

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 4, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2008AP1432

Cir. Ct. No. 2007CV1421

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

JANACEK INVESTMENT, INC. AND HANS G. STUTE,

PLAINTIFFS-APPELLANTS,

V.

CITY OF NEW BERLIN AND CITY OF NEW BERLIN BOARD OF APPEALS,

DEFENDANTS-RESPONDENTS,

DEER CREEK INN & CONFERENCE CENTER LLC,

DEFENDANT.

APPEAL from an order of the circuit court for Waukesha County:
KATHRYN W. FOSTER, Judge. *Affirmed.*

Before Brown, C.J., Snyder and Neubauer, JJ.

¶1 PER CURIAM. Janacek Investment, Inc., and Hans G. Stute (together, Janacek) appeal from a certiorari review affirming a decision of the City of New Berlin Zoning Board of Appeals (the Board). The Board upheld the City Plan Commission's grant of a use approval to Deer Creek Inn and Conference Center, LLC (Deer Creek). Janacek's essential claim is that the Board did not act according to law. Janacek contends the development for which the use approval was granted does not conform to zoning ordinances in existence when the Planned Unit Development (PUD) was created years earlier, effectively improperly amending the PUD or retroactively applying a subsequent ordinance. We conclude that the Board acted according to law and therefore affirm the decision of the circuit court upholding the Board's determination.

¶2 The facts are undisputed. Deer Creek plans to construct a mixed-use facility comprising a hotel, conference center, indoor water park, retail shops and restaurants. Stute owns and Janacek Investment operates an apartment complex that lies adjacent to the proposed development area. In January 2000, Deer Creek petitioned the City to create a PUD. The Plan Commission approved it in February 2000 and, after a public hearing, adopted Ordinance No. 2128 in January 2001, making the underlying zoning B-1 with a PUD overlay.

¶3 The stated purpose of Ordinance No. 2128 was "to create a zoning district that allows creative project design and flexibility from the rigid development standards of underlying zoning districts." New Berlin, Wis., Ordinance No. 2128 (Jan. 9, 2001). As is relevant here, the ordinance 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." Zoning ordinances in effect in January 2001 limited hotel building height in B-1 zoning districts to fifty-five feet.

¶4 Soon after, the City revised its municipal code. The relevant section of the revised code, now §275-34(D)(3), provided that “[h]otels ... 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” NEW BERLIN, WIS., CODE §275-34(D)(3) (2005).¹

¶5 In December 2006, Deer Creek submitted a request for use approval to the Plan Commission. The request sought approval of a seven-story, ninety-four-foot-high hotel with five levels of below-grade parking. The City’s Department of Community Development analyzed the request, prepared a report which noted that the height of the hotel was “governed by the current underlying code” and recommended approval of Deer Creek’s request. On February 5, 2007, the Plan Commission granted the use approval. Janacek filed a petition with the Board challenging the use approval. The Board denied the petition after a hearing, and Janacek sought certiorari review by the circuit court.

¶6 Before rendering a final decision, the circuit court concluded that the term “existing” in Ordinance No. 2128 (“existing zoning ordinances”) was ambiguous. The court directed the parties to provide pertinent ordinance history, specifically minutes regarding the passage of both Ordinance No. 2128 and zoning ordinance §275-34(D)(3). Upon receipt and review of the materials, the court concluded that PUD flexibility was considered during the initial PUD approval, that it was illogical that the Plan Commission would enact an ordinance designed

¹ All references to the New Berlin, Wisconsin, municipal code are to the 2005 version unless otherwise noted.

for flexibility yet require compliance with an outdated ordinance, and that the City's practice is to apply the zoning ordinance in effect at the time use approval is sought. The court affirmed the Board's decision. Janacek appeals.

¶7 Janacek challenges the Board's upholding of the grant use approval of a structure some seventy percent taller than that allowed by the ordinance adopted to create the PUD some five years earlier. Janacek argues that the Board acted illegally because it applied the wrong law and, in effect, permitted the PUD ordinance to be amended without following proper procedure. We disagree.

¶8 On appeal from a circuit court order entered on certiorari, we review the record of the Board, not the decision of the circuit court. *Hillis v. Village of Fox Point Bd. of Appeals*, 2005 WI App 106, ¶6, 281 Wis. 2d 147, 699 N.W.2d 636. Our review is limited to whether the Board: (1) kept within its jurisdiction; (2) proceeded on a correct theory of law; (3) acted in a way that was arbitrary, oppressive, or unreasonable and represented its will and not its judgment; and (4) reasonably might have made the order or determination in question based on the evidence. *State ex rel. Ziervogel v. Washington County Bd. of Adjustment*, 2004 WI 23, ¶14, 269 Wis. 2d 549, 676 N.W.2d 401.

¶9 The first step on certiorari review is to determine which facet of the Board's action Janacek challenges. See *Kraemer & Sons, Inc. v. Sauk County Bd. of Adjustment*, 183 Wis. 2d 1, 8, 515 N.W.2d 256 (1994). We then apply the portion of certiorari review applicable to that facet. *Id.* Regardless of which portion of certiorari review is applied, the Board's decision is entitled to a presumption of validity. *Id.* We may not substitute our discretion for that committed to the Board by the legislature. See *State ex rel. Ziervogel*, 269 Wis. 2d 549, ¶13.

¶10 Here, Janacek essentially contends the Board applied the wrong law.² The City finalized the PUD in January 2001 by adopting Ordinance No. 2128. The ordinance mandated conformance to “existing zoning ordinances” which, in January 2001, limited hotel building heights in a B-1 zoning district to fifty-five feet. Janacek argues that “existing zoning ordinances” means existing at the time the PUD was created. Deer Creek posits that the phrase must mean the ordinances that exist at the time use approval is sought or it simply could have stated a precise maximum height itself.

¶11 The meaning of an ordinance is a question of law that we review independently of the circuit court. *Metropolitan Builders Ass’n v. Village of Germantown*, 2005 WI App 103, ¶28, 282 Wis. 2d 458, 698 N.W.2d 301. We interpret municipal ordinances the same way we read statutes, looking first at the language of the ordinance. *Id.* If the words’ common and ordinary meaning is clear, we simply apply the ordinance to the facts using that plain meaning without resorting to rules of statutory construction. *Id.* If the language is ambiguous, however, we attempt to discern the legislative intent from the ordinance’s scope, history, context, subject matter and purpose. *Id.* An ordinance is ambiguous when it is capable of being understood by reasonably well-informed persons in either of two or more senses. *See Bruno v. Milwaukee County*, 2003 WI 28, ¶19, 260 Wis. 2d 633, 660 N.W.2d 656. We conclude the ordinance is ambiguous, and

² Although Janacek also sets forth arguments as to whether the Board kept within its jurisdiction, acted arbitrarily or oppressively, and made a decision that was unreasonable in light of the evidence, these arguments are more or less reformulations of its main one, that the Board’s decision was not based on the correct legal standards. Our analysis of whether the Board proceeded under a correct theory of law, therefore, embraces all of Janacek’s arguments, eliminating the need to exhaustively address each one. *See Kraemer & Sons, Inc. v. Sauk County Bd. of Adjustment*, 183 Wis. 2d 1, 8 n.3, 515 N.W.2d 256 (1994).

therefore may review the legislative intent to attempt to find the commonsense meaning and purpose of the words employed. See *Kania v. Airborne Freight Corp.*, 99 Wis. 2d 746, 765-66, 300 N.W.2d 63 (1981).

¶12 We are persuaded that “existing” means existing at the time the party applies for use approval. Minutes from an August 2, 1999, Plan Commission meeting reveal that the Commission discussed modifying height restrictions through a PUD and the desirability of granting specifically to hotels additional floor credits in exchange for underground parking. This was well before Deer Creek sought PUD rezoning. In addition, as noted, Ordinance No. 2128’s express purpose was to create a zoning district that would allow “flexibility from the rigid development standards of underlying zoning districts.” And what is now §275-34(D)(3) was adopted just weeks after Ordinance No. 2128 was passed, strongly suggesting that the City had Deer Creek in mind when it so amended the municipal code.

¶13 Finally, the transcript of the April 2007 meeting at which the Board reviewed the grant of the use approval to Deer Creek makes clear that where, as here, a party applies for a PUD at one point and seeks use approval at another, Plan Commission standard practice is to apply the zoning code in effect when use approval is sought. A Board member explained:

[T]he whole purpose of the PUD is to set forth structure in which to review the use application Were you not to look at it that way[,] if you were to say we have to revert back to the way it was when the PUD was adopted[,] then any ... legislative changes that the council would have decided to make over time would have been therefore of no [e]ffect. It would not give the opportunity for the [common] council to react to market changes[,] to the needs of the community, to modify the zoning ordinance with respect to the issue of height or anything else; they would have been stuck back with whatever the conditions were back in 2001.

And then, specifically addressing the word “existing,” he explained:

[T]he council gave discretion to the plan commission by referring to the “existing” zoning ordinances. What they’re saying is we recognize things are going to change over time so ... we’re going to give you the flexibility to apply whatever that code is with whatever changes occur, you look at in the context of what’s in the books at the time the use application is made. We’re giving you that discretion[;] we’re not going to say it’s 55 ft. If they wanted to do that they could have stopped and just [said] 55 feet period, it wouldn’t have referred to the existing zoning ordinances[.] [T]hat would have been surplusage and would have made no sense. The reason they did it this way is to give that very flexibility that you’re referring to. And I think that shows the wisdom of the council to allow the plan commission to respond to the changing conditions as reflected in the revised zoning code.

¶14 Against this background, Janacek’s remaining arguments tumble. It contends, for example, that Deer Creek substantially changed the plans for the proposed development since the PUD was approved, thus effectively amending the PUD ordinance without proper notice. In support, Janacek cites a city ordinance providing that “[a]ny amendment to the text of an approved PUD ordinance shall require Plan Commission review and Common Council approval.” NEW BERLIN, WIS., CODE §275-23(J)(2) (2006). It also looks to *Herdeman v. City of Muskego*, 116 Wis. 2d 687, 690, 343 N.W.2d 814 (Ct. App. 1983), and *Gloudeman v. City of St. Francis*, 143 Wis. 2d 780, 784, 422 N.W.2d 864 (Ct. App. 1988), for the proposition that a substantial change to a zoning ordinance requires reactivation of the procedural process.

¶15 Janacek’s argument fails because it rests on the premise that Ordinance no. 2128’s restriction to “existing zoning ordinances” means existing at the time a PUD is created. We have concluded that that is not the case. Deer Creek’s use approval was granted under §275-34(D)(3), which was properly enacted *before* Deer Creek applied for use approval. Therefore, Janacek’s

associated argument that the Board retroactively applied §275-34(D)(3) likewise fails in that regard, as well as to the extent it suggests it had a vested right in the retroactive application of the zoning ordinance. Neighboring property owners do not have a vested right to rely on existing zoning laws. See *Ballenger v. Door County*, 131 Wis. 2d 422, 428 n.4, 388 N.W.2d 624 (Ct. App. 1986). Nor did Janacek suffer a due process violation. Public hearings were held before both the PUD ordinance and §275-34(D)(3) were passed. Due process guarantees the right to a hearing, not to a certain result.

¶16 Finally, Janacek asserts that the PUD ordinance “limited” Deer Creek’s project to five stories and two levels of below-grade parking when it said:

The principal use will be The Deer Creek Inn & Conference Center which is a full[-]service hotel and conference center featuring a five[-]story hotel structure containing up to 405 guest rooms. The facility would include a conference center with banquet and meeting room facilities, up to 15,000 sq. ft. of retail and commercial tenant space[,] ... up to 2 full[-]service restaurants ... [and] [t]wo levels of below[-]grade parking and surface parking [to accommodate] approximately 1,000 vehicles.

We disagree. We read it simply as a description of the proposed project.

¶17 Our task is not to pass on the merits of the project or the wisdom of the ordinance. We review only the Board’s action. Because we conclude it was proper, we affirm.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

