

PRINDIVILLE LAW

The Gilbert Building
413 Wacouta Street, Suite 550
St. Paul, MN 55101
T 612-746-1043
tim.prindiville@prindivillelaw.com

September 29, 2017

Dave Callister
City Manager
City of Plymouth
Plymouth City Hall
3400 Plymouth Blvd.
Plymouth, MN 55447-1482
Email: dcallister@plymouthmn.gov

Derek Asche
Water Resources Manager
City of Plymouth
Plymouth City Hall
3400 Plymouth Blvd.
Plymouth, MN 55447-1482
Email: DAsche@plymouthmn.gov

Bassett Creek Watershed
Management Commission
16145 Hillcrest Lane
Eden Prairie MN 55346
Email: laura.jester@keystonewaters.com

St. Paul Properties Inc.
St. Paul Fire & Marine Insurance Co.
c/o Northmarq Real Estate
3500 80th St West #200
Bloomington, MN 55431

St. Paul Fire & Marine Insurance Co.
One Tower Square
Hartford, CT 06183

VIA U.S. MAIL AND EMAIL

Re: Plymouth Creek Stream Restoration Project (the "Project")

Dear Sir/Madam:

I represent Jeanne and John Starr, who reside at 3450 Fernbrook Lane North, Plymouth MN 55447 (the "Starr Property") and in connection with the above referenced Project. I understand that at its regular meeting held on September 12, 2017, the City Council for the City of Plymouth (the "City") approved by consent agenda, plans and specifications and ordered advertisement for bids for the Project. The Project violates a long-standing conservation easement and will adversely affect a "small, remnant, mature maple-basswood forest with mixed canopy located along [a] meandering stream," though tree removal and grading. (Consent Agenda Item No. 6.08.)

The Starrs have been vocal in their concerns with and opposition to the Project, for the reasons detailed below.

1. Violation of Conservation Easement

The Project directly violates the terms of that certain Declaration of Restrictions, Easements and Real Covenants dated effective August 22, 1991 and recorded on December 11, 1991 as document number 5853924 with the Hennepin County Recorder (the "Conservation Easement").

Paragraph 4 of the Conservation Easement provides, in part, that, "for the benefit of the Residential Tract, [...] no portion of the [...] 'Conservation Areas' shall be improved [...], nor shall there be any alteration of existing grades or existing vegetation in the Conservation Areas [...]." (Emphasis added.) As defined in the Conservation Easement, the term "Residential Tract" includes the Starr Property, and the term "Conservation Areas" includes land within "Reach 3" of the Project".

Proposed plans for the Project indicate that the Conservation Areas will be regraded, trees and stumps removed, the land regraded and reseeded using various seed blends, all for the purpose of restoration of stream reaches damaged by erosion or affected by sedimentation. (the "Proposed Improvements")

After Mr. and Mrs. Starr raised concerns about the Project, the Proposed Improvements, and the violation of the Conservation Easement, I understand that the City has taken the position that the Proposed Improvements will only be made within the "Drainage Easements" defined on page 3 of 3 of that certain Plymouth Business Center 5th Addition recorded on October 24, 1991 as document number 5838728 with the Hennepin County Recorder (the "Plat"). After reviewing the matter, however, it is clear that the City's interest in these Drainage Easements are subordinate to the Conservation Easement.

Prior to execution and recording of the Conservation Easement and the Plat, then developer-applicant Trammell Crow ("Trammell Crow") had applied to the City for "land use guide plan amendment, mixed use planned unit development concept plan, mixed use planned unit development preliminary plan/plat and conditional use permit, and rezoning for [the Plat]." Significant debate and negotiations surrounded Trammell Crow's pending application, a thorough summary of which can be found in a December 13, 1990 letter prepared by Trammell Crow's counsel and directed to the City Manager.¹

Reviewing this correspondence, it is clear that the City itself placed a great interest in preserving a "significant stand of mature hardwood trees" that stood on land

¹ In the interests of brevity, the letter and other referenced documents are not provided here. All such documents are available through the City's online archive or the Bassett Creek Watershed Management Commission webpage.

that would later be incorporated into the Conservation Easement. In the December 13, 1990 letter, the developer itself concluded that removal of the trees was ill-advised:

The primary reason [for Trammel Crow's decision not to acquire the Residential Tract] is that incorporation of these properties in the proposed development would require removal of a substantial portion of the existing mature hardwood trees. Trammell Crow concluded, after further review of the tree survey prepared subsequent to the original Application, that this is unwise from an environmental sensitivity standpoint.

(Dec. 13, 1990 Letter, p.4-5, emphasis added.) Trammel Crow then proposed to “impose a conservation easement over the woodland and creek [...] that will not be altered to implement the substituted MPUD concept plan and preliminary plan/plat,” (*Id.* p.5.) and states that the “conservation easement guarantees permanent protection of on-site wetlands and mature hardwood trees.” (*Id.* p.8, emphasis added.) Trammel Crow describes that the Conservation Easement will provide “spatial and vegetative buffering,” (*Id.* p.9.) and a “double layer of protection” for trees and a “triple layer of protection” for wetlands. (*Id.* p.5, emphasis added.)

After receipt of the above-described letter, the City Council met four days later, on December 17, 1990 and passed Resolution No. 90-817, in which the City approved Trammel Crow's application for preliminary plat and conditional use permit, “subject to the following conditions: [...] 9. Final Site Plans [...] shall specifically address tree preservation and visual transition to adjoining residential parcels. [...] 12. A conservation easement as approved by the City Attorney shall be filed with the final plat and shall address the issues contained in the December 17, 1990 memorandum from the applicant, with the addenda from Mr. Turner.” (Res. 90-817, emphasis added.)

Later the following year, on August 5, 1991, the City Council passed Resolution No. 91-435, which provides, in part:

SETTING CONDITIONS TO BE MET PRIOR TO FILING OF AND RELATED TO THE MPUD FINAL PLAT FOR NC BERKSHIRE LANE I LIMITED PARTNERSHIP (TRAMMEL CROW COMPANY). (90063) (MPIJD 90-1)

WHEREAS, the City Council has approved the MPUD Final Plat, Plan and Development Contract for NC Berkshire Lane I Limited Partnership (Trammell Crow Company) for Plymouth Business Center 5th Addition;

NOW, THEREFORE, BE IT HEREBY RESOLVED BY THE CITY COUNCIL OF THE CITY OF PLYMOUTH, MINNESOTA, that it should and hereby does approve the following to be met, prior to recording of, and related to said plat:

13. A conservation easement as approved by the City Attorney shall be filed with the final plat and shall address the issues contained in the December 17, 1990 memorandum from the applicant, with the addenda from Mr. Turner.

15. Final Site Plans for Lot 1, Block 2 and Lot 2, Block 2 shall specifically address tree preservation and visual transition to adjoining residential parcels.

(Res. 91-435, emphasis added.) It is clear that tree preservation within the Conservation Areas was an integral part of the larger development for which Trammell Crow sought and eventually received City approval.

Approximately two weeks later, the Conservation Easement was “executed effective of the date first written above,” on August 22, 1991, yet, for reasons unknown, recorded months later on December 11, 1991. The Plat appears to have been executed between August and September 1991 and recorded on October 24, 1991. Nonetheless, the Conservation Easement is enforceable by and against the parties thereto as of its effective date. This is also consistent with the intent of the City (1) to expressly condition the Plat’s approval on the prior entry of the Conservation Easement and (2) to perpetually protect areas within the Conservation Areas, including a prohibition against altering existing grades and vegetation.

If the Project’s violation of the Conservation Easement cannot be resolved, the Starrs will be forced to seek court intervention in this matter.

2. Lack of Scientific Basis, Claims under Minn. Stat. § 116B et seq.

The Project’s assumptions and its ultimate effect on water quality are in dispute their scientific underpinnings questionable.

According to the website for the Bassett Creek Watershed Management Commission, Plymouth Creek is included on the Minnesota Pollution Control Agency's (MPCA) Impaired Waters list. However, a draft of the Wetland Delineation Report clearly states that, “Plymouth Creek is not identified by the Minnesota Pollution Control Agency (MPCA) as an impaired water.” (Wetland Delineation Report - Draft, January 2016, Sec. 3.5.) Plymouth Creek is not listed in the 2016 Minnesota Impaired Waters List promulgated by the MPCA. (<https://www.pca.state.mn.us/water/minnesotas-impaired-waters-list>.)

Plymouth Creek drains into Medicine Lake, which is impaired with excessive phosphorous and other nutrients. (Feasibility Report for Plymouth Creek Restoration Project, Sec. 2.2.2.3.) The report also identifies stormwater (and not soil erosion) as the primary source of this impairment. It is unclear how removing trees and stabilizing

eroding banks of the creek as it passes through a mature forest would remedy a phosphorous contamination.

In addition, the pending Project contemplates the removal of not only dead, but also living trees from the Conservation Areas. It contemplates removing trees near the creek and within the lower canopy and replacing these with various seed blends. Plans for the Project give the chosen contractor, presumably with no scientific training, unfettered discretion to remove living trees within “Harvest Areas,” e.g., “CLEAR ALL BRUSH <8” [...] AS MARKED BY ENGINEER.” (Sheet C-103, “Existing Conditions and Removals 9+00 to 0+00.”)

The Starrs have consulted with ecology and forestry experts at (a) the Minnesota Department of Natural Resources, (b) the of Minnesota Center for Forest Ecology (Lee E. Frelich), (c) Hennepin County, and (d) the Izaak Walton League. All of these experts stated that that the existing forest has many advantages over the proposed replacement and that removal of mature trees will only worsen erosion and water quality. None of the experts supported tree removal as a means to improve water quality. The Starrs have shared this information with the City, and the City has chosen to ignore it.

Minnesota Statutes Section 116B *et seq.* provides, in part:

Any person residing within the state may maintain a civil action in the district court for declaratory or equitable relief in the name of the state of Minnesota against any person, for the protection of the air, water, land, or other natural resources located within the state, whether publicly or privately owned, from pollution, impairment, or destruction.

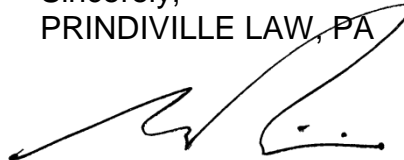
(Minn. Stat. §116B.03.) This gives the Starrs standing to bring an action against the City and the Bassett Creek Watershed Management Commission with respect to the Project.

Finally, after reviewing City council meeting minutes, there is also concern that the City and the Developer will benefit from the Project (e.g., increased tax revenue, development of privately owned land by tax-payers) to the detriment of the Starrs, their neighbors, and the local ecosystem, all of which were to be protected through the Conservation Easement and the zoning buffer that it was meant to establish. The Starrs believe that there may be a conflict of interest and our investigation of this continues.

The Starrs have repeatedly stated that goals of clean water can be accomplished while honoring the Conservation Easement and not removing trees – leaving the forest intact. The Starrs would prefer to resolve this matter amicably and without litigation. Accordingly, the Starrs demand an in-person discussion with the city manager before any tree removal begins, to discuss the above-described concerns.

I look forward to your prompt reply.

Sincerely,
PRINDIVILLE LAW, PA

A handwritten signature in black ink, appearing to read 'T. Prindiville', written over the printed name.

Timothy J. Prindiville

cc: Jeanne Starr and John Starr