



## Towns ask state legislators to fix flaw in annexation law

*New legislation allows towns to challenge non-contiguous annexations in court*

**Kim Lamoreaux**  
*Editor*

Throughout several hours of testimony last month, town officials around Wisconsin appealed to state lawmakers to fix a gaping hole in annexation case law.

They were asking for legislative action via Assembly Bill 239, that could alter a legal precedence set by a lawsuit by the Town of Merrimac against the Village of Merrimac.

The town challenged an annexation of land based on its disconnection, or lack of contiguity, with the village limits.

Rather than deciding the case on the merits of the town's contention that the annexation should be deemed illegal, the court instead decided the town had no standing to bring the case in the first place.

The case specifically was about a "direct unanimous" annexation, one for which the landowner himself petitioned the Village of Merrimac. Such a petition for annexation directly by the landowner gives no town an ability to contest a city or village's removal of town land.

At the State Assembly's Committee on Renewable Energy and Rural Affairs last month, Town of Merrimac administrator Tim McCumber told legislators the annexation petition of David Gerry at the heart of the State Supreme Court decision was a reaction to the town enforcing its zoning rules.

McCumber told legislators Gerry commenced construction that town officials believed was beyond the scope of the building permit because it included a garage with a second residence above it, violating the town's zoning ordinance.

When Gerry was asked to apply for a conditional use permit from the town's zoning and plan commission, it became clear the commission did not want to approve the second residence.

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This \$2.5 million property on Lake Wisconsin was at the heart of the case of *Town of Merrimac vs. Village of Merrimac* that reverses the age old requirement of contiguity and takes away a town's right to challenge an annexation.

## TDR workshop is June 30 in Pine Bluff

Last month we reported that a Transfer of Development Rights (TDR) ordinance may be back for another go-round with the Dane County Board of Supervisors and ultimately, town officials.

In 2007, however, an ordinance creating TDR's was voted down by Dane County town officials after being approved by the county board.

County board chair Scott McDonnell said in April under the original ordinance passed by the county board "there's no county control over it, but it protects towns and gives them administration help. I think somehow that fact got lost the last time."

As a way to disperse information about TDR and answer town officials' questions, a workshop is scheduled for Tuesday, June 30, beginning at 7:30 p.m. at the town hall in of the Town of Cross Plains in Pine Bluff.

The first hour of the workshop will be a session regarding TDR, prepared by the DCTA. It will review the intent and design of a county program and the proposed county

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## Contact the Dane County Towns Association

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The Dane County Towns Association newsletter is produced once per month. Deadline for submissions is the 25th of the month prior to the publication month.

Send any photo or copy submissions, to [kimlamoreaux@gmail.com](mailto:kimlamoreaux@gmail.com) or mail to or drop off hard copy at Mark Hazelbaker's office at 3555 University Ave. Madison, WI 53705 by the second Wednesday of the month.



*From the President's Desk*

## You heard right...

I am sure that many people were surprised by the news that the Dane County Towns Association Board of Directors appointed Ed Minihan, chairperson of the Town of Dunn, as the new DCTA representative to the Capital Area Regional Planning Commission (CARPC). It is no secret that there have been differences between Ed Minihan and me in the past, and that the Town of Dunn and the DCTA have not always seen eye-to-eye. Times change, however, and we must transcend those differences.

In recent years, the DCTA has been working hard to build connections with groups and interests with which we have not traditionally been close. We aren't going to agree with everyone on everything. But Dane County, though much larger than it once was, remains fundamentally a small community. We cannot succeed unless we all at least listen to one another and work together. We can't expect people to listen to us unless they know we listen to them. That's the difference between a diatribe and a dialogue.

Ed Minihan is a great choice for this vacancy. His commitment to town government, experience and concern for farmland preservation are unmatched. Ed has been the chairperson of the Town of Dunn for decades. You will find from talking to him that he shares a passion for the value of town government. He believes that towns, just like cities and villages, should have the right to pursue their own policies and goals. He has strong ideas about what those policies and goals should be, but he is open to discussing alternatives.

Most notably, Ed Minihan shares our concern that the current land use planning and sewer extension process offers towns no real chance of survival and growth. The process wastes farmland in the interest of expansion of cities and villages even though that growth may not be good for anyone, most especially those cities and villages.

At the time the struggle over the Regional Planning Commission began in 1996, the Towns had two major problems with the RPC. One, we were concerned that urban towns have the right to grow and obtain sewer service even though they were towns. Secondly, we were concerned that sewer expansions in cities and villages were usually adopted over objections of adjacent towns with no effort made to consult with that town. And yet, towns were bearing the impacts of development, whether from storm water, traffic, or destruction of longstanding communities.

Although we did not agree at that time about the RPC, Ed Minihan has always agreed with us that growth is not automatically good just because it happens in a city or village. And, growth in towns, if well planned and focused, is

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# Towns stay in driver's seat on long driveways

*Kim Lamoreaux*  
*Editor*

Driveway approvals will stay under the realm of town government after all, based on a decision by the Dane County Zoning and Land Regulation Committee (ZLR) last month.

The ZLR was rejecting a number of proposed zoning petitions on the ground that the areas being rezoned would have to be served by long driveways.

But during a public forum at the May 26 meeting, the ZLR took action resulting in a decision that it will not be enforcing a policy prohibiting long driveways.

Over the past few months, driveway lengths emerged as an issue in several proposals to rezone small parcels from farm properties. The rezoning proposals seemed consistent with the one per thirty-five acre splits allowed in the farmland preservation zone.

The controversial proposals called for rezoning land located at the back of the parcel, well away from the town road. Because of the location, the proposed parcel would require a driveway connecting it to the town road, sometimes more than 1,000 feet in length.

Dissension arose earlier this year when the ZLR began asserting that there was a policy which strictly prohibited driveways more than 1,000 feet in length. On the basis of that policy, the Committee rejected several zoning proposals in the Town of Deerfield and other areas. This, in turn, led to criticism from a number of individuals and questions from the DCTA and town officials.

For instance, at the Dane County Towns Association (DCTA) meeting on May 13, Town of Deerfield chairman Bob Reige said he became aware of the heightened county level scrutiny when his own rezoning petition came under review by the committee ZLR last month.

It had already been approved by the town board in a 6-0 vote (with Reige recusing himself). Reige's petition was to re-designate A-1 Exclusive Ag to A-2 to allow for three residential lots.

"Land planning and development is starting to enforce a 1000-foot driveway length," said Reige at the DCTA meeting. "It's not written policy. It's not fair if we have to implement this into our town plan. The town saw no reason to deny this because it keeps A-1 farmland."

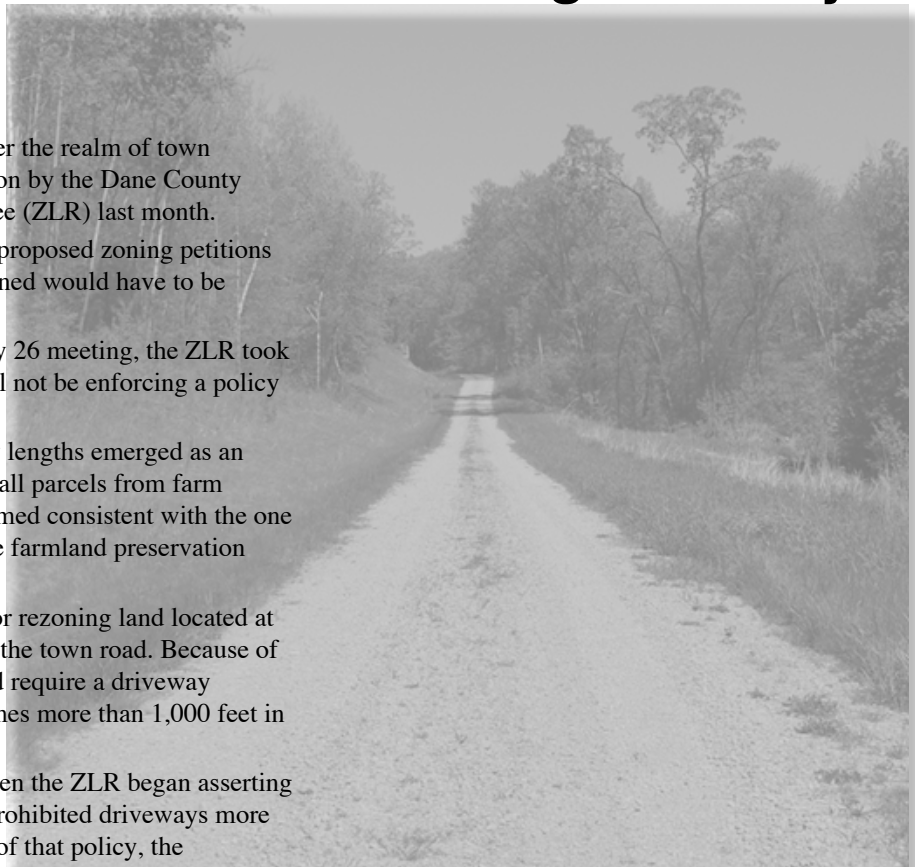
Dane County Planning and Development director Todd Violante said following the meeting the ZLR members focus on the ability for emergency vehicles to enter and exit a driveway including driveways that traverse slopes, wooded areas and over streams.

"The concern is if a tree goes down or if there is a flood there is difficulty getting back with an emergency vehicle like a fire

truck," said Violante. "The (ZLR) committee factors that into their decision making. Neither the county comprehensive plan nor town plans address driveways or define long driveways. So how does the committee treat people in like situations similarly? There was a sense by committee members they didn't like long driveways under certain circumstances. What we heard Tuesday and at the DCTA meeting is we want a formal policy dealing with driveways in rural areas. This should be taken up in a formal route like a working group to come up with formal policies. It's probably time towns and the county board come up with some policies."

But ZLR committee member Al Matano, said during the ZLR's discussion of the Reige petition on April 28, "This is the zoning committee and our rules say 1000 feet (for a driveway) is the maximum. I'm not clear on why we should abdicate our authority to a third party when we've made it clear 1000 feet is our maximum. Our rules say this (petition) is unapprovable."

ZLR committee member John Hendrick agreed, saying, "The requirement on the zoning committee has existed for many years that the zoning committee has to determine and recommend whether adequate public facilities are available. (Ordinance) Chapter 75 has existed for many years requiring that public roads can't be more than 1000 feet from a through road. The most recent time the zoning committee approved a



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long driveway and sent it to the county board, the county board rejected it. It's no good for us to give people the impression that things are just like the old days and send everything on to the co board and have it be turned down there."

ZLR committee member Gerald Jensen disagreed, however pointing out the ordinances weren't clear and there was no precedence of driveway permits by the ZLR.

"I've been on this committee now for five years and I have never seen a rule that set the standard at the length of a driveway at a 1000 feet," said Jensen. "This idea that a driveway cannot be over 1000 feet is just ludicrous. If there is a state law or a county ordinance that a driveway cannot be over 1000 feet, I would like to see it."

Obviously, there are a number of points of view about the propriety of such long driveways. Some Dane County towns will not allow driveways to be constructed across prime farmland at all. These effectively preclude use of driveways to access the anterior portion of a lot. Other towns have no policy on driveways. Other towns permit long driveways because the towns believe it is better to have residences located well off the roads where the residences are not visible.

Commendably, rather than staying with an inflexible position on the matter, the ZLR asked the county attorney for a legal opinion. The public hearing last month invited comment on the desirability of a driveway policy and its implications. A number of people affected by the policy spoke, as did the DCTA attorney Mark Hazelbaker. Hazelbaker pointed out the ZLR does not have the authority to adopt policies. Policies are established by ordinance. Hazelbaker also questioned the wisdom of a policy flatly prohibiting long driveways, suggesting that the matter should be handled by individual town land-use plans and/or ordinances

At that meeting, county board supervisor John Hendrick indicated that he agreed that there was no such binding policy, and that the committee would not attempt to enforce it.

The ZLR's action is significant for a number of reasons. The DCTA appreciates the efforts by Chairman Patrick Miles to air

the controversy rather than let it simmer. Putting the matter on the agenda of the ZLR for a public hearing was appropriate, and allowed frustrated individuals to be heard. It resulted in the clarification of the issue in a relatively timely fashion and marks a positive step in relations between the county and the towns. Perhaps the ZLR will move forward on the petitions it earlier rejected on the basis of the driveway.

For the longer term, we think it is appropriate for all towns to have ordinances which address their local driveway standards. That is the basis for review and approval of zoning parcels by the individual town and the county. It is the DCTA's position that the regulation of driveways on town roads is legally a function for the town to perform, not the county. There are several model ordinances available for town officials on our web site that can be printed out and adjusted.

Hazelbaker consults with many towns in drafting ordinances and his contact information is on page 2 of this newsletter.

Finally, the DCTA is relieved that the ZLR took the conciliatory path on this issue. When a governmental body starts applying a rule no one has ever heard of before, it challenges that body's credibility. With the issue of transfer of development rights (TDR) looming in the near future, it is especially important that the town and the county have a clear understanding of the allocation of responsibilities between them.

If a TDR plan is implemented, it will succeed only if the county can win the trust of land owners. Land owners will not give up their development rights by agreeing to be in "sending areas" unless it is certain that there will be areas designated as "receiving areas." If the county designates sending areas, but it is able to find creative reasons why it will not designate receiving areas, then TDR simply won't work.

But, based upon the outcome of the driveway length issue, the DCTA is optimistic a better way of resolving county and town conflicts is emerging. The hope is that it is the foundation for more such actions in the future.



## You heard right continued from page 2

appropriate. He has indicated to us that he will be supportive of towns which have sewer service areas, and expanding those areas if the growth is well planned and well thought-out. We can ask no more from any commissioner.

DCTA, if it is to be successful, needs to work with and represent the whole spectrum of ideas among the towns. We are genuinely attempting to reach out to every town. Our selection of Ed Minihan is at least in part representative of those efforts.



But, please understand this is not tokenism. We have selected an exceptional individual to serve on an important body at a very critical time in setting the future course of Dane County.

We look forward to working closely with Ed in his representation on the CARPC.

**Ed Minihan, the DCTA's recent appointee to the Capital Area Regional Planning Commission, is long time chair of the Town of Dunn.**

## Flaw in annexation law continued

Gerry left the meeting and quickly filed for direct unanimous annexation to the Village of Merrimac.

“The (village) accepted that and it doesn’t meet with the very premise of their own zoning ordinance with two residences on a single lot,” McCumber told the assembly committee members. “One of the (village) board members said ‘it’s already there so we have to take it.’”

McCumber said the kicker is that the property was eventually valued at \$2.5 million, representing a whopping \$10,000 to the village’s tax base.

McCumber explained the basis for the town’s legal challenge to the annexation by the Village of Merrimac because of its lack of contiguity to the village limits.

“You cannot get to this portion of the Village of Merrimac through the Village of Merrimac by any stretch of the imagination,” said McCumber. “You can’t walk through someone’s backyard or drive down a village street to get to it. The only way you can get to this property by boat. We have a ferry and you can’t take the ferry to that property. (The Supreme Court case) never got to the issue of whether or not this was a legal annexation. It just addressed the town had no standing to (challenge it).”

In doing so, the court rendered contiguity a moot issue at best, and at worst, virtually superfluous and not essential to a city or village’s annexation criteria.

“This particular statute, if left as it is,” McCumber told legislators, “is in stark contrast in the exact opposite of what the legislature has been trying to do over the years.”

Assembly Bill 239, according to the state’s Legislative Reference Bureau (LRB), would correct what the Supreme Court decision did in setting case law taking away a town’s ability to “challenge direct annexation by unanimous approval, as well as several other types of annexations, including annexation by referendum initiated by a city or village, and annexation of city-owned or village-owned territory, but only on the issue of whether the territory proposed for annexation is contiguous to the annexing city or village,” states the LRB’s analysis.

Curt Witynski, assistant director of the League of Wisconsin Municipalities (LWM), said the LWM supports almost all of AB 239 except for its provision allowing towns to legally challenge an annexation.

“I think the goal of the author (of AB 239) and proponents could be addressed by simply adding the word ‘contiguous’ to (Wisconsin Statute Chapter 66). AB 239 adds the word contiguous to the relevant paragraph. But it restores the ability of a town to file a lawsuit to against a city or village to challenge the validity of an annexation if the issue of contiguity is at stake. We don’t support the bill because of that second part. If that second part was jettisoned, or removed through an amendment we would be up here with

the (Dane County) towns association supporting this bill about clarifying state law and making it clear that cities cannot annex land that isn’t contiguous.”

Wytynski said five years ago the DCTA agreed in negotiations to support legislative changes to Chapter 66 and agreed to give up the ability to legally challenge annexations.

Therefore, one of the changes to the law in 2007’s Act 43 forbids a town to file a lawsuit against a city or village challenging an annexation.

“(Towns) agreed as part of that settlement not to be able to litigate annexations,” Wytynski told the legislators. “So at least part of this bill is reneging on that agreement. The (LWM) was not part of that negotiated agreement. It was between the towns and the Wisconsin Builders and Realtors Association. We actually opposed that bill.”

State Representative Andy Jorgensen, a co-author of AB 239, asked Wytynski, “If we only added the word contiguous, and the aggressive communities you spoke of still did an annexation that wasn’t connected, how would the towns be able to raise that concern?”

Wytynski replied to the legislator, “If the law says that territory has to be contiguous, then a city or village is not going to blatantly not follow the law. That would be called misconduct in office. Is the only reason cities follow the law the threat of a town suing them? I hope that’s not the case. We’re going to follow state law, even in the absence of a lawsuit.”

But speaking for the Wisconsin Towns Association, Ann Jablonski was clear why the provision for challenging illegal annexations was necessary.

“Private non-contiguous annexations in our view are bad public policy,” Jablonski told the legislature. “The only way to guard against them is to bring action in circuit court. (State Statute) Section 66.021 also provides the limitation that new town islands may not be created with annexation except under a cooperative boundary agreement to do so. The post Merrimac situation provides cities and villages with little incentive to come to the table to formulate agreements that ideally are mutually advantageous. The Merrimac decision and what we fear will be its aftermath is only one more example of how lopsided the balance of power has become among local governments and how that undermines their ability to work together for the public good.”

Town officials should go to [www.danecotowns.org](http://www.danecotowns.org) to find your local legislator and offer your support of AB 239.



**Coming in next month's issue:  
The CARPC and Mazomanie**



# DCTA launches new web site design

[www.danecotowns.org](http://www.danecotowns.org)

Maybe not everyone involved in town government is a frequent user of the Internet.

But if you are, the DCTA has re-vamped its web site to make it easier to get state, county and town-related information without spending hours surfing other relevant government web sites.

There is currently important legislation proposed at the state level involving town government. There are ordinance revision proposals in Dane County, as well important policies being discussed and acted upon by the Zoning and Land Regulation of the county board.

We hope to give town officials instant and easy access to information regarding these issues, promote both Wisconsin Towns Association and DCTA agendas, and offer resources that town officials may need.

Another new feature of the DCTA web site is a clearing house of information regarding open government issues including open meetings and open records. By now, most towns have seen the importance of having their own public access policies, but those policies are governed by state law.

We also hope to feature a different township each month so that DCTA members can get acquainted with each other.



Some of the older features are still there: links to other towns online, contact information for our staff and directors, links to other government-related web sites, archives of DCTA meeting minutes and our newsletters.

Most importantly, we want to hear from our members, town clerks, and even the general public regarding how the web site or our newsletter can be improved. We invite and encourage editorial submissions, questions, or simply the sharing of an experience from which other town officials may benefit.

DCTA members—this is your web site and your newsletter, and we strive to keep this as helpful and complete of a resource as it can be.

Contact Kim Lamoreaux at 445-7557 or at [kimlamoreaux@gmail.com](mailto:kimlamoreaux@gmail.com) to discuss how you can submit information for our web site or our monthly newsletter.

## Task Force to discuss Planned Unit Developments

The Task Force that has been working on Dane County Chapter Ten ordinances regarding land use is expected to review a Planned Unit Development (PUD).

The task force has drafted an ordinance and is expected to review it at their next meeting this month, focusing on “rural” PUD’s, versus “urban” PUD’s.

In addition, the task force is looking for comment from town officials regarding residential uses in the A-1 Exclusive districts.

Some task force members expressed concern at their last meeting on May 27 regarding a requirement of placing replacement residents within 100 feet of the existing

residence.

The draft ordinance as worded would eliminate a new secondary farm residence as a permitted use, which could present a significant obstacle to farmers seeking to house farm help or family members engaged in the farm operation since this provision is the only way a property owner can have more than one residence on a parcel.

The task force’s ultimate action and revision proposal includes a secondary farm residence as a conditional use.

Town officials are encouraged to submit feedback to Renee Lauber, DCTA planning consultant at [reneelauber@consultant.com](mailto:reneelauber@consultant.com).

## TDR Workshop continued

ordinance amendment.

The second hour will be presented by County Planning and Development staff and will cover current planning and zoning issues and processes, proposed ordinance changes and a “how to” session on AccessDane and DCIMap.

For more information please contact DCTA planning consultant, Renee Lauber at (608) 577-9997.

## Directions to Pine Bluff

Take the beltline north to the Mineral Point Road exit. Head west on Mineral Point Road for about 7-8 miles to the intersection of CTH P. At the stop sign, turn left. The Cross Plains town hall is the second building on the right.



## DCTA directors elected at annual meeting

*A*ll but one of the Dane County Towns Association directors were returned to their posts after town officials caucused and voted on their representatives at the DCTA annual meeting in the Town of Verona.

Pictured above from top left are Pat Downing, director for district four and chairman of the Town of Perry; Renee Lauber, DCTA planning consultant; Milo Breunig, director for district five and chairman for the Town of Middleton; Milt Sperle, director for district three and supervisor for the Town of Rutland; Bob Lee, director for district seven and chairman for the Town of Dane; Jim Pulvermacher, new director for district six (replacing Harold Krantz), and supervisor for the Town of Springfield; Mark Hazelbaker, DCTA legal counsel; Steve Schultz, DCTA vice president and chairman for the Town of Medina, Jerry Derr, DCTA president going on 18 years, and chairman for the Town of Bristol; and Julie Gau, DCTA secretary. Contact information can be found on page 2 of this newsletter, and on line at [www.danecotowns.org](http://www.danecotowns.org).



## Energy independence planning in Stevens Point June 29

Town and village leaders are invited to attend an energy independent communities pilot planning program at the Holiday Inn Conference Center in Stevens Point; June 29; 10:00 a.m. to 3:00 p.m. Pilot communities preparing energy independence plans under a grant from the Wisconsin Office of Energy Independence will discuss their progress, challenges and successes in data collection and analysis and setting priorities for achieving their energy independence goals. The results of a local government survey regarding readiness to plan for energy independence will also be discussed. Experts will also address the production and use of bio-fuels in Wisconsin. See the complete agenda for more information at [www.wisctowns.com](http://www.wisctowns.com)

Register at the Wisconsin Counties Association website; at [www.wicounties.org](http://www.wicounties.org) and go to "Upcoming Featured Events" on the left side of the page and click on "WCA Educational Seminar." WCA has agreed to offer WCA Member rates to anyone affiliated with any local unit of government. Those rates are \$70 for the first person, \$55 for the second and \$45 for all subsequent participants from a single local government unit. All others not affiliated with a local unit of government must register at the non-WCA member rate of \$105. WCA is co-hosting the event with the Local Government Institute and the Office of Energy Independence.



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