

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3 SCHNITZER STEEL INDUSTRIES INC.,

4 *Petitioner,*

5 and

6 METRO METALS NORTHWEST INC.,

7 *Intervenor-Petitioner,*

8 vs.

9 CITY OF EUGENE,

10 *Respondent,*

11 and

12 PACIFIC RECYCLING INC.,

13 *Intervenor-Respondent.*

14 LUBA No. 2013-038

15 FINAL OPINION

16 AND ORDER

17 Appeal from City of Eugene.

18 Dana L. Krawczuk, Portland, filed a petition for review and argued on behalf of
19 petitioner. With her on the brief were Steven L. Pfeiffer and Perkins Coie LLP.

20 Thane W. Tienson, Portland, filed a petition for review and argued on behalf of
21 intervenor-petitioner. With him on the brief were David L. Blount and Landye Bennett
22 Blumstein LLP.

23 No appearance by the City of Eugene.

24 Jeffrey G. Condit, Portland, filed the response brief and argued on behalf of
25 intervenor-respondent. With him on the brief was Miller Nash LLP.

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

28 AFFIRMED

29 09/17/2013

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

NATURE OF THE DECISION

Petitioners appeal a hearings officer’s decision that affirms a planning director’s interpretation of the Eugene Code (EC). In the disputed interpretation, the city concludes that a “scrap and dismantling yard” use category, a use category that is listed as a permitted use in the city’s Heavy Industrial (I-3) zone, may include a metal shredder.

FACTS

Petitioner Schnitzer Steel Industries, Inc. (Schnitzer) provides useful background regarding the metals recycling industry that helps in understanding the parties’ positions regarding the city’s interpretation. Although intervenor-respondent Pacific Recycling, Inc. (PRI) disagrees with some aspects of that background statement, the points of disagreement are not significant, and we set that background out below:

“1. Collection of Unprocessed Scrap

“The first step is the collection of unprocessed scrap metal, which typically involves businesses and individuals delivering unprocessed scrap to a scrapping, dismantling and sorting facility.

“2. Scrapping, Dismantling and Sorting

“During this phase of the process, vehicles and other sources of metal are dismantled, or ‘scrapped.’ The dismantling process first typically includes detitling, general degarbaging, and formal processes for removal, recovery and recycling of the various fluids and hazardous materials, such as mercury switches, gasoline, freon, power steering fluid and brake fluid. Then re-usable parts are recovered for sale. The parts are removed in a deliberate manner, and the pieces that are removed remain intact (e.g., an engine block is carefully removed and sold). Once a vehicle or other scrap material (e.g., a washing machine) has no further salvageable parts value, the residual vehicle hulk is flattened with either a portable or a stationary car crusher. Additional light processing of the materials may occur, such as shearing. This step is often referred to in the industry as a ‘wrecking yard,’ ‘pick and pull’ or a ‘feeder yard’ and the output is referred to as ‘feed stock.’ In Oregon, there are approximately 265 of these uses. * * * The light processing of the materials, such as crushing or shearing, is done to facilitate transport of the scrap to a different location – a metal shredder – to further process and produce steel shred and recoverable non-ferrous metals.

1 **“3. Processing Facility**

2 “Feed stock from a variety of sources (dismantled auto bodies, home
3 appliances, industrial scrap, construction and demolition debris, and other
4 sources of metals) are then transported from a feeder yard to a high intensity
5 processing facility, where scrap metal is shredded by a metal shredder so that
6 the resulting shred is more uniform in size and the waste is separated out. At
7 this point, the shred is furnace ready. This step in the process and the facility
8 utilized is often referred to in the industry as a ‘metals processing facility,’
9 ‘metal shredder,’ ‘recycling plant’ or ‘recycling mill.’ In Oregon, there 2
10 Shredders. * * *

11 “To accomplish this task, a Shredder engages in a complex process that does
12 more than just indiscriminately shred dismantled vehicles and other feeder
13 stock into small unrecognizable pieces in a matter of seconds; it also has
14 intricate conveyor systems that sort and separate the valuable ferrous and non-
15 ferrous metals (the ‘shred’) that is mill ready from ‘fluff’ (which is also called
16 automotive shredder residue, or ASR) which consists of plastics, glass, rubber
17 and other debris. The resulting shred meets internationally recognized
18 Institute of Scrap Recycling Industries, Inc. (“ISRI”) size, density and purity
19 specification for steel mills and foundries, and are ready for melting and use in
20 the production of new finished steel and nonferrous metal products.

21 “Shredders are typically comprised of 10 to 15 different shedder, electro-
22 magnetic and Eddy current machines, and up to 50 different conveyors,
23 separators and sorting machines, all of which cover between 10 and 15 acres,
24 typically cost between \$10 million to \$25 million to acquire, require their own
25 transformers for adequate electrical supply and frequently rely upon rail or
26 deep water ports to ship finished product. Given the capital intensive
27 investment of a Shredder, operations succeed with higher volume and
28 production throughput. Consequently, these uses are more suited to a
29 24/7/365 mindset, with continuous delivery of feedstock (the input) and
30 transport of finished product (shred) to customers (by truck at all times of the
31 day). * * *

32 **“4. Melting and Re-Forging**

33 “The final step typically occurs in a steel mill or foundry, where processed
34 scrap is melted down and formed into useable materials, such as steel plate,
35 rebar, wire rod, merchant bar and other specialty products. In Oregon, there is
36 1 steel mill.” Schnitzer’s Petition for Review 4-6 (record citations omitted).

37 The City of Eugene has three industrial zones: the Campus Industrial Zone (I-1), the
38 Light-Medium Industrial Zone (I-2) and the Heavy Industrial Zone (I-3). The subject
39 property is located in the I-3 zone. Under the Eugene Code (EC), there are essentially four

1 types of uses: (1) uses that are permitted, (2) uses that are permitted subject to site review, (3)
2 uses that are permitted subject to a conditional use permit, and (4) uses that are permitted
3 subject to special development standards. The industrial uses that are allowed and the
4 conditions under which they are allowed are set out in EC Table 9.2450. EC Table 9.2450
5 lists a total of 112 uses that are allowed in some manner in the city’s industrial zones. Scrap
6 and dismantling yards are one of the permitted uses in the I-3 zone, under the broader
7 category of “Manufacturing.” The exact EC terminology for that use category is “Recycling
8 – scrap and dismantling yard (includes vehicle wrecking and salvage).” One way to translate
9 this EC verbiage is to say recycling is a permitted use in the I-3 zone, but is limited to “scrap
10 and dismantling yards,” which include but are not limited to “vehicle wrecking and salvage.”
11 That essentially is how the city interpreted the EC language. The parties dispute the scope of
12 uses that are included within the term “scrap and dismantling yards” (SADYs).

13 We do not understand any party to dispute that PRI owns and operates a vehicle
14 wrecking and salvage yard on its I-3 zoned property in the City of Eugene. That existing
15 operation receives, among other things, discarded vehicles and appliances. PRI causes
16 salvageable parts to be removed from those discarded vehicles and appliances and the
17 salvaged parts are sold. As currently constituted and operated, PRI’s existing facility
18 therefore qualifies as the one example of a SADY that is given in the EC.

19 As noted above, what remains of the discarded vehicles and appliances after salvaged
20 parts are removed is called feed stock. PRI currently transports that feed stock to intervenor-
21 petitioner Metro Metals’ facility in Vancouver, Washington, where Metro Metals’ shredder
22 reduces the feed stock to shred and fluff. Metro Metals sells the shred to steel mills where it
23 is smelted into usable steel. Metro Metals send the fluff to landfills. The central issue in this
24 appeal is whether adding a metal shredder to PRI’s existing vehicle wrecking and salvage
25 yard facility converts it into something other than a SADY. If it does, the resulting use is not

1 permitted in the I-3 zone at all, as the parties agree that a shredder is not allowed under any
2 other of the permitted or conditionally permitted use categories authorized in the I-3 zone.

3 There does not seem to be any real dispute that if the focus is narrowly on the output
4 of PRI's existing facility (feed stock and salvaged parts) and the output of Metro Metals'
5 shredder facility (shred and fluff), those outputs are different. There is also no dispute that
6 the operating characteristics of PRI's existing vehicle wrecking and salvage yard and the
7 operational characteristics of a metal shredding facility are somewhat different as well.
8 Moreover, there does not seem to be any real dispute that within the national metals recycling
9 industry (and within Oregon's part of that industry) SADYs that do not include shredders are
10 numerous (247 in Oregon) and shredders are few (two in Oregon). Finally, there does not
11 appear to be any real dispute that within the industry the production of shred and the
12 production of feed stock are viewed as distinct and different steps in the metals recycling
13 process, although there apparently is a current trend toward vertical integration in the metal
14 recycling business, and indeed this case may be an example of that trend. Record 33.¹

15 The question the city had to answer, and the question we must answer on appeal, is
16 whether adding a shredder to PRI's existing facility converts PRI's facility into something
17 other than a SADY, within the meaning of EC Table 9.2450. Answering that question is
18 complicated because the EC includes no definition of "recycling" or "scrap and dismantling

¹ The record includes a document entitled "All Shredder Residue (ASR) Issue Paper" prepared by the Washington Department of Ecology and an environmental consulting firm. Record 30-43. That paper includes the following observation:

"It is also worth mentioning that the industry is changing. Recent changes include:

- "● A reduction in the number of auto dismantlers across the state.
 - "● Consolidation in the dismantler industry.
 - "● A move toward larger and more environmentally protective dismantlers.
 - "● Vertical integration whereby shredders are purchasing dismantling facilities."
- Record 33.

1 yard.” To simplify the parties’ respective positions, petitioners point to the differences in
2 typical SADYs and metal shredding facilities that are recognized in the recycling industry to
3 conclude that they are different *uses* and that a metal shredder cannot be authorized under the
4 SADY use category in EC Table 9.2450. The city on the other hand ultimately took the view
5 that industry perceptions about various sectors in the metal recycling industry have no real
6 bearing on the city council’s intended meaning of the words “scrap and dismantling yards” in
7 EC Table 9.2450. The city relied largely on dictionary definitions of the individual words
8 that make up the term SADY and context from the EC and Metro Plan to conclude that a
9 SADY may include a metal shredder. In doing so, the city took the position that the shredder
10 is a piece of equipment and that the shredder simply makes PRI’s SADY a more efficient
11 scrap and dismantling facility.

12 INTRODUCTION

13 The interpretation of the EC that is challenged in this appeal was adopted first by the
14 city’s planning director and then affirmed with additional analyses by the hearings official.
15 Because the interpretation on appeal was not adopted by the city council, the highly
16 deferential standard of review that would be required in reviewing a city council decision
17 under ORS 197.829(1) and *Siporen v. City of Medford*, 349 Or 247, 259, 243 P3d 776 (2010)
18 (interpretation must be affirmed unless it is implausible) does not apply here. *Gage v. City of*
19 *Portland*, 319 Or 308, 317, 877 P2d 1187 (1994). LUBA’s review is to determine if the
20 hearings official *correctly* interpreted the EC. *Gage v. City of Portland*, 133 Or App 346,
21 349-50, 891 P2d 1331 (1995); *McCoy v. Linn County*, 90 Or App 271, 275, 752 P2d 323
22 (1988). Stated in terms of our standard of review, the issue on appeal is whether the hearings
23 official “improperly construed the applicable law.” ORS 197.835(9)(a)(D).²

² ORS 197.835(9) provides in part:

“In addition to the review under subsections (1) to (8) of this section, the board shall reverse
or remand the land use decision under review if the board finds:

1 The methodology that we are required to apply in deciding the meaning of the
2 relevant EC language, so that we can determine if the city correctly interpreted that language,
3 is set out in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993) and
4 *State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009). Under that methodology we look first at
5 text, context and any available legislative history. All parties agree there is no legislative
6 history for the disputed EC Table 9.2450 language. So we look first at text and context.³

7 **THIRD ASSIGNMENT OF ERROR (SCHNITZER)**

8 **SECOND AND THIRD SUBASSIGNMENTS OF ERROR (METRO METALS)**

9 Petitioner Schnitzer’s petition for review includes five assignments of error;
10 intervenor-petitioner Metro Metals’ petition for review includes one assignment of error
11 broken down into three subassignments of error. Schnitzer’s third assignment of error and
12 Metro Metal’s second and third subassignments of error confront the dispositive interpretive
13 issue in the most direct way. We therefore turn first to petitioner Schnitzer’s third
14 assignment of error and Metro Metal’s second and third subassignments of error first.

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- “(a) The local government or special district:
 - “(A) Exceeded its jurisdiction;
 - “(B) Failed to follow the procedures applicable to the matter before it in a manner that prejudiced the substantial rights of the petitioner;
 - “(C) Made a decision not supported by substantial evidence in the whole record;
 - “(D) Improperly construed the applicable law; or
 - “(E) Made an unconstitutional decision[.]”

³ The hearings official explained his understanding of the proper method of analysis under *PGE*:

“* * * Once ambiguities are identified, the first *PGE* step is to provide meaning to those terms with text and context. This step uses the text itself to provide meaning to the ambiguities. A dictionary may be used in this process, but the dictionary is simply a tool. As Appellant and Metro Metals point out, there are times when a dictionary should not be used – for instance, when the meaning can be adequately found from the surrounding code context. In addition, there are times when a dictionary is of no real help because the dictionary provides many different possible meanings.” Record 7.

1 The planning director’s decision sets out dictionary definitions for “recycle,”
2 “scrapyard,” “scrap” and “dismantle.” Record 248.⁴ Applying these definitions, the planning
3 director concluded that SADYs include more than “vehicle wrecking and salvage,” which is
4 expressly listed as merely an example, and include recycling activities that are consistent with
5 the definitions for the words that make up the term SADYs. The planning director ultimately
6 concluded that while the shredder may be a fairly unique piece of equipment, it is one that
7 simply facilitates the SADY use and is permitted in the I-3 zone. Record 248. The hearings
8 official agreed with the planning director. Record 8.

9 “While the exact code interpretation request made of the Planning Director by
10 Appellant was not phrased in this manner, the central question is whether a
11 metal shredder is allowed in the I-3 zone within the EC Table 9.2450 use
12 category ‘Recycling – scrap and dismantling yard (includes vehicle wrecking
13 and salvage).’

14 “To arrive at an answer, the Planning Director looked to dictionary definitions
15 of ‘recycle,’ ‘scrapyard,’ ‘scrap,’ and ‘dismantle.’ In terms of *PGE*, the
16 Planning Director took the proper first step of identifying the ambiguous terms
17 in light of the factual question before her. I have consulted the judicially-
18 recognized classic dictionary resource, Webster’s Third New International
19 Dictionary, unabridged, and have confirmed that the definitions cited by the
20 Planning Director are definitions this resource agrees are the commonly
21 understood definitions of these terms. Appellant finds fault in the Planning
22 Director’s Analysis by noting the term “dismantling yard” is not found in the
23 dictionary. I find no fault in this regard. The Planning Director found a
24 definition for the term ‘dismantle.’ Once the term dismantle is understood, it
25 takes no great leap to determine that a commonly understood meaning of the
26 term dismantling yard is a ‘yard’ where dismantling occurs.

27 “The Planning Director also looked to the Code defined term, ‘wrecking yard,
28 motor vehicle and building materials.’ She then concluded that, in addition to
29 the uses that would fall within the definition of wrecking yard, the scrap and

⁴ Those definitions were from Webster’s International Dictionary (Merriam-Webster.com) and from Webster’s Third New International Dictionary. We do not set out all those definitions here. The definitions for “recycle” included: “to adapt to a new use,” “to bring back,” “to make ready for reuse.” The definition for “scrapyard” was “a place for receiving or handling scrap.” The definitions for “scrap” included: “manufactured articles or parts rejected or discarded and useful only as material for reprocessing; *especially*: waste and discarded metal.” The definition of “dismantle” included the following: “to take to pieces; also : to destroy the integrity or functioning of.” Record 248.

1 dismantling yard use category includes recycling uses that fall within the
2 parameters of the definitions of ‘recycle,’ ‘scrap,’ and ‘dismantle.’ The
3 Planning Director then added that the use on the property is the determinative
4 factor, not the specific equipment employed as part of the recycling
5 operations.” Record 8.

6 The hearings officer also found contextual support for the planning director’s interpretation.⁵

7 The hearings officer ultimately concluded that the term “scrap and dismantling yard” should
8 not be interpreted to exclude metal shredders:

9 “* * * Thus the notion that a metal shredder takes metal recycling to a new
10 scale does not rule out allowing the use within the City’s large-scale industrial
11 zone. I see no code support for the notion that there is an upper end to the
12 scale of the scrap and dismantling yard use category. * * *

13 In conclusion, metal processing is a component of the commonly understood
14 recycling process – the process of taking ‘old’ metal and processing it so that
15 it can be used to make ‘new’ metal products. By industry standards, metal
16 processing done in conjunction with a metal shredder is a unique aspect of
17 metal processing, or recycling process. However, the commonly-understood
18 definition of ‘recycle’ is not as limited as the industry standards. A site (or
19 yard) that efficiently turns scrap into shred is a recycling use within EC Table
20 9.2450, even if the site is large and processes scrap at an industry leading
21 rate.” Record 12.

22 We address separately each of petitioners’ challenges to the planning director’s and hearings
23 official’s interpretive exercise set out above.

⁵ The hearings officer’s findings in this regard include the following:

“Although not cited by the Planning Director, there is additional contextual support for her conclusion. Generally speaking, the zoning regulations are intended to implement the designations of the Metro Plan and other adopted land use plans. * * * The Heavy Industrial zone is the City’s zoning for large-scale and potentially intrusive industrial uses. * * * In other words, the fact that a metal shredder may be big and noisy does not cut against the Planning Director’s decision.

“* * * In addition, the Metro Plan specifically states that large Heavy Industrial sites are suitable for industries that process by-products or waste products (e.g. recycling metal scrap).” Record 9.

1 **A. The Hearings Official’s Reliance on Dictionary Definitions**

2 Petitioners concede that “[w]ords of common usage should be given their ‘plain,
3 natural and ordinary meaning,’” and that “dictionaries may be consulted to help ascertain the
4 meaning of words within a statute.” *State v. Higgins*, 165 Or App 442, 445, 998 P2d 222
5 (2000) (citing *PGE* at 611 and *Steele v. Employment Department*, 143 Or App 105, 112, 923
6 P2d 1252 (1996), *aff’d* 328 Or 292, 974 P2d 207 (1999)). Petitioners contend that “SADY”
7 (scrap and dismantling yard) is not a term of common usage and that none of the dictionaries
8 consulted by the planning director and hearings official include a definition for that complete
9 term. Petitioners contend that the planning director and hearings official erred by cobbling
10 together dictionary definitions of component words and terms in an attempt to establish the
11 outer parameters of the SADY use category.

12 Petitioners’ real complaint is that the hearings official “refused to consider the
13 recycling industry’s accepted practices and technical terms as context for interpreting the
14 Code.” Schnitzer’s Petition for Review 19. We turn to that contention below. Petitioners
15 include two complaints about the city’s reliance on dictionaries, without regard to whether
16 use of dictionaries might be permissible in this case. First, they contend the hearings official
17 failed to identify the dictionaries he relied on. Second, petitioners suggest it is error to rely
18 on a dictionary unless the complete term is defined in the dictionary.

19 The planning director did identify the dictionaries she relied on, although it is not
20 always clear precisely which edition of those dictionaries were used. Record 248. The
21 hearings official also relied on the planning director’s dictionary definitions, and stated that
22 he also consulted *Webster’s Third New Int’l Dictionary*, but did not identify which edition of
23 that dictionary he consulted. Record 8. The cited dictionary definitions of “recycle,”
24 “scrapyard,” “scrap” and “dismantle” are all generally consistent with definitions of those
25 terms in *Webster’s Third New Int’l Dictionary* 1900 (recycle), 2039 (scrap; scrapyard), and
26 651-52 (dismantle) (unabridged ed. 2002). We see no error in this case with the city’s

1 imprecision regarding the precise edition of the dictionaries it was relying on. With regard to
2 petitioners' second complaint, we do not understand petitioner to contend that "recycle,"
3 "scrapyard," "scrap" and "dismantle" are not terms of common usage. Petitioners cite no
4 authority for their position that consulting a dictionary in this case was improper, simply
5 because the complete EC term is not defined, and we are aware of no such authority.

6 **1. Did the City Council Intend to Adopt the Recycling Industry**
7 **Understanding of the Scope of the SADY Use Category?**

8 Citing *Tharp v. PSRB*, 338 Or 413, 423, 110 P.3d 103 (2005) (terms of art are given
9 specialized meanings instead of their plain, natural, and ordinary meanings), petitioners
10 contend it is error to rely on dictionary definitions if it can be established that the city council
11 intended a technical or industry based meaning for the ambiguous term. However, petitioners
12 concede there is no legislative history to support their suggestion that in adopting the term
13 SADY, the city council intended a technical or industry based definition, assuming there is
14 such a definition. Petitioners rely instead on "context." That contextual argument is based
15 on the city's decision to distinguish between five different recycling uses in the EC.⁶
16 Petitioners contend these recycling use categories "closely align with the accepted steps and
17 practices in the metals recycling industry, which strongly suggests that the City Council
18 intended to rely upon the recycling industry's practices and terms of art to define uses
19 permitted as a [SADY]." Schnitzer Petition for Review 25.

20 We agree with PRI that petitioners fail to establish any real correlation between the
21 five categories of recycling and metal recycling industry practices and terms of art. In fact,
22 four of those recycling use types have no direct or obvious connection with the metal
23 recycling industry practice that we can see. There is nothing in those five recycling use

⁶ Those five different recycling facilities are: "Recycling – scrap and dismantling yard," "Recycling-Composting Facility," Recycling – Large Collection Facility," "Recycling-Reverse Vending Machine," and "Recycling-Small Collection Facility." As already noted, the first recycling use category is not defined in the EC, but definitions of the other four recycling use categories appear at EC 9.0500.

1 categories that would justify inferring that the city council intended that SADYs authorized
2 by EC Table 9.2450 may not include a metal shredder.

3 **2. Terms of Art in the Recycling Business as Context Even if**
4 **Reference to a Dictionary is Appropriate**

5 Petitioners contend that while dictionaries may be helpful in discovering what terms
6 mean, dictionaries are only one tool that may be used in determining legislative intent.
7 Petitioners contend that dictionaries only tell you “what words *can* mean, depending on their
8 context and the particular manner in which they are used.” *State v. Cloutier*, 351 Or 68, 96,
9 261 P3d 1234 (2011) (emphasis in original). In support of their contention that the city
10 should look to industry practice to determine that a SADY may not include a metal shredder,
11 petitioners cite *Cook v. Yamhill County*, 13 Or LUBA 137 (1985).

12 *Cook* predates *PGE* by eight years and therefore was not decided under the *PGE*
13 methodology. Moreover, *Cook* does not support petitioners’ contention that the city erred by
14 failing to shape or adapt its interpretation of the term SADY to match industry practice. In
15 *Cook* the interpretive question was whether a zoning ordinance that authorized “wineries”
16 authorized a proposed winery that would include a wine tasting room and retail sales of wine.
17 In determining whether the commonly understood meaning of the term winery was broad
18 enough to include tasting rooms and on-site wine sales, notwithstanding dictionary
19 definitions that failed to mention those additional uses at wineries, the board of county
20 commissioners found that the commonly understood meaning of the term winery at the time
21 it was adopted would have included a tasting room and on-site sales of wine. In doing so, the
22 county relied largely on the actual practice at wineries:

23 “[A] majority of wineries in the county have on-premise wine tasting rooms
24 and sell wine at retail. There is evidence in the record that tasting facilities are
25 almost always present at wineries, throughout the United States and that retail
26 sales of wine are small wineries. * * * These facts provide a basis for the
27 county’s interpretation that the common understanding of what occurs at
28 wineries includes tasting facilities and provisions for retail sales of wine
29 directly to consumers.” 13 Or LUBA at 140.

1 But what is missing in this case, and what makes *Cook* largely inapposite, is that the
2 hearings official expressly found in this case that there is simply no reason to believe that
3 industry understandings of the separate steps in metals recycling and industry understanding
4 of the scope of activities at similarly named scrap and recycling facilities had any effect on
5 the city council’s intent regarding the scope of the meaning of the words “scrap and
6 dismantling yard.”⁷ In *Cook* the county implicitly found that there was reason to believe that
7 actual practice at wineries would have influenced the county commissioners’ understanding
8 of the term winery at the time wineries were authorized in the county zoning ordinance.

9 3. Statutes and Administrative Rules Concerning Dismantling

10 Petitioners next cite statutes and rules that regulate dismantling facilities and exclude
11 the function performed by a metal shredder:

- 12 “● A ‘dismantler’ is defined as a person who is engaged in the business of
13 ‘(1) Buying, selling, dealing in or processing, **except for processing**
14 **into scrap metal**, motor vehicles for the purpose of destroying,
15 salvaging, dismantling, disassembling, reducing to **major component**
16 **parts**, crushing, compacting, recycling or substantially altering in
17 form; or (2) Buying, selling, dealing in or processing motor vehicle
18 major component parts that are stocked in the inventory of the
19 business, if the buying, selling, dealing in or processing of major
20 component parts is not part of a business selling new vehicles or
21 repairing vehicles.” ORS 801.236 * * * Also see OAR 735-152-
22 0000(7).
- 23 “● To ‘dismantle’ means ‘one or more major component parts are
24 removed from a motor vehicle acquired by a dismantler.’ OAR 735-
25 152-0000(8).
- 26 “● ‘Major component part’ includes ‘significant parts of a motor vehicle
27 such as engines...doors...hoods...’ etc. and expressly excludes ‘cores or
28 parts of cores that require remanufacturing or that are limited in value
29 to that of scrap metal’ ORS 822.137. Also see OAR 735-152-

⁷ The hearings official found: “What is missing from all of this evidence [of the recycling industry’s view of the uniqueness of shredders] is the link between the evidence and the Eugene City Council’s intent in adopting the use table I am asked to interpret.” Record 14.

1 0000(13).” Schnitzer Petition for Review 30 (bold type added by
2 petitioner).

3 Petitioners contend these statutes and rules are relevant context and support their reading of
4 the scope of the term SADY.

5 Once again PRI contends that while these statutes and rules deal with similar subject
6 matter, absent some reason to believe these statutes and rules adopted for different regulatory
7 purposes were known to and considered by the city council when it enacted EC Table 9.2450,
8 they are not contextually relevant and shed no light on what the city council may have
9 intended when it authorized SADYs in the I-3 zone. We agree with PRI.

10 **B. The Metro Plan and the EC Zone Verification Process as Context**

11 As noted earlier, the hearings official relied in part on the I-3 zone purpose statement
12 and Metro Plan language concerning the Heavy Industrial Zone as context to reject
13 petitioners’ arguments that SADY should be construed narrowly to exclude the larger, noisier
14 and more impactful metal shredders from the SADY use category. Petitioners complain that
15 while the I-3 zone “may be intense, it is not an ‘anything goes’ zone.” Schnitzer Petition for
16 Review 31.

17 We agree that the Metro Plan and I-3 zone purpose statement do not lend a great deal
18 of support in answering the question presented in this appeal. But the Metro Plan and I-3
19 purpose statement are accurately viewed as relevant regulatory context, and the city did not
20 err by citing the Metro Plan and I-3 purpose statement as lending some support for its
21 interpretation.⁸

22 EC 9.1080 authorizes a zoning verification process whereby the city may authorize
23 uses in a zoning district that are not expressly listed in the relevant EC Table that lists the

⁸ The Metro Plan and I-3 zone purpose statement actually lend more contextual support for the hearings official’s rejection of petitioners’ contention—that the term SADY should be interpreted to exclude large, noisy metal shredders with significant off-site impacts—than they do to support the interpretation the hearings official adopted.

1 allowable uses in each zoning district may nevertheless be approved.⁹ The city relies in part
2 on this process to lend support to its decision to interpret SADY more broadly to include
3 metal shredders. Petitioners contend that the zoning verification process was not used in this
4 case and had it been used the city would have been required to address the operating
5 characteristics of the metal shredder, which it did not do.

6 We tend to agree with petitioners that the possible availability of the zoning
7 verification process to approve uses that are not expressly authorized on the EC tables lends
8 some support to their position that the uses in the EC tables should not be interpreted
9 expansively in cases where the zoning verification process is not being invoked to include
10 uses that are not listed in the EC Tables. But the issue in this appeal is the meaning of
11 SADY, not whether uses beyond those fairly included within the scope of the term “scrap and
12 dismantling yard” include metals shredders. Again while the zoning verification process
13 does not lend much support for the interpretation the city adopted, neither is it inconsistent
14 with the interpretation the city adopted. Under *PGE*, the city certainly did not err in
15 considering the zoning verification process as context.

16 For all of the reasons set out above, Schnitzer’s third assignment of error and Metro
17 Metal’s second and third subassignments of error are denied.

⁹ EC 9.1080 provides, in part:

“Zone verification is used by the city to evaluate whether a proposed building or land use activity would be a permitted use or be subject to land use application approval or special standards applicable to the category of use and the zone of the subject property. * * * As part of the zone verification, the planning and development director shall determine whether uses not specifically identified on the allowed use list for that zone are permitted, permitted subject to an approved conditional use permit or other land use permit, or prohibited, or whether a land use review is required due to the characteristics of the development site or the proposed site. This determination shall be based on the requirements applicable to the zone, applicable standards, and on the operating characteristics of the proposed use, building bulk and size, parking demand, and traffic generation.”

1 **FOURTH ASSIGNMENT OF ERROR (SCHNITZER)**

2 **FIRST SUBASSIGNMENT OF ERROR (METRO METALS)**

3 Once again the relevant EC language at the center of the dispute in this appeal is
4 “scrap and dismantling yard,” which we have frequently shortened to the acronym SADY. In
5 this assignment of error and subassignment of error, petitioners contend the hearings official
6 erred by interpreting that term in the disjunctive (allowing a “scrap or dismantling yard”) rather than in the conjunctive (requiring a “scrap and dismantling yard”).¹⁰ Petitioners
7 apparently rely on the following text from the hearings official’s decision to conclude the
8 hearings officer found that a scrap yard that conducts no dismantling could be permitted as a
9 SADY.
10 SADY.

11 “* * * In describing the other uses that would fall within the subject use
12 category, the Planning Director referenced the dictionary for undefined terms
13 and concluded that the use allowed any ‘recycling’ use that related to ‘scrap’
14 *or* ‘dismantling’ as those terms were defined in the dictionary. * * *” Record
15 5 (emphasis added).

16 “* * * Appellant argues that ‘dismantling’ is a term of art. It then cites to
17 statute and administrative rules, and industry standards to conclude that
18 dismantling does not include a metal shredder. This argument is made
19 without any effort to link these external resources to the City Council Code
20 amendment process in 2001 and 2002 in particular or even to the City
21 Council’s intent in a general sense. Within the analysis of *PGE* and *Gaines*, I
22 do not find Appellants argument here helpful. In addition, Appellant does not
23 make these same arguments as to the phrase ‘scrap ... yard.’ Thus, even if a
24 metal shredder is not dismantling’ metal products, a metal shredder could be
25 part of the recycling process for ‘scrap’ and dismantled metal products.
26 Indeed the record demonstrates that a metal shredder takes ‘scrap’ and turn[s]
27 it into shred.

28 “*Given the common meaning of the term ‘dismantle,’ turning an automobile*
29 *body into shred and fluff is the ultimate in dismantling.* A dismantling yard
30 with a metal shredder is simply able to ‘dismantle’ a car body in a fraction of

¹⁰ Metro Metals makes two arguments under its first subassignment of error: In addition to the conjunctive/disjunctive argument, Metro Metals argues under this subassignment of error that the metal shredder cannot be allowed because it is not expressly listed as a use. We address this other argument with Schnitzer’s second assignment of error below.

1 the time of a dismantling yard without a metal shredder.” Record 13-14
2 (underlining and italics added).

3 Initially we question petitioners’ assumption that EC term “scrap and dismantling
4 yard” must be construed to require that a use seeking approval under this use category must
5 be both a scrap yard and a dismantling yard so that a yard that only accepts scrap (without
6 dismantling that scrap) would not be permitted. As PRI argues EC 1.010 sets forth rules of
7 construction for the EC and provides:

8 **“Or, and.** ‘Or’ may be read ‘and’ and ‘and’ may be read ‘or,’ if the sense
9 requires it.”

10 We can think of no reason why the city council would have intended to require that a yard
11 engage in both processes so that a yard that only accepted scrap without also engaging in
12 dismantling would be prohibited.

13 In any event, we do not agree that the hearings official’s decision depends on
14 interpreting the term “scrap and dismantling yard” in the disjunctive. The first paragraph
15 quoted above is simply describing how the planning director interpreted the term SADY.
16 The underlined language does appear to rely on a disjunctive interpretation of the term
17 SADY, but does so only as an alternative response to petitioners’ “dismantling” arguments.
18 If the hearings official’s entire decision is read, it is clear that the gravamen of the hearings
19 official’s interpretation is not that the term SADY should be interpreted in the disjunctive,
20 but rather that the hearings official and petitioners simply disagree about whether a metal
21 shredder “dismantles.” Petitioners in a number of places in their petitions for review contend
22 that dismantling requires that individual parts of a larger whole must be dismantled in a
23 deliberate way and that the dismantled part must retain some recognizable and utilitarian
24 form. It is clear in the italicized language above that the hearings official did not agree with
25 that narrow view of what it means to dismantle: “turning an automobile body into shred and
26 fluff is the ultimate in dismantling.” We cannot say that that in adopting that more expansive

1 view of the concept of dismantling the hearings official “improperly construed the applicable
2 law” under ORS 197.835(9)(a)(D).

3 Schnitzer’s fourth assignment of error is denied. Metro Metal’s first subassignment
4 of error is denied, in part.

5 **FIRST ASSIGNMENT OF ERROR (SCHNITZER)**

6 **THIRD SUBASSIGNMENT OF ERROR (METRO METALS)**

7 Petitioners next contend that a metal shredder is a distinct “use” and that it is not a
8 “scrap and dismantling yard” use. Petitioners assert a number of bases for this contention.

9 **A. The EC Definition of “Use”**

10 EC 9.0500 defines the word “use” as “[t]he purpose for which land or a building is
11 arranged, designed or intended, or for which either land or a building is occupied or
12 maintained.” Petitioners equate the “finished product” with the “purpose.” In the case of a
13 metal shredder the finished product is shred; in the case of a typical SADY the finished
14 product is recycled parts and feed stock. We understand petitioners to contend those different
15 finished products support a conclusion that a SADY and metal shredder are different uses.
16 Petitioners contend the hearings official erred by refusing to assign significance to the
17 different outputs.¹¹

¹¹ Among the hearings official’s finding are the following:

“* * * Appellant differentiates a site that includes a metal shredder from a recycling site that does not include a metal shredder in terms of their respective outputs. A metal shredder site produces shred that can immediately be processed by a steel mill, while a site without a metal shredder just produces ‘scrap’ that must go through an additional process before it can be accepted at a steel mill. I do not see the Code making a distinction in the use categories based upon the output of the recycling use. Both the metal shredder recycling site and the non-metal shredder recycling site are part of the recycling process. The metal shredder recycling site will be more efficient and allow immediate transfer of recycled material to a steel mill. But in terms of the City’s use table, both uses are recycling uses; and both uses are large-scale recycling yards that accept scrap and dismantled cars.” Record 10-11.

1 **B. A Metal Shredder Does not Dismantle**

2 Petitioners next argue that a SADY must dismantle. As noted earlier, petitioners
3 contend that dismantling is a deliberate process where the removed parts retain their physical
4 properties. Petitioners contend the reduction of feed stock and scrap to shred is not
5 dismantling.

6 **C. A Shredder Changes the Design and Configuration of a Site**

7 Petitioners next contend adding a metal shredder to a SADY will dramatically change
8 the way the site “is arranged, [and] designed” and “occupied and maintained.” Petitioners
9 contend these changes are “hallmarks of a distinct use.” Schnitzer Petition for Review 13.

10 **D. A Shredder is More Than a Piece of Equipment**

11 Petitioners contend a metal shredder is more than another piece of recycling
12 equipment. According to petitioners, the cranes, bulldozers and shearers that are common at
13 SADYs do not have the same kind of transformative effect that adding a metal shredder to a
14 SADY will have.

15 **E. Conclusion**

16 Because the term SADY is not defined in the EC and because the term is ambiguous,
17 each of the points petitioners make above, individually and collectively, arguably could have
18 led the planning director and hearings official to conclude that a metal shredder is more than
19 a piece of recycling equipment and is a sufficiently unique step in metals recycling that it
20 should be recognized as something different in kind from the activities that occur at a more
21 typical “scrap and dismantling yard” and therefore a different use. But as the hearings
22 official found there is simply no reason to believe the city council intended that the
23 admittedly unique step in the metals recycling process associated with a metal shredder
24 means that a metal shredder must be viewed as a use that is separate and distinct from a
25 “scrap and dismantling yard.” Therefore, even if the hearings official could have agreed with
26 petitioners that a metal shredder should be viewed as a use that is different than a “scrap and

1 dismantling yard,” we cannot say that the planning director and hearings official
2 “[i]mproperly construed the applicable law,” in relying on dictionary definitions of the
3 component words and terms to conclude that the “use” in this case is metals recycling and the
4 metal shredder is properly viewed as a permissible piece of equipment at a scrap and
5 dismantling yard that allows a SADY to complete the recycling process so that the resulting
6 shred may be sent to a steel foundry to begin the remanufacturing process.

7 Schnitzer’s first assignment of error and Metro Metals’ third subassignment of error
8 are denied.

9 **SECOND ASSIGNMENT OF ERROR (SCHNITZER)**

10 **FIRST SUBASSIGNMENT OF ERROR (METRO METALS)¹²**

11 Petitioners contend that because the “laundry list” of 112 uses in the city’s industrial
12 zones lists “scrap and dismantling yard,” and does not list metal shredders, “scrap and
13 dismantling yard,” should be interpreted narrowly to exclude metal shredders. Petitioners
14 contrast other jurisdictions’ zoning ordinances, where a more general category of use is
15 authorized, followed by a list of nonexclusive examples. Petitioners contend that it may be
16 inappropriate to narrowly interpret terms in zoning ordinances that take this latter approach,
17 but it is appropriate to narrowly interpret zoning ordinances that take the laundry list
18 approach that the City of Eugene’s zoning ordinance takes.

19 The EC is not so easily pigeonholed into one of the dichotomous zoning approaches
20 that petitioners describe. The complete term that is in dispute—“Recycling – scrap and
21 dismantling yard) (includes vehicle wrecking and salvage)”—has elements of both
22 approaches. There admittedly is a fairly large list of uses, which lends some support to a
23 narrow interpretation. But the parenthetical “(includes vehicle wrecking and salvage)”

¹² See n 10.

1 supports the hearings official's conclusion that a SADY can include more than vehicle
2 wrecking and salvage.

3 If petitioners are arguing that the long list of uses in the city's industrial zones
4 requires that the terms that make up the operative term SADY must be interpreted more
5 narrowly than their dictionary definitions justify, we do not agree. And petitioners' recurring
6 argument that SADYs must be limited to the activities that typically occur at a "vehicle
7 wrecking and salvage" yard is contradicted by the city council's choice to list "vehicle
8 wrecking and salvage" as merely an example of what SADYs include.

9 Schnitzer's second assignment of error and Metro Metals' first subassignment of error
10 are denied.

11 **FIFTH ASSIGNMENT OF ERROR (SCHNITZER)**

12 Finally, petitioners argue the planning director and hearings official have essentially
13 interpreted the words "scrap and dismantling yard" broadly enough to encompass anything
14 related to recycling. Petitioners contend that as the planning director and hearings official
15 interpret the words "scrap and dismantling yard," even a steel foundry could qualify as a
16 SADY.

17 The question whether the city could interpret its SADY use category to include a steel
18 foundry is not before us. Moreover, we do not understand the city to have interpreted the
19 words "scrap and dismantling yard" broadly enough to encompass a steel foundry. Rather,
20 we understand the city to have interpreted the recycling activity that is permissible at a SADY
21 to include not only the penultimate step of producing feed stock but also the ultimate step of
22 reducing that feed stock to metal shred that is ready for smelting and the remanufacturing
23 process. For the reasons already explained, we do not agree that that interpretation is
24 overbroad or inconsistent with the dictionary definitions of the operative words and terms.

25 Schnitzer's fifth assignment of error is denied.

26 The city's decision is affirmed.