

## BOARD OF APPEALS

April 12, 2007

**Please note: Minutes are unofficial until approved by the Board of Appeals at their next regular scheduled meeting.**

The meeting was called to order at New Berlin City Hall, at 7:00 PM.

On roll call, Brian McGrath Chairman, Goetter, Valerius, Loohaus, Klappa, Galke and Bohen. Also present was Planning Services Manager Nikki Jones, Director of Community Development Greg Kessler, Division Engineer for Storm Water Eric Nitschke and City Attorney Mark Blum.

Motion by Anthony Valerius to approve the minutes from the Board of Appeals meeting from March 1, 2007, seconded by Milt Galke and carried unanimously.

Chairman McGrath reviewed the procedures for taking testimony for the pending petitions with the persons assembled for the meeting, noting, that if your case was approved, a building permit is required and it can be picked up at the Building Inspection Department. Mr. McGrath also noted that it takes 4 affirmative votes to approve any variance request.

The first petition called was that of John & Rebecca Himmelspach, Case No.2535. Mr. McGrath read the petition. It was noted that 37 addresses were notified by mail and that publication had been made on two occasions. Jennifer Curtis from House Beautiful spoke on behalf of the owners of 3965 S Cavendish and came forward to speak in favor of the petition. The board requested additional information to be brought to the next meeting

**Mr. Goetter made a motion to table till the next month and Mr. Loohaus seconded the motion.**

**Motion to table was approved unanimously 5 to 0.**

There was no one further to speak in favor of the petition, and there was no one to speak in opposition to the petition. Mr. McGrath stated there was a letter in opposition to variance and that if the neighbor did change her mind she would need to sent another letter stating she was in favor of the variance.

Chairman McGrath reviewed the procedures for taking testimony for the pending petition with the persons assembled for the meeting, noting, that Attorney Long would speak first on behalf of the Appellant, then City Attorney Mark Blum would speak on behalf of the Plan Commission and then Attorney Gatzke will speak on behalf of the owner & developer. If anyone in the audience has anything else to add they may speak after as long as it pertains to the appeal.

The second petition called was that of The Deer Creek Inn and Conference Center, Case No. 2536. Mr. McGrath read the petition. It was noted that 15 addresses were notified by mail and that publication had been made on two occasions. Attorney Michael Long came forward to present his case to the board. Mr. Long explained that they believe that what the Plan Commission approved on February 5, 2007 is different than what was approved in the PUD ordinance in 2001. Mr. McGrath asked at this time if the appeal was being limited to just the height issue or if the appeal still included the setback issue and the storm water issue. Mr. Long stated that the appeal was being limited to the height issue. Mr. Long stated that in January 2001 the PUD which the ordinance was attached to his letter, specifically states in Section 2 of the ordinance that what was being proposed is a full service hotel and conference center featuring a five story hotel structure containing up to 405 guest rooms. In Section 2 Sub 8 of the PUD Ordinance 2128 which addresses the issue of building height, it said that the building height shall conform to existing zoning ordinances. In January of 2001, the exiting height ordinance for hotels height limit was 55 feet. Six years later on February 5 the Plan Commission was there to consider a use approval for the applicant Deer Creek Inn and Conference Center and that evening the Plan Commission approved a 94 foot hotel and based on the testimony of some of the representatives of the developer that evening said the roof could reach up to 110 feet depending on the amenities located on the roof. This is twice the size of what was approved back in January of 2001 with the initial PUD ordinance. Mr. Long's client maintains that an amendment to the January 2001 PUD ordinance is required and the City's Ordinance sets forth the process by which a PUD Ordinance is amended, which requires not only the approval of the Plan Commission, but also the City Council. Mr. McGrath stated that the issue is; did the Plan Commission have the power to grant the height for the hotel that it granted given the language that the Council used in the PUD Ordinance.

The next person to speak was Mark Blum City Attorney. He stated that what we are discussing tonight is the integrity of the process and whether the Plan Commission exercised the authority that was given to them within the bounds of the ordinances of the City of New Berlin. A PUD is an overlay; it's an additional set of circumstances that apply to a particular piece of property. Each property has an underlying zone under the code, the PUD is an overlay which gives relief or makes adjustments to certain conditions that are set forth in that underlying zoning. The existence of the overlay then provides an additional set of requirements that have to be considered at the time a use application is submitted. Mr. Kessler explained that the function of a PUD ordinance is primarily to take an existing site and modify current code for the specific project. When the City takes in an

application for a use approval with a PUD on the site we look at both the PUD ordinance and the existing code at the time the application for use approval is applied for. Mr. Kessler stated that how we always reviewed applications is we look at the use approval application when the use approval application is submitted. We look at the current code in effect at that time.

The next person to speak was Attorney Jim Gatzke. He stated that there were issues with the height of the building and that a PUD gives you flexibility to adjust plans. The PUD gave guidelines to the developer so he could put together a package to present to the City and say this is exactly what the developer did when he submitted the plans.

There were three residents that came up to speak, but their testimony did not pertain to the case, except that one resident noted that he believed only a 5 story hotel was presented to the public at the time of the PUD Ordinance.

There was no one further to speak in favor of the petition, and there was no one to speak in opposition to the petition. The evidence in Case No. 2536 was declared closed.

**The appeal considered by the Board was that of Janacek Investments Inc., Case No.2536. Mr. Loohuis made a motion to deny the appeal and Mr. Galke seconded the motion.**

**The appeal was denied 4 to 1.**

There being no further matters to be discussed in front of the Board of Appeals, the said meeting was adjourned at 9:00 PM.

Respectfully Submitted

Lori Schulpus, Inspection  
Clerk/Typist