
NOTICE OF DECISION

Case File: T2-2019-11423

Permit: Verification of Nonconforming Use

Applicant: Dean Alterman, Alterman Law Group PC **Owners:** Scenic Fruit Company

Location: 7510 SE Altman Road, Gresham
Tax Lot 200, Section 21CA, Township 1 South, Range 4 East, W.M.
Tax Account # R994210520 Property ID #R342503

Base Zone: Multiple Use Agriculture – 20 (MUA-20) **Overlays:** N/A


Proposal Summary: The Applicant has requested a Verification of Nonconforming Use application to determine the nature and extent of uses, structures and physical improvements associated with an agricultural processing plant that were legally established prior to adoption or amendment of zoning regulations disallowing the use.

Determination: The agricultural processor use, known as Scenic Fruit, is a nonconforming use as described and limited within this determination. Some physical improvements have not been shown to have been lawfully established as part of the nonconforming use.

This decision is final at the close of the appeal period, unless appealed. The deadline for filing an appeal is Friday, December 13, 2019 at 4:00 pm.

Opportunity to Review the Record: The complete case file, including the Planning Director Decision containing Findings, Conclusions, Conditions of Approval, and all evidence associated with this application is available for review at the Land Use Planning office. Copies of all documents are available at the rate of \$0.30/per page. For further information, contact Lisa Estrin, Staff Planner at 503-988-0167 or at lisa.m.estrin@multco.us

Opportunity to Appeal: An appeal requires a \$250.00 fee and must state the specific legal grounds on which it is based. To obtain appeal forms or information on the procedure, contact the Land Use Planning office at 1600 SE 190th Avenue (Phone: 503-988-3043). This decision is not appealable to the Land Use Board of Appeals until all local appeals are exhausted.

Issued by: 

By: Lisa Estrin, Senior Planner

For: Adam Barber, Interim Planning Director

Date: Friday, November 29, 2019

Vicinity Map



Applicable Approval Criteria:

For this application to be approved, the proposal will need to meet applicable approval criteria below:

Multnomah County Code (MCC): General Provisions: 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;

Multiple Use Agriculture – 20: MCC 39.4302 through MCC 39.4345;

Nonconforming Use: MCC 39.8305 Verification of Nonconforming Use Status; and

Multnomah County Road Rules (MCRR): MCRR 4.000 Access to County Roads, MCRR 18.000 Right of Way Use Permits

Copies of the referenced Multnomah County Code sections are available by contacting our office at (503) 988-3043 or by visiting our website at <https://multco.us/landuse/zoning-codes/> under the link: *Chapter 39 - Zoning Code*

Copies of the referenced Multnomah County Road Rules (MCRR) sections can be obtained by contacting our office at (503) 988-3043 or by visiting our website at: <https://multco.us/transportation-planning/>.

Findings of Fact

FINDINGS: Written findings are contained herein. The Multnomah County Code (MCC) criteria and Comprehensive Plan Policies are in **bold** font. Staff analysis and comments are identified as ‘**Staff:**’ and address the applicable criteria. Staff comments may include a conclusionary statement in *italic*.

1.0 Project Description

Staff: The Applicant has requested a Verification of Nonconforming Use application to determine the nature and extent of uses, structures and physical improvements associated with an agricultural processing plant that were legally established prior to adoption or amendment of zoning regulations disallowing the use.

MCC 39.2000 Definitions defines a **Nonconforming Use** as **A legally established use, structure or physical improvement in existence at the time of enactment or amendment of the Zoning Code but not presently in compliance with the use regulations of the base zone. A use approved under criteria that have been modified or are no longer in effect is considered nonconforming.**

The applicant’s General Application Form (Exhibit A.1) lists three tax lots as the subject of this application. These are: R994210520, R994210450 and R677811700. Tax lots R994210450 and R677811700 are no longer viable numbers since Scenic Fruit consolidated the three accounts into a single tax lot (R994210520) in the past. Therefore, this application involves only tax lot R994210520.

2.0 Property Description

Staff: In 2008, the agricultural processing operation known as Scenic Fruit Company (Scenic Fruit) was determined to be nonconforming to present land use codes (land use permit T2-08-029). Scenic Fruit became nonconforming on October 6, 1977 when the property was rezoned to Multiple Use Agriculture – 20 (MUA-20). The MUA-20 zone requires a conditional use permit to establish a **“Commercial processing of agricultural products, primarily raised or grown in the region”** [MCC 39.4320(B)(2)]. No conditional use permit has been issued on this property for this agricultural processing use.

The property currently is occupied by a dry storage building, covered loading dock and storage area, processing building, cold storage building, office building, shop building and large freezer (Exhibit B.10.a). In addition the property has on-site parking for employees and semi-truck loading areas, some areas of approved outdoor storage (Exhibit A.12 & A.13), a couple of other small accessory uses and a detention pond for processing waste water.

3.0 Code Compliance and Applications

MCC 39.1515 CODE COMPLIANCE AND APPLICATIONS.

Except as provided in subsection (A), the County shall not make a land use decision approving development, including land divisions and property line adjustments, or issue a building permit for any property that is not in full compliance with all applicable provisions of the Multnomah County Zoning Code and/or any permit approvals previously issued by the County.

(A) A permit or other approval, including building permit applications, may be authorized if:

- (1) It results in the property coming into full compliance with all applicable provisions of the Multnomah County Zoning Code. This includes sequencing of permits or other approvals as part of a voluntary compliance agreement; or**
- (2) It is necessary to protect public safety; or**
- (3) It is for work related to and within a valid easement over, on or under an affected property.**

(B) For the purposes of this section, Public Safety means the actions authorized by the permit would cause abatement of conditions found to exist on the property that endanger the life, health, personal property, or safety of the residents or public. Examples of that situation include but are not limited to issuance of permits to replace faulty electrical wiring; repair or install furnace equipment; roof repairs; replace or repair compromised utility infrastructure for water, sewer, fuel, or power; and actions necessary to stop earth slope failures.

Staff: The subject application is for a Verification of a Nonconforming Use. This application commenced at the request of County Code Compliance after the County received complaints regarding the level of activity, smells, and noise in the Summer of 2018. This application does not authorize any expansion, alteration or new development. It is a vehicle to document the scope and intensity of the nonconforming use of the site and determine if all physical improvements and operations are in compliance with the County's zoning ordinance and past decisions.

4.0 Lot of Record Criteria

4.1 MCC 39.3005 LOT OF RECORD – GENERALLY.

(A) An area of land is a “Lot of Record” if it meets the standards in Subsection (B) of this Section and meets the standards set forth in this Part for the Zoning District in which the area of land is located.

(B) A Lot of Record is a parcel, lot, or a group thereof that, when created or reconfigured, either satisfied all applicable zoning laws and satisfied all applicable land division laws, or complies with the criteria for the creation of new lots or parcels described in MCC 39.9700. Those laws shall include all required zoning and land division review procedures, decisions, and conditions of approval.

(a) “Satisfied all applicable zoning laws” shall mean: the parcel, lot, or group thereof was created and, if applicable, reconfigured in full compliance with all zoning minimum lot size, dimensional standards, and access requirements.

(b) “Satisfied all applicable land division laws” shall mean the parcel or lot was created:

- 1. By a subdivision plat under the applicable subdivision requirements in effect at the time; or**
- 2. By a deed, or a sales contract dated and signed by the parties to the transaction, that was recorded with the Recording Section of the public office responsible for public records prior to October 19, 1978; or**
- 3. By a deed, or a sales contract dated and signed by the parties to the transaction, that was in recordable form prior to October 19, 1978; or**
- 4. By partitioning land under the applicable land partitioning requirements in effect on or after October 19, 1978; and**

5. “Satisfied all applicable land division laws” shall also mean that any subsequent boundary reconfiguration completed on or after December 28, 1993 was approved under the property line adjustment provisions of the land division code. (See Date of Creation and Existence for the effect of property line adjustments on qualifying a Lot of Record for the siting of a dwelling in the EFU and CFU districts.)

(c) Separate Lots of Record shall be recognized and may be partitioned congruent with an “acknowledged unincorporated community” boundary which intersects a Lot of Record.

1. Partitioning of the Lot of Record along the boundary shall require review and approval under the provisions of the land division part of this Chapter, but not be subject to the minimum area and access requirements of this district.

2. An “acknowledged unincorporated community boundary” is one that has been established pursuant to OAR Chapter 660, Division 22.

MCC 39.3080 LOT OF RECORD – MULTIPLE USE AGRICULTURE-20 (MUA-20).

(A) In addition to the standards in MCC 39.3005, for the purposes of the MUA-20 district the significant dates and ordinances for verifying zoning compliance may include, but are not limited to, the following:

(1) July 10, 1958, SR zone applied;

(2) July 10, 1958, F-2 zone applied;

(3) December 9, 1975, F-2 minimum lot size increased, Ord. 115 & 116;

(4) October 6, 1977, MUA-20 zone applied, Ord. 148 & 149;

(5) October 13, 1983, zone change from EFU to MUA-20 for some properties, Ord. 395;

(6) May 16, 2002, Lot of Record section amended, Ord. 982, reenacted by Ord. 997.

(B) A Lot of Record which has less than the minimum lot size for new parcels or lots, less than the front lot line minimums required, or which does not meet the access requirement of MCC 39.4345, may be occupied by any allowed use, review use or conditional use when in compliance with the other requirements of this district.

(C) Except as otherwise provided by MCC 39.4330, 39.4335, and 39.5300 through 39.5350, no sale or conveyance of any portion of a lot other than for a public purpose shall leave a structure on the remainder of the lot with less than minimum lot or yard requirements or result in a lot with less than the area or width requirements of this district.

(D) The following shall not be deemed to be a Lot of Record:

(1) An area of land described as a tax lot solely for assessment and taxation purposes;

(2) An area of land created by the foreclosure of a security interest.

(3) An area of land created by court decree.

Staff: In the decision, T2-08-029 the County found that Scenic Fruit had three legal units of land that were Lots of Record (Exhibit A.4 and B.2). The three legal units of land have not been reconfigured since the T2-08-029 decision and all three continue to be Lots of Record. However, the determination of three Lots of Record as part of this report does not correct the situation with Condition No. 12 of T2-08-029 which required the consolidation of these three units of land into a single parcel.

5.0 Nonconforming Use Criteria

5.1 MCC 39.8305 VERIFICATION OF NONCONFORMING USE STATUS.

(A) The Planning Director shall verify the status of a nonconforming use upon application for a determination by an owner on application for any land use or other permit for the site, or on finding there is a need for a determination (e.g., on learning of a possible Code violation). The determination shall be based on findings that the use:

(1) Was legally established and operating at the time of enactment or amendment of this Zoning Code, and

(2) Has not been abandoned or interrupted for a continuous two year period.

Staff: MCC 39.2000 Definitions defines a Nonconforming Use as A legally established use, structure or physical improvement in existence at the time of enactment or amendment of the Zoning Code but not presently in compliance with the use regulations of the base zone. A use approved under criteria that have been modified or are no longer in effect is considered nonconforming.

The applicant in his exhibits (Exhibit A.1 through A.20) discusses and supports his application for the Verification of Nonconforming Use. Specifically in Exhibits A.3, A.6, A.9 and A.16 the applicant discusses the establishment, operations, scope and physical improvements on the site.

Use: The County in 2008 found the business known as Scenic Fruit to be nonconforming to present day codes (Exhibit A.4 & B.2). The use became nonconforming in 1977 when the property was rezoned from M-3 (Light Manufacturing District) to Multiple Use Agriculture – 20 (MUA-20) (Exhibit B.11 & B.12). The 2008 land use decision discusses the nature of the Scenic Fruit Use as an agricultural processor of berries from local farms. The processed fruit being available primarily to food manufacturers and confectionary industry in frozen, straight-packed, and pureed products. Scenic Fruit's products included locally grown strawberries, raspberries, blueberries, marionberries, boysenberries, blackberries, and rhubarb (Exhibit A.4, page 13). Fruit was purchased from processing and packaging plants from throughout the Willamette Valley. The legally established use of each structure is discussed below.

The applicant has provided documentation (Exhibit A.6) that the use has continued since 2008 without a two year interruption.

Physical Improvements and their Individual Usage: The Scenic Fruit site contains various buildings that have either been constructed prior to zoning, during the 1980's and 1990's with building permits and limited land use review (Design Review or through the Pre-Existing Use regulations) and commencing in 2008 and 2011 with the approval of the Alteration of a Nonconforming Use permits (Exhibit A.5, B.2 and B.3). The following buildings have been reviewed in the past by the County and were found to be lawfully established. These buildings are:

Building Name	Building Size
Dry Storage	15,963 square feet
Covered Dock & Storage Area	10,054 square feet (40 x160= 6400, 42 x 46= 1932, 42x41=1722)
Processing Building	14,642 square feet (4,642 sq. ft. Office, 10,000 sq. ft. Processing)
Cold Storage Building	13,600 square feet
Office Building	7,100 square feet
Shop Building/ Workshop	1,234 square feet
Freezer Building	32,594 ¹ square feet

¹ Applicant indicates building size is 31,600 sq. ft.

The applicant in Exhibit A.9 on page 3 & 4 identifies the uses occurring within the buildings on site. The uses and square footages match the information listed above except for the Cold Storage Building's mixed use.

In Scenic Fruit's narrative (Exhibit A.3, page 5) the applicant lists a 13,600 sq. ft. cold storage building but also mentions two processing buildings. The narrative then goes on to state "One of the processing buildings includes the company's office space". In the applicant's narrative submitted May 29, 2019 (Exhibit A.9, page 3), the applicant provides the various uses of the buildings on the site. For the 13,600 sq. ft. "Older cold storage building" the applicant clarifies that "some processing occurs here also".

In 1985, the County approved DR-85-04 (Design Review) for "Cold Storage" (Exhibit B.21. In April 1986, a permit for HVAC for freezer storage was approved. In 1989, the County approved an addition to the cold storage building which lists the use as Cold Storage (Exhibit B.20). The first evidence of use of the Cold Storage Building for processing is a site plan found in the land use case DR 2-96 (Exhibit B.14, page 68) that has a portion of the building labeled as processing. The land use decision for DR 2-96 does not list any conversion of use in this building.

In 2008, Scenic Fruit identified the Cold Storage Building as being used for a freezer facility (Exhibit B.2, Page 13, Finding 3.05, Applicant Narrative). There was no mention of processing within the building (Exhibit B.2). Processing is described in the 2008 permit as occurring in the northernmost two buildings (Dry Storage Building and Processing Building). In 2010, the County issued land use approval for a mechanical permit (Exhibit B.10). The plans submitted did not show a processing facility in the building. Based upon the evidence in the record, the County cannot determine that the processing use occurring within the 13,600 sq. ft. Cold Storage Building was lawfully established.

In addition to the buildings, various on-site improvements have been authorized in past land use cases. These include:

Physical Improvement	Square Footage
Process Detention Pond	6,891 sq. ft. ²
Outdoor Storage Areas	<ul style="list-style-type: none"> 60 feet x 61 feet area near Cold Storage Building and Altman Road (DR 2-96) 20-foot x 65-foot area east of the northern parking lot (T2-08-029)
Off-Street Parking Northern Parking Lot East of Large Freezer Southwest of Cold Storage Building	56 car parking spaces – five gravel, 51 paved 42 parking spaces (paved) 9 parking spaces (paved) 5 parking spaces (gravel)
Loading Zones North of Big Freezer East of Dry Storage Bldg West of Covered Dock Area	8 Semi-Truck Loading Spaces 4 semi-truck loading spaces 2 semi-truck loading spaces 2 semi-truck loading spaces
Truck Scale Area	12-foot x 50-foot (near covered dock)
Tank with Fire Dept Connection	20-foot x 20 foot (behind dry storage bldg)

² In 2008, the applicant said the detention pond had an area of 14,000 sq. ft. Staff accepted that footage at the time. With improved measurement tools available, staff measured the pond on a 2012 aerial photograph and found the size to be 6,891 sq. ft. With the reworking of the pond by Scenic Fruit from an oval to a rectangle the size has changed without review by the County.

In 2008, the site plan showed eight (8) parking spaces west of the covered dock area. These eight spaces are no longer shown on later site plans. In addition, Scenic Fruit has commenced storing containers within the area as seen in various aerial photographs (Exhibit A.7 & B.13). These eight parking spaces were nonconforming to the County's Off-Street Parking and Loading codes (Exhibit B.14) which no longer allow vehicles to back into a public right-of-way [MCC 39.6555(B)]. The site plan (Exhibit B.10) submitted in 2010 no longer identified parking for this area. Based on the information in the record, these eight parking spaces have been abandoned and converted to a non-authorized storage area.

The Outdoor Storage Area near the Cold Storage Building and Altman Road is shown in materials for DR 2-96 (Exhibit B.14), but whether it has been abandoned is discussed below in Finding 5.7. Based upon the evidence in the record, staff cannot find that the 60 ft. x 61 ft. area near Cold Storage Building and Altman Road continues to be part of the authorized use of the site.

5.2

(B) The Planning Director shall verify the status of a nonconforming use as being the nature and extent of the use at the time of adoption or amendment of the Zoning Code provision disallowing the use. When determining the nature and extent of a nonconforming use, the Planning Director shall consider:

(I) Description of the use;

Applicant: The applicant's description on the use states "The short description of Scenic Fruit's use is substantially as it was in 2008 and for many years before: the company cleans,

processes, and packs fresh and frozen produce. Scenic Fruit proposes the following phrase to describe its lawful nonconforming use: “processing, freezing, storing, packaging and shipping fresh and frozen produce, and ancillary office use.” (Exhibit A.3, page 4)

Staff: This standard requires a determination of the nature and extent of the use at the time of adoption or amendment of the zoning code provision disallowing the use. The provisions of (B) provide required considerations, such as the Description of the use (1). In this case, the relevant timeframe for this assessment is comparing the use today against the use as authorized in the 2008 land use decision (T2-08-029).

Scenic Fruit is a commercial processor of agricultural products. Within the 2008 land use decision, the County found that Scenic Fruit purchases fruit from farms throughout the Willamette Valley for processing and packaging. Its activities include the processing of frozen fruits, retail fruit packaging, quality assurance, and cold storage. Its products in 2008 include locally grown strawberries, raspberries, blueberries, marionberries, boysenberries, blackberries, and rhubarb. The processed commodities are available frozen, straight-packed, and pureed (Exhibit A.4).

5.3 (2) The types and quantities of goods or services provided and activities conducted;

Applicant: The applicant states “Scenic Fruit’s operations include freezing, packaging, and distributing different types of produce based on its availability in any given season or cycle and the longer-term fluctuations in market conditions. Scenic Fruit is not limited to processing any one specific type of produce. Its facilities are capable of processing many different types of fruits and vegetables. Although the specific types of fruits and vegetables may change from year to year because of factors outside the control of Scenic Fruit (for example, the region now produces more blueberries and fewer strawberries than it did in 2008), the overall type of the goods that Scenic Fruit handles has remained the same: fresh and frozen produce. The overall nature of Scenic Fruit’s processing has remained the same also: cleaning, freezing, packaging, and distribution fresh and frozen produce.

Staff: For MCC 39.8305(B)(2), the County must consider the type of product or service they provide for their customers and what processes are used in the business operation. In addition, the County must consider the volume of the product they are processing/manufacturing in order to consider the overall level of the nonconforming use at the site.

In the 2008 decision (Exhibit A.4 and B.2), the County found that business operation known as Scenic Fruit became nonconforming with the adoption of the MUA-20 district over the property in 1977. The 2008 decision identifies the types of goods and services that Scenic Fruit provided was the freezing, packaging and distribution of Willamette Valley Fruit. Freezing and packaging of fruit are different types of activities that are considered processing. In the 2008 decision, the County found that in 1977, Scenic Fruit purchased and processed berries from local farms for processing. The volume of fruit purchased was 7,600,000 lbs. at the time it became nonconforming. In 1977, the finished fruit was stored off-site in freezers (Exhibit B.2, page 14). Scenic Fruit packaged and distributed Oregon berries annually in various sized packaging.

Presently, Scenic Fruit’s processing use continues to include freezing, packaging and distributing different types of produce (Exhibit A.3). The applicant mentions processing of vegetables as part of the narrative, but specific information is not provided regarding vegetables within the application materials. Scenic Fruit’s website identifies their processed whole fruit products as blueberries, blackberry, strawberry, black raspberry, rhubarb, red raspberry,

boysenberry, Marion blackberries, cranberries, mango, pineapple and bananas (Exhibit B.19). The inclusion of tropical fruits does not change the type of services provided or activities conducted by Scenic Fruit, which continues to fall into the category of whole fruit processing.

Scenic Fruit's website (www.scenicfruit.com) shows they are producing an All-Fruit Smoothie line of products using strawberries, bananas, pineapple, mango, raspberry and blueberries. The individual serving sized packages require only water and are marketed to the Food Service industry (Exhibit B.19). According to the company's webpage, the smoothie line consists of 100% fruit and contains no sugar, syrup or preservatives. Staff finds that the production of all-fruit smoothies also falls into the category of whole fruit processing.

In addition to the types of goods and services provided, the provision of (B)(2) also require an analysis of the quantities of goods and services provided. In Scenic Fruit's third narrative (Exhibit A.16, page 2), the applicant provides information regarding the amount of fruit processed on the site. The amount of fruit processed from 2008 to 2013 was 10 million pounds or less. The amount of fruit processed directly relates to the quantity of goods the scope and intensity of the nonconforming use. The increase in fruit processing from 2014 to 2016 has not been authorized by an expansion of a nonconforming use approval. No quantity information was provided for 2017 or 2018, but based on the operation details below, it does not appear that the volume has been reduced in the last few years. Scenic Fruit could choose to apply and receive approval for a conditional use permit for the "Commercial processing of agricultural products primarily raised or grown in the region" to allow for the added goods, services and quantities they wish to process as part of their business operation or apply and receive approval for an Alteration of Non-Conforming Use permit.

Years	Fruit Processed (in pounds) [Ex. A.16, page 2]
2008 - 2010	6 million to 7 million
2011 – 2013	10 million pounds
2014 – 2016	15 million pounds

5.4 (3) The scope of the use (volume, intensity, frequency, etc.), including fluctuations in the level of activity;

Staff: For MCC 39.8305(B)(3), the County will compare the level of business operations for Scenic Fruit from 2008 to 2018. This is a ten year window of time that the applicant is required to provide pursuant to MCC 39.8305(E). When verifying the scope of a nonconforming use, the County verifies that the nonconforming use remains within its parameters or its level of activity has remained the same or has be reduced. Alterations or expansions (including increases in the level of activity) of a nonconforming use may only be authorized pursuant to the land use permit review provisions of MCC 39.8315¹⁰ or as allowed in the MUA-20 zone through a conditional use permit.

In 2008, Scenic Fruit provided information to establish a baseline on the scope of the nonconforming use. The County authorized the on-site 32,594 sq. ft. freezer building with the finding that the amount of fruit stored off-site would be reduced and the number of truck trips would also be reduced due to the new on-site freezer. Staff has reviewed the 2008 land use decision and the applicant's current submitted materials to produce the table below which provides a comparison of activity levels between 2008 and 2018:

Activity	2008 Nonconforming Scope ³	2018
Full Time Employees	20	42 (2016) to 94 (2013) ³
Production Workers (24 hr operation, 3 shifts)	200 total Ave. 66.66 per shift	223 (2018) to 546 (2013) Peak Production: 60 to 80 employees per shift ⁴
Volume of Fruit Processed	7,600,000 lbs.	15,000,000 lbs. ⁵
Months Operating at 24 hours / day	April, May, June, July, August, September, October	3 to 4 months from May or early June to late August or September Spring & Fall on occasion 24 hr depending on market demand ⁶
Off-Site Storage	Maximum of 2,000,000 lbs.	?
Truck trips	After freezer construction: 200 truck trips / 3 month period related to off-site storage 66.66 truck trips / month 800 total truck trips / year⁷	Fresh Trucks: 734 trucks / year Frozen Inbound: 315 / year Frozen Outbound: 1161 / year ⁸
Region where Fruit Purchased	All Fruit Oregon / 1% imported ⁷	Blueberries Only ⁹ 70% OR, 25% WA, 5% Other

³ Exhibit A.14

⁴Exhibit A.9, page 5

⁵Exhibit A.16, page 2

⁶ Exhibit A.9

⁷ Exhibit B.2

⁸ Exhibit A.15

⁹ Exhibit A.17

¹⁰ The applicant has not applied for an Alteration or Expansion of a Nonconforming Use as part of this application (Exhibit A.1 & A.3)

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

The only reduction in scope that has happened for the Scenic Fruit business operation would be the alteration from three shifts in a 24 hour period to two shifts in a 24 hour period. The number of employees working during those two shifts have has expanded slightly though. It

does not appear that the number of vehicle trips would have been reduced for the employees as the third shift personnel appear to have been absorbed into the two shifts during a 24 hour period.

5.5

(4) The number, location and size of physical improvements associated with the use;

Staff: For MCC 39.8305(B)(4), the County will look at the physical improvements on the site and see if any have been abandoned or modified lawfully. The following buildings and other physical improvements on the site have been acknowledge or authorized by land use cases T2-08-029 and T2-2011-1521:

Building Name	Building Size
Dry Storage	15,963 square feet
Covered Dock & Storage Area	10,054 square feet (40 x160= 6400, 42 x 46= 1932, 42x41=1722)
Processing Building	14,642 square feet (4,642 sq. ft. Office, 10,000 sq. ft. Processing)
Cold Storage Building	13,600 square feet
Office Building	7,100 square feet
Shop Building/ Workshop	1,234 square feet
Freezer Building	32,594 square feet

Physical Improvement	Square Footage
Process Detention Pond	Approximately 6,891 sq. ft. ¹¹
Outdoor Storage Areas	<ul style="list-style-type: none"> 60 feet x 61 feet area near Cold Storage Building and Altman Road (DR 2-96) 20-foot x 65-foot area east of the northern parking lot (T2-08-029)
Off-Street Parking Northern Parking Lot East of Large Freezer Southwest of Small Freezer	56 car parking spaces – five gravel, 51 paved 42 parking spaces (paved) 9 parking spaces (paved) 5 parking spaces (gravel)
Loading Zones North of Big Freezer East of Dry Storage Bldg West of Covered Dock Area	8 Semi-Truck Loading Spaces 4 semi-truck loading spaces 2 semi-truck loading spaces 2 semi-truck loading spaces
Truck Scale Area	12-foot x 50-foot (near covered dock)
Tank with Fire Dept Connection	20-foot x 20 foot (behind dry storage bldg.)

¹¹ While the Process Detention Pond was found to be lawful in 2008, its size in that report appears to have been misjudged by the applicant at the time. Please see Finding 5.7 for more information regarding its size and shape.

Scenic Fruit has made improvements, including outdoor usage of the property, that have not been authorized at this time. Please see Section 5.7 for detailed findings on the non-authorized improvements or usage on the site. For additional discussion regarding the outdoor storage near the cold storage building, please see Findings 5.1 and 5.7

5.6

(5) The amount of land devoted to the use; and

Staff: The applicant for Scenic Fruit indicates in his submittal the use of approximately 8 acres for the use. Planning staff measured a 2010 aerial photograph of the site to calculate after construction of the new freezer, the amount of land with authorized physical improvements. Planning staff did not include the vacant parcel to the east where processing water is sprayed on an agricultural crop of grass. As shown in the 2010 photograph below the physical improvements use approximately 7.18 acres on the 13.5 acre tax lot. 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.



Planning staff then measured the site usage on a 2018 aerial photograph. As shown in the 2018 photograph below the physical improvements use approximately 9.11 acres of the 13.5 acre tax lot. Staff did include the semi-truck and trailer parking area that was put into significant usage after 2010.



The amount of land devoted to the agricultural processing business has increased approximately 1.9 acres without an alteration or expansion authorized.

5.7

(6) Other factors the Planning Director may determine appropriate to identify the nature and extent of the particular use.

Staff: For MCC 39.8305(B)(6), the County will consider other physical improvements and uses that are found on the site that may not be part of the lawfully established nonconforming use. One of the purpose for Scenic Fruit applying for this Verification of a Nonconforming Use application was for code enforcement purposes.

Consolidation of Lot of Record into a Single Parcel: Planning staff reviewed the conditions of approval for T2-08-029 and found that Condition No. 12 has not been met. Condition No. 12 states “Prior to occupancy of the freezer building, the property owner shall complete the consolidation of Tax Lots 100 & 200, 1S4E21CA & Tax Lot 600, 1S4E21BD into a single parcel as proposed in the Lot Consolidation application, T1-08-044. While these tax lots were consolidated for taxation purposes, the underlying units of land were not consolidated into a single parcel based on review of the present deed (Exhibit B.6 & B.17). Consolidation was required to prevent the freezer unit from violating the Minimum Yard Dimensions of MCC 39.4325(C). Staff has not found any evidence that the three parcels were consolidated into one legal parcel. The freezer building is currently being used based on the applicant’s narrative (Exhibit A.3). The subject property is not in compliance with Condition No. 12 of T2-08-029.

Outdoor Storage: Condition No. 13 of T2-08-029 states that “The outdoor storage of equipment or materials that are reusable may be stored within the designated outdoor storage area as shown on Exhibit A.29. Storage of broken equipment and obsolete materials is not permitted on the site.” (Exhibit B.2.b.).



At present, Scenic Fruit is storing various materials outside of approved storage areas. No land use authorization has occurred for outdoor storage within the two areas highlighted in yellow. Areas highlighted in orange appear to be the approved outdoor storage areas at different times, but plans submitted in 2008 (Exhibit B.2.c) and 2010 (Exhibit B.10.a) do not show the south western outdoor storage area which is highlighted in orange. Scenic Fruit represented to the County in these plans that the area was no longer a storage area, but at present the use continues. The County authorized the storage area above the detention pond in 2008. As the 2008 plans did not show the south western area to be used as storage, it appears that the County allowed for the outdoor storage area to be shift to a new location. The use of the south western outdoor storage area highlighted in orange in the above graphic in no longer an authorized use.

Truck and Trailer Parking Area: In 2008, the County approved five car parking spaces southwest of the original cold storage building (Exhibit B.2.c). The applicant expanded the five parking spaces into a larger truck and trailer parking area south of the original cold storage building between August 2012 and July 2013 (Exhibit A.9, page 1). Since the truck parking improvement, the semi-trucks and trailers have expanded beyond the paved area towards the south. Applicant says the truck off-street parking is principally used during peak harvest season. The following graphics show the extent of the newly paved parking area and its enlargement for truck/trailer storage in 2018.





The parking and storage of truck and their trailers in the MUA-20 zone would require at a minimum to demonstrate compliance with the zone as required by MCC 39.4305 Uses. MCC 39.4305 states “No building, structure or land shall be used and no building or structure shall be hereafter erected, altered or enlarged in this base zone except for the uses listed in MCC 39.4310 through 39.4320 when found to comply with MCC 4325 through 39.4345 provided such uses occur on a Lot of Record.” The parking lot is a use of land and qualifies as a Structure pursuant to MCC 39.2000 Definitions. The parking area would also need to demonstrate compliance with MCC 39.6500 et al (Parking, Loading, Circulation and Access).

As part of the construction of the truck and trailer parking and storage lot, Scenic Fruit also constructed a new access point (driveway) onto SE Altman Road. Multnomah County Road Rules (MCRR) 4.000 and 18.000 require review and approval by Transportation prior to construction and/or usage of a driveway onto a public right-of-way. In addition, Multnomah County Transportation has indicated that a road rules variance would be required for various reasons including number, spacing, and width before the driveway could be authorized.

Processing in 13,600 sq. ft. Cold Storage Building: In Finding 5.1, the County discusses the use of the Cold Storage Building for processing. Based on the evidence discussed above, the County could not find that the processing within the building was lawfully established as part of the nonconforming use. To use a portion of the building for processing, Scenic Fruit would need to apply for an Alteration to a Nonconforming Use permit [MCC 39.8315] or a Conditional Use permit [MCC 39.4320(B)(2)].

Freezer Pad: Between 2010 and 2012, Scenic Fruit constructed a pad for a 40,000 sq. ft. freezer to the east of the permitted 32,600 sq. ft. freezer (Exhibit A.9, Page 2). An Alteration to a Nonconforming Use application was submitted in 2013, but was withdrawn. The graphics below show the area in 2010 and 2012.



Scenic Fruit is currently using the pad area for outdoor storage of pallets and containers and occasional parking. The graphic below shows the area as of 2018.



The construction of pad for the freezer expansion should not have occurred without first obtaining a Grading and Erosion Control (now Erosion and Sediment Control) permit (MCC 29.356/MCC 39.6210) and either approval of a Conditional Use permit for the business expansion or an Alteration of a Nonconforming Use. In addition, Scenic Fruit uses of the pad for unauthorized outdoor storage and parking. The authorization of the pad for outdoor storage and parking would at a minimum required an Alteration of a Nonconforming Use.

Detention Pond: In applicant's submitted information (Exhibit A.9, Page 3) they state that the detention pond was altered to change it from an oval to a rectangle. Their materials state that the work occurred in the years 2013 and 2014 (Exhibit A.9, page 3). The detention pond is used to store processed waste water. The alteration of the pond would have required a Grading and Erosion Control permit (now Erosion Sediment Control permit) at the time and its alteration and expansion needed to be reviewed via an Alteration of a Nonconforming Use permit. Planning staff prepared the following graphics to demonstrate the extent of the alteration.



5.8

(7) 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.

Staff: Staff finds the scope and intensity of the use on an annual basis has remained steady from 2008 to 2013. This six year time period shows a certain level of consistency in the amount of fruit processed. The table below establishes the level of activity authorized for Scenic Fruit or the future business operations through this determination.

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

- 5.9 (C) In determining the status of a nonconforming use, the Planning Director shall determine that, at the time of enactment or amendment of the Zoning Code provision disallowing the use, the nature, scope and intensity of the use, as determined above, was established in compliance with all land use procedures, standards and criteria applicable at that time. A final and effective County decision allowing the use shall be accepted as a rebuttable presumption of such compliance.**

Staff: The County in its 2008 decision determined the status, scope and intensity of the use at that time. T2-08-029 is a final decision that followed the County's procedures, standards and criteria at that time.

- 5.10 (D) Except for nonconforming uses considered under MCC 39.8315 (B), the Planning Director may impose conditions to any verification of nonconforming use status to ensure compliance with said verification.**

Staff: Planning staff is not imposing any conditions at this time.

- 5.11 (E) An applicant may prove the continuity, nature and extent of the nonconforming use only for the 10-year period immediately preceding the date of application. Evidence proving the continuity, nature and extent of the use for the 10-year period preceding application creates a rebuttable presumption that the use, as proven, existed at the time the applicable zoning ordinance or regulation was adopted and has**

continued uninterrupted until the date of application. Evidence proving the continuity, nature and extent of the use for the 10-year period preceding application does not create a rebuttable presumption that the use lawfully existed at the time the applicable zoning ordinance or regulation was adopted.

(F) For purposes of verifying a nonconforming use, the Planning Director shall not require an applicant for verification to prove the existence, continuity, nature and extent of the use for a period exceeding 20 years immediately preceding the date of application. Evidence proving the continuity, nature and extent of the use for the 20-year period preceding application does not create a rebuttable presumption that the use lawfully existed at the time the applicable zoning ordinance or regulation was adopted.

Staff: The materials used by the County were supplied by the applicant in their exhibits A.1 through A.20. The period of time used to determine the continuity, nature and extent of the use was from 2008 to 2018, a twelve year period. This application was submitted in January 2019.

6.00 Comments

Staff: Planning staff has summarized the comments provided during the Opportunity to Comment period by noticed parties.

Simon Comments: They are concerned that the use has become extremely noisy especially during the harvest season. Scenic Fruit's 24 hour operations periods have expanded. They believe the increase in noise is because of the truck parking area in the southwest corner of the property. Trucks block Altman Road while delivering to Scenic Fruit. (Exhibit D.1)

Unger Comments: Property owner agrees that Scenic Fruit is a nonconforming use and does not want to see changes that would allow for additional industrial uses. The use impacts the surrounding neighbors. (Exhibit D.2)

Allott Comments: Scenic Fruit has negatively impacted their neighbors. The processing plant has increased in size. The noise and light from the processing plant is monotonous and continuous late into the evening. Truck noise contributes to the additional noise. Waste water is not handled correctly and smells pungent. May exceed DEQ regulations. Increased water usage and its disposal impact surrounding property owners. Fruit is no longer from local farms. They process fruit from other areas. No longer fit within the current neighborhood. Trucks create safety risks and block the County roads. Overnight truck parking has been added. They allow truckers to sleep overnight on their property. Damage the roads with the increased amount of trucks. They do not appear to follow land use rules. (Exhibit D.3)

Brinks Comments: Scenic Fruit is no longer operating within the guidelines establishing their use. The business operation served the needs of local farmers but has now grown beyond that level. They no longer just process but manufacture new products, do retail sales from this location and provide storage services. They have completed various improvements without following the guidelines and operate all times day and nights. Scenic Fruit was a seasonal operation operating only during the summer months of the local harvest. They are purchasing fruit and vegetables from around the world. MUA-20 code requires a conditional use permit for these types of operations. (Exhibit D.4)

Fuller Comments: The subject property is correctly considered Nonconforming. Change would negatively impact the neighborhood and property values. The volume of noise from the business is an issue along with more traffic. (Exhibit D.5)

Gallant Comments: I have lived in this area for more than 50 years. Farming has changed in the area. The cannery was for local farmers but now brings in produce from out of state. Large semi-trucks use the small street I live on (Miller Rd). They create a problem trying to make a sharp turn on this street (damage to signs, fences and road deterioration). No expansion please. (Exhibit D.6)

Jubbs Comments: The property is nonconforming. Do not change or allow expansion. Expansion would negatively impact the neighborhood. The freezer created more noise and more traffic. (Exhibit D.7)

Nicholson Comments: The use is nonconforming. Expansion or change would impact the neighborhood. Altman is constantly being blocked by trucks backing in and out of the loading docks, forklifts come flying out onto the street without regard for others. Refrigeration trucks running 24/7 made it very difficult to enjoy property. They appear to be violating the County's noise ordinance. (Exhibit D.8)

Pitts Comments: I live across the street on Carpenter Lane. The landscape has changed from lovely scenic country area to enormous amount of trucks, fences, street blockages, and damaged roads. This is beyond doing business with local farmers of the community. Recent expansions have harmed the value to my property. Expansion should not be allowed. (Exhibit D.9)

Staff: The subject application is to verify the scope and intensity of the nonconforming use of the Scenic Fruit site. No expansion is proposed at this time. Once the base levels for the nonconforming use is set, Scenic Fruit could choose to remove any non-authorized improvements or seek authorization through the County's zoning code.

7.00 Exhibits

'A' Applicant's Exhibits

'B' Staff Exhibits

'C' Procedural Exhibits

'D' Comments Received

Exhibits with a "*"after the exhibit # have been included as part of the mailed decision. All other exhibits are available for review in Case File T2-2019-11423 at the Land Use Planning office.

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
'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