

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

3  
4 EDWIN E. CONE,                           )  
5    )  
6                    Petitioner,                           )                   LUBA No. 94-237  
7    )  
8            vs.    )                   FINAL OPINION  
9    )                   AND ORDER  
10 CITY OF EUGENE,                           )  
11    )  
12                    Respondent.                           )

13  
14  
15            Appeal from City of Eugene.

16  
17            Michael E. Farthing, Eugene, filed the petition for  
18 review and argued on behalf of petitioner. With him on the  
19 brief was Gleaves Swearingen Larsen Potter Scott & Smith.

20  
21            Glenn Klein and Anne C. Davies, Eugene, filed the  
22 response brief. With them on the brief was Harrang Long  
23 Gary & Rudnick. Anne C. Davies argued on behalf of  
24 respondent.

25  
26            HOLSTUN, Chief Referee; SHERTON, Referee, participated  
27 in the decision.

28  
29                           REMANDED   03/29/95

30  
31            You are entitled to judicial review of this Order.  
32 Judicial review is governed by the provisions of ORS  
33 197.850.

1 Opinion by Holstun.

2 **FACTS**

3 The Willakenzie Area Plan is a Refinement Plan under  
4 the Eugene-Springfield Metropolitan Area General Plan.<sup>1</sup>  
5 Petitioner seeks to amend the Willakenzie Area Plan  
6 designations for two portions of a 15.4-acre area located  
7 between Cresent Avenue and Chad Drive in the northeast part  
8 of the City of Eugene. The northern 10 acres of  
9 petitioner's property front Cresent Avenue and are planned  
10 Neighborhood Commercial and zoned C-1, SR. The southern 5.4  
11 acres front Chad Drive and are planned Special Light  
12 Industrial and zoned I-1, SR.

13 Petitioner seeks to have the planning and zoning  
14 designations for 5.4 acres fronting on Cresent Avenue  
15 changed to Special Light Industrial and I-1, SR. Petitioner  
16 also seeks to have the planning and zoning designations for  
17 the southern 5.4 acres fronting on Chad Drive changed to  
18 Neighborhood Commercial and C-1, SR. This switch of  
19 planning and zoning designations would yield no change in  
20 the acreage subject to each type of designation, but would  
21 result in the 10-acre commercially designated and zoned area  
22 fronting on Chad Drive, rather than Cresent Avenue.

23 Under the Eugene Code (EC), a private party may

---

<sup>1</sup>The Eugene-Springfield Metropolitan Area General Plan (Metro Plan) is a comprehensive plan document adopted by the cities of Eugene and Springfield and Lane County. The Metro Plan is supplemented by a number of refinement plans, including the Willakenzie Area Plan.

1 initiate a refinement plan amendment only if the requested  
2 refinement plan amendment is found to be a minor refinement  
3 plan amendment. Major refinement plan amendments may only  
4 be initiated by the planning commission or city council.<sup>2</sup>

5 The planning commission determined the refinement plan  
6 amendment petitioner proposes is a major refinement plan  
7 amendment. Petitioner appeals that determination.

8 **MOTION TO DISMISS**

9 EC 9.139 provides two ways to initiate refinement plan  
10 amendments:

11 "(a) Action of the planning commission or city  
12 council on its own motion, or at the request  
13 of any person in the manner set forth in  
14 [EC] 9.142; or

15 "(b) Application of any qualified person if the  
16 refinement plan amendment is minor and after  
17 investigation and review in the manner set  
18 forth in [EC] 9.141." (Emphasis added.)

19 City-initiated refinement plan amendments under EC 9.139(a)  
20 are governed by EC 9.142.<sup>3</sup> Privately initiated refinement

---

<sup>2</sup>EC 9.138(2)(b) defines "major refinement plan amendment" as follows:

"'Major refinement plan amendment' is one which significantly changes or amends key principles or policies in the plan, necessitates substantial plan amendments to maintain internal plan consistency, requires significant factual or policy analysis so as to substantially alter approved work programs of affected city departments, or is premature because of other related plan studies, amendments, or updates in progress. All other amendments are 'minor refinement plan amendments'." (Emphasis added.)

<sup>3</sup>EC 9.142 provides:

"Major or minor refinement plan amendments may be initiated by:

1 plan amendments under EC 9.139(b) are governed by EC 9.141,  
2 which provides:

3 "An application for a minor refinement plan  
4 amendment shall only be considered when:

5 "(a) The [planning] commission has classified it

---

"(1) An adopted motion of the planning commission or city council at any time.

"(2) Such an initiation may be at the request of any member of the commission or council, the staff or any other person.

"(3) A person may officially request a city-initiated plan amendment by consulting with and filing a written request with the planning department. \* \* \* The [planning] commission shall decide whether to initiate the request based on the guidelines set out in subsection (4) below. A decision by the commission not to initiate a requested amendment is final.

"(4) The planning commission and council shall consider the following guidelines in determining whether the city should initiate an amendment to a refinement plan:

"(a) There is an urgent need to consider the amendment in advance of the time it would normally be considered; and

"(b) The plan amendment will address one of the following:

"1. New or amended policies set forth in a state statute, regulation, planning goal or state agency land use plan; or

"2. New or amended city policies or recommendations that have direct relationship to the refinement plan, or

"3. A community-wide need based on direct and ascertainable community benefits occasioned by the plan change, and

"(c) Such other considerations as the council or commission may deem appropriate. The council or commission may refuse to initiate a plan amendment for any reason."

1 as a minor refinement plan amendment \* \* \*;

2 "\* \* \* \* \* [.]"

3 A privately initiated refinement plan amendment begins  
4 with a written request to the planning department to have  
5 the proposed refinement plan amendment classified as a  
6 "minor" refinement plan amendment. EC 9.140(2). The  
7 planning department provides notice of the written request  
8 to affected neighborhood groups, the request is reviewed and  
9 the proposed amendment is classified by the planning  
10 commission. Id. EC 9.140(3) provides:

11 "In determining whether the [proposed] amendment  
12 is a major refinement plan amendment as defined by  
13 [EC] 9.138(2)(b), the commission may consider the  
14 number of acres affected by the amendment, and the  
15 effect of the amendment on the provision of public  
16 services and facilities."

17 EC 9.140(4) provides that the planning commission's decision  
18 concerning whether a proposed refinement plan amendment is  
19 "major" or "minor" is final.

20 Respondent contends petitioner failed to pursue all  
21 available local remedies before appealing to LUBA and moves  
22 to dismiss this appeal. ORS 197.825(2)(a); Lyke v. Lane  
23 County, 70 Or App 82, 85, 688 P2d 411 (1984). According to  
24 respondent, petitioner's failure to request that the  
25 planning commission or city council initiate the proposed  
26 refinement plan amendment under EC 9.139(a) and 9.142  
27 constitutes a failure to exhaust available administrative  
28 remedies. We do not agree.

1           The above procedures for initiating refinement plan  
2 amendments create two very different ways to initiate  
3 refinement plan amendments. Under EC 9.139(b), petitioner  
4 only has a right to initiate a refinement plan amendment, if  
5 the proposed amendment is a "minor refinement plan  
6 amendment." In that event, petitioner has a right to a  
7 hearing and to have the proposed amendment reviewed under  
8 the procedures and standards set forth in EC 9.145 through  
9 9.148.

10           On the other hand, if the proposed refinement plan  
11 amendment is a "major refinement plan amendment," petitioner  
12 has no such right. The city may refuse to initiate the  
13 proposed refinement plan amendment for any of the reasons  
14 specified in EC 9.142(4). Under EC 9.142(4)(c), the city  
15 council or planning commission "may refuse to initiate a  
16 refinement plan amendment for any reason." See n 3, supra.

17           If the planning commission's determination that  
18 petitioner's proposed refinement plan amendment is properly  
19 classified as a "major refinement plan amendment" is  
20 correct, petitioner has no right to initiate his proposed  
21 refinement plan amendment under EC 9.139(b) and 9.141.  
22 Under EC 9.140(4), the planning commission's classification  
23 of petitioner's proposal as "major" is final. The planning  
24 commission and city council are not required under EC  
25 9.139(a) and 9.142 to review or reconsider the issue of  
26 whether petitioner's proposal is a minor refinement plan

1 amendment. The alternative process for city-initiated  
2 refinement plan amendments provided by EC 9.139(a) and 9.142  
3 is not an administrative remedy petitioner is required to  
4 exhaust, because petitioner has no right to have his  
5 proposal reviewed on the merits under EC 9.139(b) and 9.142.

6 While it is possible petitioner might convince the  
7 planning commission or city council to initiate the  
8 refinement plan amendment he seeks under EC 9.139(a) and  
9 9.142, the decision to classify his proposal as "major" is  
10 final, and denies petitioner the right he would otherwise  
11 have to have his proposal reviewed on its merits under EC  
12 9.139(b) and 9.141. That decision applies the EC, a land  
13 use regulation, and therefore is a land use decision subject  
14 to our review jurisdiction. ORS 197.015(10)(a)(A)(iii).

15 The motion to dismiss is denied.

16 **FIRST ASSIGNMENT OF ERROR**

17 The challenged decision quotes the definition of major  
18 refinement plan amendment in EC 9.138(2)(b). See n 2,  
19 supra. The challenged decision refers to "staff notes,  
20 attachments, and minutes" as the basis for its decision that  
21 the proposal is a major refinement plan amendment, but does  
22 not identify which staff notes, attachments or minutes.  
23 Record 5. The decision concludes "the proposal would  
24 significantly change or amend key principles or policies of  
25 the plan," but does not identify which key principles or  
26 policies. Record 6.

1           Petitioner contends the challenged decision is not  
2 supported by findings adequate for LUBA review. Petitioner  
3 is correct. The findings conclude the proposal is for a  
4 major refinement plan amendment, but do not provide the  
5 rationale for that conclusion. Quoting the EC definition of  
6 "major refinement plan amendment" and referring to  
7 unspecified key principles or polices is not sufficient.

8           The first assignment of error is sustained.

9           The city's decision is remanded.<sup>4</sup>

---

<sup>4</sup>In petitioner's second and third assignments of error, he contends the challenged decision is not supported by substantial evidence and that the city erred by not following statutory procedures for quasi-judicial land use hearings and for decisions on applications for permits. ORS 197.763; 227.175(3) and (10). We do not reach those questions and express no view concerning the merits of the second and third assignments of error. The city may consider those arguments on remand.