BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MARK FRITCH,
Petitioner,

vs.

CLACKAMAS COUNTY,
Respondent,

and

ROBIN JACOBS, LON WELSH,
CHRISTINA MEDLYN, MARILYN SULLIVAN,
SUZANNE PILAND and DIANA PARTIN,
Intervenors-Respondents.

LUBA No. 2012-094

FINAL OPINION
AND ORDER

Appeal from Clackamas County.

Daniel Kearns, Portland, filed the petition for review and argued on behalf of petitioner.

Stephen L. Madkour, County Counsel, filed a response brief and argued on behalf of respondent. With him on the brief were Nathan K. Boderman and Christopher Swensen.

Erin Madden, Portland, filed a response brief and argued on behalf of intervenors-respondents. With her on the brief was Cascadia Law PC.

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

AFFIRMED 09/16/2013

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioner appeals a hearings officer's decision denying his conditional use permit application for a custom log home operation in a forest zone.

FACTS

The subject property is a five-acre parcel zoned Timber (TBR). The property is developed with an office and shop, and is located on the east side of Marmot Road. Across the road is an area zoned for and developed with rural residential uses.

For approximately 20 years, petitioner has operated a custom log home business on another site elsewhere in the county, and recently moved his operation to the subject property. After noise complaints from residential neighbors, the county initiated an enforcement action, which prompted petitioner's application for a conditional use permit. The application seeks approval of the custom log home business as a "[p]ermanent facility for the primary processing of forest products," a conditional use allowed in a forest zone under OAR chapter 660, division 006, which is the administrative rule implementing Statewide Planning Goal 4 (Forest Lands), and implementing regulations at Clackamas County Zoning Development Ordinance (ZDO) Table 406-1.

The application proposes a series of operations on the subject property. First, raw logs are transported onto the site and stacked for processing. The bark of each log is peeled by hand, and chemical fungicides are applied at some point to prevent rot or insect damage. The logs are scribed, cut and notched with chainsaws and hand tools according to a custom home design prepared by petitioner. Some logs are also milled using a portable saw mill. The logs are then assembled with a crane on a level framework to form the exterior walls of the custom home, which can be one or two stories in height. Weight is added to the walls to compress the logs evenly, and any necessary shaping or adjustments are made to ensure the structure is level and to account for settling. Then the walls are disassembled, the logs loaded

on a truck and shipped to the construction site. At the construction site the walls are reassembled, a roof is constructed, and stairs, railings, doors, windows added according to the design. The operations on the subject property typically take several months for each custom log home.

The hearings officer conducted a hearing on the application, at which residential neighbors and others appeared in opposition. On November 26, 2012, the hearings officer issued a decision denying the conditional use application, after concluding that except for the initial processing of the raw logs, the proposed custom log home operations on the subject property, particularly the assembly of the exterior shell of the log home, did not constitute the "primary processing of forest products" within the meaning of ZDO Table 406-1 and OAR 660-006-0025(4)(a). This appeal followed.

MOTION TO STRIKE EXTRA-RECORD EVIDENCE

Petitioner attached to the petition for review two documents not included in the record: (1) a 2012 report from the U.S. Forest Service regarding Oregon's forest products industry, and (2) a 2006 document from Oregon State University entitled "The Wonderful World of Wood." The county and intervenors-respondents (intervenors) move to strike the two documents, as evidence outside the record and not within LUBA's limited scope of review. Intervenors also move to strike the arguments in the petition for review based on those documents

Petitioner responds that the two documents are not produced as evidence, but rather as "context" for determining the meaning of the phrase "primary processing of a forest product" as used in OAR 660-006-0025(4)(a). According to petitioner, the two documents demonstrate that the accepted forest products industry understanding of similar phrases is broad enough to include the challenged custom log home operation. Petitioner contends that it is permissible for LUBA to consider the two documents in interpreting the meaning of OAR 660-006-0025(4)(a).

We disagree with petitioner. For one thing, as discussed below, the Land Conservation and Development Commission (LCDC) adopted OAR 660-006-0025(4)(a) in 1990, and we fail to see how two documents dating from 2006 and 2012 could provide "context" for determining LCDC's intent in adopting the rule. Even if the two documents existed at the time LCDC adopted the rule, such documents are not legislation that can provide "context" for the administrative rule, or that LUBA could take official notice of. Petitioner cites no authority that would allow LUBA to consider the two documents for any purpose. The motion to strike is granted.

ASSIGNMENT OF ERROR

Petitioner argues that the hearings officer misconstrued the applicable law, in concluding that portions of the proposed custom log home operation on the subject property disqualified the operation as a "[p]ermanent facility for the primary processing of forest products." According to petitioner, all of the proposed steps of the operation fall within the parameters of that use category.

Intervenors argue, and we agree, that petitioner has not established that the hearings officer misconstrued the term "primary processing of forest products" to exclude at least some components of petitioner's custom log home operation.

The phrase "primary processing of forest products" as used in ZDO Table 406-1 and OAR 660-006-0025(4)(a) is undefined and the intended scope of that phrase is unclear. Because the county's code implements the administrative rule, we focus our analysis on the rule.

Under *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610, 859 P2d 1143 (1993), a reviewing body attempts to determine the intended meaning of ambiguous legislation by examining text and context, supplemented by any available legislative history. If analysis of text, context and legislative history does not resolve the ambiguity, relevant canons of construction may be applied. In the present case, LCDC added the use category of

"[p]ermanent facility for the primary processing of forest products" to the Goal 4 rule in 1990, and that use category and its review criteria have not been amended since. The parties agree that no legislative history exists from the 1990 LCDC proceedings indicating what activities LCDC intended "primary processing of forest products" to include.

Turning first to the text, the hearings officer found, and the parties agree, that "primary" means "first in order of time or development," and its relevant synonym is "initial." *Webster's Third New International Dictionary* 1800 (2002). The most relevant definition of the root term "process" is "to prepare for market, manufacture, or other commercial use by subjecting to some process." *Id.* at 1808. Thus, it is reasonably clear that the "primary processing" of forest products means the initial or first steps in transforming raw forest products (logs) into products for market, manufacture or other commercial use. Further processing beyond those initial steps are presumably secondary or tertiary steps, and are not allowed on forest lands under OAR 660-006-0025(4)(a). Based on dictionary definitions of "primary," the hearings officer concluded that "primary processing" applies to the initial treatment of raw timber, which he found would include the debarking of logs, milling, and perhaps the curing or kilning of lumber. However, the hearings officer concluded that "further processing of the logs into a log structure, and all of the associated design, staging, cutting, notching, assembling and disassembling are 'secondary processing' akin to a manufacturing business." Record 5.

Petitioner disagrees, arguing that all of the steps the hearings officer identified as "secondary" processing in fact constitute "primary" processing of forest products. According to petitioner, the "secondary" processing or manufacturing aspects of the custom log home operation occur only at the final construction site, when the logs are re-assembled into the structure, and a roof, windows, doors, and other carpentry work is added to produce the final product. Petitioner argues that the design, staging, cutting, notching, assembling and disassembling that occurs on site are all properly understood as the "primary" processing of

forest products, not secondary processing. Petitioner illustrates the proposed distinction between primary and secondary processing by discussing three types of manufactured forest products: railroad ties, cedar shakes or shingles, and wooden pallets. In all three cases, we understand petitioner to argue that only the final steps in producing a ready-to-use finished product (treating the railroad tie with chemicals, drying and treating the shakes, and assembling milled lumber into a wooden pallet) qualify as secondary processing.

The text of OAR 660-006-0025(4)(a) does not clarify where "primary" processing ends and non-primary or secondary processing begins, but we disagree with petitioner's apparent position that the line must be drawn to include all steps short of the final steps that produce a finished, ready-to-use product. The relevant dictionary definition of "primary" indicates that it means the first or "initial" steps. In a process with multiple steps, as in the present case, "primary" processing may end well before the final steps resulting in the finished product. We note that petitioner's three examples involve relatively simple processes with only two or three steps. Further, as noted, the relevant dictionary definitions indicate that "primary processing" of forest products means the initial steps in transforming logs into products for, among other things, "manufacture." Under those definitions, any step in the process that constitutes "manufacturing" is not a primary step. In a process with many multiple steps, "manufacturing" of the product may occur well before the final step resulting in the finished product.

In the present case, the hearings officer found, and we agree, that at least the partial construction of the log home on the subject property resembles "manufacturing" of a product. We understand petitioner to argue that, because the partially constructed log home is subsequently disassembled and shipped elsewhere for final assembly, the partial construction of the log home on the subject property still qualifies as "primary" rather than secondary processing. However, it is difficult to see how the proposed operation differs in this respect from a facility that produces wooden pallets, furniture or any other product that is partially

constructed on site, then disassembled for shipping and shipped to the consumer for re-assembly elsewhere. We conclude based on the text of OAR 660-006-0025(4)(a) that the "primary processing of forest products" does not include the proposed partial construction of log homes on the property.

The context of OAR 660-006-0025(4)(a) also supports that conclusion. A "[p]ermanent facility for the primary processing of forest products" is one of two dozen conditional uses allowed in a forest zone, subject to standards at OAR 660-006-0025(5). Notably, none of those uses allow manufacturing or quasi-manufacturing types of uses. Under OAR 660-006-0025(3)(d), a "[t]emporary portable facility for the primary processing of forest products" is allowed outright on forest lands. Although the two types of facilities differ in permanency and review standards, the same phrase "primary processing of forest products" is used in both, and presumably that phrase refers to the same types of processing. Thus, the same types of primary processing allowed as a conditional use in a permanent facility are allowed as outright permitted uses in a temporary, portable facility. In our view, that suggests a narrow rather than a broad scope to the meaning of "primary processing." Under petitioner's broader understanding of "primary processing," many quasi-manufacturing or assembly processes could occur on forest lands as outright permitted uses, as long as those processes did not result in a finished product.

Both parties cite as relevant context ORS 215.283(2)(j) and 215.213(2)(i). Those statutes are part of the statutory scheme governing non-farm conditional uses allowed in exclusive farm use zones, and provide for:

> "A facility for the primary processing of forest products, provided that such facility is found to not seriously interfere with accepted farming practices and is compatible with farm uses described in ORS 215.203 (2). Such a facility may be approved for a one-year period which is renewable. These facilities are intended to be only portable or temporary in nature. The primary processing of a forest product, as used in this section, means the use of a portable chipper or stud mill or other similar methods of initial treatment of a forest product in order to enable its shipment to market. Forest products, as

> used in this section, means timber grown upon a parcel of land or contiguous land where the primary processing facility is located."

This provision has existed in the EFU statutes unchanged since at least 1979, and quite possibly was the source of the phrase "primary processing of forest products" that LCDC adopted in 1990 in promulgating OAR 660-006-0025(3)(d) and 660-006-0025(4)(a). Petitioner cites ORS 215.283(2)(j) and 215.213(2)(i) as support for the proposition that "primary processing" as used in OAR 660-006-0025(4)(a) is not intended to exclude industrial or industrial-type processes such as a chipper or stud mill. By extension, petitioner argues that the proposed custom log home operation, which petitioner argues is similar to a sawmill in many of its operations and impacts, constitutes the primary processing of forest products. On the other hand, intervenors cite ORS 215.283(2)(j) and 215.213(2)(i) to support their argument that LCDC intended to limit the "primary processing of forest products" to the initial treatment of forest products, and did not intend to include the assembly or construction of wood products into secondary products such as log homes.

ORS 215.283(2)(j) and 215.213(2)(i) govern only facilities within the EFU zone, and the limited meaning of "primary processing of a forest product" set out in the statutes does not apply to facilities described in OAR 660-006-0025(3)(d) and (4)(a). Nonetheless, ORS 215.283(2)(j) and 215.213(2)(i) provide pertinent legislative context for the rule provisions. As noted, ORS 215.283(2)(j) and 215.213(2)(i) are likely a source of the language LCDC employed in promulgating OAR 660-006-0025(3)(d) and (4)(a) in 1990. At the time, the statutes represented a significant legislative statement regarding the meaning of the phrase "primary processing of forest products" and that statement may well have informed LCDC's choice to use that same phrase in the administrative rule governing forest lands. The question is what inference, if any, to draw from the fact that LCDC chose not to further define "primary processing of forest products" in the same manner as the legislature did for the EFU context. LCDC clearly did not intend that the specific restrictions imposed in that legislative definition (timber grown where the facility is located, etc.) would also govern facilities

allowed under OAR 660-006-0025(3)(d) and (4)(a). But it does not follow that LCDC intended the broadest possible scope for the phrase "primary processing of forest products," to potentially include facilities that manufacture log homes and other commercial products constructed from wood. Although no firm conclusions can be drawn from the context provided by ORS 215.283(2)(j) and 215.213(2)(i), in our view the fact that LCDC chose to use the phrase "primary processing of forest products," a phrase with a circumscribed scope as applied in a somewhat analogous statutory context, tends to support a narrower rather than a broader interpretation of the scope of OAR 660-006-0025(3)(d) and (4)(a). That view is more consistent with the relevant dictionary definitions of the text of OAR 660-006-0025(3)(d) and (4)(a), as described above.

Petitioner argues, nonetheless, that assigning a broader scope to the meaning of "primary processing of forest products" is supported by contemporary usage of similar terms in the forest industry. Petitioner's argument is based largely on the two documents attached to the petition for review, which as discussed above are not documents within LUBA's scope of review. ORS 197.835(2). Selected pages of those documents were submitted into the record below by opponents in support of their contention that petitioner's log home operation does not qualify as the "primary processing of forest products." Petitioner argues that the documents read in full actually support the opposite conclusion. However, we do not see that contemporary forest industry usage of terms similar to "primary processing of forest products" sheds any light on LCDC's intent in 1990 when it promulgated OAR 660-006-0025(3)(d) and (4)(a).

Based on the text and context of OAR 660-006-0025(3)(d) and (4)(a), we conclude that the "primary processing of forest products" does not include the proposed partial construction of log homes on the property.

It is less clear whether other disputed components of the proposed custom log home operation that occur prior to partial construction qualify as "primary processing." As noted,

the hearings officer concluded that "primary processing" included de-barking and milling of the raw logs, but did not include the "further processing of the logs into a log structure, and all of the associated design, staging, cutting, notching, assembling and disassembling * * *" Record 5. We understand the hearings officer to have concluded that de-barking and milling the logs into shorter or thinner logs qualifies as "primary" or "initial" processing, but that more refined processing, such as notching and shaping the log ends according to a custom design so that the individual logs fit precisely together to form the walls of the log home, goes beyond primary processing. Although it is a closer question, we agree with the hearings officer that custom notching and shaping of log ends to form the interlocking components of the walls of a log home goes beyond primary processing of forest products, within the meaning of OAR 660-006-0025(4)(a).

In sum, petitioner has not demonstrated that the hearings officer misconstrued OAR 660-006-0024(4)(a) or the ZDO analogue, to conclude that certain operations of the custom log home operation on the subject property do not qualify as the "primary processing of forest products," and therefore the proposed facility cannot be approved as a conditional use in the TBR zone.

The assignment of error is denied.

The county's decision is affirmed.