



February Case Law Update February 27, 2009

Wisconsin Supreme Court

No planning related cases to report

Wisconsin Court of Appeals opinions

PUDs can reflect changes in underlying zoning

[Janacek Investment, Inc. v. City of New Berlin](#), an unpublished opinion of the Wisconsin Court of Appeals (meaning it has limited precedential value), provides an interesting situation involving a planned unit development (PUD). A developer planned to construct a mixed-use facility comprising a hotel, conference center, indoor water park, retail shops and restaurants in the City of New Berlin in southeastern Wisconsin. A PUD ordinance for the project was adopted in January 2001 making the underlying zoning B-1 with a PUD overlay.

The stated purpose of the PUD was "to create a zoning district that allows creative project design and flexibility from the rigid development standards of underlying zoning districts." The PUD stated that the conference center would feature a five-story hotel and two levels of below-grade parking, and provided that "[b]uilding height shall conform to existing zoning ordinances." The City's zoning ordinances in effect at the time the PUD was approved limited hotel building height in B-1 zoning districts to fifty-five feet. However, soon after the adoption of the PUD, the City revised its zoning code to allow hotels to exceed the maximum height requirement of 55-feet by up to 2 floors if underground parking was provided. In December 2006, Deer Creek submitted a request for use approval under the PUD to the Plan Commission. The use approval took advantage of the changes to the underlying zoning and proposed a seven-story, ninety-four-foot-high hotel with five levels of below-grade parking.

The Plan Commission granted the use approval and a neighboring property owner initiated this challenge to the approval. The neighboring property owner argued that "existing zoning ordinances" meant existing at the time the PUD was created. If not, the neighbor argued that it would mean the City substantially changed the plans for the proposed development under the original PUD, thus effectively amending the PUD ordinance without proper notice. The City and Developer argued that the phrase "existing zoning ordinances" meant the ordinances that exist at the time use approval is sought.

The Court of Appeals sided with the City and the developer and found that the City's approval of the larger hotel was proper. The Court seems to have been persuaded by its conclusion that the City meant this PUD to be flexible and the City had this project in mind when it amended the zoning ordinance to provide the additional floor credit for underground parking.