

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 KENNETH THOMPSON, ROBERT KLEIN
5 and MARVIN KEY,
6 *Petitioners,*

7
8 vs.

9
10 UMATILLA COUNTY,
11 *Respondent,*

12
13 and

14
15 SEVEN HILLS PROPERTY, LLC and
16 POWERLINE RANCHES, LLC,
17 *Intervenor-Respondents.*

18
19 LUBA No. 2007-052

20
21 FINAL OPINION
22 AND ORDER

23
24 Appeal from Umatilla County.

25
26 Jannett Wilson, Eugene, filed the petition for review and argued on behalf of
27 petitioners. With her on the brief was the Goal One Coalition.

28
29 No appearance by Umatilla County.

30
31 John M. Junkin, Portland, and Patricia Sullivan, Pendleton, filed a joint response brief
32 and argued on behalf of intervenor-respondents Seven Hills Property, LLC and Powerline
33 Ranches, LLC. With them on the brief were Bullivant Houser Bailey, PC, and Corey Byler
34 Rew Lorenzen & Hojem, LLP.

35
36 HOLSTUN, Board Chair; RYAN, Board Member, participated in the decision.

37
38 BASSHAM, Board Member, did not participate in the decision.

39
40 AFFIRMED

07/05/2007

41
42 You are entitled to judicial review of this Order. Judicial review is governed by the
43 provisions of ORS 197.850.

1

2 **NATURE OF THE DECISION**

3 Petitioners appeal a county decision that amends the county’s comprehensive plan
4 and development code to allow exclusive farm use (EFU)-zoned property to be divided into
5 parcels as small as 40 acres.

6 **MOTION TO INTERVENE**

7 Seven Hills Properties, LLC and Powerline Ranches, LLC separately move to
8 intervene on the side of respondent in this appeal. There is no opposition to the motions,
9 and they are allowed.

10 **INTRODUCTION**

11 The factual and legal backdrop in this appeal has a bearing on our scope of review.
12 We turn first to the legal backdrop.

13 **A. The Legal Backdrop**

14 **1. ORS 215.780(1) and (2)**

15 In EFU zones, ORS 215.780(1) imposes a minimum lot or parcel size of 160 acres if
16 the EFU-zoned land is designated rangeland.¹ The minimum lot or parcel size in the county
17 EFU zone that applies to the subject property is 160 acres. ORS 215.780(2) authorizes lot or
18 parcels sizes that are smaller than would otherwise be required under ORS 215.780(1). In
19 land use jargon, ORS 215.780(2) is known as the “go below” statute. To take advantage of
20 ORS 215.780(2), a county must demonstrate to the Land Conservation and Development
21 Commission (LCDC) that the smaller lot or parcel sizes will not affect the comprehensive
22 plan’s and land use regulation’s compliance with the statewide planning goals and certain
23 statutory requirements.² ORS 215.780(2) does not elaborate on *how* the county must go

¹ Pursuant to ORS 215.780(1), if EFU-zoned property is not designated rangeland, the minimum lot or parcel size is 80 acres rather than 160 acres.

² As relevant in this appeal, ORS 215.780(2) provides:

1 about making the required demonstration to LCDC or specify a *procedure* for doing so.
2 However, ORS 197.650(1)(d) does provide a right to appeal an LCDC order that is issued in
3 response to a county demonstration under ORS 215.780.³ ORS 197.650(1)(d) implies that
4 LCDC must hold some sort of “proceeding” before issuing an order that permits a county to
5 approve subdivision or partition of EFU-zoned land into lot or parcel sizes that are smaller
6 than required by ORS 215.780(1).

7 **2. OAR 660-033-0100**

8 LCDC adopted OAR 660-033-0100 to elaborate on how minimum lot and parcel
9 sizes are to be established in EFU zones. OAR 660-033-0100(2) explains that the smaller lot
10 and parcel sizes authorized by ORS 215.780(2) must nevertheless “be large enough to keep
11 commercial farms and ranches in the area successful and not contribute to their decline.”
12 OAR 660-033-0100(3) sets out four steps that a county must complete to demonstrate that
13 the proposed minimum lot or parcel size will maintain the county’s commercial agricultural
14 enterprise.⁴ Other subsections of the rule authorize counties to identify subareas of the

“A county may adopt a lower minimum lot or parcel size than that described in [ORS 215.780(1)] in any of the following circumstances:

“(a) By demonstrating to the Land Conservation and Development Commission that it can do so while continuing to meet the requirements of ORS 215.243 and 527.630 and the land use planning goals adopted under ORS 197.230.”

³ As relevant, ORS 197.650 provides:

“A Land Conservation and Development Commission order may be appealed to the Court of Appeals in the manner provided in ORS 183.482 by the following persons:

“* * * *”

“(d) Persons who submitted oral or written testimony in a proceeding before the commission pursuant to ORS 215.780.”

⁴ OAR 660-033-0100(3) provides:

“To determine a minimum parcel size under this rule, the county shall complete the following steps:

“(a) Identify different agricultural areas within the county, if any;

1 county’s EFU-zoned lands for smaller minimum lot and parcel sizes and to apply different
2 minimum lot or parcel sizes in different subareas. OAR 660-033-0100(4) and (9).
3 Additional subsections provide guidance on how counties are to go about determining “the
4 nature of the commercial agricultural enterprise in the county,” under OAR 660-033-
5 0100(3)(b). OAR 660-033-0100(5). OAR 660-033-0100(6) sets out additional guidance on
6 selecting a minimum lot or parcel size under ORS 215.780(2) and OAR 660-033-0100(7)
7 makes it clear that any dwellings on such smaller lots or parcels still must satisfy the criteria
8 set out at OAR 660-033-0130(1) for dwellings that are customarily provided in conjunction
9 with farm use.

10 As outlined above, as a matter of substance, OAR 660-033-0100 sets out considerable
11 detail regarding how a county must go about demonstrating to LCDC under ORS 215.780(2)
12 that a smaller minimum lot or parcel size will be sufficient to continue the existing
13 commercial agricultural enterprise in the area in which the smaller minimum lot or parcel
14 size will apply. But neither OAR 660-033-0100 nor any other administrative rule that has
15 been cited to us or that we have been able to locate sets out a procedure for counties to make
16 the demonstration that is required by ORS 215.780(2) and OAR 660-033-0100 and for
17 LCDC to issue orders in response to such demonstrations.

18 **3. ORS 197.610 Through 197.625**

19 Although we cannot think of a reason why a county could not attempt to make the
20 demonstration required by ORS 215.780(2) as part of periodic review of its comprehensive
21 plan and land use regulations under ORS 197.629 through 197.636, ORS 215.780(2) does not

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- “(b) Determine the nature of the commercial agricultural enterprise in the county, or within areas of the county;
 - “(c) Identify the type(s) and size(s) of farms or ranches that comprise this commercial agricultural enterprise; and
 - “(d) Determine the minimum size for new parcels that will maintain this commercial agricultural enterprise.”

1 require that such demonstrations be made as part of periodic review. In this case, the county
2 utilized the post-acknowledgment plan amendment (PAPA) procedures set out at ORS
3 197.610 through 197.625 rather than periodic review. Under PAPA procedures, the county
4 must provide the director of the Department of Land Conservation and Development
5 (DLCD) notice of any proposal to amend an acknowledged comprehensive plan or land use
6 regulation. ORS 197.610. Thereafter, DLCD must raise any concerns it may have with the
7 proposed amendment during the local proceedings on the amendment. ORS 197.610(3).
8 Once a local government adopts amendments to its acknowledged comprehensive plan or
9 land use regulations, it must submit a copy of that amendment and its findings to DLCD and
10 at the same time send notice of its decision to persons who participated in the local
11 proceedings. ORS 197.615(1) and (2). DLCD and any other person who participated in the
12 local government's comprehensive plan or land use regulation amendment proceedings may
13 appeal the amendment to LUBA. ORS 197.620. If a comprehensive plan or land use
14 regulation amendment that is adopted pursuant to ORS 197.610 and 197.615 and the notices
15 required by those sections are given, the comprehensive plan or land use regulation
16 amendment is "considered acknowledged," if the amendment is not appealed to LUBA or is
17 affirmed on appeal. ORS 197.625(1) and (2).

18 As we explain in more detail below, in this case the county followed the post-
19 acknowledgement comprehensive plan and land use regulation amendment procedures set
20 out at ORS 197.610 and 197.615. As summarized above, that procedure is designed to result
21 in an adopted comprehensive plan or land use regulation amendment that is deemed to
22 comply with the statewide planning goals if the amendment is not appealed to LUBA or the
23 amendment is affirmed on appeal. But the county also submitted its proposal to reduce its
24 EFU zone minimum lot or parcel sizes below that minimum specified in ORS 215.780(1)
25 directly to LCDC for review and approval, as ORS 215.780(2) requires. As noted above, the
26 procedure that LCDC can or must follow in reviewing such a "go below" demonstration

1 under ORS 215.780(2) is ill-defined. But that procedure is apparently designed to result in
2 an LCDC order that determines whether a county demonstration under ORS 215.780(2) is
3 legally sufficient to comply with the standards set out in the statute. *See* n 2. The
4 demonstration required by ORS 215.780(2) includes a demonstration that the smaller lot
5 sizes will leave the county’s comprehensive plan and land use regulations in compliance with
6 the statewide planning goals. These overlapping review procedures (one by LCDC and one
7 by LUBA) have implications for LUBA’s scope of review in this appeal, which we discuss
8 after we set out the relevant factual backdrop.

9 **B. The Factual Backdrop**

10 **1. Application and Planning Commission Deliberations**

11 On November 23, 2005, intervenor Seven Hills submitted an application to the
12 county to allow its 1681-acre property to be divided into 20-acre lots. On January 9, 2006,
13 the county gave DLCD notice of the proposed PAPA, as required by ORS 197.610. The
14 proposed PAPA is described as a proposal to use the “go below” statute to allow “20-acre
15 vineyard parcels.” Record 287. On February 6, 2006, the county gave notice of a planning
16 commission hearing on February 23, 2006 to consider the 20-acre “go below” proposal.
17 Record 281. On February 21, 2006, DLCD and the Oregon Department of Agriculture
18 (ODA) sent a letter to the county stating that the county needed additional justification for
19 the proposed 20-acre parcel size or needed to propose larger parcel sizes. Record 239. The
20 planning commission held a public hearing on the proposed PAPA on February 23, 2006 and
21 continued that hearing to March 3, 2006. On February 29, 2006, intervenor Seven Hills sent
22 a letter to DLCD and ODA to justify its proposed 20-acre parcel sizes. Record 201-04. On
23 March 2, 2006, intervenor Seven Hills’ attorney sent an e-mail message to the county to
24 clarify that the proposal proposes fifteen 20-acre lots, nineteen 40-acre lots and eighteen lots
25 of various sizes between 20 acres and 40 acres. Record 199. At its continued public hearing
26 on March 3, 2006, the planning commission voted to recommend “Scenario B” under which

1 there could be up to thirty 20-acre lots under the proposed PAPA, while the rest of the lots
2 would have to be at least 40 acres in size, and homes could only be built on the 40 acre lots.
3 Record 183-89.

4 **2. Board of County Commissioner Deliberations**

5 On March 7, 2006, the planning director forwarded the planning commission's
6 recommendation to the board of county commissioners with draft Ordinance 2006-008. On
7 March 14, 2006, the board of county commissioners held a public hearing. Record 129-40.
8 A first reading of Ordinance 2006-008 was approved at that meeting and a second reading
9 was set for April 5, 2006. On April 5, 2006, the board of county commissioners approved
10 the proposed PAPA, with a condition that no dwelling would be allowed on parcels smaller
11 than 40 acres except in conjunction with a winery. Record 122. Ordinance 2006-008 was
12 signed on April 5, 2006. Record 92-97. As far as the record shows, the county at this time
13 did not send a copy of Ordinance 2006-008 or the PAPA that ordinance adopts to DLCD in
14 accordance with ORS 197.615(1) and did not send notices of its decision in accordance with
15 ORS 197.615(2). As explained below, the county apparently first took those steps to comply
16 with ORS 197.615(1) and (2) on February 8, 2007, when a second ordinance (Ordinance
17 2007-01) was adopted to replace Ordinance 2006-08.

18 **3. LCDC Proceedings**

19 On April 24, 2006, the county planning director forwarded the proposed PAPA to
20 LCDC and asked for LCDC to take action on the proposed PAPA at the June 2006 LCDC
21 meeting in Pendleton. Record 67-97. The county findings in support of the proposed PAPA,
22 dated April 24, 2006, appear at Record 68-91. On June 5, 2006, DLCD sent notice of the
23 procedure it would follow to review the proposed PAPA. On June 15, 2006, DLCD issued a
24 Director's Report recommending approval of the proposal if certain revisions were made.
25 On June 29, 2006, LCDC considered the proposed PAPA. On January 2, 2007, LCDC issued
26 "REVIEW ORDER 06-SUSTAIN-001717." Record 51-66. Chronologically, this order

1 appears in the record right after the proposal that the planning director sent to DLCD on
2 April 24, 2006. The record that was submitted by the county in this appeal does not include
3 the June 5, 2006 DLCD notice, or the June 15, 2006 Director's Report. Neither does the
4 record include the minutes or any other record of the June 29, 2006 LCDC hearing. The
5 June 2006 events noted above are described in the findings in LCDC's January 2, 2007
6 Order.

7 The January 2, 2007 LCDC order was issued over six months after the June 29, 2006
8 LCDC hearing at which LCDC conditionally approved the PAPA. It is not clear to us why
9 the DLCD director waited from June 29, 2006 to January 2, 2007 to sign the order.⁵

10 4. County Response to the January 2, 2007 LCDC Order

11 The cover letter to the January 2, 2007 LCDC Order states:

12 "[T]he county is to adopt and submit to the DLCD Director an ordinance
13 replacing 2006-08 that establishes a minimum parcel size of no smaller than
14 40 acres and only permits farm related dwellings in compliance with OAR
15 660-033-0135, consistent with the findings and conclusions in the Director's
16 June 15, 2006 report. This replacement ordinance must be approved in
17 writing before application of the 40-acre parcel size to the subject property is
18 effective." Record 50.

19 On January 16, 2007, the county gave notice of a February 7, 2007 hearing to
20 consider Ordinance 2007-01 to repeal and replace Ordinance 2006-08. The notice explains
21 that it is being adopted to respond to the direction in the LCDC order. If the county sent a

⁵ LCDC's January 2, 2007 Order states that the proposed PAPA is approved

"with a delayed signing by the director that authorizes him to approve the County's request upon submittal of an adopted ordinance replacing Ordinance 2006-08 that establishes a minimum parcel size of no smaller than 40 acres and only permits farm related dwellings in compliance with OAR 660-033-0135 consistent with the findings and conclusions in the Director's June 15, 2006 report."

As we explain below, the county did not adopt Ordinance 2007-01 until February 7, 2007. We cannot tell why the director waited six months and then signed the Order on January 2, 2007 approximately one month before Ordinance 2007-01, which replaced Ordinance 2006-08, was adopted. It is also not clear from the record whether the county has submitted Ordinance 2007-01 to the director, as the January 2, 2007 order directs, unless the notice of adoption mailed on February 8, 2007 constitutes that "submittal."

1 new notice of proposed PAPA to DLCD, it is not included in the record of this appeal. On
2 February 7, 2007, the board of county commissioners approved Ordinance 2007-01. Record
3 18. No party argues that Ordinance 2007-01 does anything other than modify the proposed
4 PAPA in precisely the way that LCDC's January 2, 2007 Order directs. A planning
5 department cover letter, dated February 8, 2007, with a signed copy of Ordinance 2007-01
6 attached, states that February 8, 2007 begins the 21-day appeal period to LUBA. Record 1-9.
7 The notice of adoption of the PAPA that is required by ORS 197.615(2) was mailed to
8 DLCD on February 8, 2007. Record 2-3.

9 **5. Subsequent Appeals**

10 Although there is nothing in the record that would indicate that LCDC's January 2,
11 2007 Order was appealed to the Court of Appeals, and LUBA was not informed of that fact
12 until oral argument on June 8, 2007, LCDC's January 2, 2007 Order apparently was appealed
13 to the Court of Appeals. That appeal is pending at the Court of Appeals. According to the
14 parties, record objections in that appeal remained unresolved on June 8, 2007. We are not
15 aware of any additional developments in that appeal of LCDC's January 2, 2007 Order.

16 On February 27, 2007, petitioners filed their notice of intent to appeal Ordinance
17 2007-01 with LUBA.

18 **JURISDICTION AND SCOPE OF REVIEW**

19 Despite the appeal of LCDC's January 2, 2007 Order that is pending at the Court of
20 Appeals, no party questions our jurisdiction or scope of review in this appeal. While we
21 agree with the parties that we have jurisdiction to consider petitioners' challenge to
22 Ordinance 2007-01, we believe that LCDC's January 2, 2007 Order affects our scope of
23 review in this appeal. Although intervenors suggested at oral argument that they believe the
24 parties' arguments in their briefs in this appeal establish the parameters of LUBA's scope of
25 review, we do not agree. Our scope of review is established by statute, and the parties in a

1 LUBA appeal may not expand that scope of review by simply making arguments that exceed
2 LUBA’s scope of review or failing to object to such arguments.

3 As we explain more fully below, identifying LUBA’s scope of review in this appeal
4 is complicated by the legislature’s failure to address in any express way the relationship
5 between the proceedings and orders envisioned by ORS 215.780(2) and the rights of appeal
6 to LUBA granted by other statutes. But that lack of clarity does not mean that LUBA must
7 duplicate LCDC’s review of the proposed PAPA for compliance with the statewide planning
8 goals.

9 **A. Jurisdiction**

10 Ordinance 2007-01 amends the county’s acknowledged comprehensive plan and land
11 use regulations and for that reason is a “land use decision” as ORS 197.015(11)(a) defines
12 that term. Under ORS 197.825(1), LUBA generally has exclusive jurisdiction to review land
13 use decisions.⁶ We agree with the parties that we have jurisdiction to review Ordinance
14 2007-01.

15 **B. Scope of Review**

16 In reviewing a PAPA, LUBA’s scope of review generally includes review for
17 compliance with the statewide planning goals and other applicable law. ORS 197.835(6), (7)
18 and (9).⁷ However, as we have already explained, ORS 215.780(2) required the county to

⁶ORS 197.825(1) provides:

“Except as provided in ORS 197.320 and subsections (2) and (3) of this section, the Land Use Board of Appeals shall have exclusive jurisdiction to review any land use decision or limited land use decision of a local government, special district or a state agency in the manner provided in ORS 197.830 to 197.845.”

No party argues that any of the exceptions set out at ORS 197.825(2) and (3) raise any question regarding our jurisdiction over Ordinance 2007-01 and it does not appear to us that any of them do.

⁷ As relevant, ORS 197.835 provides:

“(6) The board shall reverse or remand an amendment to a comprehensive plan if the amendment is not in compliance with the goals.

1 submit the “go below” PAPA proposal to LCDC so that LCDC could determine whether the
2 proposal complies with the statewide planning goals. LCDC’s January 2, 2007 Order
3 concludes that with specified changes the proposed PAPA complies with the statewide
4 planning goals. There is no dispute that the changes that Ordinance 2007-01 adopts to
5 replace Ordinance 2006-08 are dictated by and consistent with LCDC’s January 2, 2007
6 Order. As we have already noted, ORS 197.650(d) provides for judicial review of LCDC’s
7 order. If LCDC erred in its conclusion that the proposed PAPA, with the specified
8 amendments, is consistent with the statewide planning goals, the Court of Appeals will
9 identify those errors in the pending appeal of LCDC’s January 2, 2007 Order.

10 We think it is highly unlikely that when the legislature adopted ORS 215.780(2) in
11 1993 it intended that after an LCDC order has been issued that concludes that the proposal
12 complies with the statewide planning goals, any PAPA that a county adopts to comply with

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- “(7) The board shall reverse or remand an amendment to a land use regulation or the adoption of a new land use regulation if:
 - “(a) The regulation is not in compliance with the comprehensive plan; or
 - “(b) The comprehensive plan does not contain specific policies or other provisions which provide the basis for the regulation, and the regulation is not in compliance with the statewide planning goals.

“* * * * *

- “(9) 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:
 - “(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[.]”

1 such an LCDC order, if appealed to LUBA, should again be reviewed by LUBA for
2 compliance with the statewide planning goals. If LUBA must replicate LCDC’s review for
3 compliance with the statewide planning goals, LCDC’s June 29, 2006 review and January 2,
4 2007 Order are effectively a waste of time and effort. Such duplicative review for statewide
5 planning goal compliance with the prospect of different results from LCDC and LUBA is not
6 consistent with sound principles of judicial review.⁸ We therefore interpret ORS 215.780(2)
7 and ORS 197.835(6) and (7) together to limit LUBA’s scope of review when considering an
8 appeal of a “go below” PAPA to exclude review for statewide planning goal compliance,
9 where the “go below” PAPA has already been reviewed for compliance with the statewide
10 planning goals by LCDC under ORS 215.780(2) and found to comply with the statewide
11 planning goals.

12 ORS 215.780(2) clearly and expressly requires that counties obtain LCDC’s review
13 and approval for a “go below” PAPA. A county commits error if it approves smaller lot or
14 parcel sizes without first obtaining LCDC approval under ORS 215.780(2). *DLCD v.*
15 *Josephine County*, 28 Or LUBA 459, 465-66 (1994); *DLCD v. Wallowa County*, 28 Or
16 LUBA 452, 457 (1994); *DLCD v. Douglas County*, 28 Or LUBA 242, 256 (1994).⁹ We
17 think it highly likely that it was the legislature’s intent to substitute LCDC review and
18 approval of “go below” PAPAs in place of LUBA review of the “go below” PAPA for
19 statewide goal compliance under ORS 197.835(6) and (7).

20 Finally, we acknowledge that our conclusion above regarding LUBA’s scope of
21 review can be viewed as inconsistent with ORS 197.625(1). As we have already noted, ORS
22 197.625(1) provides that if no appeal of LUBA’s decision regarding a PAPA is filed within

⁸ ORS 197.805 provides that LUBA is to make its “decisions * * * consistently with sound principles governing judicial review.”

⁹ It may have been these decisions that led DLCD to sign its order on January 2, 2007, before Ordinance 2007-01 was adopted on February 7, 2007.

1 21 days after LUBA’s decision is issued, that PAPA would be “considered acknowledged.”
2 But in the event LUBA’s decision in this matter is not appealed, it would make little sense to
3 interpret ORS 197.625(1) to deem Ordinance 2007-01 to be acknowledged to comply with
4 the statewide planning goals, when LUBA’s scope of review in an appeal of a “go below”
5 PAPA does not include review for statewide planning goal compliance. As we have already
6 explained, any questions regarding whether the PAPA approved by Ordinance 2007-01
7 complies with the statewide planning goals will be resolved by the Court of Appeals in the
8 pending appeal of LCDC’s January 2, 2007 Order.

9 The legal effect of ORS 197.625(1) on Ordinance 2007-01, in the event our decision
10 in this matter is not appealed to the Court of Appeals, is not an issue that is presented in this
11 appeal. And we therefore need not and could not finally decide that question in this appeal.
12 However, ORS 197.625(1) is certainly relevant context for our interpretation of ORS
13 215.780(2) and ORS 197.835(6) and (7) above. *PGE v. Bureau of Labor and Industries*, 317
14 Or 606, 610-12, 859 P2d 1143 (1993). The existence of ORS 197.625(1) does not change
15 our view that LCDC orders under ORS 215.780(2) approving “go below” PAPAs have the
16 legal effect of limiting LUBA’s scope of review under ORS 197.835(6) and (7). Because
17 ORS 215.780(2) limits LUBA’s scope of review under ORS 197.835(6) and (7), it also limits
18 the operation of ORS 197.625(1), in the event a LUBA decision reviewing a “go below”
19 PAPA is not appealed to the Court of Appeals. Ultimately, the question of whether such “go
20 below” PAPAs comply with the statewide planning goals is decided by LCDC under ORS
21 215.780(2), not by LUBA under ORS 197.835(6) and (7). Similarly, whether such “go
22 below” comprehensive plan and land use regulation provisions are “considered
23 acknowledged” to comply with the statewide planning goals is decided by LCDC’s order
24 under ORS 215.780(2), not ORS 197.625(1).

1 For the foregoing reasons, our scope of review in this appeal is limited to issues not
2 involving compliance with the statewide planning goals. With that explanation of our scope
3 of review, we turn to petitioners' assignments of error.

4 **FIRST ASSIGNMENT OF ERROR**

5 Petitioners' first assignment of error is that "[t]he county erred by not adopting
6 findings for the decision." Petition for Review 4. Petitioners contend that "[g]iven the
7 significant differences between Ordinance 2006-08 and Ordinance 2007-01, it cannot be
8 assumed that the findings for the earlier ordinance suffice for the one that repealed and
9 replaced it." *Id.* at 5.

10 For purposes of resolving this assignment of error, we will assume that the challenged
11 decision is quasi-judicial and for that reason requires supporting findings. We will also
12 assume that ORS 197.615 requires that a PAPA be supported by findings, as opposed to
13 requiring that any findings that may have been adopted in support of a PAPA be sent with the
14 copy of the PAPA that must be sent to DLCD after it is adopted.

15 It would have been preferable if the county had expressly stated in Ordinance 2007-
16 01 that it was relying on its April 24, 2006 findings and LCDC's order to supply the findings
17 that explain why the adopted PAPA complies with applicable legal requirements. However,
18 in this case it is sufficiently clear that in adopting Ordinance 2007-01 the county was doing
19 precisely that. The county's April 24, 2006 findings were adopted in support of the PAPA as
20 originally proposed, which would have allowed some parcels as small as 20 acres and other
21 parcels between 20 and 40 acres. As approved by the county, that PAPA would have
22 prohibited farm dwellings in certain circumstances. LCDC found that those findings were
23 inadequate to support the PAPA as proposed. However, LCDC identified the changes that
24 needed to be made to the PAPA to bring it into compliance with the statewide planning goals
25 and approved the PAPA with those changes. There is no mystery regarding the findings that

1 the county was relying on to establish that the modified PAPA adopted by Ordinance 2007-
2 01 complies with the statewide planning goals.

3 Finally, it is not obvious to us why the April 24, 2006 findings adopted in support of
4 the PAPA that was approved by Ordinance 2006-08 cannot also be relied on to support
5 Ordinance 2007-01.¹⁰ Petitioners make no attempt to explain why the PAPA approved by
6 Ordinance 2007-01, which requires larger lots and parcels and makes it clear that any
7 dwellings must comply with the approval criteria for farm dwellings at OAR 660-033-0135,
8 necessarily must be supported by findings that are different from the findings that were
9 adopted in support of the POPA that was approved by Ordinance 2006-08.

10 The first assignment of error is denied.

11 **SECOND ASSIGNMENT OF ERROR**

12 Under their second assignment of error, petitioners argue it was error for the county
13 to approve the disputed “go below” PAPA, without also approving a map that accurately
14 depicts the 1681 acres that will be the subject of the “go below.”

15 The application that was submitted in this matter includes a map.¹¹ That map shows
16 that the proposed “go below” area includes tax lots 500 (79.39 acres), 1100 (39.4 acres),
17 1200 (39.4 acres), 800 (885 acres), 400 (380 acres), 1401 (29 acres), 1800 (173.56 acres),
18 and 1500 (55.84 acres). If the indicated acreage of each those tax lots is totaled, the total is
19 1681.59. Ordinance 2007-01 includes a three-page metes and bounds description of the area
20 that is the subject of the “go below.” Record 7-9. Petitioners do not argue that the area
21 described in that metes and bounds description is different than the areas shown on the map
22 that was submitted with the application. At the end of the metes and bounds description is a

¹⁰ We also note that it is clear to us that the county is also relying in part on LCDC’s January 2, 2007 Order to explain why the changes in the PAPA that was approved by Ordinance 2006-08 were adopted by Ordinance 2007-01.

¹¹ The unnumbered fourth page of the record table of contents states that the separately bound application is part of the record in this appeal.

1 statement that the total area subject to the “go below” includes “approximately 1681.5
2 acres.” Record 9. That is consistent with the map that was submitted with the application.

3 We tend to agree with petitioners that it is seems strange that Ordinance 2007-01 does
4 not adopt some sort of map to visually identify the “go below” area. Presumably some sort
5 of map would be useful, even if not absolutely necessary, to indicate the area of the approved
6 “go below” on the county’s official comprehensive plan and zoning maps, to visually
7 distinguish that EFU-zoned area from other EFU-zoned areas. But the map that was
8 submitted with the application identifies the area of the go below that is approved by
9 Ordinance 2007-01, and a more precise map can be prepared from the metes and bounds
10 description if necessary. We do not agree that the county erred by failing to adopt that more
11 precise map in Ordinance 2007-01.

12 The second assignment of error is denied.

13 **THIRD ASSIGNMENT OF ERROR**

14 In their third assignment of error, petitioners argue the county failed to demonstrate
15 that the approved “go below” lot or parcel sizes will be “appropriate to maintain the existing
16 commercial enterprise in the area.” Petition for Review 6.

17 Under OAR 660-033-0100(2), the county was required to demonstrate that the
18 proposed smaller lot and parcel sizes will “maintain the existing commercial agricultural
19 enterprise within an area.” That rule was adopted to implement ORS 215.780(2). It was also
20 adopted to implement Goal 3 (Agricultural Land). Goal 3 provides, in part, that if a county
21 proposes lot or parcel sizes of less than 80 acres in an EFU zone, they must “be appropriate
22 to maintain the existing commercial agricultural enterprise within the area and meet the
23 requirements of ORS 215.243.”

24 The Goal 3 and related administrative rule and statutory issues that petitioners raise in
25 this appeal were within LCDC’s scope of review and were decided adversely to petitioners’
26 position in LCDC’s January 2, 2007 Order. For the reasons we have already explained, our

1 scope of review in this appeal does not extend to second-guessing LCDC’s conclusions in its
2 January 2, 2007 Order.

3 Petitioners’ third assignment of error falls outside our scope of review, and for that
4 reason it is denied.

5 **FOURTH ASSIGNMENT OF ERROR**

6 Under their fourth assignment of error, petitioners allege the county erred by failing
7 to consider the effect that development on the lots and parcels that may be created under the
8 “go below” PAPA may have on surrounding farm uses.

9 Petitioners’ legal theory for why the county was required to address this impact is not
10 stated. Intervenors speculate that the legal basis for the fourth assignment of error is in ORS
11 217.780(2)(a), which requires that the smaller lot and parcels sizes must allow the county’s
12 comprehensive plan and land use regulations to continue “to meet the requirements of ORS
13 215.243.” *See* n 2. ORS 215.243(3) expresses concern regarding “[e]xpansion of urban
14 development into rural areas.” If that is petitioners’ legal theory, the fourth assignment of
15 error is not within our scope of review. We believe it is more likely that the legal
16 requirement underlying petitioners’ fourth assignment of error is the Goal 3 and OAR 660-
17 033-0100(3) requirement that the approved smaller minimum lot and parcel sizes must
18 “maintain the existing commercial agricultural enterprise within an area.” Although it is not
19 entirely clear why, petitioners apparently believe that if dwellings that are customarily
20 provided in conjunction with farm use are approved on all the small parcels that are
21 authorized by the “go below” PAPA, the existing commercial agricultural enterprise will not
22 be continued. Whatever the merits of petitioners’ fourth assignment of error, it appears to
23 rely on a legal theory that the disputed ordinance violates ORS 215.780(2), Goal 3 and
24 related administrative rules. The merits of that argument are not within our scope of review
25 in this appeal.

1 Petitioners' fourth assignment of error fall outside our scope of review, and for that
2 reason it is denied.

3 The county's decision is affirmed.