



City Attorney Mark G. Blum

City Prosecutor Thomas G. Schmitzer

February 27, 2007

Alderman William Moore
4260 Victoria Circle
New Berlin WI 53151

Dear Alderman Moore:

On February 23, 2007, you sent me the enclosed e-mail message. Following my receipt of that message, we had a telephone conversation, at which time we discussed the content of that e-mail.

Let me begin by saying that I stand behind my memo of February 16, 2007 as well as the advice I have given to staff and the Plan Commission concerning this subject to date. Your memo raises essentially two issues, the first having to do with the subject of the water park and the second, the issue of height. Let me attempt to respond to your questions in both regards.

In #2 of your letter, you ask whether any language of the PUD had changed or is there any language that disagrees with the final plan. The PUD which is set forth in Ordinance No. 2128 has not been amended, to my knowledge, since its enactment in January 2001. As the Staff Report notes, there had been two extensions to the deadline for inception of construction of the project; however, no substantive changes had been made to the PUD.

As to the second portion of your question, I agree with staff's conclusion that the use approval application from Deer Creek Inn & Conference Center, LLC is consistent with Ordinance No. 2128. Others have questioned whether the addition of the extra restaurant or the inclusion of the water park would be considered inconsistent with that PUD. My conclusion is that this is not the case. Again, as we discussed over the phone, principal uses in the PUD district include "any other use that the Plan Commission finds will be similar in nature, operation and function to uses allowed within the district." This PUD acts as an overlay over the B-1 district in which restaurants are a permitted use. In addition, since two restaurants were found to be consistent with the use in the original PUD, it is hard to argue that a third would represent a conflicting use. As to the water park, staff considers that to be an accessory use, and I agree with their conclusion. Accessory uses are those which facilitate support or supplement the principal use on the site. There are very few hotel and conference centers of this size which would not integrate a pool facility or water park as part of the amenities being offered. In addition, the accessory portion of the PUD indicates that "any other use that the Plan Commission finds will be similar in nature, operation and function to accessory uses allowed within the district". Clearly, a pool/water park would be consistent with amenities normally associated with a hotel complex; therefore, I believe it was reasonable for the Plan Commission to conclude that would be similar in nature to operation and function to other allowed accessory uses.

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Your next question is whether the water park would have been required by staff to be included in the PUD had they known one would eventually be built as part of a new hotel. I believe the answer to that lies in the presentation that was made at the original public hearing on this matter. Staff has a copy of the screen prints from the presentation, and one of those slides includes a reference to a water park. Thus, the City was aware of the likelihood of a water park being included and no doubt must have concluded that it would be an accessory use that did not require specific enumeration in the PUD.

As I told you, I have not been involved in the citing of any other hotels in the city and, therefore, I am not aware of how this kind of issue is normally dealt with. In speaking with Greg Kessler, he indicates that he has not been involved in such a situation either, so I cannot tell you what we would normally do in this kind of situation. What I can tell you is that if the developer decides to open the water park to the public at large, it would create the need for a new traffic assessment as well as an assessment of the parking uses in the facility and certainly would necessitate a change in the plan of operation that has been approved by the Plan Commission. That plan of operation would need to be reviewed and amended if outside parties were allowed to use the facility, so the City does have control over the decision for non-guests using the water park in the future.

As to your final question as to why would New Berlin not want to have its residents easy access to our own indoor water park? The point I would make is that the park does not belong to the City but, rather, to the developer. They have applied for a comprehensive project that the City has reviewed on a number of levels. That review anticipates that the use would be for hotel guests only. As noted above, any change in that status would no doubt have implications for parking, traffic, etc. As a matter of good planning, depending on the anticipated impacts of the use, the City may have concerns over allowing outsiders to use the indoor water park depending on the impact it would have to our parking and traffic ordinances.

As to paragraph #3 of your e-mail and the two paragraphs that follow it, I believe the fact that the Plan Commission and staff read the language in the PUD differently than you have is evidence of an ambiguity. I respect your opinion in this regard; however, the standard is not what an English teacher would conclude but, rather, what an ordinary person reviewing the ordinance would interpret it to mean. You ask rhetorically why the drafter of the ordinance would state "a credit of one hotel floor may be granted" unless they meant it. I believe they did mean it and the only way to give effect to both of the phrases in that clause would be to say that the City could give a credit of one or two floors. That phrase is then qualified by the phrase "for each level of underground parking or for the dedication of a permit or open space..." The last sentence of your paragraph 3 states that the parenthetical phrase "with a maximum of a two floor credit" is a qualifier and quantifier for the whole sentence. Again, I do not read it that way. I believe that if that was the intention, it could have simply been remedied by the drafter adding a sentence at the end of the paragraph stating, "under no circumstances may a credit of more than two floors." I think we have to ask ourselves why wouldn't the drafters have utilized such a simple remedy rather than trying to rely on the construction that you are advancing. I still maintain that if you were to ask the average person to interpret this section, they would use the simplest construction, which

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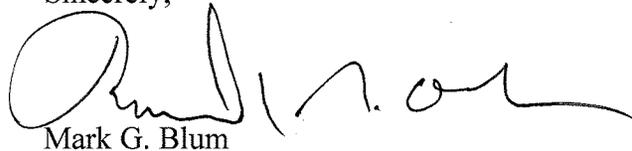
is that the two floor credit is applied on a per floor basis for each level of underground parking added. While I do not disagree that this paragraph was rather inartfully drafted, I think that at least we would have to acknowledge that the paragraph could be read in more than one way and, thus, when we are attempting to restrict the activity of the property owner, we have to recognize that they would certainly have the right to advance in court the least restrictive interpretation of the ordinance.

In the second paragraph of your section 3, you raise the issue of what is the appropriate height of a floor? In going through our code, I find no definition of what dimension a floor should have other than the argument that you present in your letter that it can be deduced by dividing the number of floors by the maximum height.

As I indicated in our telephone conversation, ultimately it is the Plan Commission and the Council as the elected or appointed representatives of the citizens of the city to come to their own conclusion about how to interpret the ordinances. We as staff can only give you the guidance of our opinions on the matter based upon our best judgment. I can only tell you that I believe that this is what Greg, his staff, as well as myself have attempted to do here. However, our opinions remain just that and you are certainly free to interpret them as you see fit. I will continue to try to provide you with my best legal analysis and judgment on these issues.

I trust that these comments have been responsive to your inquiries. If you have any questions or concerns, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "Mark G. Blum". The signature is fluid and cursive, with a large initial "M" and a long, sweeping underline.

Mark G. Blum

MGB/lah

Enclosure

cc: Mayor Jack Chiovaturo
Greg Kessler
Alderman John Hopkins
Alderman Paul D. Gallagher
Alderman Roger Hegeman
Alderman Dave Ament
Alderman Thomas J. Augustine
Alderman Kenneth A. Harenda