

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 THE PICULELL GROUP,
5 ARTHUR PICULELL and DEE PICULELL,
6 *Petitioners,*

7
8 vs.

9
10 CITY OF EUGENE,
11 *Respondent.*

12 LUBA No. 2007-213

13
14
15 FINAL OPINION
16 AND ORDER

17
18 Appeal from the City of Eugene.

19
20 Bill Kloos, Eugene, filed the petition for review and argued on behalf of petitioners.
21 With him on the brief was the Law Office of Bill Kloos PC.

22
23 Emily N. Jerome, Eugene, filed the response brief and argued on behalf of
24 respondent. With her on the brief was Harrang Long Gary Rudnick P.C.

25
26 BASSHAM, Board Member; HOLSTUN, Board Chair; RYAN, Board Member,
27 participated in the decision.

28
29 REMANDED

03/13/2008

30
31 You are entitled to judicial review of this Order. Judicial review is governed by the
32 provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioners appeal a denial of their application for tentative subdivision plan, site review plan and related approvals for a 34-lot residential subdivision.

FACTS

The subject property is a 5.89-acre parcel currently developed with a single family dwelling, and zoned Low Density Residential (R-1) with Site Review (SR) and Water Resources Conservation (WR) overlay zones. The East Santa Clara Waterway (the waterway) crosses the northeast corner of the subject property and runs south roughly parallel to the east property boundary. The northeast corner of the subject property and the area between the waterway and the eastern boundary of the subject property are vegetated with blackberry vines and trees. The waterway is a riparian corridor identified as Resource Site E57D on the city’s inventory of significant Goal 5 resources.

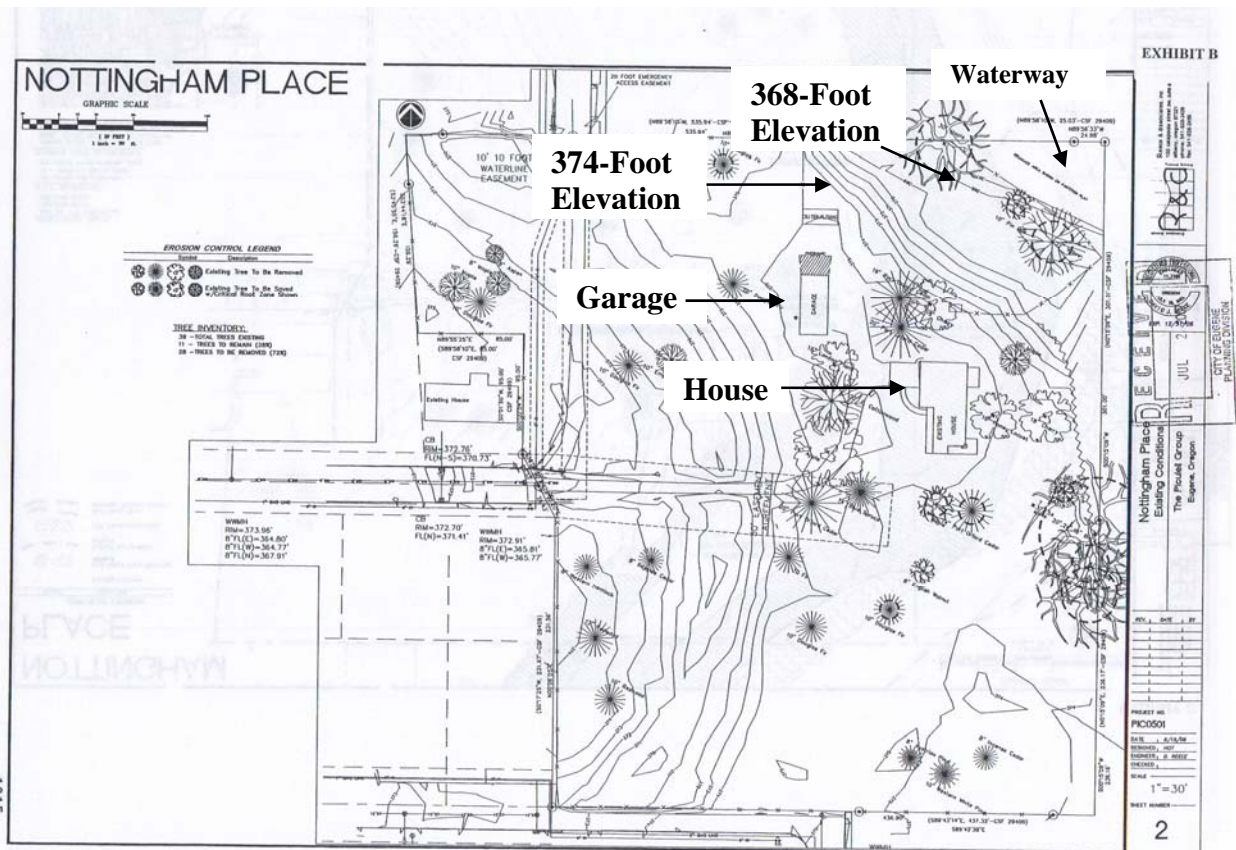
The WR overlay zone is part of the city’s program to protect significant Goal 5 sites. To protect riparian corridors such as the waterway, the WR zone restricts development within a “WR Conservation Area.” The conservation area includes (1) the resource site itself and (2) a “conservation setback” the width of which varies depending the category of resource. As discussed below, the exact geographic extent of Resource Site E57D is not known with precision. However, the principal issue in this appeal is the location of the conservation setback.

The waterway is a Category C stream, which requires a conservation setback of 40 feet landward from the waterway’s “top of high bank.” Eugene Code (EC) 9.4920(1)(c)(1) describes how to determine the “top of high bank” in the WR overlay zone:

“For conservation setback distances measured from the top of the high bank, the top of high bank is the highest point at which the bank meets the grade of the surrounding topography, characterized by an abrupt or noticeable change from a steeper grade to a less steep grade, and, where natural conditions prevail, by a noticeable change from topography or vegetation primarily

1 shaped by the presence and/or movement of the water to topography not
2 primarily shaped by the presence of water. Where there is more than one such
3 break in the grade, the uppermost shall be considered the top of the high bank.
4 * * *”

5 The waterway’s stream bed is at an elevation of approximately 361 feet. In the
6 northeast corner of the subject property, the west bank of the waterway rises nearly vertically
7 to an approximate elevation of 367-368 feet, where the grade flattens onto a terrace vegetated
8 with lawn grasses, at an approximate elevation of 369 feet. The terrace extends westward
9 approximately 40-50 feet and then rises over another 40-50 horizontal feet to a slight rise or
10 knoll, the top of which is 375 feet in elevation, where the existing dwelling is located. West
11 of the knoll the gradient drops to 371 feet, but then rises again at the western property
12 boundary. The following exhibit from the record may help visualize the existing conditions:



1 Petitioners proposed, and planning staff initially agreed, that the “top of high bank” is
2 located roughly at the two-year high water mark, at an approximate elevation of 367 to 368
3 feet. In the northeast corner of the property, the proposed “top of high bank” corresponds
4 roughly to the area where the west bank rising from the stream bed transitions to the terrace.
5 It also corresponds roughly to the landward boundary of Resource Site E57D in that area, as
6 depicted on city Goal 5 Plan maps. Petitioners accordingly proposed locating the
7 conservation setback in the northeast corner extending 40 feet landward of the 367-386 foot
8 elevation contour.

9 Neighbors opposing the application argued that the “top of high bank” in the
10 northeast corner of the property instead corresponds to the 374-foot elevation contour line,
11 roughly where the slope rising from the terrace begins to ease onto the top of the knoll on
12 which the existing dwelling sits. The 374-foot elevation contour in the northeast corner of
13 the property is located approximately 80 to 120 feet west of petitioner’s proposed top of high
14 bank line. The neighbors argued that the 374-foot elevation contour corresponds to the
15 “grade of the surrounding topography” and that when the residential subdivisions to the north
16 and south of the subject property were approved, the 374-foot elevation contour was
17 determined to be the top of high bank in those areas. The neighbors also argued that the 1996
18 flood reached the 374-foot elevation on the subject property, and that the slope up to the
19 knoll has been “shaped by the presence and/or movement of the water[.]”

20 The planning director agreed with the neighbors, concluding that the 374-foot
21 elevation is the applicable “top of high bank.” Accordingly, the planning director located
22 the conservation setback 40 feet landward of the 374-foot contour, running along the top of
23 the knoll where the existing dwelling is located. Under the planning director’s decision,
24 there is a “gap” 80 to 120 feet wide, an area roughly one half acre in size, between the
25 conservation setback and the westward boundary of Resource Site E57D in the northeast
26 corner of the property. Because petitioners’ subdivision and site plans proposed more

1 development within the conservation setback as located by the planning director than
2 permitted in the setback, the planning director denied the applications.

3 Petitioners appealed the planning director’s decision to the hearings officer, arguing
4 that the planning director misconstrued EC 9.4920(1)(c)(1). Petitioners argued, among other
5 things, that the planning director’s decision impermissibly creates a gap between the resource
6 site and the conservation setback in which development could occur. In response, staff
7 argued that in circumstances where application of EC 9.4920(1)(c)(1) creates such a gap, that
8 the landward boundary of the resource site expands to reach the conservation setback, thus
9 limiting development in the gap.

10 The hearings officer rejected the staff position on that point, concluding that the
11 geographic extent of the riparian corridor is determined by the city’s Goal 5 Plan maps, and
12 is not expanded to cover any gap between the site and the conservation setback determined
13 under EC 9.4920(1)(c)(1). The hearings officer found under the relevant code provisions
14 that “it is entirely possible that there is a gap between the riparian resource depicted on the
15 Goal 5 Plan map and the /WR conservation setback area.” Record 14.

16 However, the hearings officer agreed with the staff position that under EC
17 9.4920(1)(c)(1) the “top of high bank” is located at the 374-foot elevation contour. In a
18 conclusion, the hearings officer stated that she does not have the authority to interpret EC
19 9.4920(1)(c)(1) to reach a result that makes sense in all cases, and requested that the city
20 consider plan and code amendments to clarify the relationship between the plan maps and the
21 code provision. The hearings officer’s final decision affirms the planning director’s decision
22 in part and reverses in part. This appeal followed.

23 **FIRST ASSIGNMENT OF ERROR**

24 **A. First and Second Sub-Assignments of Error: Top of High Bank**

25 Petitioners argue that the hearings officer misconstrued EC 9.4920(1)(c)(1) in
26 concluding that the 374-foot elevation contour is the top of high bank.

1 Before turning to the parties' arguments, it is useful to examine the text and structure
2 of EC 9.4920(1)(c)(1) in more detail. As both parties recognize, EC 9.4920(1)(c)(1) is
3 ambiguous and, as the saying goes, no model of clarity.

4 In its brief, the city provides a helpful indented outline of the constituent clauses of
5 EC 9.4920(1)(c)(1). We adopt that outline, modified to include bracketed identifiers for each
6 clause or subclause:

7 “[1] For conservation setback distances measured from the top of the high
8 bank, the top of high bank is the highest point at which the bank meets
9 the grade of the surrounding topography, characterized

10 “[a] by an abrupt or noticeable change from a steeper grade to a less
11 steep grade,

12 “and,

13 “[b] where natural conditions prevail, by a noticeable change from
14 topography or vegetation primarily shaped by the presence
15 and/or movement of the water to topography not primarily
16 shaped by the presence of water.

17 “[2] Where there is more than one such break in the grade, the uppermost
18 shall be considered the top of the high bank.”

19 Clause 1 includes a general description of the “top of high bank,” that is “the highest
20 point at which the bank meets the grade of the surrounding topography[.]” That general
21 description is significantly qualified by Clauses 1(a) and 1(b), which set out specific
22 descriptions of how the “top of high bank” is “characterized.” Clauses 1(a) and 1(b) are
23 joined by a conjunction, indicating that the “top of high bank” must be characterized by both
24 specific descriptions. However, the applicability of Clause 1(b) is expressly contingent on
25 circumstances “where natural conditions prevail.” Thus, the top of high bank must be

1 characterized by Clauses 1(a) *and* 1(b), or, where Clause 1(b) does not apply, by Clause
2 1(a).¹

3 Clause 2 indicates where there is “more than one such break in the grade,” the
4 uppermost break in grade is the top of high bank. Clause 2 apparently would require
5 selection of the uppermost break where the multiple breaks are characterized by Clauses 1(a)
6 *and* (b) or by Clause 1(a) alone.

7 In the present case, the hearings officer concluded that the 374-foot elevation contour
8 is the pertinent “top of high bank” based apparently on two considerations: that (1) the
9 topography in the surrounding area is generally at the 374-foot elevation, and (2) between the
10 368-foot contour and the 374-foot contour, the land has been shaped by the presence and/or
11 movement of flood waters.² The first consideration is apparently directed at Clause 1, and
12 the second at Clause 1(b).

¹ Under the foregoing view, it is not clear that Clause 1(b) would ever have any independent significance, in determining the top of high bank. It is possible that the drafters of EC 9.4920(1)(c)(1) intended that the two clauses be joined by the disjunctive “or” rather than the conjunction “and.” That at least would give Clause 1(b) a clear significance independent of Clause 1(a). However, the drafters chose to use the conjunctive, and therefore require that the top of high bank be characterized by the descriptions in Clause 1(a) and, if applicable, Clause 1(b). We are not at liberty to read EC 9.4920(1)(c)(1) otherwise. *See Recovery House VI v. City of Eugene*, 156 Or App 509, 965 P2d 488 (1998) (code use of disjunctive “or” cannot be interpreted to mean “and”).

² The hearings officer found:

“The hearings officer concludes that the planning director did not err in establishing the 374-foot contour as the general location of the ‘top of bank’ for the purposes of EC 9.4920. As the city notes, the ‘top of bank’ is the ‘highest point at which the bank meets the grade of the surrounding topography[,] characterized by an abrupt or noticeable change from a steeper grade to a less steep grade, and, where natural conditions prevail, by a noticeable change from topography or vegetation primarily shaped by the presence and/or movement of water to topography not primarily shaped by the movement of water.’

“The evidence shows that the surrounding topography is generally at the 374-foot elevation, and that between the 368-foot contour and the 374-foot contour, the land has been shaped by the presence and/or movement of water. There is no support for the applicant’s argument that the definition is limited to landforms that are shaped by daily changes in water levels. Further, the applicant’s argument that, taken to the extreme, almost all land is shaped by water, is tempered by the other provisions of EC 9.4920(1)(c)(1), which require a relationship between the grade of the surrounding topography. In addition, while the hearings officer would otherwise agree with the applicant that one top of high bank is generally at the 368-

1 **1. Clause 1(a): Abrupt or Noticeable Change from a Steeper Grade**
2 **to a Less Steep Grade**

3 Petitioners advance a number of arguments challenging the above findings, but at the
4 outset we agree with petitioners that the hearings officer failed to find or address Clause 1(a),
5 whether the 374-foot elevation contour is “characterized by an abrupt or noticeable change
6 from a steeper grade to a less steep grade.” As noted above, as EC 9.4920(1)(c)(1) is written,
7 any potential top of high bank *must* satisfy Clause 1(a), that is, it must be characterized by an
8 abrupt or noticeable change from a steeper grade to a less steep grade. As far as we can tell,
9 the hearings officer made no findings on that critical point.

10 The city responds in relevant part that in her description of the subject property the
11 hearings officer states that from the bank at the 368-foot elevation the property “undulates up
12 to a 374-foot elevation” and that the evidence shows that the “374-foot elevation is consistent
13 with the natural elevation of abutting properties.” Record 10-11. However, that description
14 does not appear to be directed at Clause 1(a), and falls far short of concluding that the 374-
15 foot elevation is “characterized by an abrupt or noticeable change from a steeper grade to a
16 less steep grade.”

17 Even if some conclusion directed at Clause 1(a) is implicit in the findings, petitioners
18 argue, and it appears to be the case, that the 374-foot elevation is simply one point on a very
19 moderate slope leading up to the knoll that tops out at 375 feet in elevation. As far as we can
20 tell, the 374-foot elevation was chosen, as opposed to other elevations along that slope, based
21 on neighbors’ testimony about the height of the 1996 flood, rather than any abrupt or
22 noticeable change in grade that occurs at the 374-foot contour. Based on pictures cited in the
23 record, petitioners appear to be correct that it is difficult to discern any change of slope at all
24 at the 374-foot elevation, much less “an abrupt or noticeable change from a steeper grade to a

foot contour, the definition requires that, where there is a break between two banks, the higher bank is the ‘top of bank’ for purposes of the code. Accordingly, the planning director did not err in concluding that the ‘top of bank’ is located at the 374-foot contour.” Record 15.

1 less steep grade.” Certainly there is no “abrupt” change from a steeper to less steep grade at
2 that elevation and it is uncertain whether there is even a “noticeable” change from a steeper
3 to a less steep grade.³

4 As the city points out, a key consideration for both the hearings officer and the
5 planning director is the finding that “surrounding topography is generally at the 374-foot
6 elevation.” That finding appears to be directed at language in Clause 1. However, as
7 explained above, Clause 1 is only a general description of “top of high bank” that is more
8 specifically delineated in Clauses 1(a) and 1(b). In our view, that the surrounding
9 topography in the general area is at the 374-foot elevation is insufficient to identify the 374-
10 foot elevation as the “top of high bank,” in the absence of determinations made under Clause
11 1(a) and, if applicable, Clause 1(b). In other words, if there is not “an abrupt or noticeable
12 change from a steeper grade to a less steep grade” at the 374-foot elevation, then that
13 elevation cannot be the “top of high bank,” even if it represents the prevailing elevation in
14 the surrounding area.

15 2. Clause 1(b): Where Natural Conditions Prevail

16 The remainder of the hearings officer’s findings under EC 9.4920(1)(c)(1) appear to
17 be directed at Clause 1(b), which provides that “where natural conditions prevail,” the top of
18 high bank is characterized “by a noticeable change from topography or vegetation primarily
19 shaped by the presence and/or movement of the water to topography not primarily shaped by

³ One of the several interpretational difficulties in applying EC 9.4920(1)(c)(1) is what degree of change in grade is “noticeable” within the meaning of that code provision. The hearings officer made no findings on that point, and for present purposes it is not necessary for us to interpret the code provision in the first instance. However, we observe that both an “abrupt” and “noticeable” change in grade must be from a “steeper grade to a less steep grade.” That suggests that the grade at the putative top of high bank must be in some meaningful sense of the word “steep.” That is, a change in a gentle grade that is not “steep” may not be a “noticeable” change within the meaning of EC 9.4920(1)(c)(1). Based on pictures cited to us in the record it seems unlikely that the slope around the 374-foot elevation can be accurately characterized as “steep,” even if there is a perceptible change in grade at that point (which is also not clear). If on remand an issue arises regarding whether a change in grade at a putative top of high bank is “noticeable” under Clause 1(a), the hearings officer should address the issue in the first instance.

1 the presence of water.” The hearings officer concluded that “between the 368 foot contour
2 and the 374-foot contour, the land has been shaped by the presence and/or movement of
3 water,” apparently based on neighbors’ testimony that the 1996 flood reached the 374-foot
4 elevation and that the area up to the 374-foot contour has been shaped by floodwaters.

5 Petitioners direct a number of challenges at the hearings officer’s conclusions under
6 Clause 1(b), and advance elaborate theories as to how Clause 1(b) is supposed to work, alone
7 and in conjunction with other clauses. In our view, Clause 1(b) is one of the more deeply
8 ambiguous sub-sections of EC 9.4920(1)(c)(1).⁴ Given our view expressed above regarding
9 Clause 1(a) and the lack of findings supporting a conclusion that the 374-foot elevation
10 contour is the “top of high bank” under Clause 1(a), it is not clear whether we need resolve
11 each of the parties’ many disputes regarding Clause 1(b). On remand, Clause 1(b) may play
12 little or no role in determining the location of the top of high bank. Therefore, we do not
13 attempt to address and resolve all of the issues the parties raise regarding Clause 1(b).

14 Initially, petitioners argue, and we agree, that the hearings officer made no explicit
15 finding that the present circumstance is one where “natural conditions prevail.” As noted
16 above, the applicability of Clause 1(b) is contingent on circumstances where natural
17 conditions prevail. It is not clear under the hearings officer’s decision why she believes
18 “natural conditions prevail,” or why and to what extent Clause 1(b) applies.

19 Petitioners argue that because the purpose of the WR zone and the conservation
20 setback is to protect riparian habitat, the term “natural conditions” must be understood to
21 mean the presence of natural riparian vegetation, not cultivated or non-riparian vegetation.⁵

⁴ Among other problems, there is a lack of complete parallelism in Clause 1(b) that makes it difficult to understand. It is not clear why Clause 1(b) refers to a change from “topography or vegetation” to “topography” without a second reference to vegetation. Further, Clause 1(b) refers to “the presence and/or movement of the water” and then later merely to the “presence” of water. It is not clear whether this lack of parallelism is intended or inadvertent.

⁵ EC 9.4900 sets out the purpose of the WR overlay zone:

1 Petitioners note that the hearings officer found that there is little evidence of riparian
2 vegetation beyond the immediate shoreline of the waterway, most of which is located off the
3 subject property to the east. Further, petitioners argue that there is no dispute that on the
4 subject property in general and around the 374-foot elevation contour in particular the
5 grounds are cultivated with lawn grass and scattered ornamental trees. According to
6 petitioners, the criteria that the city used to designate the waterway as a significant Goal 5
7 resource focus on the presence of natural vegetated areas or native plant communities, as
8 distinct from “cultivated” areas. Record 692. Therefore, petitioners argue that the city erred
9 to the extent it relied upon the cultivated vegetation at or around the 374-foot elevation to
10 conclude that “natural conditions prevail” at that location.

11 Relatedly, petitioners argue that the limitation to “natural conditions” also acts as a
12 limitation on operation of Clause 2, which provides that “[w]here there is more than one such
13 break in the grade, the uppermost shall be considered the top of the high bank.” As noted
14 above, the hearings officer concluded under Clause 2 that the 374-foot elevation was the
15 higher of two “banks” on the property, and therefore the “top of high bank.” *See* n 2.
16 Petitioners contend that where the lower “break in the grade” has natural riparian vegetation
17 protected by the Goal 5 designation and the putative higher “break in the grade” does not, as
18 here, the lower bank with protected vegetation should be considered the top of high bank.
19 One virtue of this approach, petitioners argue, is that it would avoid the absurd result created
20 by the city’s approach, specifically the unregulated one-half acre “gap” between the
21 protected riparian corridor habitat and the conservation setback that is supposed to protect
22 the habitat. Petitioners contend that under the applicable regulations petitioners can

“The purpose of the /WR Water Resources Conservation overlay zone is to provide conservation of significant riparian areas, wetlands and other water-related wildlife habitat areas included on the city’s adopted Goal 5 inventory. In order to conserve these resources and the biological systems they contain and support, the overlay zone not only conserves the physical resources but also protects the water quality within the resource areas as a fundamental and essential requirement for continued survival of these biological systems.”

1 construct homes in that unregulated gap, next to the riparian habitat, a result seemingly
2 contrary to the purpose of the WR overlay zone.

3 Next, petitioners argue that the hearings officer erred in selecting the 374-foot
4 elevation contour under Clause 1(b), based on testimony from neighbors that the 1996 floods
5 reached the 374-foot elevation contour and staff testimony that the slope on which the 374-
6 foot contour is found appears to have been shaped by floodwaters. The hearings officer
7 recited, and apparently agreed with, the contention of the neighbors and staff that “flood risks
8 should be included in the evaluation of where the ‘top of bank’ is for purposes of
9 establishing” the conservation setback. Record 15.

10 Petitioners challenge that view, arguing that there is no basis in the code or elsewhere
11 to conclude that the WR overlay zone in general or the process for identifying the
12 conservation setback in particular is concerned with flood risks. Petitioners further note that
13 the entire subject property and much of the surrounding area is within the 100-year
14 floodplain for the waterway, which corresponds approximately to the 375-foot elevation.
15 Petitioners argue that it is likely that every natural topographic feature of the subject property
16 and the surrounding areas has been shaped over the centuries by floodwaters, and if “shaped
17 by floodwaters” is a basis to determine the top of high bank under Clause 1(b) there is no
18 principled basis to choose the 374-foot elevation contour, or any even contour. Petitioners
19 cite to testimony that expected flood recurrence level for the 374-foot elevation is
20 approximately 80 to 85 years. According to petitioners, choosing an 80-year flood level on a
21 slope as the “top of high bank” as opposed to any other flood level on the property is
22 arbitrary and unsupported by the record.

23 The city offers a number of responses to the foregoing arguments. As indicated
24 above, we see no purpose in attempting to resolve all of the parties’ disputes regarding the
25 meaning and application of Clause 1(b). Because the hearings officer’s findings do not
26 resolve these issues, including the threshold issue of whether Clause 1(b) applies at all,

1 LUBA would need to resolve them in the first instance. If in fact Clause 1(b) does not apply,
2 or has no dispositive influence, then our resolution of those issues would be merely advisory
3 dicta. We deem it more appropriate to remand the decision to the city under this assignment
4 of error and, if issues surrounding Clause 1(b) arise on remand, allow the hearings officer to
5 provide any necessary interpretations of Clause 1(b) in the first instance.

6 As a final matter, we note that the planning director’s decision questioned whether
7 petitioners had correctly identified the location of the break in the grade at or near the 368-
8 foot elevation contour. The planning director found that, at least at certain points along the
9 waterway, the applicant had measured the conservation setback “from the middle of this
10 bank.” Record 235.⁶ The planning director also noted testimony that at one point petitioners
11 appeared to locate the top of high bank actually in the waterway itself. Record 236. The
12 hearings officer applied Clause 2 in a manner that did not require her to resolve the exact
13 location of the initial break in grade. We write only to note that the concerns raised in the
14 planning director’s decision remain unresolved, and that even if there is only one relevant
15 “top of high bank” on the property under a proper application of EC 9.4920(1)(c)(1), as
16 petitioners contend, the particular locations identified by petitioners may not necessarily be
17 accurate.

18 The first and second sub-assignments of error are sustained.

19 **B. Third Sub-Assignment of Error: Goal 5 Maps**

20 The city’s Goal 5 plan includes a large-scale map that depicts Resource Site E57D,
21 but at a scale and level of detail that makes it impossible to locate the exact geographic
22 borders of the resource site with precision. Based solely on that map, there is no dispute that
23 the western boundary of Resource Site E57D cuts across the northeast corner of the subject
24 property and runs roughly parallel to and overlapping the eastern boundary. But apparently

⁶ The planning director noted that at the southeastern end of the property the 368-foot elevation contour appears to be located approximately halfway up the steep, near vertical bank rising from the waterway. *Id.*

1 at the scale of the site plan or subdivision plat the resource site boundary can be located only
2 with approximate accuracy.

3 In their application, petitioners attempted to identify the precise location of the
4 western boundary of Resource Site E57D, by relating the text of the Goal 5 plan, which
5 includes a table indicating that Resource Site E57D was designated due to the presence of
6 “natural vegetation,” with the line of natural vegetation that exists along and just within the
7 eastern property boundary.

8 The planning director and hearings officer rejected that empirical basis for locating
9 the boundaries of Resource Site E57D, finding that the Goal 5 Plan is the only legitimate
10 source for that purpose. Although petitioners challenge that conclusion, we agree with the
11 city that petitioners have not established that the hearings officer erred in that respect.
12 Nothing cited to us in the code or plan suggests that the geographic boundaries of the city’s
13 Goal 5 resource sites can be “refined” based on site-by-site empirical evaluations. Instead, as
14 the hearings officer found, the relevant code provisions appear to specify that the resource
15 site location is determined by the Goal 5 Plan, which as a practical matter means the relevant
16 map. That map may not allow the landward boundaries of Resource Site E57D to be
17 determined with the precision that petitioners desire, but petitioners make no attempt to
18 demonstrate that the map is insufficient to allow those boundaries to be determined with
19 reasonable accuracy, for purposes of the applicable WR overlay standards.

20 The third sub-assignment of error is denied.

21 The first assignment of error is sustained, in part.

22 **SECOND ASSIGNMENT OF ERROR**

23 Petitioners argue that the hearings officer erred in affirming the planning director’s
24 conclusion that petitioners “had failed to demonstrate that the proposal does not result in an
25 unreasonable risk of flooding.” Record 16. Petitioners note that, among other problems with
26 that finding, the planning director made no such conclusion, and in fact the planning director

1 found that the proposal complied with standards related to flood risk, with imposition of a
2 condition of approval.

3 The city responds that it does not oppose the second assignment of error. We
4 understand the city to concede that the decision must be remanded to the hearings officer to
5 address the issue and determine whether the application satisfies applicable standards related
6 to flood risk, with imposition of appropriate conditions of approval. Given the city's
7 concession on this point, we do not address this assignment of error further.

8 The second assignment of error is sustained.

9 The city's decision is remanded.