

Memo

To: City of New Berlin (Deer Creek Inn & Conference Center)
From: Mark G. Blum
Date: February 16, 2007
Re: Consistency of Project Application with PUD Ordinance 2128

The purpose of this memo is to review the application submitted by Robert Williams and TDI Associates for the construction of the Deer Creek Inn & Conference Center at 1401 South Moorland Road. This application is for use, site and architectural approval to construct a hotel, water park, conference center and mixed use retail facility.

As the Staff Report indicates, this project has had a long history in the City. Concept plans were submitted in 1999, 2000 and 2001. That process culminated with the adoption of a PUD ordinance for the site, specifically Ordinance No. 2128, on January 9, 2001. That ordinance modified the underlying B1 zoning on the site.

Subsequent to the initial PUD Ordinance approval, the deadlines in the ordinance for the commencement of construction were extended on two occasions. The last extension occurred on October 12, 2004 with a 3-year extension being granted at that time. The Staff Report notes that the proposed uses for the site are consistent with the 2001 PUD. Specifically, the Staff Report notes that the hotel use is a principal use on the site and was specifically identified in the PUD. The conference center aspect of the site was also noted as a principal use in the PUD ordinance. The indoor water park was not specifically identified as part of the PUD. Staff has considered that use as an accessory use, since that facility is to be used solely for hotel guests as opposed to being made available to the public. The restaurant and retail uses were referred to in the PUD, and they were also identified as an accessory use. Finally, staff identifies the multi-level underground parking as an accessory use.

For the reasons further noted in this memorandum, I support the conclusions made by staff in this regard. Ordinance No. 2128, a copy of which is attached hereto, notes on the second page that the principal use for the Deer Creek Inn & Conference Center would be a full service hotel and conference center containing up to 405 guest rooms. It also provides that there would be banquet and meeting room facilities up to 15,000 square feet, commercial tenant space and up to two full service

restaurants which would encompass approximately 15,000 square feet. Below grade parking was identified in addition to surface parking. The hotel and motel (with conference facilities) are identified as the principal use; however, the ordinance goes on to state any other use that the Plan Commission finds will be similar in nature, operation and function to uses allowed within the district would be permitted as well.

With respect to accessory uses, commercial activities permitted in the B-1 and B-2 district and which the Commission finds will meet the needs of the hotel and its guests are permitted, along with any other use the Plan Commission finds would be similar in nature, operation and function to accessory uses allowed within the district.

The application as submitted refers to a total of three restaurants on the site as opposed to two. In addition, it refers to a water park, which use was not specifically enumerated in the PUD. All of the other uses are identical to those stated in the PUD. It is always difficult when creating a PUD to walk the line between providing a specific description of the uses and allowing for some latitude for the project to evolve from the time that the PUD is approved and the ultimate use approval is given. Given that approximately six years have elapsed since this PUD was originally adopted, this project is a prime example of the tension between these two competing goals. With that having been said, it is clear that the intention in the development of the PUD was to allow for a substantial hotel and conference center facility with restaurants and retail space.

The significance of water park facilities to hotels have substantially evolved in the time since the original PUD was issued. Such facilities are becoming essential to destination facilities, i.e., facilities that one travels to utilize in and for themselves as opposed to as an ancillary activity to site seeing or attending some other event. As staff points out, the water park will be used exclusively for the benefit of the guests, and there will not be general admission passes given to the public at large. Thus, the water park exclusively serves the needs of hotel guests and, therefore, clearly it would be the kind of activity which would meet the needs of the hotel and its guests as part of the overall development. I believe this falls within the accessory use definition in the PUD.

Similarly, with respect to the issue of the restaurants, there are two full service restaurants identified. The actual application identifies a third. Restaurants are certainly the kind of use which users of such complexes would be looking for. Because of the variety of different activities going on in the hotel and conference center, it would certainly be reasonable to expect that a variety of different restaurants would be needed to meet the needs of those varying groups. Again, given the evolution of this project and the inclusion of the water park, which perhaps would focus on a different demographic than some of the attendees at the conference facilities, additional restaurant offerings would certainly be desired and, in fact, expected. As presented, these restaurants would meet the needs of hotel guests and conference attendees and users of the retail facilities; therefore, it seems

reasonable to expect that this would meet the definition of the accessory use as part of the overall plan of the development.

Overall, these changes are certainly well within what would be expected for a conference facility of this type, and it certainly was within the jurisdiction of the Plan Commission under the terms of the PUD to make the determination that these uses are similar in nature, operation and function to uses which would otherwise be allowed in the district. I, therefore, believe that the conclusions reached by staff in their report as well as the Plan Commission in the adoption of this use approval are well within the bounds of their authority under the terms of the PUD ordinance.

Another issue that arose is that the Staff Report dealt with the subject of the height of the facility. The question of height was something that was dealt with in section II(8) of the PUD ordinance. Specifically, the ordinance states that building height shall conform to existing zoning ordinances. It further states that the conference and retail facilities shall not exceed two floors. As the Staff Report noted, the height of the hotel is governed by the underlying zoning district, i.e., B-1. Under that code, the height would be limited to 55 feet; however, New Berlin Municipal Code Section 275-34(d)(3) provides that the Plan Commission is allowed to give a credit for additional height for each level of underground parking utilized or for the dedication of permanent open space. Specifically, Section 275-34(d)(3) reads as follows:

Hotels and motels may exceed the maximum height requirement of five floors (55 feet) with each underground parking floor provided. A credit of one hotel floor may be granted, with a maximum of a two-floor credit, for each level of underground parking or for the dedication of permanent open space adjacent to surface parking or the hotel structure in the amount of two times the square footage of the floor added.

In this case, there are a total of five levels of underground parking. Thus, the question that was presented by staff is how much credit was the applicant entitled to. The response I gave was that there would be a credit of up to two floors for each level of underground parking, and a credit could be provided for permanent open space. This section is not written as clearly as it should be. However, since the language as drafted did not specifically limit the total credit to a maximum of two floors, I believe it would be difficult to deny that request from the developer. For example, the section could have been written to read that a credit of one hotel floor may be granted for each level of underground parking or for the dedication of permanent open space adjacent to service parking for the hotel structure in the amount of two times the square footage of the floor added. Under no circumstances shall the credits provided under this section exceed two floors. That would have separated out the maximum floor credit from the rest of the section. As the section is written, however, the phrase "with a maximum of a two floor credit" is blended in with the rest of the sentence, and so it appears that the maximum of two floor credit applies to the phrase that follows it, i.e.,

for each level of underground parking. While an argument could be made that there should only be one floor given as a credit for each level of underground parking, the ambiguity that is created here opens the door to the construction that two floors per level of underground parking would be permitted. A fundamental tenet of the construction of ordinances and statutes is that the language is to be given its plain and ordinary meaning and that each element of the ordinance be given its full effect to the extent that that is possible. I personally believe that it would be a stretch to read this section to provide for only a one floor credit with a cap of two floors given the way the language is drafted.

The last issue that was dealt with in the Staff Report, and of which there is some degree of history, is the purported requirement of Deer Creek Inn & Conference Center paying the City the sum of \$1,000,000 towards storm water management for the site. I have reviewed the documents that were exchanged between the parties on this subject as well as the minutes of approval of the PUD. None of those documents reflect a present commitment by Mr. Kitten or a condition by the City that \$1,000,000 must be paid to the City for storm water purposes as a condition of approval. With that having been said, there was a contribution guarantee agreement signed by Mr. Kitten in January 2001 which said that to ensure that the construction of the Deer Creek Inn & Conference Center would be a positive influence on storm water control in the area, Deer Creek would agree to contribute up to \$1,000,000 towards the storm water management project known as North Pond 1 as described in the report by the City's consulting engineers, Bonestroo, Rosene, Anderlik & Associates, in October 2000. Deer Creek agreed to make that payment to the City prior to the issuance of any building permit unless the construction of NP1 has not begun, in which case a letter of credit would be issued in the sum of \$1,000,000 for purposes of the construction of North Pond 1. Those obligations, however, expired on December 31, 2005.

My understanding is that North Pond 1 was never constructed by the City, nor is that pond even permissible at this stage by the DNR. Thus, the essential focus of the contribution, namely the construction of this pond, was no longer planned by the City, nor could it be constructed. As a result of this, Mr. Kitten has constructed his green roof and, thus, dealt with the storm water issues for the site on his own property. The cost of those improvements, according to Mr. Kitten, are in excess of \$1,000,000.

In summary, the \$1,000,000 contribution was not a condition of the approvals received by Mr. Kitten to date and, in fact, dealt with a contribution that Mr. Kitten was willing to make towards the construction of a storm water pond by the City, which would have dealt with the storm water needs being created by this site. Since the City is no longer constructing that pond, Mr. Kitten was forced to deal with the storm water improvements on his own site; therefore, the basis upon which he was making the \$1,000,000 contribution no longer exists. A review of the correspondence on the issue clearly shows that the intention of the contribution was to assist in the funding of a regional storm water facility which would have benefited the Deer Creek Inn & Conference Center site. In the absence of that project, there would no longer be a

reason for the contribution to be made. Nevertheless, staff has placed a condition in the conditions for approval that provides that since the storm water improvements the City has constructed will not benefit the Deer Creek Inn & Conference Center site, to the extent the applicant believes there is a storm water issue on the site which it seeks relief from the City for, that Deer Creek Inn & Conference Center will be responsible to mitigate those issues up to the \$1,000,000 of the original proposed donation.

There is nothing in the current record which would create an enforceable promise under which the City could require payment of the \$1,000,000 and the one commitment that was made was based upon the construction of a storm water facility, North Pond 1, which has not and will not be built; therefore, making it unenforceable in that regard as well. The bottom line is that the storm water needs for the site are being dealt with and that the conditions of approval preclude the developer from seeking additional storm water benefits for the site in the future until an additional \$1,000,000 is spent by the applicant on his own storm water mitigation activities. Since this issue was not dealt with in the PUD or in any of the approvals to date, I don't believe the City would have had the ability to enforce this contribution against the developer.

In summary, I believe that the conclusions reached in the Staff Report regarding the issues of use, building height and the storm water contribution are supported under the PUD ordinance.

Respectfully submitted,

Mark G. Blum

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New Berlin/Planning/Memo 2-16-07 Deer Creek Inn & Conference Center