

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

MIKE BYRNES,
Petitioner,

vs.

CITY OF AURORA,
Respondent.

LUBA No. 2020-092

FINAL OPINION
AND ORDER

Appeal from City of Aurora.

E. Michael Connors filed the petition for review and reply brief and argued on behalf of petitioner. Also on the brief was Hathaway Larson LLP.

Emily Gilchrist filed the response brief and argued on behalf of respondent.

RYAN, Board Member; ZAMUDIO, Board Member, participated in the decision.

RUDD, Board Chair, did not participate in the decision.

AFFIRMED 06/15/2021

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

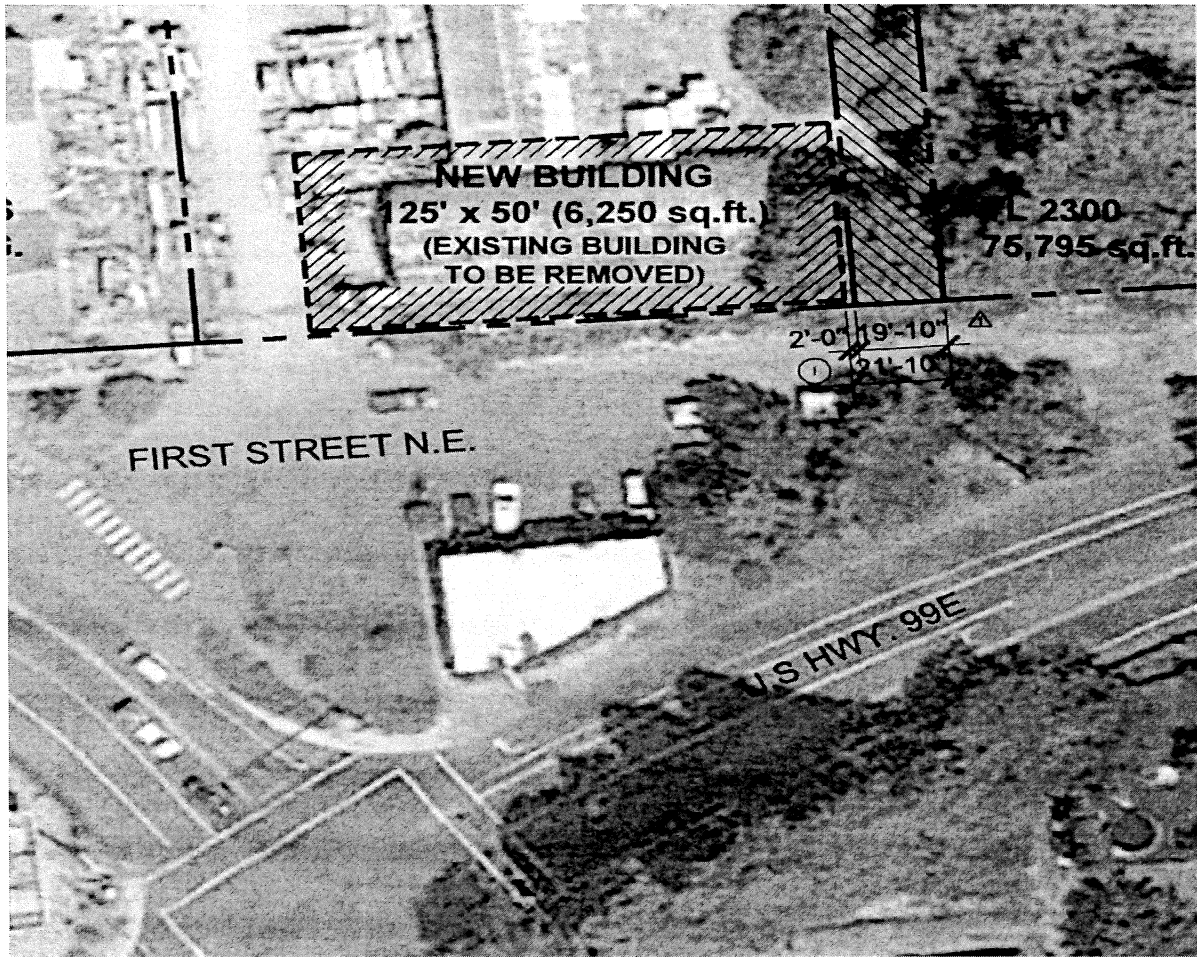
NATURE OF THE DECISION

Petitioner appeals a city council decision denying an application to modify an approved site design review to add a garage door to the basement of a commercial building.

FACTS

The subject property is owned by petitioner and abuts First Street NE to the south. First Street NE is an approximately 250-foot long and 24-foot wide dead-end street, within a 90-foot wide right-of-way, that is classified in the City of Aurora Transportation System Plan as a Local Residential street. City of Aurora Transportation System Plan App A; Record 119. A portion of First Street NE is paved, but the east end is either not improved or improved with gravel. There is one property to the south of First Street NE, between First Street NE and Highway 99E.

Prior to 2019, the subject property included a Quonset hut building that took access both from a driveway on the east end of First Street NE and from a shared driveway over the western boundary of the subject property. An aerial site plan showing the location of the Quonset hut, First Street NE, and the property to the south of First Street NE is below:



1

2 Supplemental Record 12.

3 In 2019, petitioner applied for site design review for an 8,125-square-foot
4 building to replace the Quonset hut, which petitioner proposed to demolish. The
5 footprint of the proposed building encompasses not only the entire footprint of
6 the Quonset hut but the driveway on the east end of First Street NE, as well. The
7 application proposed and the city approved a parking lot and a loading space on
8 the north side of the building, and a two-foot setback planted with grass on the
9 south side of the building. Record 229.

1 The planning commission approved the site design review application.¹
2 After construction began, petitioner discovered poor soil quality under the
3 demolished Quonset hut and sought approval from the city to construct a concrete
4 foundation and 1,875-square-foot basement under the eastern approximately one-
5 half of the proposed building. The city approved the concrete foundation and
6 basement as part of building permit approval. Record 189.

7 In April 2020, petitioner applied to modify the approved site design review
8 to include an access door directly into the basement on the southern façade of the
9 building. Petitioner proposed a roll-up style garage door measuring eight feet by
10 eight feet. Petitioner's proposal explains that the purpose of the south-facing
11 access door would be to allow service vehicles to drive into the basement when
12 installing, servicing, and replacing mechanical equipment that is intended to be
13 located there. Record 7.

14 The planning director concluded that the request was a major modification
15 to an approved site design review and, consequently, that Aurora Municipal Code
16 (AMC) 16.58.060(B) required the planning commission to review the

¹ The 2019 site design review approval included a condition requiring petitioner to provide half-street improvements along First Street NE. Petitioner appealed that condition to the city council and proposed that they instead agree not to object to the future formation of a local improvement district. The city council removed the condition requiring half-street improvements and added a condition requiring petitioner to execute a non-remonstrance agreement.

1 application.² The planning commission denied the application on three bases.
2 First, because the footprint of the proposed building encompasses the driveway
3 on the east end of First Street NE, and because petitioner had already excavated
4 and leveled off the driveway pursuant to the building permit, the planning
5 commission concluded that petitioner had voluntarily relinquished or abandoned
6 that access. Record 7. Second, the planning commission concluded that the
7 proposal is for a “loading space” and that it fails to satisfy the standards in AMC
8 16.42.020(B) for loading spaces. Record 7-8. Third, the planning commission
9 concluded that the proposal is for an “access aisle” and a “service drive” and that
10 it fails to satisfy the standards in AMC 16.42.050(F) and (I) for access aisles and
11 service drives. Record 9-10.

12 Petitioner appealed the planning commission’s decision to the city council,
13 which held a hearing on the appeal. At the conclusion of the hearing, the city
14 council voted to deny the application. The city council adopted the planning
15 commission’s findings as well as supplemental findings included in a
16 memorandum from the city’s attorney. Record 2-41. This appeal followed.

² AMC 16.68.060(B) provides, “When a proposed modification to the site development plan is determined to be a major modification, the applicant shall submit a modified site development review application and receive Planning Commission approval prior to any issuance of building permits.”

1 **INTRODUCTION**

2 The city denied petitioner’s application. Generally, only one valid basis is
3 required for denial of an application and, where LUBA has affirmed one basis
4 for denial, any error committed with respect to alternative or independent bases
5 for denial does not provide a basis for reversal or remand. *Wal-Mart Stores, Inc.*
6 *v. Hood River County*, 47 Or LUBA 256, 266, *aff’d*, 195 Or App 762, 100 P3d
7 218 (2004), *rev den*, 338 Or 17 (2005). For the reasons explained below, we deny
8 the third assignment of error and conclude that at least one of the city’s bases for
9 denial is valid—that the proposal is for a loading space and that the loading space
10 does not meet the dimensional standards. Because we deny the third assignment
11 of error, the city’s decision must be affirmed. In that circumstance, LUBA
12 typically does not address challenges directed at other, alternative bases for
13 denial. However, due to the posture of this appeal and the other bases for denial,
14 resolution of additional issues may be useful if, in the future, petitioner files a
15 new application. We therefore also resolve the issues presented in the first and
16 second assignments of error, so that the parties will have a more complete
17 resolution by LUBA of the appeal.

18 **FIRST ASSIGNMENT OF ERROR**

19 In the first assignment of error, petitioner argues that the city council
20 improperly construed the AMC when it concluded that petitioner had
21 relinquished or abandoned the access on the east end of First Street NE. The city
22 concluded:

1 “[T]he Planning Commission finds that [petitioner’s] construction
2 activity displaced and closed the access driveway in early 2020. The
3 gate has been removed, the former driveway has been excavated and
4 leveled off. The existing building permit authorized construction of
5 the new building where the access driveway was formerly located
6 and included no approval for replacement or reinstatement of the
7 previously closed access drive. The Planning Commission reviewed
8 [petitioner’s] site plan and finds that [petitioner] voluntarily
9 replaced the closed access to First St. with new access to the subject
10 property leading from the west up to the north side of the building.
11 * * * The Planning Commission finds no evidence that the city
12 demanded closure of the First St. access driveway. The Planning
13 Commission concludes that vehicle access into the northwest
14 portion of the site was approved by the City at [petitioner’s] request
15 in [the site design review approval], and was therefore lawfully
16 established. Because that access was designed by [petitioner] to
17 serve the parking area and the loading space for this building and
18 property, the Planning Commission finds the new access provides
19 reasonable access to the subject property, and therefore that a second
20 vehicle access to the subject property is not required.” Record 7.

21 City approval or denial of a discretionary permit application must be based on
22 standards and criteria set forth in the city’s code. ORS 227.173(1). Petitioner
23 argues that the city’s findings do not identify any provision of the AMC that
24 provides that an existing property loses access from a public street if that access
25 is not shown on an approved site design review or if construction activity is
26 performed in the access.

27 The city responds that the city council did not deny the application on the
28 basis that petitioner had relinquished or abandoned access from the east end of
29 First Street NE. Based on the findings quoted above, we reject that premise. The

1 city council relied on its conclusion that the property could no longer be accessed
2 from First Street NE as one basis to deny the application.

3 The city also responds that the city council correctly concluded that
4 petitioner relinquished access from the east end of First Street NE by (1)
5 excavating the driveway and (2) proposing, in the site design review application
6 that was approved, to construct the new building where the driveway was located.
7 However, nothing in the city's decision or the response brief points to any
8 provision of the AMC that requires a site design review application to show
9 existing access points in order to preserve those access points if the application
10 is approved, that limits access to a property to a single access point depicted on
11 an approved site design review, or that provides that construction activity in or
12 excavation of an access point results in the loss of that access point. Absent such
13 a citation, we agree with petitioner that the city erred in concluding that the
14 subject property does not have a right of access from the east end of First Street
15 NE.

16 The first assignment of error is sustained.

17 **SECOND ASSIGNMENT OF ERROR**

18 The city found, in relevant part:

19 "The Planning Commission requested information on the sizes of
20 the mechanical equipment to justify the need for the 8 foot wide roll
21 up door, however, none was provided by [petitioner]. The Planning
22 Commission finds that the application does not include evidence to
23 support an assertion that the mechanical equipment requires 1,875
24 square feet, or that it requires an 8-foot wide and 8-foot high access

1 door for installation, repair, or maintenance. The Planning
2 Commission notes the prior approval of land use and building
3 permits for the project without vehicle access to the basement, and
4 the commencement of construction pursuant to those plans, and is
5 unpersuaded that the roll-up door is required for the installation,
6 maintenance or replacement of mechanical equipment.” Record 7.

7 In the second assignment of error, petitioner challenges the city council’s
8 conclusion that petitioner failed to “justify the need” for the access door. *Id.*
9 Petitioner argues that no applicable criterion in the AMC requires an applicant to
10 demonstrate a need for an access door and that the city may only apply criteria
11 that are included in the AMC to the application. ORS 227.173(1).

12 In the response brief, the city takes the position that the lack of a
13 justification was not a basis for the city’s denial of the application. We disagree.
14 The city’s findings quoted above conclude that petitioner failed to demonstrate a
15 need for the access door. The findings do not point to any criterion in the AMC
16 that requires an applicant to justify a need for a development, and we are aware
17 of none.

18 The second assignment of error is sustained.

19 **THIRD ASSIGNMENT OF ERROR**

20 The city council denied the application for failure to satisfy AMC
21 16.42.020(B), which sets out the dimensional standards for loading spaces,³ and
22 AMC 16.42.050(F) and (I), which set out width and vision clearance standards

³ AMC 16.42.020(A) requires one loading space for commercial buildings between 5,000 and 25,000 gross square feet.

1 for access aisles and service drives. In the third assignment of error, petitioner
2 challenges each of these bases for denial.

3 Petitioner argues that the city improperly construed AMC 16.04.030's
4 definition of "loading space" to conclude that the access door and basement are
5 subject to the dimensional standards in AMC 16.42.020(B). Petitioner does not
6 dispute that the door and basement do not satisfy the dimensional standards;
7 rather, petitioner disputes the city's conclusion that the proposal is for a loading
8 space. Petitioner argues that the city's conclusion that the proposal is for a loading
9 space relies on an incorrect and unfounded conclusion that vehicles will back
10 through the access door into the basement. According to petitioner, the access
11 door is not a loading space because the door is only a door, and vehicles will
12 drive through the door and park in the basement. Relatedly, petitioner argues that
13 the city erred to the extent that it reviewed the use of the basement because the
14 basement has already been approved as part of the building permit.

15 The city responds that the city council did not conclude that the proposal
16 is for a loading space merely because vehicles would back through the door into
17 the basement. Rather, the city responds, the city concluded that the proposal is
18 for a loading space because the access door and basement will be used for loading
19 and service vehicles. The city responds that the city council properly construed
20 the proposal as a proposal for a loading space, comprised of (1) a door to provide
21 access for (2) vehicles to drive into the basement to unload mechanical

1 equipment, under the plain language of the definition of “loading space” in AMC
2 16.04.030:

3 “*Loading space* means an off-street space or berth on the same lot
4 or parcel, with a building or use, or contiguous to a group of
5 buildings or uses, for the temporary parking of a vehicle for loading
6 or unloading persons, merchandise or materials, and which space or
7 berth abuts upon a street, alley or other appropriate means of access
8 and egress.” (Emphasis in original.)

9 The city council concluded that “an area, whether indoors or outdoors, designated
10 for unloading equipment and temporary parking of service vehicles is a ‘Loading
11 space.’” Record 8.

12 We agree with the city that the city council properly construed the
13 definition of loading space to conclude that petitioner proposed an internal
14 loading space and that the city’s conclusion is not dependent on whether vehicles
15 use the access door to enter the basement driving backwards or forwards. The
16 city is not bound by petitioner’s characterization of the proposal. *S. St. Helens*
17 *LLC v. City of St. Helens*, 71 Or LUBA 30, *aff’d*, 271 Or App 680, 352 P3d 746
18 (2015).

19 We also disagree with petitioner to the extent that they argue that the city
20 is precluded from considering petitioner’s proposed use of the basement for
21 loading and unloading. Although the building permit approved construction of
22 the basement, there is no dispute that that permit did not approve an access door
23 or loading space in the basement. The proposal for the access door to allow
24 loading and unloading activities in the basement is part of the 2020 modification

1 of the approved site design review, and the city council was within its authority
2 to consider those activities in reviewing the proposal.

3 Petitioner also argues that the city council's decision impermissibly
4 requires two loading spaces for the building where AMC 16.42.020(A) requires
5 only one. *See* n 3. The city responds, and we agree, that the city's decision does
6 not require a second loading space. Rather, it concludes that the second loading
7 space proposed by petitioner must meet the dimensional standards in AMC
8 16.42.020(B).⁴

9 Petitioner advances additional arguments challenging other bases for the
10 city's denial of the application for failure to satisfy applicable criteria in the
11 AMC. Because the city has established one valid basis for denial of the
12 application, resolving petitioner's challenges to other bases for denial would not
13 provide a basis for reversal or remand of the decision, and we do not reach those
14 portions of the third assignment of error.

15 The third assignment of error is denied.

16 The city's decision is affirmed.

⁴ The city council concluded, based on its conclusion that the proposal failed to meet the dimensional standards for a loading space, that it also failed to satisfy AMC 16.42.050(D), which requires, in relevant part, that parking areas be developed "to the dimensional standards of this title." Petitioner challenges this finding on the same basis as their challenge to the city's finding that the proposal is for a loading space. Petition for Review 30 n 5. Because we reject petitioner's arguments above, we reject them here as well.