

## PROPOSED HEARINGS OFFICER FINDINGS

The Hearings Officer finds this application was remanded by LUBA because the prior county decision “misconstrued the community use natural resources criterion [MCC 39.7515(B)] and, based on that misconception, failed to adopt adequate findings supported by substantial evidence.” *Cottrell Community Planning Organization et al v. Multnomah County*, \_\_ Or LUBA \_\_ (2025) (LUBA No. 2023-086, January 22, 2025, slip op at 130). As a result, this remand decision must address both the meaning and application of MCC 39.7515(B). *See Beck v. City of Tillamook*, 313 Or 148, 153, 831 P2d 678 (1992) (remand proceedings are limited to “new, unresolved issues” relating to LUBA’s remand instructions). This decision does not consider or resolve, “issues that LUBA affirmed or reversed on their merits, which are old, resolved issues.” *Id.*

LUBA also ruled that construction impacts are not part of the scope of the use to be evaluated under MCC 39.7515(B). Slip op at 130 (“The hearings officer did not misconstrue the applicable law in concluding that the county was not required to consider construction impacts under the community use criteria.”). The Hearings Officer concludes the current question is whether the operation of the water treatment facility and pipelines will adversely affect natural resources. The Hearings Officer considered the applicant’s argument that all the natural resource impacts are due to construction, and notes the logical extension of the applicant’s argument is that the construction of the water treatment facility and pipeline could permanently degrade or destroy any natural resource it found inconvenient to preserve without offending MCC 39.7515(B). The Hearings Officer concludes this argument is inconsistent with the express language of that code which requires no adverse impact, is inconsistent with the purposes of the comprehensive plan and zoning code which are to preserve natural resources, is inconsistent with the underlying county and state policies to preserve agricultural resources, and is contrary to ORS 215.243(1) and Goal 3 which the comprehensive plan and MCC 33.7515(B) implement.

The Hearings Officer notes that at LUBA, the parties debated the meaning of the term “natural resources” in MCC 39.7515(B). The Hearings Officer understands that LUBA concluded, as a matter of law, that:

1. The “hearings officer misconstrued the code when they concluded that ‘natural resources’ in MCC 39.7515(B) includes only those significant resources included in SEC overlays.” Slip op at 121.
2. “The MCCC glossary explains that within the context of the MCCC, ‘natural resource’ is defined as: ‘Generally, a functioning natural system, such as a wetland or a stream, wildlife habitat or material in the environment used or capable of being used for some purpose, also

including minerals and fuels, agricultural resources and forests[.]’ MCCP App 2 B, at 7.” (Footnote omitted.) Slip op at 121–122.

The Hearings Officer finds that three terms require interpretation: “natural resource”, “agricultural resource”, and “adversely affect”. The Hearings Officer finds that the definition of the term “natural resource” set forth in the Glossary of the MCCP is the correct definition of that term for purposes of MCC 39.7515(B). Accordingly, the “natural resources” to be considered under MCC 39.7515(B) are functioning natural systems, such as wetlands or streams, wildlife habitat, material in the environment used or capable of being used for some purpose, including minerals, fuels, agricultural resources, and forests.

The Hearings Officer considered the applicant’s testimony from the April 16, 2025 hearing that the original meaning of “natural resources” as written in the original comprehensive plan did not include “agricultural resources” in the enumerated list of natural resources, and, therefore, that agricultural resources need not be considered. The applicant contends that this prior list of natural resources controls, because when MCC 39.7515(B) was first enacted, the prior list was in effect.

The Hearings Officer disagrees for two reasons. First, although it is inherently difficult to determine the meaning of terms drafted a half century earlier, there is a timely analysis from LUBA of the same approval criterion, that the community service use will not adversely affect natural resources. In the case of *West Hill and Island Neighbors, Inc. v. Multnomah County*, Metro applied for a community service designation for the development of a solid waste landfill. The application was approved by the County, and then appealed to LUBA. LUBA No. 83-018, June 29, 1983 (Unpublished). Petitioner complained the fill would reduce the soil capability for timber production. LUBA remanded and ruled that the community service standards protecting forest resources:

“are stated in absolutes; and, together, they require any proposed community service use to meet very stringent standards. Whether or not the land will be returned to forest production [when the site is returned to timber production after the fill is completed] begs the question of the impact of the use now.” Slip op at 18.

LUBA also opined that the code:

“may indeed be unnecessarily strict when applied to community service uses, but the policy nonetheless exists and is part of the approval criteria  
\*\*\*\* The county might wish to consider amending the policy or

exempting certain community service uses from it.” *Id.*, at 33 (footnote omitted).

Said plainly, *West Hill and Island Neighbors, Inc.* is a contemporaneous LUBA opinion which indicates the not adversely affect natural resources criterion must be applied strictly. The Hearings Officer notes and agrees with the April 16, 2025, hearing testimony of Oregon Association of Nurseries that a strict interpretation and application of MCC 39.7515(B) consistent with that case does not preclude a community service use in this rural zone; rather, a community service use can be approved on a property that was previously developed with a non-farm use such that there are not remaining natural resources that would be adversely affected by the large water treatment facility. The Hearings Officer notes the City’s own engineer found the Powell Butte site within the UGB was feasible. Rec. 2746-48. The Hearings Officer finds a strict application of MCC 39.7515(B) does not preclude development of a new water treatment facility or other community service use.

The Hearings Officer considered the applicant’s argument at the April 16, 2025, hearing that the current LUBA remand was inconsistent with prior interpretations of the natural resource standard. However, *West Hill and Island Neighbors, Inc.* and the current remand order are consistent because both require strict protection of natural resources; displaced forest resources in *West Hill and Island Neighbors, Inc.* and displaced agricultural resources here. As quoted above, in *West Hill and Island Neighbors, Inc.* LUBA invited the County to consider exempting certain community service uses, but the Hearings Officer finds the County has not exempted the water treatment facility or the associated pipelines in any way. The Hearings Officer concludes that *West Hill and Island Neighbors, Inc.* applies, and that there is nothing in the intervening years, or in the text or context of MCC 39.7515(B), that suggests a less than strict interpretation is correct. The Hearings Officer further notes the very large size of the water treatment facility does not compel a different interpretation of the MCC 39.7515(B) criterion, and concludes the applicant’s argument for a looser interpretation is unpersuasive.

Second, the Hearings Officer notes the MCCP has been updated since MCC 39.7515(B) was enacted, and now expressly includes agricultural resources on the enumerated list of natural resources. The current MCC 39.7515(B) must be interpreted consistently with the current comprehensive plan—not the comprehensive plan in effect in 1977 as the applicant argues. The Oregon Supreme Court requires that zoning code provisions must be interpreted consistently with the *current* comprehensive plan.

“If [a comprehensive] plan is to have any efficacy as the basic planning tool for the City of Milwaukie, it must be given preference over conflicting prior zoning ordinances. To hold otherwise would allow a city to go through the motions and expense of formulating a comprehensive

plan and then relegating that document to oblivion through continued reliance on the older zoning ordinances.”

*Baker v. City of Milwaukie*, 271 Or 500, 509, 533 P2d 773 (1975).

The Hearings Officer concludes that the current comprehensive plan definition of natural resources controls, and that agricultural resources are natural resources which are protected under MCC 39.7515(B).

The Hearings Officer finds, in the alternative, that even if the 1977 version of the comprehensive plan was relevant to interpretation of MCC 39.7515(B), that plan restricts uses that are similar to the proposed community service uses.

“The Zoning Article: should include a Multiple Use Farm Zone with:

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b. the following examples of uses:

1. permitted as primary uses; agriculture and forestry practices and single family dwellings on legal lots;
2. the sale of agricultural products on the premises, dwellings for farm help, and mobile homes, should be allowed under prescribed conditions;
3. on lands which are not predominantly Agricultural Capability Class I, II, or III, rural planned developments, cottage industries, limited rural service commercial, and tourist commercial should be allowed as conditional uses upon the showing that the conditional use standards can be met[.]”

Ex S.7 Comprehensive Framework Plan 1977, page 206 (emphasis original).

The Hearings Officer finds that these MUA provisions demonstrate the 1977 comprehensive plan classifies uses in the MUA area by soil type, and that non-resource uses were discouraged from locating on Class II soils. The Hearings Officer notes the evidence in the record is that the water treatment facility property and pipeline properties are Class II soils and thus high-value farmland under Oregon law. Rec. 3659-3560; Ex N43, page 63. *See, e.g.* ORS 215.710(1) (defining high-value farmland). No party has provided contrary evidence. The Hearings Officer particularly notes that the applicant’s post-rebuttal report attempting to explain why the agricultural soils on the subject property are not natural resources does not challenge the assertion the soils are Class

II and thus high-value farmland under Oregon law. Ex S.36. The hearings officer concludes that the 1977 comprehensive plan discouraged non-resource uses in the MUA zone on Class II agricultural soils, and, therefore, that the applicant's argument that the 1977 version of the plan supports approval of the conditional use permits for the proposed water treatment facility and pipelines is unpersuasive.

The next definitional requirement is to define "agricultural resources". The term "agricultural resources" is not defined in the County zoning code or comprehensive plan, so we look to other sources for relevant context and guidance, in the context of the listing of agricultural resources in the comprehensive plan as a natural resource. The Oregon legislature declared, as a matter of policy, that: "Open land used for agricultural use is an efficient means of conserving natural resources." ORS 215.243(1). The Hearings Officer finds this legislative declaration is relevant context for defining agricultural resources because, analogous to the comprehensive plan, it indicates "open land used for agricultural use" is a "natural resource". Conversely, the Hearings Officer finds no authority for the proposition that "open land used for agricultural use" is not a "natural resource"; indeed, such an argument would conflict with the legislative policy. The Hearings Officer concludes that "open land used for agricultural use" is "agricultural resources" and constitutes "natural resources" within the meaning of MCC 39.7515(B).

The parties debate this definitional question. In support of their argument that agricultural soils are agricultural resources and functioning natural systems and thus natural resources within the meaning of MCC 39.7515(B), Oregon Association of Nurseries and 1000 Friends have provided information from the Natural Resources Conservation Service, which is part of the US Department of Agriculture. For example, Chapter 9 of the US Soil Survey Manual, written by the Soil Science Division Staff of the United States Department of Agriculture, explains how agricultural soils function as a natural system.

"Soil function is a way of describing the role of soil in the environment and has been used to define the concept of soil quality and soil health. Essential soil functions include nutrient cycling, water storage and release, biodiversity and habitat, filtering and buffering, and physical stability and support (simplified from Mausbach and Seybold, 1998). Soil stores and moderates the cycling of nutrients and other elements. It regulates the drainage, flow, and storage of water and solutes (N, P, and pesticides). It supports biodiversity and habitat and promotes the growth of plants, animals, and microorganisms. It serves as a filter and buffer for toxic compounds and excessive nutrients and protects the quality of water, air, and other resources. It provides physical stability and support, allowing the passage of air and water through its porous structure, serving as a

medium for plant roots, and providing an anchoring support for human structures.” Ex. U-24, page 65.<sup>1</sup>

The Hearings Officer finds that these federal reports are credible expert testimony, because they were written by scientists employed by the Soil Science Division Staff of the United States Department of Agriculture. Indeed, the name of the soils science agency—Natural Resources Conservation Service—demonstrates that the federal government classifies agricultural soils as natural resources and strives to conserve them. While the County comprehensive plan and zoning code need not be interpreted and applied consistently with reports provided by the US Department of Agriculture or its Natural Resources Conservation Service, the Hearings Officer finds that the reports detailing how agricultural soils function as a natural system are credible expert evidence which supports the conclusion that the open land used for growing nursery crops on the water treatment facility property and the pipeline route properties is a functioning natural system and therefore a natural resource within the meaning of MCC 39.7515(B). The support from federal scientists indicates this conclusion is not only plausible, it is entirely consistent with both the federal government’s scientific work and the Oregon legislature’s declaration of policy.

In response, the applicant relies on a report from Globalwise, dated May 5, 2025, to support its preferred definition of “agricultural resources”. Ex S-36. The Globalwise logo at the top of the report indicates that it provides “marketing and economic services”. The report was written by Mr. Prengruber, whose signature block indicates that he is an Agricultural Economist. The report explains:

“Farmland, particularly ornamental nurseries, dominate the lands surrounding the proposed filtration facility site. \*\*\*\* These farms do not follow organic or typical sustainable cultural practices. Significant human intervention with large amounts of inputs are employed. \*\*\*\* The added materials to the soil are fertilizers, pesticides, herbicides, rodenticides, soil amendments, and seeds/seedlings in order to be utilized for crop or livestock production. \*\*\*\* Agricultural land is managed for crop production, not for natural conditions such as wildlife habitat, wetland functions, or stream management.”

Ex S-36. The report concludes: “Agricultural land, considered as either farmland or farmed soil, is not a functioning natural system.” Ex S-36. As a starting point, the Hearings Officer finds the report is not provided by a professional with apparent training or knowledge of agricultural

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<sup>1</sup> *Assessing Dynamic Soil Properties and Soil Change*, by Skye Wills, Candiss Williams, and Cathy Seybold, USDA-NRCS, from the US Soil Survey Manual, page 482, by Soil Science Division Staff of United States Department of Agriculture, February 2018.

resources as natural resources, such as a soils scientist. Expertise regarding marketing, economics, and agricultural economics is not relevant to the question of how to define “agricultural resource” within the context of the County comprehensive plan, zoning code, and the state laws and goals that the County provisions implement. The Hearings Officer concludes the Globalwise report is not expert evidence on whether the soils on the water treatment facility and pipeline properties are functioning natural systems or natural resources.

Substantively, the crux of the Globalwise report is that the historic use of customary farm practices such as the application of fertilizers, pesticides, soil amendments, and seeds for the production of nursery crops means the water treatment facility property and surrounding properties are not a functioning natural system, and thus not an agricultural resource or a natural resource. The Hearings Officer concludes this is a legal argument which conflicts with the plain text of the comprehensive plan glossary definition of natural resources. The applicant admits the subject property was open land used for agricultural use and produced nursery crops. The Hearings Officer finds that the employment of customary farm practices on the water treatment facility property and pipeline route properties including the application of fertilizers, pesticides, and soil amendments, and the planting of seeds, does not mean the those properties are not a functioning natural system. Partially inorganic perhaps, but still functioning. Globalwise wrongly attempts to insert the qualifier “organic” into the glossary definition, as if the terms were “functioning organic natural systems” and “organic agricultural resources”. That interpretation would mean that only a certified organic farm where no artificial inputs were provided—not even seeds—would qualify as a functioning natural system and thus an agricultural resource. This argument violates ORS 174.010 by inserting the “organic” qualifier that the County omitted. The Hearings Officer concludes that the Globalwise interpretation of “agricultural resources” is inconsistent with the text of the comprehensive plan and the purposes of both the comprehensive plan and MCC 39.7515(B) which are to protect natural resources, expressly including agricultural resources.

The next interpretive question is the meaning of “adversely affect”. The Hearings Officer finds the term “adversely affect” is not specifically defined in the MCCP or the Code. However, the MCCP does provide relevant context. MCCP Community Service Policy 2.45 identifies the importance of requiring community facilities like the water treatment facility to avoid adverse impacts on farm practices, which rely on native soils and related agricultural natural resources.

“Support the siting and development of community facilities and services appropriate to the needs of rural areas while avoiding adverse impacts on farm and forest practices, wildlife, and natural and environmental resources including views of important natural landscape features.”

Another comprehensive plan provision explains that the County's primary concern with respect to protection of natural resources is avoiding "environmental degradation." MCCP 1-3 (explaining that the County has embraced land use planning as a necessary means "to protect natural resources from environmental degradation."). The Hearings Officer turns to the dictionary for a definition of "degradation" in this context. Webster's indicates that degradation means "5: impairment in respect to some physical property: a: damage by weakening or loss of some property, quality, or capability." *Webster's Third New International Dictionary* 594 (unabridged ed 2002). Therefore, when taken together with the meaning of the term "natural resources," the Hearings Officer finds the legal question under the adversely affect natural resources standard is whether the water treatment facility use, including the pipelines, weakens or impairs some property (as in characteristic), quality, or capability of the enumerated natural resources, including wetlands or streams, wildlife habitat, material in the environment used or capable of being used for some purpose, including minerals, fuels, agricultural resources, and forests.

With those interpretative questions resolved, the substantive question under MCC 39.7515(B) is whether the operation of the water treatment facility and pipelines adversely affect natural resources, including agricultural resources. The Hearings Officer concludes the answer is yes, for the following reasons.

Factually, the Hearings Officer finds the applicant previously testified that "The filtration facility site was previously leased to neighboring farmers and was used for nursery crop production with crop rows generally oriented in a north/south direction[.]" Rec 236. The Hearings Officer finds no contrary evidence in the record on this point, and concludes, factually, that the water treatment facility property is open land used for agricultural use, most recently for the production of nursery crops.

The record also indicates that operation of the water treatment facility would displace, cover and convert nearly 95 acres of agricultural natural resources to an urban water treatment facility. As the Oregon Dept. of Agriculture testified,

"The proposed facilities would be located amongst and upon lands that are highly suitable for agriculture and have been in agricultural production for decades. Most of the soils contain prime or other high-value agricultural soils. Much of the immediate area contains Class II soils, some of the best agricultural soils in the United States. It is important to note that these capability ratings are regardless of irrigation. The area soils are high quality with or without irrigation." Rec 3624.



The Hearings Officer finds this testimony is credible and persuasive, in part because no party has challenged the asserted fact that the soils on the water treatment facility property are high-value agricultural soils as defined in state law.

Regarding adverse impacts, the application stated: “the Water Bureau prioritized placement of the pipelines within the right-of-way where possible to preserve surrounding farmland and natural resources *where feasible*.” Rec 346 (emphasis added). The Hearings Officer finds that where the applicant deemed that preservation of agricultural natural resources was not feasible, such as on the water treatment facility property, those resources are not preserved, and therefore concludes agricultural resources are adversely impacted such that MCC 39.7515(B) is not satisfied.

Regarding impacts to agricultural resources on the water treatment facility property, the record indicates “According to the United States Department of Agriculture, over 95% of the proposed site contains Class 2 soil. The State of Oregon considers Class 2 soil ‘High-Value Farmland’ and Farmland of Statewide Importance” (OAR§660-033-0020 (8)(a)). Prior to construction, the City estimates approximately 1,225,000 cubic yards of soil to be removed, of which it is estimated 245,200 cubic yards of High-Value Class 2 topsoil will be removed across 75 to 80 acres.” Rec. 3659. The Hearings Officer notes that no party disputes the soil removal. Instead, the applicant explains that the topsoil has been relocated to a nearby property where it can be used for agricultural production. The Hearings Officer finds there is no evidence in the record that the relocated topsoil is actually being used for agricultural production, or that the receiving property is not already agricultural so that depositing the relocated topsoil will maintain the same number of acres of agricultural resources as before. Nor is there evidence that the receiving property has other attributes of the water treatment facility property to support a conclusion the relocated topsoil will be part of a functioning natural system that is similar to the functioning natural system that produced nursery crops on the water treatment facility property. The Hearings Officer finds the relocation of topsoil is a degradation of the agricultural resources caused by the operation of the water treatment facility which permanently removes the topsoil from its natural environment and prevents the replanting of nursery stock or other crops, and concludes the operation therefore adversely affects natural resources such that MCC 39.7515(B) is not satisfied. Moreover, the Hearings Officer finds that unlike in *West Hill and Island Neighbors, Inc. v. Multnomah County*, the applicant does not contend that most of the water treatment facility property can later be replanted and used for agriculture including the growing of nursery crops, and concludes that the inability to replant the formerly open agricultural land with new crops due to ongoing operation of the facility adversely affects agricultural resources, and is not a construction impact, such that MCC 39.7515(B) is not satisfied.

Similarly, the Hearings Officer finds that approximately four miles of proposed pipeline traverses high value soils of existing farmland. The Hearings Officer notes the testimony indicating that

local farmers and soil scientists with the Oregon Department of Agriculture agree that the valuable topsoil will be permanently degraded by the operation of 7-9 foot diameter pipes. As a result, the operation of the pipeline alone will degrade approximately 10-15 acres of valuable soil across two counties. Rec 3659. The Hearings Officer finds this is credible expert evidence that operation of the pipeline adversely affects natural resources such that MCC 39.7515(B) is not satisfied.

In addition, the Hearings Officer notes record testimony that “Degradation of natural resources, including increased soil compaction, soil horizon mixing, and decreased crop yields have been common outcomes of underground pipeline installation.” Rec 1261; 2911. Again, the Hearings Officer finds that unlike in *West Hill and Island Neighbors, Inc. v. Multnomah County*, following construction, the pipeline properties cannot later be replanted due to permanent easement restrictions. The Hearings Officer concludes the operation of the pipeline degrades agricultural resources and is an adverse impact to natural resources where the underground pipeline traverses agricultural land such that MCC 39.7515(B) is not satisfied.

As further evidence in support of these conclusions, the Hearings Officer considered this testimony from Rec. 3659.

“According to the United States Department of Agriculture, over 95% of the proposed site contains Class 2 soil. The State of Oregon considers Class 2 soil ‘High-Value Farmland’ and Farmland of Statewide Importance” (OAR§660-033-0020 (8)(a)). Prior to construction, the City estimates approximately 1,225,000 cubic yards of soil to be removed, of which it is estimated 245,200 cubic yards of High-Value Class 2 topsoil will be removed across 75 to 80 acres. Similarly, approximately 4 miles of proposed pipeline routes for both the raw and treated water spans through high value soils of existing farmland. Furthermore, it will negatively impact and permanently destroy future farmland production in these areas. Local farmers and soil scientists with the Oregon Department of Agriculture agree that the valuable topsoil will not recover from the dredging of trenches, construction, and heavy equipment needed to establish the connectivity of redundant 7-9 foot diameter pipes. As a result, the raw and treated water pipeline alone will destroy approximately 10-15 acres of valuable soil across two counties. Maps provided in Figure 5 and Figure 6 illustrate the spatial extent of high value farmland within the agricultural community which the City wishes to build the facility and its pipeline network.”

The Hearings Officer finds there is not credible contrary evidence in the record to indicate that soil will not be removed, or that the pipeline route could later be replanted with trees, and concludes the operation of the pipeline routes across high-value agricultural land degrade agricultural resources and therefore the application does not satisfy MCC 39.7515(B).

The Hearings Officer considered the applicant's argument that degradation of agricultural resources on the water treatment facility property and the pipeline properties is a construction impact that is outside the scope of MCC 39.7515(B). The Hearings Officer notes that the prior occupant of the water quality treatment facility property was Surface Nursery which grew nursery crops. Rec. 236. Surface Nursery vacated the property in approximately 2019 when the applicant began preparations for construction of the water treatment facility. The Hearings Officer finds that 2018 is the base line condition for measurement of the natural resources on the water treatment facility property and pipeline properties, and for consideration of adverse effects to natural resources. Ex. S-27.

The Hearings Officer finds that because these adverse impacts to agricultural resources are permanent and are not being mitigated, they are not construction impacts that are exempt from review. For example, new nursery stock cannot be planted on most of the water treatment facility property, and, therefore, the operation of the facility adversely impacts agricultural resources. Similarly, trees cannot be planted along the pipeline route due to permanent easement restrictions, even to replace trees that were removed for construction, and, therefore, operation of the pipeline adversely impacts natural resources. Therefore, MCC 39.7515(B) is not satisfied.