

# 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 which helps protect our freedoms from government excess. A free press must, for the courts seriously fail to do so.

**News Briefs** War and terrorism are tragedies, as we have just seen. Let us not compound the tragedy by letting it cost us more of our freedoms.

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### FARMERS & RURAL HOMEOWNERS

**TAKE NOTE!** Dane County's Ordinance Amendment 4 is another raid on our freedoms. It would require farmers, or anyone, on land zoned as A1-Exclusive to rezone in order to have a residence. It is in public hearing before the county zoning agency, the ZNR. A continuation of that public hearing is now scheduled for 5 PM, Tuesday, September 25, at the City-County Building on Martin Luther King Jr Blvd, in Madison. A substitute amendment, OA 4 Sub 1, will be offered then, which proposes to treat residential use as a conditional use instead of requiring a rezone. This is still a drastic measure, though it has the advantage that it would keep farmhouses out of the hands of the County Executive, and thereby out of the employment of vetoes as a land use tool.

### RURAL CLEANSING IN DANE COUNTY.

It's happening! Fourteen homeowners on Fish Lake, which is a seepage lake, are faced with gradually rising water levels threatening to flood them out. They have worked with DNR, who determined that the only good solution was to pump the lake water down, and, via a four mile pipeline, into the Wisconsin river. Yet, DNR has stalled on funding it (cost: \$250,000). Now the county, instead of helping to pump the lake, is seeking a FEMA grant of some \$1.5 million dollars to buy the home owners out. It seems the County Executive wants them off the lake, almost at any cost. About two years ago, a developer who was going to put more home owners on Fish Lake was cajoled into selling his land to the county and letting it be kept undeveloped. Great for the 14 home owners already there, until now. NIMBYism is a risky business.

## Feature Article

### The Perry-Gehl Dispute. Part II. Is This a Case of Government Abuse of a Farmer?

By Bob Bowman.

Imagine a lovely home in a rural countryside, and you walk in and find it remodeled into a torture chamber. That's the jolt this case delivers.

David Gehl described Perry government as "mob rule." His attorneys called it a conspiracy against his civil rights. Yet, the Perry Town Chair called it "Democracy at its best."

In a terrible way, are all three right? The case continues to unfold, one horror after another.

#### A Permitted Use, by Law

Part I of this account, last week, ended where Gehl, at a stalemate with the Perry Town Board, applied to the county zoning department, a subdepartment of the Planning and

Development Department (the PDD), to build a farm house. That by law is a permitted use for a farmer.

The county's exclusive agriculture zoning ordinance conforms to state statutes, which say that "the minimum parcel size to establish a residence or a farm operation is 35 acres." "Minimum" means "no less." The statute also cites as a "minimum" that homes are permitted for a farm owner or operator, or certain family members.

That preserves our traditional family farm. By any other meaning of "minimum," the farmland preservation bill would not have passed.

Thus, the county exclusive agriculture zoning ordinance (s. 10.123) lists as a *Permitted Use*: "Residence for farm owner/operator. Substantial income must be derived from the farm operation."

#### Back to Basics

The most fundamental principle of zoning law is that a permitted use is permitted.

Readers' Bulletin Board. If you have comments you want published, e-mail them to us and include your name. We reserve editor's rights to delete parts or not publish.

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That means that the zoning administrator can neither stop it, nor modify it.

**Neither can the town! Not without violating the zoning ordinance.**

The zoning ordinance leaves only one issue for the county to resolve; i.e., is "substantial income" derived from the farm operation.

Zoning Administrator Jim Gregorious applied PDD policy, which sets a minimum of \$6000 per year for three years. Gehl reported farm income of over \$80,000 per year for more than three years. Gregorious ruled that Gehl passed the income test. The decision wasn't even close.

**The Perry Board Appeals.**

Perry ignored the basics. Within hours of Gregorious' decision, the Perry Board filed an appeal of it with the Board of Adjustment, asking that it be remanded..

**The Board of Adjustment(BoA)**

BoA ignored the basics too. By statute and zoning ordinance, BoA is a five-person administrative panel appointed by the County Executive and confirmed by the county board.

Among its administrative duties, BoA is to hear appeals from decisions of the zoning administrator. In conformity with law, the Board may reverse, affirm or modify the decision of the zoning administrator, and "make the .... decision .... as ought to be made, and to that end shall have all the powers of the officer from whom the appeal is taken."

The statute does not authorize BoA to make law or policy, nor to remand for that purpose.

So, the Board of Adjustment, as an agency of the county, is merely to put itself in the zoning administrator's place and make the decision the zoning administrator ought to make.

**The BoARuling**

The Board of Adjustment held a hearing on the Perry Appeal, and then ruled thus:

**Motion 1.** ".... to sustain the Town of Perry's Appeal and remand back to the Zoning Administrator, finding that and to find [sic] that the Dane County Zoning administrator's \$6,000 substantial income test is arbitrary and capricious and directing the Zoning Administrator to find a new test which is consistent [sic] with the intentions and overall policy of the A-1 Agricultural Exclusive statement of purpose, 10.123(1)(a). Motion carried, 5-0."

**Motion 2.** ".... to instruct the Zoning Administrator that any interpretation of the substantial income test must conform with, or be consistent with Chapter 91, state Statutes and 10.123, Dane County ordinances which reference the Town's Land Use Plans. Motion carried - 5-0."

**Motion 3.** ".... to direct Staff to request of the Zoning Administrator written clarification of his interpretation of owner/operator as found in 10.123(2)(b) specially [sic] as it refers to similar terms gramatical [sic] constructions in the Dane County Ordinances. Motion carried - 5-0."

**The BoARuling Is Absurd**

**BoA's first motion is nonsense.** It ignores the issue. Gehl's evidence for farm income was not contested, and it is so large (over \$80,000 per year) that if Gehl is not thereby a farmer, then Dane County has no farmers.

Did BoA ignore Gehl's reported farm income, just so they could rule against him?

In the statutes (chapter 91), farmers with sufficient farm income can get state farmland tax credit. Thus, the county adopted the same farm income test that the statute uses as sufficient to qualify for farmland tax credit [s. 91.01(6)].

Hence, the zoning administrator used the right test, and BoA's ruling was arbitrary and capricious.

Finally, BoA attacked county policy, rather than decide the issue. The farm income policy was set by the zoning administrator's bosses. BoA may lament county policy, but still, must follow it.

In sum, BoA's ruling failed to address the issue of Gehl's actual farm income. Is that a dereliction of duty so serious as to violate Gehl's civil rights? The facts give reason to think so.

**BoA's second motion is nonsense.** Read it. It cites no errors, and decides nothing. Its wording hints that it may refer to two findings of fact listed by BoA; i.e., (#3) the farmland preservation statute (Chapter 91) references town's land use plans, and (#4) Perry's land use plan prohibited Gehl from building on land he purchased from a farm that had used up its building sites.

BoA is wrong if it means to say that Perry's land use plan thus prohibits Gehl from building his home.

The law is clear, and BoA's ignorance of it is no excuse. Gehl's purchase of the 22 acres from Smith did not create a new parcel; the land simply became part of Gehl's farm. That's critical, because the county zoning ordinance [10.123(2)(b)] allows Gehl to build his home anywhere he wants on his farm, provided only that he meets the county's test for farm income.

To say it another way, county zoning power does not include site approval for a farmhouse. The town has no zoning power except the county's. Thus, the town has no power to site a farmhouse, no matter what its land use plan says.

Thus, BoA's motion 2 constitutes such legal nonsense that it looks like an abuse of Gehl.

**BoA's third motion is merely a query.** BoA did not contest that Gehl owns the land as defined by state statute s. 91.01(9), nor did it challenge his claim that he was the farm operator.

**Why Such an Absurd BoARuling?**

The Gehl case has become a *cause celebre* of the progressive-liberal political faction. From the county executive down to the Perry Town Board chair, that faction has lined up against Gehl, as described last week in *FreedomMatters*.

If BoA was not biased against Gehl, how else explain the absurd motions they used to rule against him? Note: the BoA members were appointed by a progressive-liberal County Executive, who stood in front of the Hauge Log Church and publicly proclaimed her bias against Gehl's farmhouse.

This County Executive also publicly said, when asked how she would protect our civil rights, that we could sue her or vote her out of office. In like vein, she has proposed to confiscate a half a billion dollars of property value from Dane County farmers, and to deny them a home on their farm. Why is she so biased against people's rights?

**A Conspiracy Against Civil Rights?**

When politics overrules law, our civil rights are in danger. Is this case one of conspiracy against Gehl's civil rights? His lawyers charged so.

The record suggests they may be right.

*Freedom Matters* will continue to follow this story.