BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

SCENIC FRUIT COMPANY, LLC,
Petitioner,

vs.

MULTNOMAH COUNTY,
Respondent.

LUBA No. 2020-010

FINAL OPINION
AND ORDER

Appeal from Multnomah County.

Dean N. Alterman, Portland, filed the petition for review and argued on behalf of petitioner. With him on the brief was Alterman Law Group PC.

Katherine Thomas, Assistant County Attorney, filed a response brief and argued on behalf of respondent.

RUDD, Board Chair; RYAN, Board Member, participated in the decision.

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

REMANDED 05/12/2020

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

Opinion by Rudd.

NATURE OF THE DECISION

Petitioner appeals a hearings officer's decision approving in part and rejecting in part its application for verification of a nonconforming fruit processing use.

FACTS

Since 1931, petitioner has conducted a fruit[1] processing and packing operation on an 8-acre portion of a 13.5-acre tract. County zoning was first applied in 1951, when the northern portion of the tract on which most of the processing facilities are located was zoned M-3 (light industrial), a zone that allows fruit processing outright. In 1977, the county rezoned the property to Multiple Use Agricultural-20 acre minimum (MUA-20), which would allow petitioner's processing plant as a conditional use, with certain restrictions.[2] However, petitioner has never sought county approval as a conditional use. Instead, petitioner and the county have consistently treated the processing plant as a lawful nonconforming use.

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[1] Petitioner mostly processes fruit, but from time to time also processes vegetables. The evidence presented below and the hearings officer's decision does not distinguish between fruit and vegetables, and apparently that distinction is not a disputed or material issue in this appeal. Accordingly, we follow the parties in using "fruit" as a shorthand term for both fruits and vegetables.

[2] Multnomah County Code (MCC) 39.4320(B)(2) allows as a conditional use the "[c]ommercial processing of agricultural products primarily raised or grown in the region."

In 2008, petitioner filed applications with the county to (1) verify the scope of the nonconforming fruit processing use, and (2) approve a 32,000-square foot freezer building, as an alteration of the nonconforming use. The freezer building was intended to allow on-site freezing and storage of fruit that had formerly been trucked to an off-site freezing and cold storage facility. Petitioner estimated that having an on-site freezer building would cut the number of associated trucking trips in half. In its 2008 decision verifying the nonconforming use and approving the proposed freezer building (hereafter, the 2008 NCU decision), the county noted petitioner's testimony that the facility processes and stores approximately 15 million pounds of fruit per year.

In 2018, in response to complaints regarding processing activities on the property, the county inspected the property and noted improvements and activities that, the county believed, exceeded the scope of the activities verified in the 2008 NCU decision. Petitioner took the position that all current activities were within the scope of the verified use. To resolve that dispute, the county requested that petitioner file a new application for a nonconforming use verification, and in 2019 petitioner filed such an application. In the county's view, the 2019 application was intended to (1) resolve any ambiguities as to the nature and extent of the use verified in the 2008 NCU decision, (2) determine whether some portion of the scope or intensity of the use had been lost since 2008, due to a reduction in intensity for more than the two-year period prescribed under the Multnomah County Code (MCC), and (3) determine whether some

elements of the current operation represented an expansion in scope or intensity since 2008.

On November 29, 2019, the county planning director issued a decision concluding in relevant part that the nature and extent of the fruit processing use had changed since 2008 in several respects. Specifically, the director found that the 2008 NCU decision verified (1) the processing of only 7.6 million pounds of fruit per year, instead of the 15 million advocated by petitioner, and (2) only 200 truck trips per three-month period, or 800 total per year, instead of the 2,200 truck trips advocated by petitioner.

Petitioner appealed the director's decision to the county hearings officer. In addition, a neighbor, Simon, also appealed the director's decision, challenging a finding that the 2008 NCU decision did not limit the source of fruit accepted at the facility to fruit from the Willamette Valley.

On December 20, 2019, the hearings officer conducted a public hearing and, on January 8, 2020, issued the county's final decision on the application. In relevant part, the hearings officer agreed with Simon that the 2008 NCU decision limited the source of fruit accepted at the facility to fruit from the Willamette Valley. In addition, the hearings officer concluded that petitioner had lost the right to process any more than 10 million pounds of fruit per year, and further that the 2008 NCU decision limited petitioner to 200 truck trips per three-month period. On appeal, petitioner challenges these three adverse conclusions.

FIRST ASSIGNMENT OF ERROR

MCC 39.8305(B)(7) provides that a "reduction of scope or intensity of any part of a [nonconforming] use * * * for a period of two years or more creates a presumption that there is no right to resume the use above the reduced level." The presumption "may be rebutted by substantial evidentiary proof that the long-term fluctuations are inherent in the type of use being considered."[3] *Id.*

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[3] MCC 39.8305(B) provides, in full:

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

As noted, the hearings officer concluded that the 2008 NCU decision verified the right for the fruit processing operation to process up to 15 million pounds of fruit per year.[4] The hearings officer viewed this number as a baseline, or more accurately a ceiling, on how much fruit could be processed each year without seeking county approval to alter or expand the nonconforming use. However, based on evidence petitioner submitted regarding the weight of fruit processed every year from 2009 to 2019, the hearings officer, like the planning director, concluded that for more than two years, petitioner processed less than

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> 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."

[4] The hearings officer's decision states, in relevant part:

> "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." Record 21.

15 million pounds of fruit per year. Citing evidence from the period from 2011 to 2013, the hearings officer concluded that, pursuant to MCC 39.8305(B)(7), petitioner's nonconforming use right to process fruit had been reduced to only 10 million pounds of fruit, notwithstanding that after 2013 the amount processed per year increased to 15 million pounds or more.[5]

The hearings officer also rejected petitioner's arguments that the variation over the period 2008 to 2018 represented "long-term fluctuations" inherent in the fruit processing business:

> "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:
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> > "'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

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[5] The hearings officer's decision continues:

> "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). * * *" Record 21.

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.' * * *

"* * * * *

"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*[, 292 Or 69, 636 P2d 952 (1981)]. 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 [square feet (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. * * *" Record 22-23.

A. Exhibit B.4

On appeal, petitioner argued that the hearings officer misconstrued MCC 39.8305(B)(7), and ignored evidence in the record, in concluding that the nonconforming use right was reduced to 10 million pounds of fruit per year. According to petitioner, the hearings officer overlooked Exhibit B.4, which is a 2013 letter from petitioner to the county that the county itself entered into the record. Record 295-98. In relevant part, Exhibit B.4 includes for each year from 2002 to 2012 totals of fruit purchased from two sources: (1) direct from farmers and (2) from other processors. For example, Exhibit B.4 indicates that in the year 2008 petitioner directly purchased 7.5 million pounds of fruit from farmers, as well as 8.4 million pounds from other processors, for a total of approximately 15.9 million pounds. Petitioner argues that these figures are consistent with the otherwise inexplicable findings in the 2008 NCU decision that petitioner purchased 7.6 million pounds of fruit in 2008, but also processed approximately 15 million pounds.

For the years 2011 and 2012, two of the years the hearings officer found were limited to processing only 10 million pounds of fruit each year, Exhibit B.4 indicates the following purchases:

	Farm Direct	Other Processors
2011	8,600,000	11,870,000
2012	7,900,000	10,950,000

Record 296. Petitioner notes that these totals exceed 15 million pounds per year. Based on Exhibit B.4, petitioner argues that the director and hearings officer both failed to appreciate that petitioner's facility obtains fruit from two sources of fruit, and that most of the annual totals cited and relied upon in the county's decision, including the limit of 10 million pounds, are incomplete because they appear to reflect only one source of fruit rather than all sources.

Petitioner acknowledges that the information in Exhibit B.4 appears to be inconsistent with the information that petitioner itself submitted to the county in support of the application.[6] For example, petitioner informed the county that for the period 2011-13 petitioner processed only 10 million pounds of fruit per year, and the hearings officer relied on that figure and similar figures from petitioner to conclude that the nonconforming use right had been reduced to 10 million pounds of fruit. Record 22 (citing petitioner's Exhibit A.16, at Record 363). However, we understand petitioner to argue that its role in providing incomplete or misleading information to the county does not absolve the county of its obligation to make a decision based on substantial evidence in the record. Petitioner contends that the hearings officer should have been aware of the information presented in Exhibit B.4, because county staff submitted that document into the record.

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[6] Petitioner concedes that in its application and presentations to the county "Petitioner itself did not clearly distinguish between fruit purchased from farms and fruit purchased from other processors." Petition for Review 12 n 4.

The county responds, and we agree, that the hearings officer did not err in failing to consider Exhibit B.4 for purposes of determining whether post-2008 reductions in fruit processing had limited the verified right under the 2008 NCU decision to process up to 15 million pounds of fruit per year.[7] Petitioner's case in chief in support of its application informed the county that during the period 2011-13 petitioner processed only 10 million pounds of fruit per year. Petitioner apparently failed to inform that county that this 10 million pound figure is based on only one source of fruit, and that more complete information is available and within petitioner's control, suggesting purchasing and processing totals during that period in excess of 15 million pounds per year.

Exhibit B.4 is apparently from the county's file of a withdrawn application for a nonconforming use verification, filed by petitioner in 2013. It is not clear why county staff placed Exhibit B.4 in the record of the current application, but it was presumably not intended to establish, for purposes of MCC 39.8305(B)(7), that no reduction in fruit processing had occurred between 2008 and 2019. No party, including petitioner, cited to Exhibit B.4 below in support of the application or any issue before the hearings officer. Under these circumstances,

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[7] Petitioner notes that the hearings officer refers to Exhibit B.4 in his findings, as evidence that the hearings officer was aware of Exhibit B.4. However, the county argues that the three references to Exhibit B.4 in the decision are typographic errors, and the hearings officer is clearly referring to (and quoting) Exhibit B.2, which is a copy of the 2008 NCU decision. Response Brief 8; Record 37, 43, 44. As far as we can tell, the county is correct.

the hearings officer cannot be faulted for failing to consider Exhibit B.4, and for instead relying on petitioner's own application materials to conclude that petitioner had failed to meet its burden of proof under MCC 39.8305(B)(7).

B. Long-term Fluctuations Inherent in the Type of Use

Petitioner also argues that the hearings officer erred in rejecting arguments that any reductions in fruit processing that might have occurred between 2008 and 2013 represented long-term fluctuations inherent in the fruit processing industry. Petitioner argued to the hearings officer:

> "Fluctuations are a natural part of Scenic Fruit's operations because Scenic Fruit's ability to process produce depends on how much produce is grown. The market may dictate which type of produce is grown and harvested in any particular year, depending on what customers are purchasing. Weather may also dictate how much farmers actually produce of any given fruit or vegetable in any given season * * * These are factors outside the control of Scenic Fruit. * * *" Record 406.

As quoted above in the text, the hearings officer rejected that argument, finding that petitioner's evidence showed only steady increases in fruit processing from 2008 to 2019, and petitioner presented no evidence of any cyclic fluctuations affecting the fruit processing industry as a whole during the 2011-13 time period. *See* Record 46 ("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").

On appeal, petitioner argues that changes in market demand and other conditions that cause changes in the *supply* and *kinds* of fruit available to the fruit

processing industry is one possible example of "long-term fluctuations" "inherent in the type of use being considered," for purposes of MCC 39.8305(B)(7), that could impact the amount of fruit processed from year to year. Petitioner contends that it presented substantial evidence to the county that the supply and types of fruit available to processors can vary from year to year, as weather and market conditions change. Petitioner argues that post-2008 there has been a steady rise in fruit supply and demand, and the fact that during that period there has been no cyclic rise and fall and rise again does not mean that the processing numbers petitioner experienced post-2008 do not represent "long-term fluctuations" inherent in the fruit processing industry.

Petitioner may be correct that changes in local market conditions affecting supply and demand may be responsible for "long-term fluctuations" "inherent in the type of use" for purposes of MCC 39.8305(B)(7). In *Polk County v. Martin*, 292 Or 69, a case cited by the hearings officer, the Oregon Supreme Court held that a nonconforming rock quarry operation had not been abandoned or interrupted, despite significant fluctuations in mining activity over many years, because sporadic and intermittent operations are inherent in the business model for the quarry, which depended entirely on local market demand, which was sporadic and intermittent. Similarly, in the present case, if there were evidence that reductions in processing amounts over the relevant period of years were the result of changes in market supply or demand similarly affecting all local fruit

processors, then petitioner could argue that such reductions were caused by "long-term fluctuations" "inherent in the type of use[.]"

However, petitioner does not cite to any such evidence. As far as we can tell, petitioner submitted evidence only that, as a general proposition, market supply and demand for fruit can vary from year to year. Nothing cited to us specifically links the reduced processing levels petitioner experienced in the years 2011 to 2013, the years in question, to local market conditions or other circumstances that could be described as "long term fluctuations" "inherent in" the local fruit processing industry.

C. 26,893,000 Pounds of Fruit

At two points in the petition for review, citing to Exhibit B.4, petitioner argues that during 2010 petitioner processed 6,053,000 pounds of fruit purchased directly from farmers, and 20,840,000 pounds of fruit purchased from other processors, for a total of 26,893,000 pounds. Petitioner argues that to the extent any limit on fruit processing should be imposed on petitioner, it should be the highest amount shown on Exhibit B.4, or 26,893,000 pounds per year.

The county responds that petitioner waived the argument that processing limits should be based on the highest number from the year 2010 shown in Exhibit B.4, by failing to raise any issue at all under Exhibit B.4, or advance argument that processing levels should be set above the 15,000 pounds per year as described in the 2008 NCU decision. We agree with the county. Even if that issue were not waived, petitioner's argument is simply incorrect as a matter of

law. MCC 39.8305(B)(7) allows a nonconforming use to continue notwithstanding reductions in the scope or levels of intensity, if the applicant can link those reductions to long-term fluctuations inherent in the type of use. But the opposite proposition is not true: MCC 39.8305(B)(7) does not allow a nonconforming use to *expand* the scope or intensity of a nonconforming use beyond the scope or intensity of the lawful or verified use, based on subsequent changes to conditions experienced by that type of use, such as increased market demand. Such expansions are lawful only if approved by the county as an alteration.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

As noted, a neighbor appealed the planning director's initial decision, arguing in relevant part that the 2008 NCU verification impliedly limited the source of fruit processed at petitioner's facility to fruit grown in the Willamette Valley. The hearings officer agreed with that argument, in part on reliance with MCC 39.4320(B)(2), which is a conditional use permit regulation allowing the "[c]ommercial processing of agricultural products" in the MUA-20 zone, limited to agricultural products that are "primarily raised or grown in the region."[8] In

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[8] The hearings officer's decision states, in relevant part:

> "The Hearings Officer regards the source of the fruit (and vegetables) as an important factor that defines the scope (nature) of this nonconforming use. There is no evidence in the 2008 NCU

addition, the hearings officer also reasoned that a significant element of the verified use was the seasonality of the fruits processed at the facility. If petitioner can process fruits from outside the relevant region or elsewhere in the world, the hearings officer concluded, that could allow unrestricted year-round operation, which could represent an expansion of the facility. Accordingly, the hearings officer concluded that the 2008 NCU decision impliedly limited petitioner's nonconforming operation to fruit grown within the "region," which the hearings officer understood to be the Willamette Valley.[9]

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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." Record 20-21.

[9] The hearings officer's decision continues:

"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

On appeal, petitioner argues that the hearings officer erred in relying in part on MCC 39.4320(B) as a basis to restrict the source of fruit processed at the facility. MCC 39.4320(B) is a conditional use standard that, petitioner argues, has no bearing on verifying the nature and extent of a nonconforming use.

The county responds that the hearings officer did not "apply" MCC 39.4320(B) in the sense of an approval standard. Instead, the county argues, the hearings officer simply cited the code provision to support the proposition that, because the code regulates the source of agricultural commodity for a *conforming* commercial processing facility, the source of agricultural commodity is also a relevant consideration in determining the nature and extent of a *nonconforming* commercial processing facility. In any case, the county argues, even if MCC

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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." Record 45.

39.4320(B) is entirely irrelevant, the hearings officer properly considered geographic limits on the source of commodities for petitioner's processing facility, because in the 2008 NCU decision those geographic limits were described as part of the nature and extent of the nonconforming use.

We generally agree with petitioner that MCC 39.4320(B) is not a directly applicable standard in determining the nature and extent of a nonconforming commercial processing facility. The focus of the nonconforming use verification is on determining the nature and extent of the nonconforming use on the date it became nonconforming. That said, in conducting a nonconforming use verification it is not error, and in fact may be necessary, to contrast the nature and extent of the nonconforming use against the restrictions and regulations that would otherwise apply and that render the use nonconforming. A use is nonconforming precisely *because* and *to the extent* it varies from whatever land use restrictions would otherwise apply. In our view, if on the date the use became nonconforming some discrete aspects or components of the use in fact *conformed* with otherwise applicable land use regulations, thereafter that conforming aspect or component of the use cannot become nonconforming without seeking county approval for an alteration or expansion of the nonconforming use.

In *Morgan v. Jackson County*, ___ Or LUBA ___ (LUBA No 2019-023, Aug 1, 2019), *aff'd*, 300 Or App 582, 452 P3d 1088 (2019), a case the hearings officer cites and the parties discuss, we rejected an argument that a change in the source of automobiles purchased off-site for a nonconforming auto yard use

means that the auto yard use had been discontinued after it became a lawful nonconforming use. *Id.*, ___ Or LUBA ___ (LUBA No 2019-023, Aug 1, 2019) (slip op at 18). However, unlike the present case, the land use regulation that rendered the auto yard use nonconforming did not specifically restrict the *source* of automobiles purchased off-site. Had the land use regulation done so, and had the change in source rendered the auto yard use more nonconforming, we might have concluded in *Morgan* that the change in source represented at least an unpermitted alteration of the auto yard use.

Notably, *Morgan* involved an initial verification of a nonconforming use. In the present case, the county has already conducted an initial verification, and the purpose of the current proceeding is to (1) resolve certain ambiguities in the initial 2008 verification, and (2) determine whether any post-verification changes to petitioner's facility represent reductions in the nature and extent of the nonconforming use, or (3) alterations and expansions that require county approval. As the hearings officer found, and no party disputes, the 2008 NCU decision is the baseline against which any post-verification changes are measured. Accordingly, the precise question in the present case is what, if anything, the 2008 NCU decision verified with respect to the source of fruit processed at petitioner's facility.

Prior to 1977, the property was zoned M-3, an industrial zone which allowed a fruit processing facility outright, without any source restriction. In 1977, the property was rezoned to MUA-20, which as noted classifies such a

facility as a conditional use, subject to source restrictions. The 2008 NCU decision was a detailed and comprehensive attempt to verify the nonconforming fruit processing use. The Willamette Valley is mentioned twice in the 2008 NCU decision, both times in reciting the applicant's statements, not as part of the staff analysis or conclusions. The two applicant statements are as follows:

> "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. * * *
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> "* * * *
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> "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." Record 321.

The only staff analysis or conclusion directed at the source of fruit states that "Scenic Fruit is a commercial processor of agricultural products primarily raised or grown in the region." *Id.* The language of this statement echoes MCC 39.4320(B), although the decision does not otherwise cite or mention the code provision. However, it is a reasonable inference that during the 2008 NCU proceedings petitioner represented to the county that, as far as the source of fruit goes, the fruit processing facility conformed with MCC 39.4320(B)(2), and hence did not need nonconforming use verification in that respect, because the facility processed fruit "primarily raised or grown in the region." Based on the applicant's statements, the county decision-maker found, as part of its description of the nature and extent of the nonconforming use, that the facility processed fruit

that was "primarily raised or grown in the region." Record 321. Accordingly, we agree with the county and the hearings officer that the 2008 NCU decision verified the facility as lawful in relevant part because it processes fruit that is "primarily raised or grown in the region." *Id.*

The remaining question is what "primarily raised or grown in the region" means. The 2008 NCU decision is silent on what the county decision-maker thought the undefined terms "primarily" and "region" mean. The MCC apparently includes no relevant definitions. The hearings officer accepted the opponents' argument that the relevant "region" must be limited to the Willamette Valley, because petitioner twice mentioned sourcing fruit from the Willamette Valley.[10] Based on those references, the hearings officer concluded that the scope of the nonconforming use allows petitioner to process fruit *only* from the Willamette Valley.

We agree with petitioner that the foregoing conclusion is erroneous and inconsistent with the 2008 NCU decision. First, the two statements from petitioner cited in the 2008 NCU decision do not state or necessarily suggest that

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[10] We understand petitioner to argue that it is unclear exactly what constitutes the "Willamette Valley" and to question whether Multnomah County, in which petitioner's facility is located, is in the Willamette Valley. We need not resolve these questions, but note that ORS 215.010(6) defines "Willamette Valley" for purposes of that land use chapter as "Clackamas, Linn, Marion, Multnomah, Polk, Washington and Yamhill Counties and the portion of Benton and Lane Counties lying east of the summit of the Coast Range."

petitioner *exclusively* obtains fruit from the Willamette Valley. In fact, one of the statements notes that petitioner obtains fruit from "Oregon berry growers," without limit to the Willamette Valley. Record 321.

Second, the 2008 county decision-maker evaluated those statements in order to conclude that petitioner "primarily" obtained fruit from the "region." *Id.* This conclusion was presumably not intended to establish compliance with MCC 39.4320(B), which was not an applicable criterion, but rather to establish that the facility conformed to MCC 39.4320(B) with respect to the source of fruit, and therefore did not *require* any nonconforming use verification in that respect. Consequently, it appears that the 2008 NCU decision recognized, rightly or wrongly, petitioner's right to process fruit from sources in different geographic locations, even outside the relevant "region," as long as the fruit processed at petitioner's facility is *primarily* grown or raised in the "region." In the current proceedings, the county is bound by the 2008 NCU decision on this point, and cannot impose new or inconsistent restrictions on sourcing.

However, that appears to be what the hearings officer did. The 2008 NCU decision did not establish what the relevant "region" is, but even assuming that the "region" is the Willamette Valley, petitioner would exceed the nonconforming use right verified in the 2008 NCU decision only if there was evidence that petitioner *primarily* obtains fruit from somewhere other than the Willamette Valley. Most dictionary definitions of "primarily" indicate that it means something like "for the most part," *i.e.*, more than 50 percent. *See*

Webster's Third New Int'l Dictionary 1800 (unabridged ed 2002) (defining "primarily" in part as "1 : first of all : FUNDAMENTALLY : PRINCIPALLY"). The hearings officer essentially interpreted the 2008 NCU decision to implicitly limit petitioner to obtaining fruit *exclusively* from the Willamette Valley. The 2008 NCU decision includes no such limitation, and the only express statement with respect to sourcing refers only to obtaining fruit "primarily" from the region.

The hearings officer also justified the limitation of exclusive sourcing from the Willamette Valley on the grounds that, if petitioner could obtain fruit from geographically disparate sources that have different growing seasons or conditions, petitioner could potentially expand the processing operation from a mostly seasonal operation to a full-intensity, year-round operation. However, that hypothetical apparently has no basis in the record.

The 2008 NCU decision imposed limits in amounts processed, employee numbers and operational dates and times that reflect the mostly seasonal nature of the verified operation. The 2008 NCU decision, as re-affirmed in this decision, limited the operation to 20 full-time employees year-round, with 200 part-time employees over three shifts during the three-month peak summer season, which is presumably linked to local harvest schedules. During that peak season, 24-hour operation is permitted; for all other months of the year the hours of operation, limited to 20 full-time employees, are 8 a.m. to 5 p.m. Even if there were evidence in the record that obtaining fruit from different geographic regions with different growing seasons or conditions could feed processing operations in

non-peak months, as long as those non-peak operations comply with the temporal and quantitative operational limits imposed under the 2008 NCU decision, then no expansion of the nonconforming use has occurred. Stated differently, fruit seems largely fungible. We do not see that a change in the geographic *source* of fruit makes any difference in terms of the scope or intensity of the nonconforming use, as long as such changes do not exceed the temporal, quantitative and other operational limits imposed by the 2008 NCU decision, or otherwise constitute an expansion or alteration of the nonconforming use.

Accordingly, remand is necessary to remove the limitation that petitioner obtain fruit exclusively from the Willamette Valley. On remand, the hearings officer may require, based on the 2008 NCU decision, that petitioner submit evidence that at all relevant times it has continued to obtain fruit "primarily" from the region identified by the county. The hearings officer may also allow argument and evidence regarding what is, or was on the date the use became nonconforming, the relevant "region."

The second assignment of error is sustained.

THIRD ASSIGNMENT OF ERROR

The hearings officer found that the 2008 NCU decision limited truck trips to and from the facility to 200 truck trips per three-month period or a total of 600 truck trips per year.[11]

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[11] The hearings officer's decision states, as relevant:

"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 [*sic*] to 200 truck trips during the 3-month peak or 600 truck trips [*sic*] annually [quoting passage from 2008 findings, quoted below in n 13]:

"* * * * *

"The applicant raises the issue in its second appeal issue 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 [*sic*] annually, the Director's 2019 decision permits more truck trips than are allowed.

"* * * 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. 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 [*sic*] 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." Record 24-25 (internal record and case citations omitted).

Petitioner challenges that finding, arguing that the hearings officer misconstrued the 2008 NCU decision and adopted findings not supported by substantial evidence. The hearings officer's error, petitioner argues, stems from his confusing truck trips to and from offsite cold storage with the *total* of all truck trips to and from the facility, including trips not related to frozen fruit and cold storage. According to petitioner, the best evidence of the number of total truck trips from all aspects of the operation is evidence petitioner submitted in the current proceeding, showing that in 2018 there were over 2,000 truck trips per year associated with the facility, including 734 truck trips involving fresh rather than frozen fruit. Record 393. We understand petitioner to argue that the trip numbers addressed in the 2008 NCU decision concerned only trips associated with frozen fruit being trucked to and from cold storage, and that the 2008 NCU decision does not address (or restrict) the number of trips involving fresh fruit, or the number of total truck trips.

The county responds, and we agree, that truck trip evidence from 2018 is not particularly helpful in understanding what the 2008 NCU decision determined regarding truck trips. As the county found, in between 2008 and 2018 petitioner altered and expanded the fruit processing operation in various ways, without county approval, and the truck trip figures from 2018 presumably reflect that altered and expanded operation, not the truck trips from 2008 (or 1977 for that matter).

Nonetheless, we agree with petitioner that remand is necessary to adopt clear findings supported by substantial evidence regarding the total number of truck trips allowed per year.

Initially, there is some confusion regarding whether the hearings officer affirmed a total of 600 truck trips per year, or a total of 800 truck trips per year. The hearings officer's findings recite both figures, without explanation for the variation. For example, at Record 38 the hearings officer states that the 2008 NCU decision verified "200 truck trips per 3-month period (66.66 truck trips per month on average, or 800 total truck trips per year)." The 800-annual trip figure seems to conflict with the 600-annual trip figure cited in other findings, including the findings quoted in note 11.

Both figures appear to be calculated based on 200 trips per three-month period, or an average of 66 trips per month, extrapolated over a 12-month period, but that extrapolation would yield approximately 800 annual trips, not 600 annual trips. It seems likely that the reference to a total of 600 truck trips per year in the findings quoted in the margin is simply a typographic error, and the hearings officer uniformly meant 800 truck trips per year. But that is not entirely clear. It is possible the 600-trip figure could be explained by an uneven distribution of trips among the four quarters of the year. Because remand is necessary for other reasons, we conclude that the decision should also be remanded for the hearings officer to clarify which figure was intended.

Regardless of whether the 600 or 800 trip figure is used, petitioner argues that the hearings officer misconstrued the evidence and the 2008 NCU decision with respect to the types of truck trips included in the total trip figure. According to petitioner, the 2008 NCU decision, properly construed, imposes no limit on total truck traffic and, to the extent it imposes any limit at all, the decision limits truck trips associated only with frozen fruit, not truck trips associated with fresh fruit.

The hearings officer's findings do not directly address this issue, although it seems clear that the hearings officer understood the 2008 NCU decision to encompass all truck trips within the 600/800 total trip figure, whether hauling fresh or frozen fruit. We have examined the portions of the 2008 NCU decision cited to us, [12] and in our view the 2008 NCU decision does not contain a clear

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[12] The 2008 NCU decision recites the following applicant testimony:

> "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[d] 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

resolution of the issue.[13] It is possible that, as petitioner argues, the 2008 NCU decision considered only truck trips associated with frozen fruit, and did not

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significant portion of these trips occur at harvest time, and are spread out over the course of a 24 hour workday during that period." Record 322.

"According to Scenic Fruit staff, an average annual volume of 15 million pounds of product are moved in this way, equating to some 400 truck trips related to offsite cold-storage in any given three-month period. They estimate that by constructing a new onsite cold-storage facility, these truck trips could be reduced by as much as 50%, to 200 freight trips in a three-month period, or a reduction of 1 to 2 PM peak-hour trips. This will significantly reduce the offsite impacts caused by freight traffic, belying the trip generation that the reduction in freight trips will result in a situation where the proposed building[] has 'no significant affect' on the local transportation system during the PM peak-hour." Record 327.

[13] The staff analysis on this point states, in relevant part:

"Staff: 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. During a meeting between Scenic Fruit and their representatives and planning staff, it was indicated that off-site cold storage will continue in some amount. This calls into question the amount of truck traffic that will be reduced. At present, Scenic Fruit moves an annual volume of 15 million pounds of product between their Altman facility and off-site cold storage. * * * It would appear the amount of on-site storage will be able to handle the cold storage needs for the business, thereby

include within the relevant calculations truck trips associated with fresh fruit. However, it is also possible that the evidence petitioner submitted in the 2008 proceedings did not clearly distinguish between trips associated with fresh or frozen fruit, and the 2008 decision-maker accordingly assumed that the figures supplied by petitioner reflected all truck trips, regardless of cargo.

Given the uncertainty on these points, and because the decision must be remanded in any event, we conclude that remand is also warranted for the hearings officer to adopt focused findings addressing the issue.

The third assignment of error is sustained.

The county's decision is remanded.

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reducing the number of truck trips. Provided the amount of offsite cold storage is reduced commensurate with the new cold storage capacity being created onsite, the number of truck trips will be reduced. *No adverse impact has been identified provided there is a reduction in off-site storage.*" Record 328 (emphasis in original).