

# Freedom Matters

## A Weekly Newsletter

Dane County, Wisconsin

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We are a free people in a republic, under a constitution which limits the powers of government to those necessary to secure the unalienable rights of each person to their life, liberty and property. Yet, when a legislature is in session, no one's life, liberty or property is safe. It's the curse of a democracy. That's why we have a republic instead. *Freedom Matters* dedicates itself to be a watchdog who helps protect our freedoms from government excess. A free press must, for the courts seriously fail to do so.

### News Briefs

This is the Premier Issue of *Freedom Matters*, a weekly e-mail newsletter dedicated especially to property rights. To subscribe or unsubscribe, call 831-6653.

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**WILL "SMART GROWTH" TAKE YOUR LAND VALUE? Will it regulate away your freedoms? Hear Larry George, head of the state of Oregon's property rights movement, who helped get Oregon to vote to compensate land owners for land value lost to regulations. Larry will speak here in Madison, Friday, September 14, at The Bar Next Door, 232 E. Olin Ave. (next to Jingles) at 7:00 PM. For reservations, call Bob Bowman (831-6653) or Bill Hitzemann (437-8679).**

Coming Attractions. Readers' Bulletin Board. E-mail us your comments. If you want them published in our e-mail edition, say so, and include your name. No anonymous publications, and we reserve the right to delete parts, or not to publish.

Future Articles. 1. The County Exec's Attack on a Farmer's Right to Live on Their Own Farm. 2. Can We Keep Smart Growth from Being Stupid Growth? 3. The Progressive Agenda for the North Beltline: Let's Study It to Death. 4. The County Exec's Budget Priorities: Cut Senior Care and Buy More Park Land. 5. Peasants in Our Own Time: The Rebirth of Feudal Tenure. 6. Urbanites Who Move to the Country: You're Rural Now and Better Act It.

### FEATURE ARTICLE

#### **IS A CHURCH A BAD NEIGHBOR TO HAVE? YOU BE THE JUDGE. THE HAUGE LOG CHURCH VS A FARMER'S RIGHTS IN THE TOWN OF PERRY**

by Michael Byrne and Bob Bowman

**IT'S GETTING SCARY IN PERRY.** Farmer David Gehl wants to build his farm home and a pole shed on his 200+ acre farm, on a hill where a county road gives him the best access to his farm fields on the terrain below. This is his right, under the county zoning ordinance. His problem is, the Town of Perry Board has tried to stop him. Did one of them break the law? Therein lies a sorry tale.

The troubles began when the Perry clerk issued a "Town of Perry Land Division Application" to Fred and Mary Smith, who proposed to sell the south 22 acres of their farm to David Gehl, for a field road to access his adjacent farm fields. What right did the Town have to require such an application?

### **The Town Was in the Wrong**

In this case, the Town had no right at all. The Town admitted so in their June 13, 2000, Perry Board minutes, which cite their attorney to say that Perry's Land Division Ordinance did not apply to this sale between adjacent land owners. Oddly, the Board refused an open records request for the opinion.

Did the Board hide that state statutes exempt such sales from control by local ordinances, if the sale creates no new parcels; i.e. if the Smith parcel became part of Gehl's farm.

Fred and Mary Smith also filed with the Town clerk a "Town of Perry Driveway Construction Permit Application" for Gehl's field road on the south boundary of the parcel. It turned out that even this application exceeded the Town's authority.

June 13, the Perry Board admitted so, by passing a motion (2 yes, 1 no) that no action by the Board was required, since Gehl had not applied for a rezone, building site or driveway, and the Town did not regulate field roads.

Were fees paid for these two applications? Did the Town refund them?

### **The Pole Shed Mishandling**

Between June 13 and November 14, Gehl cleared a site on the land for a pole shed. This was observed by neighbors and Board, who felt it was too close to the Hauge Church.

November 14, without an agenda item to notice that they would act re the Gehl property, the Board acted. The minutes record it:

"The Clerk reported .... that as directed by the Land Use Committee a letter stating building permits are required by the Town of Perry for all buildings was sent to David Gehl on November 8, 2000. The Clerk reported that Mr. Gehl contacted the Clerk on November 9, 2000 and stated that he is planning to build a pole building in January, 2001 and will be applying to the Town of Perry for a building permit prior to construction. The Board discussed options available to deny the issuance of a building permit to David Gehl." [underlining added]

As part of it, the Board heard testimony from neighbors opposed to a building permit for the site. The Board chair cited alternatives he had investigated for ways to deny it.

The Board then passed a motion not to issue such a building permit and instructed the clerk to

so notify Gehl by letter. The resultant letter to Gehl (sent November 16) stated:

"The Town Board will not issue a building permit for any building on the site which has been excavated and prepared due to its proximity to the Hauge Church, a historic site."

### **Did the Town Violate Open Meetings?**

At issue is the Wisconsin open meetings law. Did the Town Board violate it? The courts will eventually decide the legality of it. Gehl has sued over it.

Who of us would grant a Town Board the right to act concerning us unless we were personally notified in advance? This is a Town Board that expressed the need to notify the neighbors before acting. Why then did it act without notice to the landowner?

So, by common standards, the Town did wrong.

### **Is Perry's Building Ordinance Legal?**

The Perry Building Ordinance cites this authority: "**1.03 Authority** These regulations are adopted under the statutory authority granted pursuant to sec. 101.65, 101.651, 101.76, and 101.761, and by its adoption of village powers under sec. 60.10(2)(c), 60.22(3) and 61.34(1) of the Wisconsin statutes."

First, can the Perry Board prove village powers?

Second, even if it can, s. 60.22(3) says a town's village powers are limited to those which do not conflict with statutes on towns and town boards. Hence, s. 60.62 (a statute not cited by Perry's ordinance) is critical. It says the Perry Board has no zoning powers unless approved by the town electors and by the Dane County board. Perry has no such approval, as attested by county corporation counsel.

This says that Perry has no zoning powers.

### **Perry's Claim of Siting Authority**

The Perry Building Ordinance claims the authority to site buildings. The power to site buildings is the power to decide land use; i.e., it is a zoning power.

Hence, since Perry has no zoning power, as noted above, then it has no power to site buildings.

### **Perry's Claim of Permitting Authority**

Perry's Building Ordinance relies on statute 101, which requires Perry to adopt the state uniform dwell-

ing code and the state building permit application forms. Has Perry done so? Its Ordinance does not say.

Finally, and critically, the Perry Building Ordinance claims the authority to regulate buildings other than dwellings. Yet, statute 101 as cited by Perry only gives it the authority to regulate 1- and 2-family dwellings.

This says Perry has no permitting authority over accessory buildings or agriculture buildings.

### Did Perry Exceed Its Authority?

The above facts indicate that the Perry Board is on shaky legal ground, if not over the brink. Yet, it exacerbated its legal position by proceeding to adopt a very aggressive course on the Gehl issue, as follows.

December 12, the Perry Board again acted on the Gehl matter without notice that it would do so; i.e., its agenda said it would merely "Report/Discuss" it.

The minutes record it as follows:

".... on Nov. 20, 2000 Mr. Gehl delivered a Building Permit Application and a remittance in the amount of \$15.00 to the clerk. The Board reviewed Mr. Gehl's Building Permit Application. .... Mr. Gehl's planned building at its current site could be a public nuisance due to the proximity to the historic Hauge Church. Larry Price moved and Dan Keller seconded a motion to deny the building permit to .... [Gehl] .... and to authorize the Chairman and the Clerk to enforce the Building Permit Ordinance if necessary through civil action by hiring Atty. Mark Rooney. Motion carried."

December 21, the Clerk by letter informed Gehl of the above board action, and said the Board was willing to meet with him re an alternative site.

### "Democracy at Its Best"

So said the Perry Board chair, March 17, 2001, about the Board's actions on Gehl's property. The facts, before and after, suggest it is otherwise.

March 13, the Perry Board minutes describe negotiations between Gehl, the Hauge Church Preservation Association and the Perry Board, at the Board meeting, re the site for Gehl's pole shed, and the offer of the Association to buy a buffer strip from Gehl and deed restrict other of his property.

The Board also cited to Gehl the Building Ordinance section by which it denied his building permit.

The Board and Gehl agreed to meet at his pole shed site on March 17, and to invite the Perry Church Council's President Ken Stamm and the Hauge Church Preservation Assn president, Gary Boley

March 17, the Perry Board minutes indicated as follows. Gehl asked if the Board would accept a pole shed site agreed to by Gehl and the Hauge Log Church Preservation Association. The Board said yes, and said it would probably approve a complete Site Plan acceptable to the Association that included a homesite, driveway and ag accessory building, and it reminded Gehl that it has the authority to approve Site Plans.

Gary Boley reported that the Association and Gehl were scheduled to meet, to try to come to an agreement.

However, Ken Stamm, representing the Perry Lutheran Church Council, reported that the Council voted unanimously not to participate in the siting or approval process.

March 29, Gehl filed the Site Plan with the Clerk, but protested in writing that the law did not require it. He also had to pay a Town filing fee of \$500 for it, which he did, by check.

April 4, a Notice was posted by Larry Price, Town Board Supervisor, for a Perry Town Board Meeting April 7 at the Jelle property (9 AM), at the Laufenberg property (9:30 AM), and at the Gehl property (10 AM), with this agenda:

1. Call to order.
2. Issuance of citations for Town Ordinance violations.
3. Selection of court system to use for citation enforcement.
4. Any other business properly presented.
5. Adjournment.

Gehl has said he did not get the above agenda, but instead got a Perry Land Use Committee Meeting Notice for April 9, which at the bottom, merely said: "Site Views for the Scott Jelle, Steve Laufenberg, and DSG properties will be held on Saturday, April 7, 2001, beginning at 9:00AM."

April 7, the Perry Board minutes state:

"Pat Downing called the meeting to order at 9:35 AM at the Scott Jelle property .... [and] explained the procedures for issuing citations. ....

"The Board proceeded to the Laufenberg property .... The Board then travel [sic] to the Hauge Church next to the .... Gehl property .... [where] Town residents .... [and two] Dane County Deputy Sheriffs ,,, [were waiting].

"The Board observed the .... [Gehl] .... property. .... It was apparent that driveway construction had begun. The soil was bladed and crushed rock was applied and leveled in the area that corresponded to the site plan .... There was also some site preparation for a building, land that that [sic]

had been leveled, graveled and graded, in the area that corresponded to the location of the ag building site on the site plan. ....

"Larry Price moved and Dan Keller seconded that a violation of the Town's driveway permit ordinance had occurred .... , specifically construction of a driveway without a driveway construction permit. Motion carried.

"Larry Price moved and Dan Keller seconded a motion that a violation of the Town's Building Permit ordinance had occurred .... , specifically construction of a building without a building permit. Motion carried. .... Pat will direct the Clerk to issue additional citations each day until the violations are corrected. ....

"The Land Use Committee then conducted their site visit on the .... [Gehl] .... property."

April 10, at their annual meeting, the Town of Perry electors authorized the Town Board to purchase, at a minimum, a 250-foot wide strip of land surrounding the Hauge Log Church and Cemetery, for which the electors authorized up to \$50,000 levied in taxes. The electors also voted for the Town Board to consider adopting a Town Historic Preservation Ordinance.

April 17, the Perry Board minutes note a discussion of Gehl's site plan application, at which Gehl's attorney offered compromises.

April 25, the Perry Board minutes describe various compromises offered by Gehl, by Gary Boley for the Hauge Church Preservation Association, and by the Perry Board. However, no meeting of the minds was described.

Gehl asked for a vote at this meeting. The Board then voted to deny Gehl's Site Plan Application including dwelling and driveway construction.

May 15, the Perry Board minutes record that the Town had changed attorneys.

May 24, the Dane County Zoning Administrator approved Gehl's Farm Plan, thus permitting him to build a farmhouse on his land. The same day, the Town of Perry Board appealed that decision to the Board of Adjustment. The results of that appeal will be the subject of a later news story by *Freedom Matters*.

Meanwhile, in June, Gehl commenced four legal actions against the Perry Town Board and its officers. Those actions are in progress.

### **The "Hauge Church" Issue**

The Hauge Log Church sits next to the Gehl property. As an historic icon, it seems desecrated by having its logs covered with clapboard siding.

The church, built in 1852, has not been used for worship for over a century. Its congregation long ago moved to a new church which itself no longer exists, though its cemetery is still used for burials. Its congregation has merged with the Perry Lutheran Church in Daleyville, which thus now owns the Hauge Log Church.

In other words, it seems the "Hauge Log Church Preservation Association, Inc." has no property rights in the Hauge Log Church. The Perry Town Board clearly has no such rights.

Note. The Perry Lutheran Church Council, which owns the log church, voted unanimously not to be involved in the dispute with Gehl.

So when is a church a bad neighbor?

One answer is when people who have no property rights in the church act to take away the property rights of a church neighbor, even if the church owners refuse to do so.

Has that happened here? Is this "democracy at its best?" Or, as Gehl claimed to the Perry Board, is this "mob rule?"

### **County Ordinance Amendment 4**

As a result of the Perry-Gehl conflict, County Executive Kathleen Falk held a press conference in front of the Hauge Log Church, and announced the introduction of O.A. 4 to require a farmer to rezone in order to build a farmhouse, claiming this would give towns the authority to site farm houses. In other words, she was saying that Perry does not have siting authority.

### **Has the Perry Board Abused Gehl?**

If the Perry Board has no legal authority to require building permits for accessory buildings, then it has no legal authority to accuse or fine a landowner for constructing such a building without a town permit.

If so, it has abused Gehl big time.

If the Perry Board has no legal authority to site buildings, then it has no legal authority to require Site Plans, or to inspect the siting of buildings, or to charge fees for same.

If so, it has again abused Gehl big time.

*Freedom Matters* will continue to follow this story.