BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

CATHERINE LESIAK, MARK REED,
KATE PERLE, KEITH WALTON and
KEVIN JONES,
Petitioners,

vs.

CITY OF EUGENE,
Respondent,

and

THE PICULELL GROUP,
ARTHUR PICULELL and DEE PICULELL,
Intervenors-Respondents.

LUBA No. 2008-097

FINAL OPINION
AND ORDER

Appeal from City of Eugene.

Kate Perle, Catherine Lesiak, Keith Walton, Mark Reed and Kevin Jones, Eugene, filed the petition for review and argued on their own behalf.

No appearance by City of Eugene.

Bill Kloos, Eugene, filed the response brief and argued on behalf of intervenors-respondents. With him on the brief was the Law Office of Bill Kloos PC.

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

RYAN, Board Member, did not participate in the decision.

AFFIRMED 10/29/2008

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioners appeal a hearings officer's decision on remand approving a tentative subdivision plan and a site review plan for a 34-lot residential subdivision.

MOTION TO INTERVENE

The Piculell Group, Arthur Piculell and Dee Piculell (intervenors), the applicants below, move to intervene on the side of the respondent in the appeal. There is no opposition to the motion and it is granted.

FACTS

The city's initial decision denied the application for failure to comply with a conservation setback. LUBA remanded the decision for additional evidence and findings regarding the location of the "Top of High Bank" on the subject property, as defined in the Eugene Code (EC) 9.4920(1)(c)(1).[1] *Piculell v. City of Eugene*, __ Or LUBA __ (LUBA No. 2007-213, March 13, 2008). We recite the relevant facts from that decision:

> "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

[1] EC 9.4920(1)(c)(1) provides, in relevant part:

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

> 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 on the category of resource. * * *
>
> "* * * * *
>
> "The waterway's stream bed is at an elevation of approximately 361 feet. In the northeast corner of the subject property, the west bank of the waterway rises nearly vertically to an approximate elevation of 367-368 feet, where the grade flattens onto a terrace vegetated with lawn grasses, at an approximate elevation of 369 feet. The terrace extends westward approximately 40-50 feet and then rises over another 40-50 horizontal feet to a slight rise or knoll, the top of which is 375 feet in elevation, where the existing dwelling is located. West of the knoll the gradient drops to 371 feet, but then rises again at the western property boundary." Slip op 2-3.

In her initial decision, the hearings officer located the "top of high bank" at the 374-foot elevation, near the top of the knoll on the subject property, based on neighbors' testimony that the 374-foot elevation corresponds to the prevailing elevation in the surrounding area and was the high point reached by a 1996 flood. Intervenors appealed, arguing that the hearings officer misconstrued EC 9.4920(1)(c)(1) and that under a correct interpretation of the code the top of high bank is located at approximately the 368-foot elevation.

We remanded the city's initial decision because the hearings officer failed to address whether the "top of high bank" she identified at the 374-foot elevation is "characterized by an abrupt or noticeable change from a steeper grade to a less steep grade," as required by EC 9.4920(1)(c)(1). We also remanded the decision for the hearings officer to clarify whether the application satisfies applicable standards related to flood risk.

On remand, the hearings officer conducted an evidentiary hearing, and issued a decision finding that the only "top of high bank" on the subject property that satisfied the elements of EC 9.4920(1)(c)(1) is located at the 368-foot elevation, as intervenors advocated. Accordingly, the hearings officer approved the tentative subdivision plat and site plan. The hearings officer also found that the application satisfied all applicable standards regarding flood risk. This appeal followed.

FIRST, SECOND AND THIRD ASSIGNMENTS OF ERROR

A. Introduction

In *Piculell*, we provided a partial analysis of the structure and meaning of EC 9.2.4920(1)(c)(1), referring to the various clauses of the definition as Clause 1, Clause 1(a), etc.

> "In its brief, the city provides a helpful indented outline of the constituent clauses of EC 9.4920(1)(c)(1). We adopt that outline, modified to include bracketed identifiers for each clause or subclause:
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> "'[1] 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
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> "'[a] by an abrupt or noticeable change from a steeper grade to a less steep grade,
>
> "'and,
>
> "'[b] where natural conditions prevail, by a noticeable change from topography or vegetation primarily shaped by the presence and/or movement of the water to topography not primarily shaped by the presence of water.
>
> "'[2] Where there is more than one such break in the grade, the uppermost shall be considered the top of the high bank.'
>
> "Clause 1 includes a general description of the 'top of high bank,' that is 'the highest point at which the bank meets the grade of the surrounding topography[.]' That general description is significantly qualified by Clauses 1(a) and 1(b), which set out specific descriptions of how the 'top of high bank' is 'characterized.' Clauses 1(a) and 1(b) are joined by a conjunction, indicating that the 'top of high bank' must be characterized by both specific descriptions. However, the applicability of Clause 1(b) is expressly contingent on circumstances 'where natural conditions prevail.' Thus, the top of high bank must be characterized by Clauses 1(a) *and* 1(b), or, where Clause 1(b) does not apply, by Clause 1(a).
>
> "Clause 2 indicates where there is 'more than one such break in the grade,' the uppermost break in grade is the top of high bank. Clause 2 apparently would require selection of the uppermost break where the multiple breaks are characterized by Clauses 1(a) *and* (b) or by Clause 1(a) alone." *Piculell*, slip op 6-7.

On remand, the hearings officer applied the foregoing analysis and, as instructed, considered whether the 368-foot elevation (advocated by intervenor) or the 374-foot elevation (advocated by petitioners) is the top of high bank under all of the applicable clauses of EC 9.4920(1)(c)(1), including Clause 1(a) and, if applicable, Clause 1(b). In the first, second and third assignments of error, petitioners challenge the hearings officer's findings under Clause 1 and 1(a). In the fourth through eighth assignments of error, petitioners challenge the findings directed at clause 1(b).

B. Clause 1: Highest Point at which the Bank Meets the Grade of the Surrounding Topography

Under the first and second assignments of error, petitioners argue that the hearings officer failed to address the Clause 1 language describing the top of high bank as the "highest point at which the bank meets the grade of the surrounding topography." According to petitioners, the hearings officer correctly found in her initial decision that the area surrounding the subject property consists generally of a flat plateau at approximately 374 feet in elevation. Petitioners argue that on remand the hearings officer made no explicit determination regarding whether the 374-foot elevation or the 368-foot elevation "meets the grade of the surrounding topography." In finding that the 368-foot elevation is the "top of high bank" under clauses 1(a) and (b), petitioners argue, the hearings officer implicitly and erroneously determined that the narrow terrace adjacent to the waterway at the 368-foot elevation is where the bank meets the "grade of the surrounding topography."

As we explained in *Piculell*, Clause 1 generally describes the top of high bank, "the highest point at which the bank meets the grade of the surrounding topography," as *characterized by* the elements found in clause 1(a) and, if applicable, clause 1(b). In other words, the elements in clause 1(a) and 1(b) (where (b) is applicable) must be present in order to qualify a site as the top of high bank. As EC 9.4920(1)(c)(1) is written, the general description in Clause 1 and particularly the phrase "grade of the surrounding topography" does not have significance independent of the specific characterizations in clauses 1(a) and

(b). That is, a contour line representing the edge of the prevailing elevation in a particular area cannot be the "top of high bank" if it does not satisfy clause 1(a) and, if applicable, 1(b). Put differently, the question of what constitutes the "surrounding topography" is informed and defined by clauses 1(a) and 1(b). For the reasons explained below, the hearings officer found that the only elevation contour on the subject property that satisfies clause 1(a) and 1(b) is the 368-foot elevation contour. To the extent a specific finding regarding the "grade of the surrounding topography" is necessary, the hearings officer appears to have implicitly concluded that the terrace at the 368-foot elevation on the subject property is the relevant "surrounding topography." In our view, the validity of that conclusion depends on the validity of the hearings officer's findings regarding clauses 1(a) and 1(b), which petitioners challenge in the third through seventh assignments of error, below. Because we reject those challenges, petitioners' arguments under the first and second assignments of error do not provide a basis for reversal or remand.

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

In the third assignment of error, petitioners challenge the hearings officer's finding that there is not an "abrupt or noticeable change in grade" at the 374-foot elevation on the subject property.

The hearings officer found, in relevant part:

> "Neither of the pertinent terms in Clause [1][a] are defined. Therefore, I turn to the plain, natural and ordinary meaning of those terms. 'Abrupt' is defined in *Webster's Third New Int'l Dictionary* (2002 edition) 6, as:
>
> > "'**1 :** Broken off: suddenly terminating as if cut off or broken off * * * **3 :** rising or dropping sharply as if broken off: PRECIPITOUS, STEEP * * *.'
>
> "'Noticeable' is defined as:
>
> > "'**1 :** worthy of notice : likely to attract attention : CONSPICUOUS * * * **syn** REMARKABLE, PROMINENT, OUTSTANDING * * *

> applies to whatever is worthy of notice or unlikely to escape notice * * *.' *Id.* at 1544.

> "There is no dispute that the 368-foot contour generally follows the line where the slope drops precipitously to the creek bed. Therefore, it is clear that the 368-foot contour is one 'top of bank.' With respect to the 374-foot elevation, as the opponents' photographic evidence demonstrates, the location where the 374-foot contour levels off is much less discernible. Although one notices a rise in the landscape, the edge of that rise is not obvious to the eye. Consequently, I conclude that the 'top of high bank' as described by EC 9.4920(1)(c)(1) is at the 368-foot contour because the higher elevation is not 'characterized by an abrupt or noticeable change from a steeper grade to a less steep grade.'" Record 2-3.

Petitioners challenge the evidentiary support for the hearings officer's finding that the edge of the rise around the 374-foot contour on the property is "not obvious to the eye." According to petitioners, the photographs they submitted show a "noticeable" change in grade at the approximate location of the 374-foot elevation contour, contrary to the hearings officer's finding. Further, petitioners note that during her site visit the hearings officer took notes indicating that she observed a "break in topography" and an "edge" at the 374-foot elevation, which indicates that the change in grade at the 374-foot elevation attracted the hearings officer's attention during her site visit and is therefore "noticeable." Petitioners also contend that the site plan shows relatively steep slopes up from the terrace, with grades up to 17 percent, flattening out at the top of the rise or knoll at approximately the 374-foot elevation. In sum, petitioners argue, the evidence in the record does not support the hearings officer's finding that there is not a "noticeable" change in grade at the 374-foot elevation.

Resolution of petitioners' evidentiary challenge depends on the meaning of the term "noticeable." Petitioners appear to understand the term to broadly refer to any change in grade that is discernible or capable of attracting attention. The hearings officer on the other hand appears to have interpreted the term "noticeable" more narrowly to refer to changes in grade that are conspicuous or "obvious to the eye." Petitioners do not directly challenge that interpretation and we do not see that it is erroneous. The definition of "noticeable" that the hearings officer cited and relied upon suggests a range of meanings that include both broad

and narrow senses of what is noticeable. However, clause 1(a) requires that a change in grade be "abrupt" or "noticeable." Read in that context, it is reasonable to conclude that "noticeable" has the narrower sense of conspicuous or prominent, closer in meaning to "abrupt," rather than the broadest sense of anything that is discernible.

Turning to the evidence that petitioners cite to, the hearings officer noted that the photographs in the record are somewhat unreliable, because "angle and distance can significantly distort relevant reference points." Record 2-3, n 3. From our review of the photographs cited to us, both those submitted by intervenor and those submitted by petitioners, that observation is accurate. Both sets of photographs are taken at angles and from perspectives that tend to visually enhance or diminish the perceived degree of topographic change around the 374-foot elevation.

Perhaps for that reason, the hearings officer stated that she based her conclusions on her site visit and the topographic maps in the record. Record 3, n 3. Petitioners quote portions of her site visit notes suggesting that the hearings officer observed a change in grade at the 374-foot elevation. However, under the hearings officer's interpretation affirmed above, to be "noticeable" the top of high bank must have an edge or localized topographic change from a steeper to a less steep grade that is "obvious to the eye." The hearings officer concluded on remand that while there is a change in grade somewhere in the vicinity of the 374-foot elevation, it is not so visually conspicuous as to be "noticeable" within the meaning of clause 1(a). Similarly, while the topographic maps show that the slope rises up from the terrace at 368 feet and eases at the top of the knoll at 375 feet over a 40 to 50 foot distance, petitioners have not demonstrated that the maps show a topographic change at any specific point on that slope that is obvious to the eye, conspicuous, or prominent.

Substantial evidence is evidence a reasonable person would rely on in reaching a decision. *City of Portland v. Bureau of Labor and Ind.*, 298 Or 104, 119, 690 P2d 475 (1984). In reviewing the evidence, we may not substitute our judgment for that of the local

decision maker. Rather, we must consider and weigh all the evidence in the record to which we are directed, and determine whether, based on that evidence, the local decision maker's conclusion is supported by substantial evidence. *Younger v. City of Portland*, 305 Or 346, 358-60, 752 P2d 262 (1988). If there is substantial evidence in the whole record to support the decision, LUBA will defer to it, notwithstanding that reasonable people could draw different conclusions from the evidence. *Adler v. City of Portland*, 25 Or LUBA 546, 554 (1993). Where the evidence is conflicting, if a reasonable person could reach the decision the local government made, in view of all the evidence in the record, LUBA will defer to the local government's choice between conflicting evidence. *Mazeski v. Wasco County*, 28 Or LUBA 178, 184 (1994), *aff'd* 133 Or App 258, 890 P2d 455 (1995).

Here, a reasonable person could conclude that there is no "noticeable" change in grade at the 374-foot elevation, as the hearings officer interpreted that term. While the hearings officer certainly could have chosen to rely on the evidence petitioners cite to reach the opposite conclusion, the choice between believable conflicting evidence belongs to the hearings officer. Accordingly, petitioners have not established that the hearings officer's finding that there is no "noticeable" change in grade at the 374-foot elevation is unsupported by substantial evidence.

The first, second and third assignments of error are denied.

FOURTH THROUGH EIGHTH ASSIGNMENTS OF ERROR

As noted, clause 1(b) states that "where natural conditions prevail," the top of high bank is characterized "by a noticeable change from topography or vegetation primarily shaped by the presence and/or movement of the water to topography not primarily shaped by the presence of water."

The hearings officer concluded that the 368-foot elevation contour qualified as the top of high bank under clause 1(b), but that the 374-foot elevation contour did not qualify. The fourth through eighth assignments of error challenge those findings, from various

perspectives. However, we need not and do not address the fourth through eighth assignments of error, for the following reasons. As we understand the structure of EC 9.4920(1)(c)(1), any qualifying top of high bank must satisfy clause 1(a). Clause 1(b) is expressly contingent on circumstances where natural conditions prevail, and therefore may not be applicable in a given case. Because we have affirmed the hearings officer's conclusion that the 374-foot elevation contour does not qualify as a top of high bank under clause 1(a), any error the hearings officer might have made in rejecting the 374-foot elevation under clause 1(b) would seem to be harmless error. Indeed, petitioners argue under the fifth assignment of error that clause 1(b) is *not* applicable and that clause 1(a) by itself is determinative.[2] Petitioners do not dispute that, if clause 1(b) applies, the 368-foot elevation contour qualifies as a top of high bank under that clause. Therefore, petitioners' arguments under the fourth through eighth assignments of error do not provide a basis for reversal or remand.

NINTH AND TENTH ASSIGNMENTS OF ERROR

EC 9.8515(5)(a) requires a finding that the proposed subdivision will not "result in unreasonable risk of fire, flood, geological hazards, or other public health and safety concerns." In the initial proceedings, the planning director found that the proposal complied with EC 9.8515(5)(a), based on a condition prohibiting placement of fill below the 370.7 foot elevation. The applicants (intervenors in this appeal) appealed the planning director's initial decision, arguing in relevant part that the planning director should have used the 367.8-foot elevation as the point below which fill is prohibited. The hearings officer agreed with intervenors on that point. However, the hearings officer nonetheless found that the proposal did not comply with EC 9.8515(5)(a), because "[t]he applicant's hydrological study includes assumptions regarding a theoretical 'wall' that does not address flooding across the East

[2] Petitioners argue that "[t]he hearings official erred in construing section [1b] as somehow applicable, thus her finding that the vegetation [at the 374-foot elevation] is not natural is irrelevant." Petition for Review 15.

Santa Clara Waterway * * *." Original Record 16 (attached to the *Piculell* Petition for Review at App-10).[3]

On appeal of the hearings officer's initial decision to LUBA, intervenors assigned error to that finding, under their second assignment of error. The city, which was the only other party on appeal, responded that it did not oppose the second assignment of error. The city agreed with intervenors that the hearings officer should have found compliance with EC 9.8515(5), subject to the condition intervenors proposed, *i.e.* no fill below the 367.8 foot elevation. We understood the city to concede that "the decision must be remanded to the hearings officer to address the issue and determine whether the application satisfies applicable standards related to flood risk, with imposition of appropriate conditions of approval." *Piculell*, slip op 15. Accordingly, we sustained the second assignment of error.

On remand, the hearings officer addressed the issue of compliance with EC 9.8515(5). Petitioners presented testimony that challenged intervenors' studies and evidence directed at EC 9.8515(5). The hearings officer adopted the following finding:

> "In my initial decision, I concluded that the applicant failed to demonstrate that the proposal would not result in an unreasonable risk of floods. This conclusion was based on arguments by the city that the 1990 OTAK stormwater standards were inadequate to address impacts from a 25-year storm event, and on evidence and testimony from neighbors that the applicant's flood calculations addressed flood water volume but did not demonstrate that the water's velocity would not pose an unreasonable risk to property owners on lowlands to the east of the site.
>
> "The applicant and the city argue that the city has comprehensively addressed flood hazards in its flood prone area regulations, and that the hearings officer may not interpret EC 9.8515(5) to impose a 'no-rise' or 'no-impact' standard. They argue that the proposal will not pose an unreasonable risk of flooding, if conditions of approval are imposed to limit the fill to above the 367.8-foot

[3] It is not entirely clear what the "theoretical wall" is or why the hydrological study assumed its existence, but we understand that the model used to predict the consequences of adding the proposed fill to the floodplain did not make accurate predictions regarding the rise and dispersal of flood waters unless a "wall" was assumed to exist to contain flood waters.

> contour. Opponents again argue that the evidence does not support a finding that the proposal will avoid creating an unreasonable risk of flood.
>
> "EC 9.8515(5) appears to be directed at the creation of a new flood risk rather than an exacerbation of an existing one. Here, the evidence shows that the East Santa Clara Waterway periodically floods, and that property within the flood fringe is inundated. This will occur with or without the proposed development. Therefore, the hearings officer finds that if conditioned as the city proposes, this standard is met." Record 4.

Under the ninth assignment of error, petitioners argue that the hearings officer's finding of compliance with EC 9.8515(5) is not supported by substantial evidence. Specifically, petitioners argue that the hearings officer got it right in her initial decision that the hydrology study is flawed because it assumes a non-existent "wall" to contain flooding and the study does not take into account the displacement of existing floodwaters. According to petitioners, even if the proposed fill does not cause a vertical rise in flood waters, it will displace flood water onto low-lying property to the east that would not otherwise be flooded, possibly resulting in unreasonable flood risk. Under the tenth assignment of error, petitioners challenge the hearings officer's view that EC 9.8515(5) is directed at creation of new flood risk rather than exacerbation of an existing one.

Intervenors respond, initially, that the two issues raised in the ninth and tenth assignments of error cannot be raised in this appeal of the hearings officer's decision on remand. According to intervenors, petitioners were not participants in the earlier LUBA appeal and the only respondent participating in that appeal, the city, did not oppose the second assignment of error, which challenged the finding of noncompliance with EC 9.8515(5). Intervenors argue that in their second assignment of error in *Piculell* they comprehensively challenged the hearings officer's finding of noncompliance with EC 9.8515(5), and the city not only did not dispute those arguments but in fact agreed that the decision should be remanded for the hearings officer to find compliance with EC 9.8515(5) with imposition of the condition proposed by intervenors. Under these circumstances, intervenors argue, the issue of compliance with EC 9.8515(5) cannot be

relitigated in the present appeal under the waiver principle set out in *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992) (issues that were resolved in an earlier appeal to LUBA, or could have been raised but were not, cannot be raised on a subsequent appeal of the decision on remand). On the merits, intervenors incorporate the arguments in their petition for review filed in *Piculell*, at pages 37-46.

For a somewhat different reason we agree with intervenors that the issues raised in petitioners' ninth and tenth assignments of error are issues that are beyond LUBA's scope of review. As intervenors argued in their *Piculell* brief, the issues before the hearings officer in the initial local appeal of the planning director's decision were framed by the local notice of appeal that was filed to appeal the planning director's decision to the hearings officer. EC 9.7605(3) (the appeal shall be limited to the issues raised in the appeal statement). Only the applicants (intervenors) appealed the planning director's initial decision; the opponents filed no local appeal.[4] Intervenors' notice of appeal challenged the condition prohibiting fill below the 370.7 foot elevation and requested that the hearings officer revise the condition to prohibit fill below the 367.8 foot elevation. As noted, the hearings officer agreed with intervenors on that point. However, apparently in response to issues raised at the hearing by the opponents (petitioners in the present appeal) the hearings officer went on to find noncompliance with EC 9.8515(5) based on concerns regarding the "theoretical wall" and the adequacy of the hydrology study.

On appeal of the hearings officer's initial decision to LUBA, intervenors argued in their second assignment of error that the hearings officer exceeded her authority under the code in addressing an issue not raised in the notice of local appeal. *Piculell* Petition for Review 43-45 (citing *Smith v. Douglas County*, 93 Or App 503, 763 P2d 169 (1988), *aff'd*

[4] The planning director's initial decision was issued following the notice and comment required for a limited land use decision at ORS 197.195. The planning director's decision was not a permit decision issued without a hearing under 227.175(10), and therefore the city was not prohibited by ORS 227.175(10)(a)(E) from limiting the issues at the hearing to those raised in the notice of appeal.

308 Or 191, 777 P2d 1377 (1989)). Given that the city essentially conceded the second assignment of error, we did not specifically address the various challenges intervenors made to the hearings officer's findings under EC 9.8515(5), including whether the hearings officer erred in addressing an issue not stated in the notice of local appeal. Nonetheless, we believe that our remand "resolved" the issues raised in the second assignment of error, including whether the hearings officer exceeded her authority under EC 9.7605(3) in addressing an issue not raised in the notice of appeal, specifically the validity of the hydrology study. Because that resolved issue cannot be relitigated under *Beck*, the issue of the validity of the hydrology study was not properly before the hearings officer on remand and is not within our scope of review in this appeal. Therefore, the issue raised in petitioners' ninth assignment of error is beyond our scope of review, under *Beck*.

Under the tenth assignment of error, petitioners challenge the hearings officer's interpretation that EC 9.8515(5) "appears to be directed at the creation of a new flood risk rather than an exacerbation of an existing one." Record 4. Petitioners argue that this interpretation is not supported by the text of EC 9.8515(5). According to petitioners, nothing in EC 9.8515(5) suggests that the standard is unconcerned with development proposals that will exacerbate existing conditions with respect to flood risk, and is concerned only with the creation of new flood risk.

As explained above, the scope of remand to the hearings officer under the second assignment of error was relatively narrow, despite the nonspecific terms of our resolution of the second assignment of error. The primary and perhaps the only issue before the hearings officer on remand of the second assignment of error was whether intervenors' proposed condition prohibiting fill below the 367.8 foot elevation is sufficient to ensure compliance with EC 9.8515(5). The hearings officer found that it is. We are not sure what the hearings officer meant by stating that EC 9.8515(5) "appears to be directed at the creation of a new flood risk rather than an exacerbation of an existing one." However, that statement does not

appear to have any obvious bearing on the question of whether proposed condition prohibiting fill below the 367.8 foot elevation is sufficient to ensure compliance with EC 9.8515(5). To the extent the hearings officer's statement goes to an issue that is not precluded under *Beck*, it would appear to be surplusage and hence only harmless error, if it is error at all. Accordingly, petitioners' arguments under the tenth assignment of error do not provide a basis for reversal or remand.

The ninth and tenth assignments of error are denied.

The city's decision is affirmed.