



# DANE COUNTY PLANNING & DEVELOPMENT

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TO: County Board Supervisors  
County Executive Joe Parisi  
Town of Berry Supervisors  
Town of Berry Planning Commission  
All Other Interested Parties

FROM: Majid Allan, Senior Planner

SUBJECT: Updated staff review for Ordinance Amendment #85, Adopting Revisions to Town of Berry Comprehensive Plan

DATE: April 21, 2017

## I. SUMMARY

On January 23, 2017, the Town of Berry Board of Supervisors adopted amendments to the *Town of Berry Comprehensive Plan*. The Town has requested that the Dane County Board of Supervisors adopt the revised *Town of Berry Comprehensive Plan* as an amendment to the *Dane County Comprehensive Plan*.

The plan makes several changes to the Agricultural, Cultural, and Natural Resources, Land Use, Transportation, and Implementation elements. With the exception of potential concerns over provisions of the town's Transfer of Development Rights Policy, staff find the amendments to be reasonable and appropriate given the town's planning objectives. See the description section, below, for detailed explanation of the changes made to the town plan.

Staff have identified concerns with an aspect of the town's Transfer of Development Rights Policy that makes available to the town development rights it considers "extinguished" on property it determines has been "permanently restricted" to prohibit development (e.g., lands subject to a conservation easement). Those concerns are outlined in the analysis section, below.

At the town's annual meeting held on April 18, 2017, town electors approved an ordinance adopted by the town board under the provisions of 2015 Wisconsin Act 178 withdrawing the town from county zoning, coverage of the county development plan, and county subdivision regulations. Act 178 requires that the county development plan (comprehensive plan) must, "include, and integrate, the master plan and the official map" of a town that withdraws from county zoning, "without change".

## II. DESCRIPTION

The town plan amendment consists of the following changes to the elements listed below.

### *Agricultural, Cultural, and Natural Resources Element*

- Deletes Cultural Resources policy "j" on page 39 of the plan, regarding town policy on siting communications towers. The siting policy included provisions that are in conflict with section 66.0404 of Wisconsin Statutes which limits local regulation of communication towers.

- Removes a statement in Natural Resources policy “c” on page 36, regarding town standards for development on slopes over 20% grade. The town requires that any such development must be accompanied by an architectural and engineering plan that, upon completion, “attempts not to increase surface water runoff, retains water infiltration at 90% of pre-development standards on an annual basis, and allows no active erosion on site”. Plans are to be reviewed by the town engineer for compliance with the town standards. The deleted statement indicated that engineering plans meeting the standards of section 14.51 of the county code of ordinances (stormwater management) would be deemed to meet the town’s explicit standards.

*Land Use Element*

- Under policy #5, continues to allow development rights to be transferred between owners in accordance with the town’s Transfer of Development Rights Ordinance. The policy is expanded to consider development rights “extinguished” on lands the town determines have been “permanently restricted”, with the town then making an equal number of development rights available to itself to transfer in accordance with the TDR ordinance.
- Under policy “f” for the planned Rural Development Areas, removes the statement indicating that engineering plans for development on slopes over 20% meeting the standards of section 14.51 of the county code of ordinances would be deemed to meet the town’s explicit standards.

*Transportation Element*

- Adds policy “k” indicating the town’s acceptance of longer driveways to site development in areas less visible from road ways in order to maintain the rural character of the town.

*Implementation Element*

- If the town of Berry withdraws from county zoning, adds a paragraph to section E regarding plan interpretation on pages 126-127:

“If the Town of Berry leaves Dane County Zoning pursuant to Wis. Stat. §60.23(34), all references to Dane County, as well as its Committees, Boards, staff and Ordinances, herein shall immediately be deemed removed from this Comprehensive Plan and replaced by the appropriate Town Commission, Board or Ordinance serving the function previously served by Dane County, or its Committees, Boards, staff and Ordinances.”

**III. ANALYSIS**

The amendments addressing town policy on stormwater management, long driveways, and withdrawal from county zoning are generally in keeping with existing town plan policy and the town board’s expressed intent to opt out of county zoning.

*Concerns with TDR policy*

Staff have identified a number of concerns with aspects of the town’s TDR policy (#5 inserted on page 56 – emphasis added):

“...Density units or development rights attached to property which have been permanently restricted against further development by contract, deed restriction or other non-revocable action by the owner of that property, after January 1, 2015, rendering the density unit or development rights unusable at that property, **shall be considered extinguished** and an equal number of density units or development rights shall be **made available by the Town of Berry for**

**transfer from** the Town of Berry in accordance with Town Ordinance 500.5. In no event shall new or additional density units or development rights be created beyond the total number available in the Town of Berry based on the “one residential dwelling unit per 35 acres” policy calculated and interpreted as of April 13, 1981.”

Specifically, staff is concerned with the potential ramifications of the town considering development rights “extinguished” on private property. There is also concern with the town making transferrable development rights available to itself, and the advantage that could give the town over individual property owners who may wish to make their rights available for transfer under the TDR policy.

The town’s longstanding density policy is the means by which the town allocates development potential to property. The town policy is relied upon by farmers and other property owners as they make decisions about the long term uses and value of their property. With regard to conservation easements or other private property transactions, the town density policy provides the foundation for appraisals which establish valuations that inform negotiations between buyer and seller.

Other concerns include the following:

- There are no definitions provided for various terms used in the policy (e.g., non-revocable action; permanently restricted).
- There is no procedure detailed for how the town would render a determination of extinguishment or whether such determination would be communicated to the property owner.
- It’s unclear if the town intends to examine each non-revocable action, or if there is any way for a property owner to challenge the town’s determination.
- The policy could cause confusion for property owners and potentially impact the value of their development rights.

Conservation easements, while most often intended to be long term instruments of land preservation, are not necessarily permanent or non-revocable, and could be renegotiated by the parties in any number of ways. In addition, easements are not uniform, and can include provisions allowing the owner to retain the ability to utilize available development rights on the property.

In addition, sec. 700.40(2)(a) of Wisconsin Statutes states that a conservation easement can be “*released, modified, terminated or otherwise altered or affected in the same manner as any other easement.*” Most conservation easements include a provision regarding extinguishment and a provision regarding compensation if the easement is terminated or extinguished, in whole or in part. Such easements by their express terms are *not* non-revocable.

#### Town role in TDR Program

It is unclear how the “equal number of development rights” will be “made available” for transfer “from the Town of Berry”. Although the policy references that such transfer from the town of Berry is to be done in accordance with the town’s TDR ordinance, there is no implementation detail in the ordinance to indicate the town’s role in the TDR process, raising the following additional questions:

- Will the town maintain a list of the number and origin of the transferrable development rights it’s made available?

- Can the town sell the transferrable development rights without impacting the TDR market and providing itself an unfair advantage over individual property owners?

It would be advisable for the TDR policy and ordinance to include some additional detail so that property owners, prospective TDR buyers and sellers, and town officials are clear as to the town's role as a potential purveyor of transferrable development rights.

#### Policy clarification and alternatives

Although not entirely clear, it appears the intent of this policy may be to "regenerate" development rights from lands the town believes will not be developed as a result of a property owner recording a conservation easement or similar instrument on his/her property. Staff contacted the town board requesting clarification of the policy and suggesting that the town could use its planning authority to create new or replacement transferrable development rights instead of considering rights extinguished on specific properties.

In response to that request, Town of Berry Board Chair Varda indicated that the town does not intend to expand the total number of development rights available beyond that established as of April 13, 1981, and that the town doesn't want to incentivize new development by expanding rural development areas. He further clarified that the town is, *"...vulnerable to a steadily shrinking potential tax base when development rights are extinguished, particularly when it happens in conjunction with making the property tax exempt."*

County corporation counsel asked for additional clarification on whether the town considered development rights "extinguished" on properties that may be subject to a conservation easement including provisions for amendment or termination of the easement. In response, the town chairman stated that, *"If it is not a permanent restriction, it is not 'extinguished'."*

#### **IV. CONCLUSION**

As noted in this staff review, the town plan amendment includes a number of minor and reasonable policy changes to carry out the town's planning objectives. The changes do not appear to impact the town's agricultural preservation area in a manner that would result in any inconsistency with the county farmland preservation plan.

Concerns persist over the town's TDR policy of making development rights available to itself for possible transfer, particularly when other options exist to address the town's concerns with a shrinking potential tax base. However, the town's clarification that it would not consider development rights extinguished on properties which are not permanently restricted, suggests that the policy may ultimately be of limited impact, as most easements would not qualify as permanent restrictions.

To address any potential future concerns with the TDR policy, property owners should seek clarification from the town board as to the applicability of the TDR policy for any proposed easement or other action that may involve their development rights.

Given the town's imminent withdrawal from coverage of the Dane County comprehensive plan, the ZLR Committee may wish to discuss whether or not adoption of OA 85 is necessary.