

Derick P. Berlage

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Steven J. Kanstoroom
1014 Ashton Road
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Dear Steve:

You asked me whether MNCPPC has ever approved a subdivision which includes development that will violate a private easement. Unfortunately, I cannot recall such a case coming up before, although it may well have. What I can say is that it would be very bad public policy, in my opinion, to approve development that violates the express language of an easement that has been duly recorded in the land records.

The principal of recordation is centuries old, and its very purpose is to put the world on notice that the easement holder enjoys certain rights over the property. The recordation is there for the benefit of the government as well as private parties. It may or may not be illegal for government to approve something that on its face violates the rights of the easement holder. But it surely does not serve the public interest. If the meaning of the private easement is ambiguous, than a planning commission might want to have the courts sort things out. But if the language of the easement is unambiguous, I would think the commission would have discretion to say, in essence, “we’re not going to approve a trespass.”

Significantly, I cannot imagine that a planning commission would approve a subdivision that on its face violates the language of an easement held by a *public* entity. For example, if I submit an application to build a shed on land subject to a forest conservation easement, I would expect the planning commission to reject it. I don’t see why private easements should be given less deference. Honoring easements that run to public agencies while ignoring easements that run to private parties is not fair or consistent.

I hope the above is helpful to you. Just for the record, I want to make clear that I am not offering you legal advice. I merely offer my public policy views, without compensation and as a private citizen with some experience in these matters. I would recommend you retain an attorney to assess any legal issues.

Sincerely,

Derick P. Berlage