petitioners are arguing against the county's evaluation of the evidence.

1           **B. Traffic**

2           Petitioners refer to UZO 13.03(a), 20.05(8), 32.10(2)  
3 and 40.02(c) as requiring an evaluation of traffic impacts.  
4 Petitioners argue that the county's findings are inadequate  
5 because they are predicated on a study dated April 1993,  
6 which is too old to be credible.

7           The age of a report does not, in itself, determine its  
8 credibility. In Schrock Farms, Inc. v. Linn County, \_\_\_ Or  
9 LUBA \_\_\_\_ (LUBA No. 95-058 March 21, 1996) slip op 9-11,  
10 aff'd \_\_\_ Or App \_\_\_ (July 3, 1996), in the absence of  
11 evidence that undermined the conclusions of a ten-year old  
12 report, we found the report reliable as substantial evidence  
13 to support a decision.

14           Petitioners do not point to evidence in the record that  
15 undermines the conclusions of the report in contention,  
16 which was prepared within one year of the subject  
17 application. The report is substantial evidence to support  
18 the required findings regarding traffic impacts.  
19 Petitioners' argument does not establish that the findings  
20 are inadequate to show compliance with the applicable  
21 criteria.

22           This subassignment of error is denied.

23           **C. Future Development**

24           UZO 13.03(b) requires a finding that:

25           "If the use will remain after the area is  
26 urbanized it will: 1) be located in such a manner  
27 that any significant unused portion of the

1 property has adequate development options, and 2)  
2 not restrict development options on adjacent  
3 properties."

4 The challenged decision states:

5 "Urbanization of this area is not a concern. The  
6 area is dominated by farmland, parkland, the  
7 landfill and a working gravel pit and not likely  
8 to be urbanized. [UZO 13.03(b)] is not applicable  
9 to this proposal." Remand Record 18.

10 Petitioners state:

11 "The subject property is inside the Urban Growth  
12 Boundary, and has been designated for urban type  
13 density use in the Salem Area Comprehensive Plan.  
14 How can it be that urbanization is 'not likely'  
15 when the area is designated for urban growth?"  
16 Petition for Review 33.

17 Although the finding states the provision in question  
18 is not applicable, it also evaluates the use of the area and  
19 determines that it is not likely to be urbanized. The  
20 county must either establish why UZO 13.03(b) is  
21 inapplicable or decide that it is applicable and explain how  
22 the two components of UZO 13.03(b) are satisfied. In so  
23 doing, the county must also explain the relationship between  
24 the Salem Area Comprehensive Plan, the urban transitional  
25 zoning designation and the conclusions it makes in its  
26 decision.

27 This subassignment of error is sustained.

28 The fifth assignment of error is sustained, in part.

29 **SIXTH ASSIGNMENT OF ERROR**

30 Petitioners argue that the county "improperly construed  
31 the applicable law in determining that a recycling depot was

1 an allowable Secondary Use in the zone." Petition for  
2 Review 34. UZO 49.238 defines a secondary use as "a use  
3 located on a lot with one or more primary uses \* \* \* and it  
4 is, or can be, maintained independent of the primary use."  
5 Petitioners contend that the recycling component of the  
6 proposed use is not independent of the yard waste component  
7 because "there is no way the recycling process, and sale of  
8 those products, can occur independently." Petition for  
9 Review 35.

10 The county responds that this secondary uses was  
11 approved as a conditional use under UZO 25.20(m), and  
12 explains "'maintained independent of the primary use' \* \* \*  
13 does not mean, as petitioners contend, that the secondary  
14 use must have no connection to the primary use."  
15 Respondent's Brief 23. The county describes many of the  
16 secondary uses allowed under UZO 25.20 and explains that  
17 "'independent' means that they are not part of the primary  
18 use and separate approval can be required."<sup>12</sup> Id. Much of  
19 petitioners' argument is devoted to a discussion of other  
20 secondary uses and the circumstances under which those uses  
21 are allowed in other zones. Petitioners do not cite to a  
22 prohibition of secondary uses pertinent to the zones  
23 applicable to the proposed use.

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<sup>12</sup>For example, a parsonage is allowed as a use secondary to a religious organization. However, without the religious organization the structure would not be a parsonage.

1           The county has provided an adequate explanation of its  
2 application of its code to allow a recycling depot, for  
3 materials that are mixed with yard waste but are unsuitable  
4 for yard waste composting, as a use secondary to a yard  
5 waste facility.

6           The sixth assignment of error is denied.

7           **SEVENTH ASSIGNMENT OF ERROR**

8           Petitioners argue that the decision violates UZO  
9 19.13(a), because it fails to include conditions to ensure  
10 that flood protection standards are met.

11           UZO 19.13(a) provides "\* \* \* a conditional use permit  
12 shall be obtained before construction or development begins  
13 within the Flood Plain Overlay Zone. The conditional use  
14 permit shall include conditions ensuring that the Flood  
15 Protection standards in Section 19.14 are met."

16           The county explains that it required proof that the  
17 entire parcel is above 146 feet MSL.<sup>13</sup> Because flood level  
18 is 145 feet, the county contends and we agree that the  
19 applicable requirement of UZO 19.14 is met.<sup>14</sup>

20           The seventh assignment of error is denied.

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<sup>13</sup>Although the general area is described as being in a floodplain, apparently the accumulation of waste from the historic use of the site as a landfill has caused the site to be elevated above the flood plain level.

<sup>14</sup>Additionally, although the county argues that UZO 19.14 is applicable only to structures below the flood level of 145 feet elevation, it explains in what manner each of the other requirements of UZO 19.14 could not be applicable to the subject proposal.

1 **EIGHT ASSIGNMENT OF ERROR**

2           Petitioners make a substantial evidence challenge  
3 identifying 11 instances in which they argue the evidence is  
4 inadequate to support the finding.<sup>15</sup> Petitioners identify  
5 deficiencies with respect to finding 3 and additional  
6 findings 3, 5, 6 and 7. The county has identified and  
7 described substantial evidence in the record to support each  
8 of the challenged findings. See Younger v. City of  
9 Portland, 305 Or 346, 358-60, 752 P2d 262 (1988), Mazeski v.  
10 Wasco County, supra, 28 Or LUBA at 184.

11           In errors identified with respect to additional  
12 findings 2, 5 and 9, petitioners have not established that  
13 the alleged deficiencies relate to any applicable  
14 criterion.<sup>16</sup> Findings that are not necessary to support an  
15 applicable criterion provide no basis for reversal or remand  
16 even if those findings are in error. Waite v. Marion  
17 County, 16 Or LUBA 353, 361 (1987).

18           The eighth assignment of error is denied.

19           The county's decision is remanded.

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<sup>15</sup>Petitioners allege more than one deficiency in several findings.

<sup>16</sup>For example, petitioners state that there is no evidence that any of the surrounding farmland is in commercial production. In its description of the surrounding farmland the finding does, in one instance, describe the farmland as commercial. Although the county does not point to any evidence in the record that the surrounding farmland is commercial farmland, petitioners have identified no criterion that in any way relates to whether the surrounding farmland is commercial farmland.