

**BEFORE THE LAND USE HEARINGS OFFICER
FOR MULTNOMAH COUNTY, OREGON**

In the Matter of two appeals of a Director's
Type II Nonconforming Use Verification on
Three Legal Lots of Record of apx. 13.5
acres zoned MUA-20 in unincorporated
Multnomah County, Oregon.

FINAL ORDER

**Scenic Fruit Company
(appeal)
T2-2019-11423**

I. Summary:

This Order is the decision of the Multnomah County Land Use Hearings Officer affirming in part and modifying in part the Director's verification of the applicant's nonconforming agricultural processing operation on approximately 13.5 acres zoned MUA-20 in unincorporated Multnomah County (T2-2019-11423).

II. Introduction to the property and the underlying nonconforming use:

Applicant..... Alterman Law Group, PC
Attn: Dean Alterman
805 SW Broadway, Suite 470
Portland, OR 97205

Owner..... Scenic Fruit Company
7510 SE Altman Road
Gresham, OR 97080

Property Legal Description: Tax Lots 100, 200 & 600 in Section CA/BD,
Township 1 South, Range 4 East of the Willamette Meridian,
Street Address: 7510 SE Altman Road, Gresham.

Applicable Laws Multnomah County Code (MCC) 39.1515 (Code Compliance and Applications), MCC 39.2000 (Definitions), MCC 39.3005 (Lot of Record – Generally), MCC 39.3080 (Lot of Record – MUA-20), MCC 39.4302-4345 (Multiple Use Agriculture - 20), MCC 39.8305 (Verification of Nonconforming Use Status); and Multnomah County Road Rules (MCRR) 4.000 (Access to County Roads), and MCRR 18.000 (Right of Way Use Permits)

The subject site has been developed and used in some capacity as a processing facility for Willamette Valley fruits and vegetables since approximately 1933. The 13.5-acre property consists of three tax lots (TLs 100, 200 & 600), but the Scenic Fruit Company operation occupies less than 8 acres of the property. County zoning was first applied to this site in 1955, when the northern portion, where most of the processing facilities are located, was first zoned M-3 (Light Industrial). At the same time, the balance of the site was zoned S-R (Suburban Residential). Restrictive zoning was first applied to the site in 1977 in the form of the current MUA-20 zoning, which conditionally allows the "[c]ommercial processing of agricultural products primarily raised or grown in the region." MCC 39.4320(B)(2). Thus, the use at issue in this matter requires a

conditional use permit under the current code. It is uncontested that the Scenic Fruit Company operation became nonconforming in 1977, and all that is needed to bring it into conformance with current zoning is a conditional use permit.

The record of the current proceeding shows that the fruit and vegetable processing operation has waxed and waned over the years for various reasons as the source of fruit and vegetables, the market and the specific types of processing has changed. For example, Scenic Fruit Company was a seasonal operation, processing just fruits from the Willamette Valley until about 1985; after which, it became a year-round operation. In the years since it became nonconforming, the owner/operator applied for and obtained county approval to construct various buildings, mostly by way of building permits, but the following land use approvals were granted by the county:

Year	Permit No.	Permit
1985	DR 85-12-04	Design review for building addition
1990	DR 90-09-03a	Design review for expanded employee parking area
1990	TP 2-90	Approval to park a temporary office trailer
1996	DR 2-96	Approval for a maintenance shop
1999	PLA 24-99	Property line adjustment to separate the Carpenter Lane residence from the commercial property
2008	T2-08-029	Verification and alteration of a nonconforming use to allow construction of a ~32,200 sf freezer building
2008	T1-08-044	Lot consolidation
2011	T2-2011-1521	Alteration of a nonconforming use to add a second floor to the existing office building

Most significant for the present proceeding is the 2008 Type II decision to verify and alter the then-existing nonconforming use to construct a ~32,200 sf freezer building and related alterations in the site lay-out (Ex. B.2 – the “2008 NCU verification”).¹ The 2008 NCU verification was not appealed, and therefore represents a relatively clear statement of the nature and extent of the then-existing nonconforming use, plus the specific alteration (expansion) requested and approved in that decision. The 2008 NCU verification describes the nature and extent of the nonconforming use as it existed at that time in the following terms:

For over 77 years, Scenic Fruit has been an important part of Oregon’s rural economy by purchasing fruit from farms, throughout the Willamette Valley for processing and packaging. As a full-service, vertically-integrated company, its activities include the processing of frozen fruits, retail fruit packaging, quality assurance and product reworking, as well as on-demand cold storage. Its products include locally grown strawberries, raspberries, blueberries, marionberries, boysenberries, blackberries, and rhubarb. These are available frozen, straight-packed, and pureed.

* * *

¹ The record of the 2008 NCU verification (T2-08-029) is not part of the record of the present proceeding (T2-2019-11423), except for the final decision and three of its exhibits (Exs. B.2, B.2a, B.2b & B.2c).

Scenic Fruit is a commercial processor of agricultural products primarily raised or grown in the region. At the time the use became nonconforming in 1977, fruit processed included strawberries, red raspberries, black raspberries, marion blackberries, boysenberries, loganberries and blueberries from local farms. In 1977, marketing of fruit was sold primarily to food manufactures in the confectionery industry.

* * *

Scenic Fruit's primary operations include the freezing, packaging, and distribution of Willamette Valley fruits. Oregon berry growers supply Scenic Fruit with 10 to 15 million pounds of fruit annually. Variable portions of this product volume are packaged, frozen, and distributed, depending on the need of the client or buyer. Most of these activities take place onsite; however, additional offsite cold-storage capacity is utilized, and freeze-drying of fruits is done by a third-party processor.

2008 NCU verification (Ex. B.2) at 13-14.

The 2008 NCU verification also documented the fact that there were seasonal fluctuations in harvest and processing levels and employment levels for full-time and seasonal workers:

In 1977, Scenic Fruit purchased and processed strawberries, red raspberries, black raspberries, marion blackberries, boysenberries, loganberries and blueberries from local farms for processing. The volume of fruit purchased was 7,600,000 lbs. Product was stored off-site in freezers.

* * *

Although Scenic Fruit's operations are conducted on a year-round basis, there are significant – though predictable – fluctuations in activity based on the growing and harvesting season. There are 17 full-time employees, who generally work from 8:00 a.m. to 5:00 p.m. during non-harvest months. During harvest, as many as 200 additional employees are active over a 24 hour-period, which is divided into three shifts.

Based on information provided by Scenic Fruit staff, some 15 million pounds of product are processed and stored annually. Scenic Fruit occupies a position near the middle of the food supply chain. It receives raw harvest materials, stores, processes and packages them for wholesalers and retailers. Given its function, the peak intensity is during the summer months, after which most activities are related to processing of product that is place in cold storage. Activities involve truck traffic for the disposition of harvested goods at the site, movement of such goods to onsite and offsite cold-storage locations, and final delivery to, or pickup by clients and customers. Based on information provided by the company, some 400 freight trips are generated in any given three-month period – approximately 4.5 per day. It is important to note, however, that a significant portion of these trips occur at harvest time, and are spread out over the course of a 24 hour workday during that period.

* * *

In 1977, Scenic Fruit operated 24 hours a day during the months of June, July and August. Production schedules varied with the harvesting of the crops. Scenic Fruit employed 12 full time employees and 500 production workers (average of 166 workers per shift) total during a 24 hour period. Volume of fruit processed was 7.6 million pounds. All product produced was frozen in the form of puree, individual quick frozen and straight pack. Packaging was different sizes ranging from 6 lbs tubs to 400 lbs drums

2008 NCU verification (Ex. B.2) at 14.

The 2008 NCU verification also documented the size (area) and capacity of the buildings and outdoor parking, circulation and storage areas:

Since 1977, Scenic Fruit has undergone a number of additions through the County's Pre-Existing Conditional Use provisions. As currently permitted, the site has a 15,963 sq. ft. dry storage building, a 14,642 sq. ft. building which has 10,000 sq. ft of processing area and 4,642 sq. ft. office space, 13,600 sq. ft cold storage building, a 2,446 sq. ft. office, lunchroom & employee lounge building, a 1,234 sq. ft. maintenance building. A 120 ft driveway approach leading to the processing building's loading docks and a 35 ft wide truck entrance from Dodge Park Boulevard have existed prior to zoning and transportation regulations. The sizes of these approaches are based on the 1985 Site Plan (Exhibit A.22.o), 1990 Plot Plan (Exhibit B.12) and 1996 Design Review plans (Exhibit B.6). A 30 ft driveway access leading from Altman Road between the cold storage building and processing building and a 90 ft wide driveway approach in front of the cold storage building was authorized in 1985. While a 20 ft wide driveway approach to the employee parking lot was permitted in 1990, it was not constructed in its correct location and appears to have been abandoned for over two years based on aerial photographs (Exhibit A.35.h, A.35.i & B.15).

* * *

Currently the physical improvements (buildings, loading area, parking areas and drainage pond) occupy approximately 6.27 acres (Exhibit B.16).

2008 NCU verification (Ex. B.2) at 14-15.

The 2008 NCU verification recites the applicant's statement about the then-existing nature and extent of the nonconforming use and the applicant's view that, since the time the operation became nonconforming, it had expanded through various county approvals and that the then-existing nature and extent of the operation was protected as a lawful nonconforming use. However, it does not appear that the Director's 2008 NCU verification ratified or agreed with the applicant's statement that the operation's extent or volume of business had necessarily increased over time. In that regard, the 2008 NCU verification is somewhat ambiguous about exactly what it found by way of the nature and extent of the nonconforming use at that time.²

² For example, the 2008 NCU verification characterizes the applicant's legal argument in the following terms "As demonstrated by Attachment 8, Scenic Fruit has been in continuous operation for at least 27 years. Since its inception, Scenic Fruits activities have only expanded; therefore,

Notwithstanding a degree of uncertainty, the following descriptions and metrics are relatively clear from the 2008 NCU verification and define, respectively, the nature and extent of the applicant's nonconforming use as of 2008:

- The use involved the processing of fruit, mentioning "vegetables" only once and with no documentation about when, now or in what volume the operator began processing vegetables;³
- 7.18 acres of land devoted to the use;⁴
- Source of fruit was the Willamette Valley;⁵
- 15 million pounds of product processed per year;⁶
- 20 full-time employees with 200 part-time employees over 3 shifts during peak season (average of 66.66 workers per shift);⁷
- 24-hour operation during a 3-month peak season of June, July and August; otherwise, hours of operation were 8 a.m. to 5 p.m.⁸

the right of use at and above current levels is secure." Ex. B.2 at 15. However, the 2008 Director's decision does not appear to echo or necessarily agree with the applicant's argument at the time.

³ The 2008 NCU verification focuses exclusively on fruit and mentions vegetables only once as an undocumented assertion by the applicant (Ex. B.2 at 5). However, by 2019, vegetables are mentioned as part of the nature of this nonconforming use four times in the Director's decision (Ex. C.5 at 9), which implied that it was an undocumented expansion: "The applicant mentions processing of vegetables as part of the narrative, but specific information is not provided regarding vegetables within the application materials." Ex. C.5 at 9.

⁴ The 2008 NCU verification concluded that 6.27 acres of the site were devoted to the nonconforming use (Ex. B.2 at 15). When the 32,200 sf freezer is added to the area, however, the Director concluded the total was 7.18 acres (Ex. C.5 at 13).

⁵ The 2008 NCU verification states twice that the use is the processing of Willamette Valley fruits, for example "Scenic Fruit's primary operations include the freezing, packaging, and distribution of Willamette Valley fruits." (Ex. B.4 at 13). The Director's 2019 decision at issue in this appeal states that, in 2008, the fruit was from Oregon but that 1% was imported (Ex. C.5 at 11) and cites the 2008 NCU verification as authority. The 2019 decision also describes the current mix of produce sources as 70% Oregon, 25% Washington and 5% "other." Ex. C.5 at 11). However, the 2008 NCU verification does not appear to support the statement about any non-Willamette Valley fruit, much less any fruit from outside Oregon.

⁶ Although the 2019 Director's decision at issue in this appeal describes the 2008 limit as 7.6 million pounds annually (Ex. C.5 at 11), the 2008 NCU verification actually states multiple times that 15 million pounds were processed by the close of 2008 (Ex. B.2 at 13, 14, 19 & 20).

⁷ The 2008 NCU verification is equivocal about the number of full-time employees verified at that time. See Ex. B.2 at 14, 19 & 22 where the applicant states there were 17 full-time employees. However, in the end, the Director appeared to confirm 20 full-time employees from 2004 to 2008. See B.2 at 18 ("The number of full time employees has increased to a limited extent from 15 employees in 1996 & 1998 to 20 employees in 2004 through 2008.").

⁸ The 2008 NCU verification noted that, when the use became nonconforming in 1977, it operated 24-hours a day only for 3 peak months of June, July and August (Ex. B.2 at 22), but that it instituted 24-hour operation from April through October beginning in 1996. The Director noted in his 2019 decision an absence of any authorization for such an expansion and concluded it was

- 200 truck trips per 3-month peak period (66.66 truck trips per month on average, or 800 total truck trips per year).

These descriptions of the nature, and metrics of the extent, of the nonconforming use from the 2008 NCU verification appear to include the impacts of the alteration (construction of a 32,200 sf freezer) that was approved in that 2008 decision. Consequently, it does not appear that the 2008 decision nor any subsequent county land use approval authorized an expansion or increase beyond/above these metrics. Conversely, and what makes the 2008 NCU verification somewhat ambiguous, nothing in the 2008 NCU verification directed the owner/applicant to remove, eliminate or reduce any element(s) of the use or infrastructure because they were deemed to be an unapproved alteration or expansion of the nonconforming use that existed in 1977. As such, the Hearings Officer regards the use described in the 2008 NCU verification to be the starting point for an analysis of the present request and appeals.

II. Summary of the application, the Director's decision and two appeals:

A. The Application. On January 15, 2019, the applicant submitted a Type II request that "the county approve Scenic Fruit's long-standing nonconforming use of the subject property in accordance with the information and documentation provided in [the] application." (Ex. A.1). The application did not seek approval for any alteration or expansion of the nonconforming use. A supporting memorandum clarified the request:

"Multnomah County Land Use and Transportation Planning Code Compliance Office (the 'County') recently inspected the Scenic Fruit site and suggested that some of the non-structural improvements on the Scenic Fruit site (principally driveways and parking areas) were constructed without the appropriate permits. The County has requested that Scenic Fruit apply for a Verification of a Nonconforming Use to establish the current scope and intensity of its nonconforming use of the property. Scenic Fruit is not currently proposing to build any new structures or to expand the existing structures, all of which were either appropriately permitted or were built before the County required permits." (Ex. A.3)

Because the 2008 NCU verification was unappealed, it established the nature and extent of the nonconforming use at that time, understanding that it also approved the construction and use of a 32,200 sf freezer building. Any use elements (nature of the use) or metrics (extent of the use) that exceed what was acknowledged or allowed in the 2008 NCU verification are unpermitted and unlawful. Those elements would require a nonconforming use alteration or conditional use approval to continue. Any diminution of nature or extent of what was acknowledged or approved in the 2008 NCU verification reduce the nonconforming use and would require an alteration to revive or expand upon those elements.

B. The Director's Decision. The Director processed the application with a Type II process, noticed the application as required by the County Code, accepted public comment, and issued a decision without conditions on November 29, 2019 (Ex. C.5).

not part of the nonconforming use right: "The alteration of the 24-hour production schedule to include Spring and Fall is outside the time period that was established in 2008." (Ex. C.5 at 11).

The Director's decision confirmed the nature and extent of the nonconforming use from the 2008 NCU verification and then noted the following exceedances of that verification:

1. Unauthorized expansion of the scope of uses. In the last ten (10) years, the scope of operations on the property has increased. The scope of the use has grown beyond the previously verified levels for the operation. The ramping up of the operations appears to begin in 2013 and has continued through to 2018. Staff has found no authorization for the expansion or alteration of the nonconforming use since 2008 when the large freezer was approved so as to reduce off-site storage of fruit and truck trips. The alteration of the 24-hour production schedule to include Spring and Fall is outside the time period that was established in 2008. To continue the use at current levels, Scenic Fruit would need to apply for a conditional use permit as discussed above in Section 5.3. See Ex. C.5 at 11.
2. Unauthorized expansion in the area devoted to the use. The truck and trailers stored southwest of the blue area were not authorized or confirmed as a nonconforming use in 2008, so the area on the nonconforming use does not include that grassed area. ... The amount of land devoted to the agricultural processing business has increased approximately 1.9 acres without an alteration or expansion authorized. See Ex. C.5 at 13-14. In particular, the following unauthorized outside storage uses were noted in the Director's decision:
 - Four unpermitted outdoor storage areas depicted in orange and yellow in the Director's decision (Ex. C.5 at 15) are an unpermitted expansion of the use.
 - The truck parking area depicted south and west of the blue area in the Director's decision (Ex. C.5 at 13 & 15-17) is an unpermitted expansion of the use.
 - The new access to the unpermitted truck parking area off of SE Altman Road (Ex. C.5 at 17) is an unpermitted expansion of the use.
 - Use of the 13,600 sf cold storage building for processing is an unpermitted expansion of the use. See Ex. C.5 at 17.
 - Construction and use of a 40,000 sf paved pad for outdoor storage east of the freezer building approved in 2008 is an unpermitted expansion of the use. See Ex. C.5 at 17-19.
 - Unpermitted expansion of the detention pond used to store process water is an unpermitted expansion of the use. See Ex. C.5 at 19-20.
3. Reductions in the scope or intensity. As for the nature of the use and its basic parameters, the Director summarized in the following table the levels of activity that appeared from the application materials to remain steady for the 6-year period from 2013 to 2018. Some of these levels appear to have increased and other decreased from what had been established and verified in the 2008 NCU verification:

Nonconforming Use	
Use	The freezing, packaging and distribution of produce.
Volume of Produce Authorized to be Processed	10,000,000 pounds annually
Business Operations	
Full Time Employees	20 workers
Production Workers	200 workers total for all shifts within a 24-hour period
24 Hour Operations Permitted	May, June, July, August, September, October
Normal Business Hours	8 am to 5 pm (production & office)
Truck Trips	600 truck trips per year
Outside Storage Area	Area North of Detention Pond
Maximum Area of Parcel to be Use for Nonconforming Use	7.18 Acres
Buildings	See Finding 5.1 for details
Parking and Loading	See Finding 5.1 for details Semi-Truck and Trailer Parking in authorized Loading Zones Only

C. The Appeals. The applicant/operator and an affected neighbor to the site (Starlena Simon) filed timely appeals (Exs. E.1 & E.2), raising the following issues:

1. Applicant's appeal arguments: The applicant takes issues with three of the Director's specific findings about how the nature and extent of this nonconforming use has changed since 2008 and how the Director describes the nature and measures the extent of the use today.

Applicant 1. The applicant challenges the Director's determination that the scope of the nonconforming use, as established in the 2008 NCU verification is measured in pounds of fruit processed, that the amount was 7.6 million pounds per year, and that the amount should now be 15 million pounds per year (Ex. E.1 at 2). The applicant asserts three reasons why the amount should now be viewed as 15 million pounds per year.

Applicant 2. The applicant challenges the Director's calculation of the annual number of truck trips as a measure of the level of nonconforming use (Ex. E.1 at 3-4). The applicant argues that the figure of 200 truck trips in a 3-month period (800 trips per year) used in the 2008 NCU verification reflects only the trucks going to and coming from off-site frozen storage. According to the applicant, if all truck trips had been used 2,200 truck trips per year would account for in-bound fresh

fruit, out-bound product to customers and the trips to and from off-site freezer storage.

Applicant 3. The applicant challenges the Director's determination that processing now occurs in the 13,600 sf cold storage building, that it didn't occur in 2008, and that the new processing operation in that building constitutes an impermissible expansion of the nonconforming use (Ex. E.1 at 4-5). According to the applicant, the nonconforming use is the general processing of fruit, and that state law definitions in ORS 215.130 and the MCC 39.200 do not support such a granular calculation of use within buildings and on the property as a whole.

2. Appellant Starlena Simon's appeal arguments. Opponent/appellant Starlena Simon ("Simon") provided several general arguments against the Director's decision, based primarily on nuisance impacts to her property that have increased significantly in recent years, most notably noise associated with outside truck parking and storage, the number of truck trips and the acceptance of fruit from outside the area.

Simon 1. Simon focuses on findings in the Director's decision allowing the applicant to accept and process produce from outside the area. Simon argues that the 2008 NCU verification mentions only fruit from the Willamette Valley and the Director should have limited the use to processing only material from the immediate area as anticipated by MCC 39.8305, 39.4302-4345.

Simon 2. Simon challenges the Director's calculation of the number of trucks allowed on the site; although, perhaps not a specific challenge to the Director's determination of the number of permissible truck trips to/from the site. Simon's focus appears to be the number of trucks parked on site, especially over night with engines or refrigeration equipment running, which are part of 24-hour operations. Ultimately, Simon ties the number of trucks on site and the amount of time they are parked there to the noise and other nuisance impacts from the operation that affect her and which she claims have increased significantly over the past 10 years. These nuisance impacts are echoed by her neighbors (Exs. D1 to D9, H.1, H.4, H.5 & H.6)

III. Summary of the local proceeding and Record:

The underlying application and initial supporting information were filed January 15, 2019 (Exs. A.1 to A.8). The application was initially deemed not complete by the County on February 14, 2019 (Ex. C.1), but after submitting additional documentation at staff's request (Exs. A.9 to A.15), the applicant demanded that it be deemed complete (Ex. A.16). The County then deemed the application complete July 1, 2019 (Ex. C.3). Over the next few months, the applicant provided additional supporting information (Exs. A.17 to A.21). Notice of the pending Type II application and opportunity to comment was mailed to owners of surrounding property within 750 feet and posted on the property September 10, 2019 (Ex. C.4). Numerous written comments from surrounding neighbors to the site were submitted (Exs. D.1 to D.9). The Director's decision was issued November 29, 2019 (Ex. C.5), along with a preemptive notice of a public appeal hearing (Ex. C.6) set for December 20, 2019. Two timely appeals were filed (Exs. E.1 & E.2).

At the commencement of the December 20, 2019 hearing, the Hearings Officer made the disclosures and announcements required by ORS 197.763(5) and (6) and 197.796 and disclaimed any *ex parte* contacts, conflict of interest or bias. No one raised any procedural objections or challenged the Hearings Officer's ability to decide the matter impartially, or otherwise challenged the Officer's jurisdiction. No one requested that the record be left open or that the hearing be continued.

At the hearing, Lisa Estrin, Senior Planner for the County, provided a verbal summary of the Director's November 29th decision. For the applicant, attorney Dean Alterman, and Derick Eisele, appeared in support of the project, answered questions and explained their appeal arguments. Starlena and Howard Simon also testified in support of their appeal and provided additional written memos (Exs. H.4 & H.6). No one else testified in favor of the application or the applicant's appeal; however, several additional written comments in opposition to the applicant were received (Exs. H.1 & H.5), and one person (Julie Allott) testified in opposition to the application, generally in favor of the Simon appeal, and submitted a written memo in support of her comments (Ex. D.3). No one else requested the opportunity to testify, and the Hearings Officer closed the record at the conclusion of the December 20th hearing.

III. Findings:

Only issues and approval criteria raised in the course of the application, during the hearing or before the close of the record are discussed in this section. All approval criteria or issues not raised by staff, the applicant or a party to the proceeding have been waived as contested issues, and no argument with regard to these issues can be raised in any subsequent appeal. The Hearings Officer finds those criteria to be met, even though they are not specifically addressed in these findings. The Hearings Officer adopts the following findings related to the issues and approval criteria that were preserved during the proceeding while the record was open:

A. Overview of relevant nonconforming use law. Generally, nonconforming uses are not favored because, by definition, they detract from the effectiveness of comprehensive land use regulation. *Parks v. Tillamook Co.*, 11 Or App 177, 196-97, 501 P2d 85 (1972), *rev den* (1973). The proponent for a nonconforming use bears the burden of proving the facts upon which the right to such a use is based. *Aguilar v. Washington County*, 201 Or App 640, 645, 120 P3d 514 (2005); *Weber v. Clackamas County*, 42 Or App 151, 154, 600 P2d 448 (1979). The right to continue a use that was lawfully established and in existence on the date restrictive zoning became applicable is recognized by state law and the MCC. See ORS 215.130(5) and MCC 39.8300, *et seq.* As such, nonconforming uses are limited to their nature and extent as they existed on the date they became nonconforming. Nonconforming uses cannot change in nature or extent without an approval of such an alteration, nor can they expand without specific approval. MCC 39.8315. Any nonconforming use that is suspended, reduced or abandoned for more than two years cannot be resumed without new land use approval. MCC 39.8300(D). Consequently, the focus in any nonconforming use verification is to determine the nature and extent of the nonconforming use on the date it became nonconforming. Provisions for the continuation of nonconforming uses are strictly construed against continuation of the use, and, conversely, provisions for limiting nonconforming uses are liberally construed to prevent the continuation or expansion of nonconforming uses as much as possible. *Parks v. Tillamook County*, *Supra*, *see also*

Apperson v. Multnomah County, 27 Or App 279, 284, 555 P2d 929 (1976) (provisions for the continuation of nonconforming uses are disfavored and strictly construed)

The present application, like the 2008 NCU verification, ask the Director to verify the existence, nature and extent of the nonconforming fruit processing operation on the subject property. MCC 39.8305(A) and (B) govern this inquiry. MCC 39.8305(B) provides the following non-exclusive list of factors to be evaluated when determining the nature and extent of the nonconforming use:

- (1) Description of the use;
- (2) The types and quantities of goods or services provided and activities conducted;
- (3) The scope of the use (volume, intensity, frequency, etc.), including fluctuations in the level of activity;
- (4) The number, location and size of physical improvements associated with the use;
- (5) The amount of land devoted to the use; and
- (6) Other factors the Planning Director may determine appropriate to identify the nature and extent of the particular use.

MCC 39.8305(7) provides the following guidance on how to account for changes in the level or intensity of the use over time and whether those fluctuations affect the nature or extent of the nonconforming use right:

A reduction of scope or intensity of any part of the use as determined under this subsection (B) for a period of two years or more creates a presumption that there is no right to resume the use above the reduced level. Nonconforming use status is limited to the greatest level of use that has been consistently maintained since the use became nonconforming. The presumption may be rebutted by substantial evidentiary proof that the long-term fluctuations are inherent in the type of use being considered.

The Hearings Officer interprets these guidelines as the material factors in this evaluation of the current nature and extent of this nonconforming use. It is clear from the record that the applicant has a nonconforming use right, and that the nature and extent were verified in the 2008 NCU verification (Ex. B.4). Because the current application does not include a request to alter the use, the Hearings Officer views the 2008 NCU verification as setting the critical benchmark of the nature and extent of the current nonconforming use. Under the applicable law, the current nonconforming use cannot be greater in scope or intensity today than what was documented in the 2008 NCU verification, plus the addition of the 32,200 sf freezer building at that time. According to MCC 39.8305(7), any sustained reductions in the nature or extent of the operation since 2008 will have the effect of reducing the scope and intensity of the underlying nonconforming use. In this light, the task will be to identify those metrics of the applicant's operation that provide relatively objective measures of its nature and extent so that the limits of the use right can be understood readily by affected neighbors and county enforcement. Any increase beyond what remains of the 2008 NCU verification is not allowed without approval of an alteration under MCC 39.8315 or a conditional use permit.

B. Nature and extent of the use as of 2008 and in 2019. The critical task in this matter is to describe clearly the nature and extent of the nonconforming use, since that is what the underlying application requested (T2-2019-11423). LUBA has faulted other hearings officers for failing to identify and quantify appropriate metrics of a nonconforming use so as to prevent unauthorized expansions over time. See e.g., *Morgan v. Jackson County*, ___ Or LUBA ___ (LUBA No. 2019-023, slip op. Aug 1, 2019), *aff'd w/out opn* 300 Or App 582 (2019) (hearings officer erred in using yard area used to store junk vehicles as the metric for the measuring the extent of a junk yard and should have used number of vehicles; otherwise, the intensity of the junk yard use could grow impermissibly by stacking vehicles in the yard). Consequently, the Hearings Officer's focus in this section is to identify metrics that define with precision the nature and extent of the applicant's nonconforming use so that it cannot grow impermissibly over time. The 2008 NCU verification established a benchmark for several useful metrics for measuring the nature and extent of this nonconforming use. The following appear to be useful (material) metrics of the nature and extent of the nonconforming use, and several of the issues discussed in this section relate to issues raised in the two appeals:

1. Fruit versus vegetables. In 2008, the use involved the processing of fruit, and "vegetables" were mentioned only once but with no documentation about when, how or in what volume the operator began processing vegetables (Ex. B.2 at 5). By 2019, however, vegetables are mentioned as part of the nature of this nonconforming use four times in the Director's decision (Ex. C.5 at 9), which may imply that it was a post-2008 undocumented expansion. In his 2019 decision, the Director notes the absence of any information about vegetables but concludes the inclusion of vegetables does not change the fundamental nature of the use. See Ex. C.5 at 9 ("The applicant mentions processing of vegetables as part of the narrative, but specific information is not provided regarding vegetables within the application materials.").

The Hearings Officer does not regard the distinction between fruit and vegetables as particularly material for several reasons. First, there are better metrics of the level of processing activity at this site that are directly material to impacts to surrounding properties, such as the pounds of produce processed, truck trips or the geographic source of produce. Second, it appears from the applicant's materials in this proceeding that no effort was made to distinguish fruit from vegetables; thus, vegetables were likely underreported by the applicant in 2008, but an extremely small part of the operation.

2. Source of agricultural products processed at the site. The 2008 NCU verification states twice that the use is the processing of Willamette Valley fruits (Ex. B.4 at 13). See e.g., "Scenic Fruit's primary operations include the freezing, packaging, and distribution of Willamette Valley fruits." The Director's 2019 decision at issue in this appeal states that the fruit is from Oregon but that 1% is imported (Ex. C.5 at 11) and cites the 2008 NCU verification as authority. However, the 2008 NCU verification does not appear to support the statement about any non-Willamette Valley fruit, much less any fruit from outside Oregon. Several opponents raised the source of produce as an issue that allowed an unpermitted expansion of this use, and it was specifically raised in the Simon appeal of the Director's decision (Ex. E.2).

The Hearings Officer regards the source of the fruit (and vegetables) processed as an important factor that defines the scope (nature) of this nonconforming use. There is no evidence in the 2008 NCU verification that fruit came from outside the Willamette Valley at that time, but the record indicates that the source of fruit has expanded beyond

the Willamette Valley since 2008. This element of the operation is material for several reasons. First, the processing of agricultural products is allowed as a conditional use in the MUA-20 zone, so long as the agricultural products processed are “primarily raised or grown in the region.” MCC 39.4320(B)(2). This policy that favors agricultural processors serving the region’s growers and shows that the source of the agricultural products is a material factor. Second, the applicant indicates there is a seasonality to the volume of material processed at the site due to annual and seasonal fluctuations in temperature and amount of precipitation. The record supports that argument to some degree, but the seasonal and annual fluctuations would be obscured or eliminated entirely if agricultural products from other regions and other parts of the world were allowed to be processed here throughout the year. For example, if the northwest had a dry year or bad growing season, the applicant would if it could import fruits and vegetables from other parts of the country that had a better growing season. Likewise, the applicant would import fruits and vegetables from the southern hemisphere during our winter if it could.

Year-round processing of agricultural products from outside the region and around the world would allow increased annual processing that exceeds the extent (intensity) of the nonconforming use as it was established in 1977 and verified in 2008. Nothing in the 2008 NCU verification decision suggests that full production would be permissible year-round. Instead, it appears from the 2008 NCU verification that the region’s seasonal and annual fluctuations drove the flow of agricultural products in 2008. The same should be true today; thus, the Hearings Officer concludes that acceptance and processing of agricultural material from outside the region (outside of the Willamette Valley) exceeds the nonconforming use established in 1977 and verified in 2008. The applicant’s acceptance of produce from outside the Willamette River Valley and outside the region after 2008 is an impermissible and unpermitted expansion of the nonconforming use.

3. Amount (weight) of product processed per year. As a starting point, the Hearings Officer regards the amount (weight) of agricultural product processed to be a material metric of the extent (intensity) of the nonconforming use. Arguably, this is the metric that drives all other aspects of this nonconforming use, including processing, number of truck trips, truck parking, outside storage, capacity of the detention pond, amount of process water disposed of on adjacent fields, and all of the various nuisance impacts that affect neighboring properties. Although the 2019 Director’s decision at issue in this appeal describes the 2008 limit as 7.6 million pounds annually (Ex. C.5 at 10-11), the 2008 NCU verification states multiple times that 15 million pounds were processed by the close of 2008 (Ex. B.2 at 13, 14, 19 & 20). Thus, it would appear that the extent of the nonconforming use as of 2008 was 15 million pounds per year.

The Director started his 2019 analysis with a lower weight of produce in 2008, *i.e.*, 7.6 million pounds per year (Ex. C.5 at 10-11). The Director then used the data provided by the applicant (Ex. A.16) to conclude that volumes remained between 6 and 7 million pounds per year for 2008 to 2010, increased to 10 million pounds for the years 2011 to 2013, then increased again to 15 million pounds from 2014 to 2016. The Director concluded at the end that the applicant had consistently processed 10 million pounds per year, which he concluded was the current (2019) diminished but vested level of production (Ex. C.5 at 21). Anything above that sustained level of production, according to the Director’s 2019 decision would constitute an unpermitted expansion of the nonconforming use.

The Hearings Officer recognizes a different starting point from the 2008 NCU verification than did the Director in his 2019 decision but agrees with his analysis and conclusion. The 2008 NCU verification is replete with references to 15 million pounds of produce (fruit) per year documented at that point, not the 7.6 million pound figure the Director recently relied upon. However, sustained reductions in the extent (intensity) of a nonconforming use will diminish the nonconforming use under ORS 215.130(7) and MCC 39.8305(7) unless they are part of a documented cyclic fluctuation in the particular nonconforming use. See e.g., *Polk County v. Martin*, 292 Or 69, 636 P2d 952 (1981) (“a nonconforming quarry use had not been ‘interrupted,’ for purposes of ORS 215.130(7), by virtue of fluctuations in the level of the use or the sporadic and intermittent manner in which it was conducted.”). Otherwise, a nonconforming use can decrease over time and later expand and resume the higher prior production level without limits. Consequently, even though the applicant may have begun with a 15 million pound per year limit in 2008, the record of this proceeding shows sustained reductions in the weight processed after 2008, even though it steadily increased to 15 million pounds at the end. The applicant has the burden of proving entitlement to a claimed nonconforming use, including any sporadic or intermittent fluctuations. *Tigard Sand & Gravel v. Clackamas County*, 149 Or App 417, 943 P2d 1106 (1997). At the hearing, the applicant claimed that fruit production drove its fruit processing and that fruit production is a cyclic business that varies from year to year. In written materials, however, the applicant said the following:

“The average for 2008-2010 was approximately 6 million to 7 million pounds a year. The average for 2011-2013 was about 10 million pounds a year. The average for 2014-2016 was about 15 million pounds a year. Most of the increase has been in blueberries, for which the supply and demand have skyrocketed in the last 10 years. Oregon’s blueberry production more than doubled between 2008 and 2016, and the demand for Scenic Fruit’s blueberry processing increased accordingly.” (Ex. A.16 at 2),

At the hearing, the applicant clarified that, following the 2008 alteration allowing construction of the 32,200 sf on-site freezer building, it took several years for the operation to ramp-up to fully utilize that new/increased capacity.

The Hearings Officer concludes three things from the applicant’s explanations. First, there is no sporadic or intermittent cyclic nature apparent in these numbers from year to year, i.e., no ups and downs in a predictable or regular pattern as was the case in *Polk County v. Martin*. Instead, the applicant’s information describes a steady rise in market demand for processed fruit from 2008 to present. Second, the applicant’s written explanation did not attribute the increase in processing to seasonal fluctuations, annual or global weather patterns. Instead, the increase was entirely market demand driven. Consequently, the applicant has failed to articulate, much less prove, a sporadic or intermittent pattern of fluctuations that would exempt it from the sustained reduction in processing activity from 2008 and 2010. Third, the applicant is likely correct that it took a few (2) years for the applicant to construct the new freezer building and ramp-up production to use that new capacity, which the Hearings Officer concludes would take it to the 2010-2013 period and the 10 million pounds per year level. The Hearings Officer concludes that the applicant’s reported 2011-2013 levels of production represent the production level with the approved freezer building in operation (10 million pounds/year).

In that light, the Director correctly concluded that sustained reductions in annual production diminished the extent (intensity) of this nonconforming use to the lower sustained levels of 10 million pounds per year, once the applicant fully utilized the new capacity allowed by the 32,200 sf on-site freezer. To the extent the applicant asserts in this appeal the right to a greater annual processing capacity, it failed to carry its burden of proving that right. If the applicant wishes to increase processing capacity above this limit, it must apply for and obtain a permit that addresses the impacts. On this basis, the Hearings Officer rejects the applicant's first appeal issue (Ex. E.1 at 2-3).

4. Area devoted to the use. The 2008 NCU verification concluded that 6.27 acres of the site were devoted to the nonconforming use (Ex. B.2 at 15). When the 32,200 sf freezer is added to the area, the Director concluded the total was 7.18 acres (Ex. C.5 at 13). The Hearings Officer agrees with the Director's conclusion about the area devoted to the use being 7.18 acres.

A significant element in the expanded surface area now devoted to the use, however, are several areas now used for outside storage and truck parking that didn't exist in 2008. The Hearings Officer agrees with and adopts as his own the Director's multiple findings that these expansions, including the expanded detention pond, are unpermitted and unauthorized expansions of the nonconforming use and must be removed or immediately permitted. See Ex. C.5, findings 5.6 & 5.7. The Hearings Officer specifically finds that, except as explained in the next paragraph, Findings 5.6 and 5.7 are supported by a preponderance of credible evidence that the applicant's operations have impermissibly expanded into these areas after the 2008 NCU verification.

The only finding that the Hearings Officer disagrees with is the Director's conclusion, included in Finding 5.7 (Processing in 13,600 sq. ft. Cold Storage Building), that processing inside the 13,600 sf cold storage building is an unpermitted expansion of the 2008 NCU verification. See Ex. C.5 at 17. The Hearings Officer agrees with the applicant's third appeal argument that the cold storage building was approved by the County for this use generally, without any specificity about the precise nature of processing that is conducted in it. Because the allowed use of the cold storage building is part of the overall nonconforming fruit processing use, albeit mostly or entirely cold storage, that does not preclude other types of processing. That said, the specific processing uses within the building cannot increase the site's annual processing limit of 10 million pounds.

5. Number of full-time and part-time employees. The 2008 NCU verification is equivocal about the number of full-time employees verified at that time. See Ex. B.2 at 14, 19 & 22 where the applicant states there were 17 full-time employees. However, the Director appeared to confirm 20 full-time employees from 2004 to 2008. See B.2 at 18 ("The number of full time employees has increased to a limited extent from 15 employees in 1996 & 1998 to 20 employees in 2004 through 2008."). The Hearings Officer specifically affirms and adopts as his own the Director's conclusion (Ex. C.5 at 11 & 21) that the 2008 NCU verification allowed and the applicant has maintained a full-time work force of 20 employees and 200 part-time employees over 3 shifts during peak season (average of 66.66 workers per shift).

6. 24-hour operations. The 2008 NCU verification noted that, when the use became nonconforming in 1977, it operated 24-hours a day only for 3 peak months of

June, July and August (Ex. B.2 at 22), but 24-hour operations expanded into April through October beginning in 1996. The Director noted in 2008 an absence of any authorization for such an expansion and concluded it was not part of the nonconforming use right:

“In 1977, 24-hour operations occurred during the months of June, July & August, though production schedules varied with harvest cycles and weather conditions on a year to year basis. Since 1996, Scenic Fruit has operated 24 hours a day during the months of April through October (Exhibit A.30). In the prior land use decisions, DR 85-12-04, DR 90-09-03 & DR 2-96 no request for expansion to the number of months of 24 hour operations was requested or granted. This change would be an expansion of hours for the nonconforming use. The increase in the number of months utilized for 24 hour operations, would increase the noise levels in the area at night during the months of April, May, September & October.” (Ex. B.2 at 22, emphasis added)

Notwithstanding that finding in 2008, the Director concluded in 2019 that the applicant had a nonconforming use right to 24-hour operations from May to October (Ex. C.5 at 21). The Hearings Officer disagrees because the credible evidence in the record documents a right to only 3 peak months of 24-hour operation as the base nonconforming use right in 2008 (Ex. B.2 at 22). Based on evidence the applicant presented at the hearing, however, it is not possible to specify exactly where that 3 month period will fall from one year to the next. Consequently, the Hearings Officer finds that, while only a 3-month total period of peak production operating 24-hours per day is vested, that 3-month period could occur anywhere from May to October, but not exceed 3 months total. This issue relates directly to the night-time noise and truck traffic nuisance impacts asserted in the Simon appeal (Ex. E.2) and opponent testimony. While not drafted with precision, the Simon appeal asserts that more trucks visit and park on the site than are allowed, especially at night. These allegations relate to the 24-hour operation and are valid to the extent that the operator has impermissibly expanded to more than 3 months of peak 24-hour operations each year. This was clearly understood by the Director in the above-quoted finding from the 2008 NCU verification, and it remains valid today.

7. Truck trips. Truck trips is another critical metric of this nonconforming use that helps define its extent (intensity). The 2008 NCU verification involved an alteration request to construct a 32,200 sf freezer building, which the applicant said would reduce truck trips to and from the site. Before the on-site freezer, multiple truck trips were devoted to transporting processed fruit to the off-site freezer and then back to the processing plant (or bringing fresh fruit to the plant and then transporting it to the off-site freezer). According to the 2008 NCU verification, truck trips were anticipated to drop from the high of 400 truck trips in a 3-month period (or 800 truck trips annually) to 200 truck trips during the 3-month peak or 600 truck trips annually:

“The statement that the number of truck trips to the site will be cut in half from 400 to 200 per a three month period is based on the assumption that the importation of product from off-site cold storage will be reduced. The applicant in their submittal (Exhibit A.2, page 5) has indicated that the use of off-site cold storage presently generates approximately 133 truck trips per month. The applicant indicates that a 50% reduction of truck trips will

be generated by the construction of the new freezer building. Truck trips would be reduced to 66 truck trips a month. ... Provided the amount of off-site cold storage is reduced commensurate with the new cold storage capacity being created on-site, the number of truck trips will be reduced.” (Ex. B.2 at 20).

The applicant provided little documentation of truck trips since 2008 (Exs. A.9 at 5, A.15 & E.1 at 3-4). The only numeric data the applicant provided for truck trips covered only 2018 (Ex. A.15). In his 2019 decision, the Director was hampered by the lack of truck trip data (Ex. H.2), but from the data and narrative information the applicant provided, he concluded the applicant was still bound by the truck trip limit in the 2008 NCU verification:

“In the last ten (10) years, the scope of operations on the property has increased. The scope of the use has grown beyond the previously verified levels for the operation. The ramping up of the operations appears to begin in 2013 and has continued through to 2018. Staff has found no authorization for the expansion or alteration of the nonconforming use since 2008 when the large freezer was approved so as to reduce off-site storage of fruit and truck trips. The alteration of the 24-hour production schedule to include Spring and Fall is outside the time period that was established in 2008.” (Ex. C.5 at 11 & 21).

The applicant raises the issue in its second appeal issue (Ex. E.1 at 3-4) and suggests that it is entitled to 2,200 truck trips per year. The Simon appeal asserts that, even at 200 truck trips during the 3-month peak or 600 truck trips annually, the Director’s 2019 decision permits more truck trips than are allowed (Ex. E.2).

On this issue, as with all other elements of a nonconforming use, the proponent has the burden of proving of entitlement to a particular nature and extent (level of intensity) of the claimed nonconforming use. *Tylka v. Clackamas County*, 28 Or. LUBA 417, 438 (1994) (“The proponents of a nonconforming use have the burden of producing evidence from which a local government can make an adequate determination of the nature and extent of the nonconforming use.”). The Hearings Officer agrees that the applicant’s evidence is thin as to data and documentation of truck trips in the years since 2008. In any event, the applicant is not entitled to a truck trip rate that exceeds what was verified in 2008, and the alteration approved in that proceeding was supposed to reduce truck trips to and from the site (Ex. B.2 at 20). The Hearings Officer regards the evidence in the record as a sufficient basis from which to conclude that truck trips were supposed to drop after construction of the on-site freezer building to 200 truck trips during the 3-month peak or 600 truck trips annually. For this reason, the Hearings Officer rejects the applicant’s second appeal issue and the suggestion that a truck trip number that exceeds the 2008 limit is allowed.

C. Other issues raised in the appeals. Although only two appeals were filed, which raised numerous issues, many affected neighbors submitted written comments in opposition to the use generally (D.1 to D.9, H.1, H.4, H.5 & H.6), and one testified in opposition at the hearing (Julie Allott). The gist of all of these comments is that the nonconforming fruit processing operation has expanded over the past 10+ years, as measured by many of the above-mentioned metrics, beyond what was allowed in 2008, without permission. According to this testimony, these expanded aspects of the

operation have significant negative nuisance impacts on the lawful use of their properties. The Hearings Officer interprets these opposition arguments in the context of the Simon appeal which echoes similar nuisance impacts (Exs. E.2, H4 & H6).

Two nuisance impact issues warrant a specific response. Excessive noise, especially over-night and associated with trucks parked on-site as part of a 24-hour operation was a common complaint of the immediate neighbors. A commercial business such as this one, however, cannot acquire a right to violate the County's noise ordinance as part of a nonconforming use. Therefore, this use must comply with the County's noise regulations at all times, regardless of the nature or extent of its nonconforming use right. As a practical matter, however, many of the factors discussed and resolved in this decision relate directly to the intensity of this use, including the amount of fruit that can be processed, where trucks may be parked, the number of truck trips allowed, the duration of 24-hour operations, etc. By limiting these aspects of the applicant's operation will go a long way to addressing the neighbor's noise complaints and any noise violations that may exist.

Second, one witness complained about the smell associated with spray-irrigation of wash water effluent on surrounding fields and asserted that the frequency and area of application had increased over the past 10 years. This issue appears to be related to the expansion of the wastewater detention pond on the property, that is addressed above. While understandable, this property and the surrounding land are zoned for agricultural use (MUA-20), where farm uses are allowed. LUBA has previously determined that spray-irrigation of process wastewater on farm fields qualifies as a "farm use" as defined in ORS 215.203. See Swenson v. DEQ, 9 Or LUBA 10 (1983).⁹ For that reason, this nuisance element of the use is related to an allowed farm use and is not covered by the underlying nonconforming use claim.

D. Summary of the resolution of appeal issues. Based on the foregoing findings, the Hearings Officer resolves the appeal issues as follows:

Applicant 1 - Annual weight of produce processed. The Hearings Officer rejects the applicant's first appeal issue and concludes that the limit on the weight of produce processed annually was limited to 15 million pounds in 2008 and has dropped to 10 million pounds per year in the intervening years. Pursuant to MCC 39.8305(7), the former nonconforming use right of 15 million pounds per year was diminished to 10 million pounds per year during the years 2011-2013, which is the maximum limit today.

Applicant 2 - Truck trip calculations. The Hearings Officer rejects the applicant's second appeal issue and affirms the Director's calculation of allowed truck trips. The Hearings Officer concludes that the credible evidence in the record is that truck trips were at a

⁹ In *Swenson*, the applicant proposed to (1) pipe effluent from a cannery to a 20-acre holding pond on EFU-zoned property, (2) treat the effluent at the holding pond, and (3) spray irrigate that treated effluent on a 9.87-acre farm. LUBA pointed out that the purpose of the project in *Swenson* was to dispose of wastewater rather than to make a profit on the irrigated crops. Nevertheless, LUBA concluded the proposal constituted a farm use, because "the land occupied by the irrigation equipment can be considered land in current employment for farm use in the same way that 'land under buildings supporting accepted farm practices' is land in farm use." In reaching that conclusion LUBA stated that irrigation was an accepted farming practice and the source of the irrigation water is irrelevant.

high in 2008 of 400 truck trips for the 3-month peak (800 truck trips annually) and dropped as a result of construction of the on-site freezer building to 200 truck trips for the 3-month peak (600 truck trips annually), which is the maximum limit today.

Applicant 3 - Processing use within the 13,200 sf cold storage building. The Hearings Officer agrees with the applicant's third issue and concludes that the 13,200 sf cold storage building was approved by the County for the nonconforming use. Cold storage is part of the nonconforming processing use that is allowed on this site.

Simon 1 - Produce brought in from outside the region. The Hearings Officer agrees with Simon's first appeal argument. The 2008 NCU verification was limited to produce (fruits and vegetables) from the Willamette Valley, which formed a material limit on the nature of this nonconforming use.

Simon 2 - Calculation of the number of trucks allowed on the site. The exact argument here is not clear. However, the Hearings Officer resolves the number of allowed truck trips above in response to the Applicant's second appeal argument. To the extent Simon's second argument is focused on the number of trucks allowed to be on-site over night as part of a 24-hour operation, the Hearings Officer concludes that 24-hour operations are limited to a maximum of 3 months between May and October. To the extent Simon's second argument asserts that the applicant has improperly expanded truck parking beyond what was verified in 2008, the Hearings Officer agrees and adopts and affirms the following elements of the Director's Findings 5.6 and 5.7 related to outdoor parking, storing and processing that were not recognized in the 2008 NCU verification and are not allowed without a separate permit/approval:

5.6 – The amount of land devoted to the use (Ex. C.5 at 13-14).

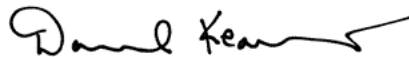
5.7 – Outdoor Storage (Ex. C.5 at 14-15).

5.7 – Truck and Trailer Parking Area (Ex. C.5 at 15-17).

5.7 – Freezer Pad (Ex. C.5 at 17-19)

In addition, the Hearings Officer affirms and agrees with the Director's findings related to the applicant's failure to complete the lot consolidation process (Ex. C.5 at 14) and the improper and unpermitted alteration of the detention pond (Ex. C.5 at 19-20).

Date of Decision: January 8, 2020.



By: _____
Daniel Kearns,
Land Use Hearings Officer

Exhibit List for T2-2019-11423

Exhibit #	# of Pages	Description of Exhibit	Date Received / Submitted
A.1	1	General Application Form	1/15/2019
A.2	1	Authorization Letter from Scenic Fruit for Alterman Law Group to file and pursue the land use application dated January 11, 2019	1/15/2019
A.3	8	Memorandum regarding Verification of Nonconforming Use Application dated January 14, 2019	1/15/2019
A.4	32	Land Use Decision T2-08-029	1/15/2019
A.5	1	Exhibit B – Partial List of Land Use Approvals granted to Scenic Fruit	1/15/2019
A.6	1	Letter from Scenic Fruit regarding the continuous operation of the business since 2008 dated January 8, 2019	1/15/2019
A.7	1	Aerial Photograph of 7510 SE Altman Rd from Google Maps dated as 2019 Map Data	1/15/2019
A.8	10	Oregon Agriculture Facts & Figures August 2018	1/15/2019
A.9	6	Additional Information in Support of Scenic Fruit Co.	5/29/2019
A.10	1	Exhibit I.1c Landscaping Plan (Architectural Site Plan)	5/29/2019
A.11	1	Exhibit I.4 Lighting Plan	5/29/2019
A.12	13	Exhibit I.4A Examples of Light Fixtures	5/29/2019
A.13	1	Exhibit I.5 Access Points	5/29/2019
A.14	1	Exhibit II.4 Employee Count	5/29/2019
A.15	1	Exhibit II.6 Truck Trips for 2018	5/29/2019
A.16	4	Second Additional Information Letter	7/11/2019
A.17	1	Exhibit 4 Prior response to the Question on Sales Volume	7/11/2019
A.18	1	Exhibit 5 Prior answer to the Question on Offsite Storage	7/11/2019
A.19	1	Exhibit 8 Prior answer to the Question on the Number of Employees	7/11/2019
A.20	1	Exhibit 9 Prior answer to the Question on Operating Hours	7/11/2019
A.21	1	Clarification on Ownership Letter dated 11/21/2019	11/21/2019
'B'	#	Staff Exhibits	Date
B.1	2	Department of Assessment, Records and Taxation (DART): Property Information for 1S4E21CA - 00200	2/12/2019

B.2	32	T2-08-029 Decision a. Revised Grading and Utility Plan stamped by County on 5/5/09 b. Exhibit A.29 showing outdoor storage areas for Condition No. 13 c. Site Plan revised 5.5.2009 d. T1-08-044 Lot Consolidation Approval	9/19/2019
B.3	10	T2-2011-1521 Decision	9/19/2019
B.4	4	September 3, 2013 Information provided by Scenic Fruit for application T2-2013-2938 dated September 3, 2013	9/19/2019
B.5	4	The Berkeley Group Incorporation Papers	9/5/2019
B.6	5	Statutory Warranty Deed - Grantor Scenic Fruit Co. LLC Grantee The Berkeley Group Inc. recorded on 07/01/2019 in Instrument 2019-067148 (Lists 5 parcels)	9/5/2019
B.7	3	Bargain and Sale Deed – Grantor Scenic Cold Storage LLC Grantee Scenic Fruit Co recorded on 04/02/2010 in Instrument 2010-042225	9/5/2019
B.8	2	Approved Property Line Adjustment descriptions for PLA 24-99 dated 3/28/00	9/5/2019
B.9	5	Statutory Quit Claim Deed Granted Scenic Fruit Co Grantee Scenic Cold Storage LLC recorded on 01/30/2009 Instrument 2009-012692	9/19/2019
B.10	1	2010 Mechanical Permit a. 2010 Site Plan showing Mechanical Equipment Location and Parking Layout b. Refrigeration Layout Plan	11/07/2019
B.11	3	Light Manufacturing District (M-3)	11/12/2019
B.12	6	Multiple Use Agriculture – 20 (MUA-20) – 9.6.1977 Version	11/12/2019
B.13		Various Aerial Photographs	11/13/2019
B.14	68	DR 2-96 Case file	11/13/2019
B.15	36	DR 90-09-03 Case file	11/13/2019
B.16	9	Multiple Use Agriculture – 20 (MUA-20) – current version	11/13/2019
B.17	2	2008 DEQ LUCS	11/14/2019
B.18	2	2013 DEQ LUCS	11/14/2019
B.19	6	Scenic Fruit Website Information	11/14/2019

B.20	3	Building Permit for Addition of Cold Storage Area approved October 26, 1989 a. Approved Site Plan b. Staff Made Duplicate of Building Permit	11/14/2019
B.21		Design Review Info for Original Cold Storage Building (DR-85-12-04)	11/18/2019
B.22	1	1986 Card for HVAC approval for Freezer Storage; 1986 Card for Addition to Compressor Room; and 1986 Card for Addition to Compressor in Packing Plant	11/20/2019
B.23	1	1996 Card for Maintenance Shop; and 1985 Card for Accessory Building/Warehouse	11/20/2019
B.24	1	1986 Card for Warehouse Shell Only; 1989 Card for Addition of Cold Storage Area; and 1986 Card for Electrical Feeder and Service	11/20/2019
B.25	1	1989 Card for Addition of Cold Storage; 1998 Card for LUCS; and 1990 Card for Lunch Room and Office	11/20/2019
B.26	1	Zone Change 163-60 Card to make Cannery Conforming S-R to M-3; Design Review 90-09-03 Office and Lunch Room; Design Review 85-12-4 Card for Cold Storage	11/20/2019
B.27	1	Temporary Permit 2-90 Card for 8 ft x 20 ft Trailer to be used for office on temporary basis; Design Review 2-96 Card for Maintenance Shop for Fabrication and Equipment Repair	11/20/2019
B.28	1	Records Request Regarding Building Permits from Gresham	11/20/2019
B.29	1	Site Plan for MC860474 Building Permit (1986 Freezer Storage)	11/20/2019
B.30	1	Floor Plan and Elevations for 1996 Approved Maintenance Shop	11/20/2019
B.31	1	Floor Plan for Addition to Cold Storage Building in 1989	11/20/2019
'C'	#	Administration & Procedures	Date
C.1	4	Incomplete letter dated February 14, 2019	2/14/2019
C.2	1	Applicant's acceptance of 180 day clock	3/5/2019
C.3	1	Complete letter (day 1 – July 11, 2019)	9/6/2019
C.4	2	Opportunity to Comment	9/10/2019
C.5	26	Administrative decision	11/29/2019
C.6	2	Notice of Potential Public Hearing	11/27/2019

'D'	#	Comments	Date
D.1	1	Simons Comments	9/18/2019
D.2	1	Unger Comments	9/20/2019
D.3	1	Allott Comments	9/23/2019
D.4	10	Brinks Comments	9/23/2019
D.5	1	Fuller Comments	9/23/2019
D.6	1	Gallant Comments	9/23/2019
D.7	1	Jubbs Comments	9/23/2019
D.8	2	Nicholson Comments	9/23/2019
D.9	1	Pitts Comments	9/24/2019
'E'	#	Post Decision Comments	Date
E.1	2	Alterman Notice of Appeal	12/13/2019
E.2	3	Simon Notice of Appeal	12/13/2019
'H'	#	Hearing Exhibits	Date
H.1	5	Willis email and attachment	12/20/2019
H.2	1	Staff memo re: Scenic Fruit truck trips calculations	12/20/2019
H.3	1	Statement of Maridean Eisele	12/20/2019
H.4	3	Starlina Simon narrative	12/20/2019
H.5	1	Dan Madden (Brinks) comments	12/20/2019
H.6	2	Howard Simon narrative	12/20/2019
H.7	1	Hearing Sign-in sheet	12/20/2019