



Board of Appeals
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DECISION

The New Berlin Board of Zoning Appeals (the “Board”), at its meeting held on April 12, 2007, has considered the appeal of Janacek Investments, Inc. of the decision of the Plan Commission relating to the use approval for the Deer Creek Inn and Conference Center. The Board also received and considered all of the various written submissions from the appellant, the City of New Berlin (the “City”) and the developer. Pursuant to Section 275-31(C) of the New Berlin Zoning Code (the “Code”), the Board “shall notify the appellant in writing and the Plan Commission within 10 working days after taking final action on an appeal, and shall, in case of denial, state its reasons for denial in writing.” This written decision has been approved by the four members of the Board who voted to deny the appeal and constitutes notice to the appellant and the Plan Commission of the Board’s decision to deny the appeal and sets forth the Board’s reasons for such denial.

The Board’s reasons were as follows:

1. Although the appellant originally raised issues relating to the height of the building, the building set-backs, and the building’s storm water management plan, at the April 12th hearing the appellant limited the issue on this appeal to the issue involving the height of the building.
2. The Board understands that the building in question will be seven floors, with a height of 94 feet, to be used as a hotel and conference center. The Board understands that the zoning for the property is B-1/PUD, pursuant to Ordinance No. 2128.
3. Ordinance No. 2128 was adopted by the Common Council on January 9, 2001.
4. In Ordinance No. 2128, the Common Council included the following provision:
 - (8) Building Height. (See also Sections 17.0501 and 17.0503(1))
 - (a) Building height shall conform to existing zoning ordinances.
 - (b) Conference and retail facilities not exceed two (2) floors.
 - (c) Building height shall be measured as the vertical distance from the highest established existing grade or finished grade at the building line, whichever is higher, to the highest point of the main building and does not include architecturally significant roofs, etc.

5. At the time Ordinance No. 2128 was adopted, the Code had a height restriction on hotels of 55 feet, although Code Section 17.0501 provided that the Plan Commission could exceed that limit in the circumstances set forth in that section of the Code.

6. Shortly after the passage of Ordinance No. 2128, the Common Council of New Berlin amended the Code and included what is now Section 275-34(D)(3), which allows a hotel to be granted a credit of one additional hotel floor, with a maximum of a two-floor credit, for each level of underground parking. The Board understands that the project in question will have five floors of underground parking and has been granted a two-floor credit by the Plan Commission under Section 275-34(D)(3).

7. The appellant contends that the Common Council's reference to "existing zoning ordinances" in Ordinance No. 2128 was intended to be a reference to the zoning ordinances as they existed in January, 2001 when Ordinance No. 2128 was passed. The Board disagrees and believes the more logical interpretation is that the reference is to the Code as it existed when the developer or applicant seeks use approval. The Board's conclusion is based upon the testimony of Gregory Kessler that the practice of City staff has always been to require applicants who seek use approval to comply with the Code as it exists at the time of such application. The Board also bases this conclusion on the Code itself, which both in 2001 and at the time of the use application, provided that if application for use approval in a PUD overlay district was made at a time different than the creation of the PUD overlay, then the application should follow all the regular regulations in the respective zoning permit sections of the Code. *See, e.g.*, Code Section 275-23(E)(7).

8. The Board also believes that this is the more common sense reading because it allows staff and the Plan Commission to review current use applications based upon what the Common Council has determined to be current City policy under the Code current at the time of the use application.

9. The Board also took into consideration that the change to the Code that added Section 275-34(D)(3) was very close in time to Ordinance No. 2128 and, as a result, it is logical to conclude that the Common Council likely had this very project in mind when it adopted that amendment to the Code.

10. The Board believes that the Plan Commission properly carried out its powers and duties under Section 275-15 of the Zoning Code.

11. The Board does not believe that by granting use approval for the Deer Creek Inn and Conference Center, the Plan Commission amended the text of Ordinance No. 2128 and, as a result, the appeal should be denied.

The foregoing constitutes our collective reasons for denying the appeal.

Brian W. McGrath
Milton Galke
Brian Loohaus
James Klappa

Voting in favor of the appellant:
Anthony Valerius