

SOUTH DAKOTA SOCIETY OF PROFESSIONAL LAND SURVEYORS

Title Insurance and Survey Issues

TITLE INSURANCE AND SURVEYS

- Disclaimer – the requirements, views, and other comments expressed in this presentation are specific to Dakota Homestead Title Insurance Company. Each title insurance underwriter has their own requirements and opinions regarding surveys and title insurance. All properties are subject to underwriter review for potential issues and requirements and exceptions are made based on the particular facts for each specific property and each specific transaction.

TITLE INSURANCE SURVEY TERMINOLOGY

- Most realtor association purchase agreement forms have the following options for surveys:
 - Mortgage Inspection Survey
 - Staked Survey
 - Waiver of Survey
- Dakota Homestead uses the terms boundary survey and ALTA survey too

MORTGAGE INSPECTION

- Other names include Mortgage Loan Certifications, Improvement Location Exhibits, Title Insurance Drawings, and others
 - FYI – the title industry dislikes the name Title Insurance Drawings as our requirements usually do not accept this type of survey for coverage purposes
- These types of inspections are generally not inspections conducted according to the professional standard for establishing boundaries and dimensions of the property and any encroachments onto or off of the property
 - In fact, most of these inspections contain disclaimer language that they are NOT disclosing or certifying boundary or title matters
- Mortgage inspections are meant to verify an improvement, usually a residence, is located on the land described therein.
- Dakota Homestead typically treats Mortgage Inspections as capable of showing a potential issue to take exception to, but that they are not sufficient to satisfy situations where the title company is requiring a survey without further review and approval by Dakota Homestead's underwriting attorneys

STAKED SURVEY / BOUNDARY SURVEY

- Title insurance industry talks about staked surveys in terms of the completion of a boundary survey
 - Important to note because we hear realtors and lenders refer to stakes in the ground for getting a fence as the main reason to get a staked survey
- Dakota Homestead's definition of a boundary survey is a survey that accurately locates and depicts the true boundary lines of the subject property. The survey needs to depict all improvements associated with the subject property in relation to the boundary lines. Any encroachments on to and off of the property, along with gaps, gores, and other defects relative to the property's legal description should be listed.
 - Boundary surveys required by a title insurance commitment need to be certified by the licensed surveyor that it was completed in compliance with all professional surveying standards as well as certified to the title company and their underwriter (as well as perhaps the owner). Such certifications establish the title company / UW's reliance upon the boundary survey.

ALTA SURVEY

- For Dakota Homestead, an ALTA Survey is typically the highest type of survey we require or receive
- ALTA Surveys are completed the set standards established by the American Land Title Association and the National Society of Profession Surveyors for the surveying of the property and the disclosure of survey matters as to how they relate to the title to the property.
- We typically only receive ALTA Surveys from our offices for commercial transactions or future land developments

WHEN ARE SURVEYS REQUIRED

- Dakota Homestead's policy is that when a survey is required, we require a boundary survey certified to include the title company / underwriter
- Type of title insurance coverage matters for survey issues:
 - Standard Coverage – includes the General Exceptions on the final title policy, which includes an exception for any issue that would have been disclosed by a boundary survey
 - Extended Coverage – deletes the General Exceptions
- Dakota Homestead typically requires a survey in these situations:
 - When an Extended Coverage Owner's Policy is requested
 - Following new construction / improvements on the subject property and an Extended Coverage Loan Policy is requested
 - Pursuant to the requirements of a requested endorsement
 - When survey matters are known to affect the land or its legal description and Extended Coverage Loan Policy is requested

WHAT DO TITLE COMPANIES DO WITH SURVEYS?

- Surveys are typically provided to title companies by the lenders and realtors involved with the transaction
 - Very rarely do title companies order surveys anymore
- Abstractors at the title company review the survey to see if there are any potential issues that are disclosed
 - If there are, most abstractors submit the survey to the insuring underwriter for guidance
- Items that abstractors are looking for:
 - Drawings that show potential encroachments
 - Surveyor notes disclosing potential issues

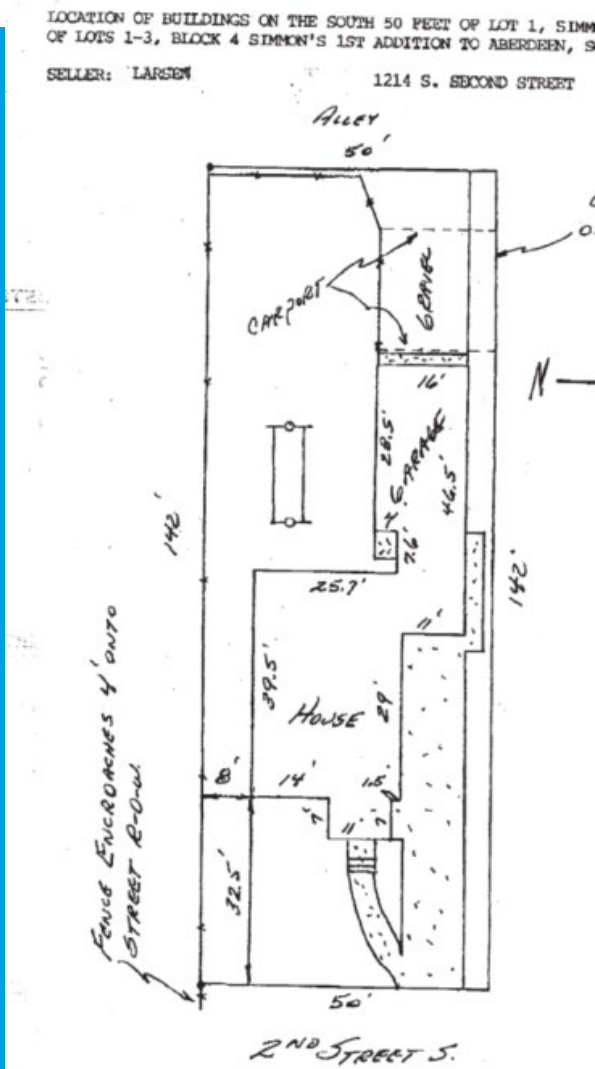
TYPES OF ENCROACHMENTS

- Most common issue found on surveys are potential encroachments
- Dakota Homestead's approach is to classify most encroachments into two categories
 - Minor / Average Encroachments – typical encroachments that exist with all property. Examples include fences, garage and roof overhangs, decks, concrete patios and walkway, and others that encroach a few feet on to or off of the property line.
 - Key idea – relatively easy to remove or fix. The encroachment does not impact the main value of the property.
 - Major Encroachments – significant encroachments of a substantial fixture (building) on to or off of the insured property.
 - Key idea – very difficult or impossible to fix. The encroachment has a significant impact on the value of the insured property.

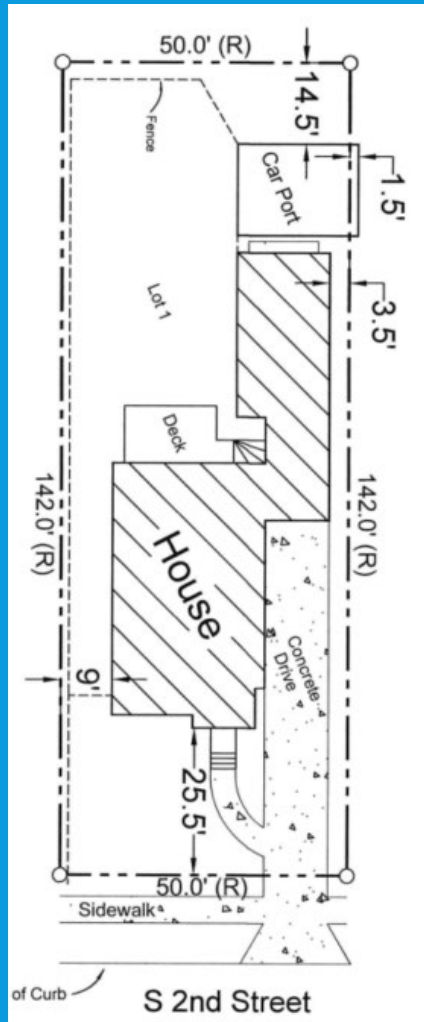
HOW ENCROACHMENTS RESOLVED

- For Minor Encroachments, the typical resolution is:
 - Show the potential encroachment on the Owner's Title Policy as a specific exception
 - Encroachment be removed from the Lender's Title Policy provided the owner signs an Indemnity Agreement for the encroachment
- For Major Encroachments – the resolution is going to depend on the facts and circumstances
 - Easements or other legal fixes could be used to permit the encroachment
 - Owner and adjacent property owner may agree to convey the encroaching property so that it is owned by the correct party
 - The parties and any lender involved may agree to an exception in all Title Policies

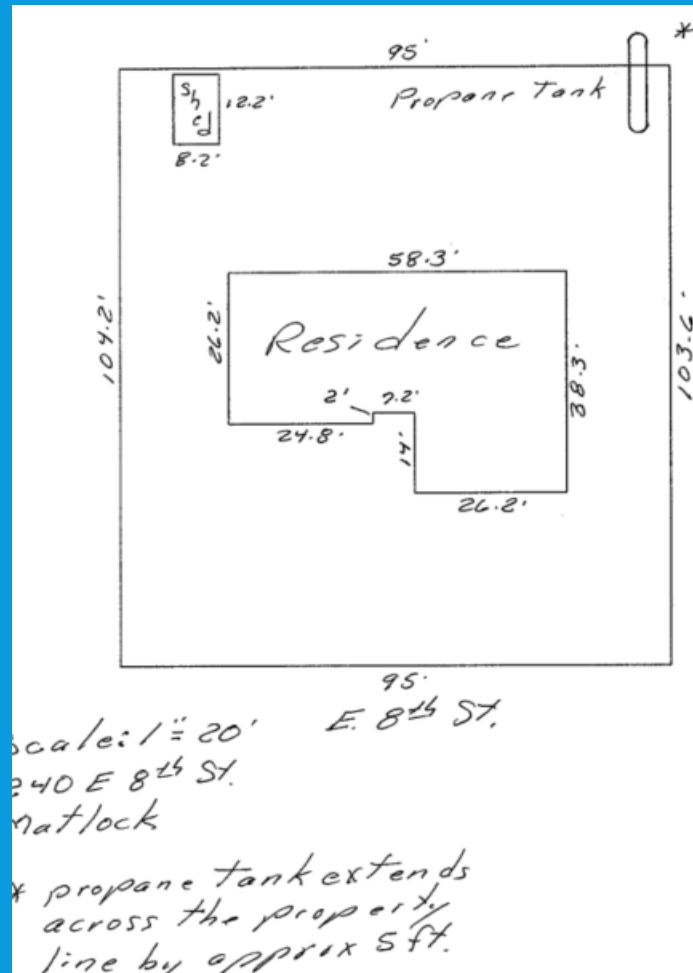
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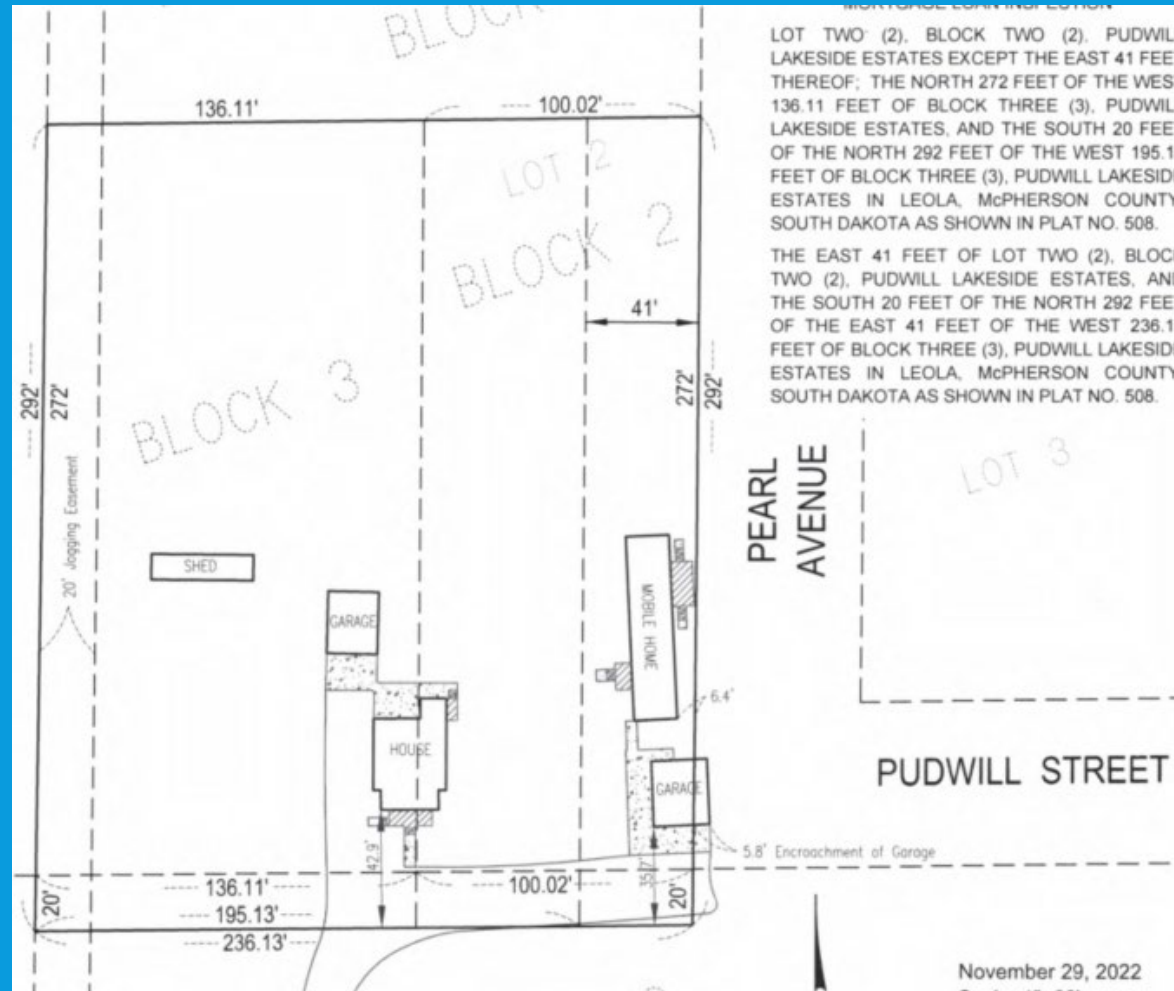
MINOR ENCROACHMENT ISSUE – 2022



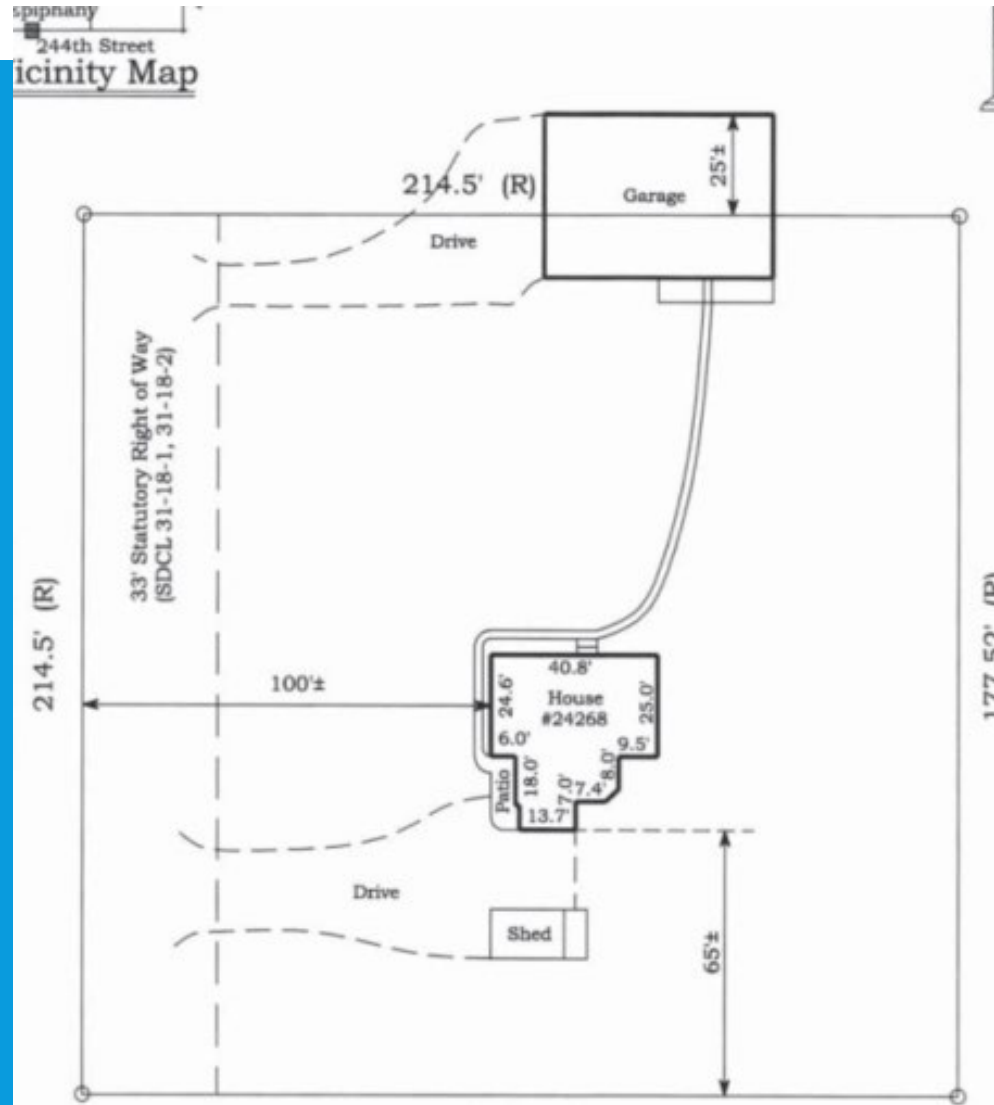
MINOR ENCROACHMENT - STRUCTURE



RIGHT OF WAY ENCROACHMENT



MAJOR ENCROACHMENT – STRUCTURE

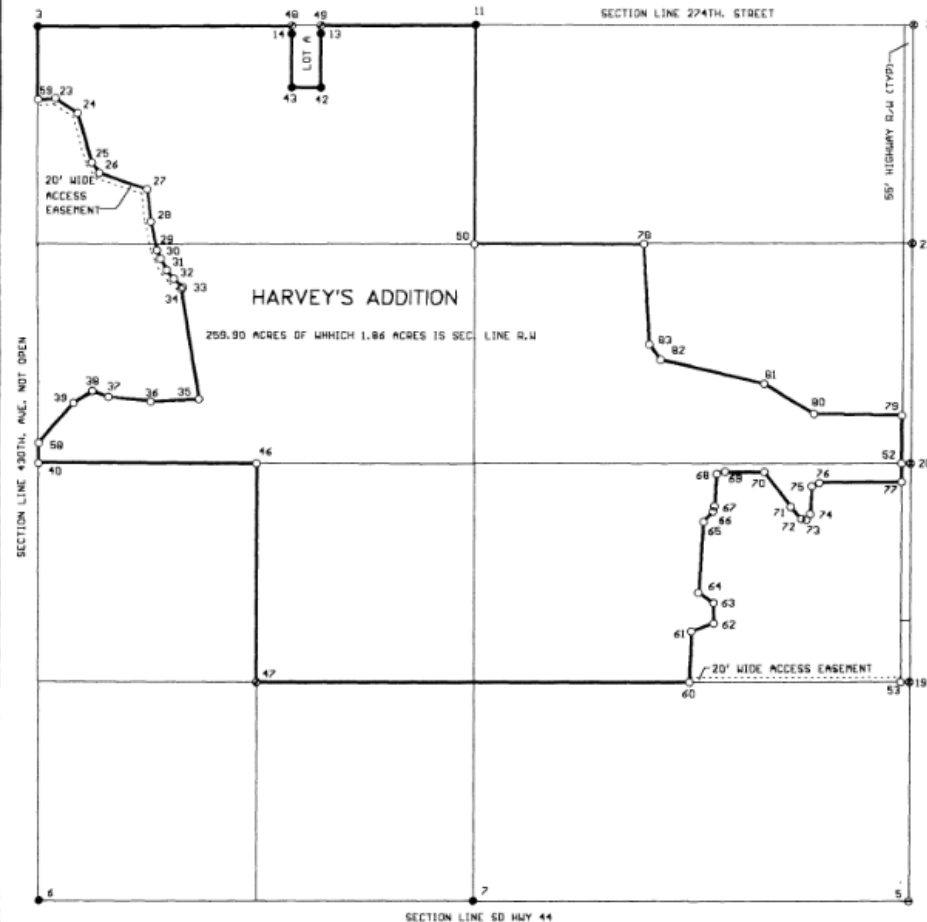


TAX PARCELS AND PRORATIONS

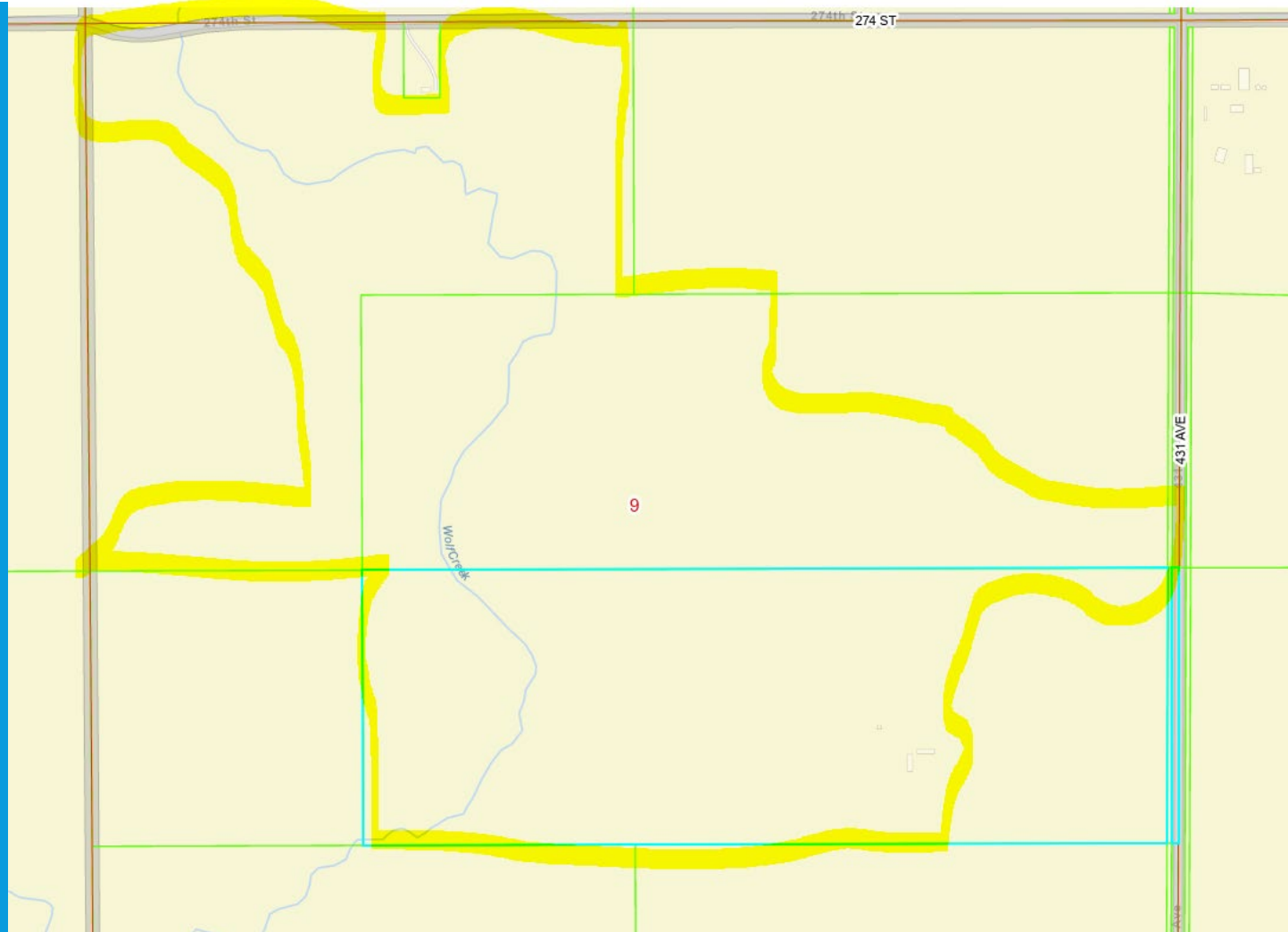
- One of the challenges title companies face is trying to produce tax information that matches what the purchase agreement requires
 - Must purchase agreement require that the taxes for the prior year due in the current year are paid by the seller and that the taxes for the current year are prorated through the date of closing
- Issue for all closings – the amount of taxes due for the current year due the next year won't be posted till January of the following year
- Specific survey issue – when property has been platted, using the prior tax parcel information is not going to produce accurate results
- When property is coming out of multiple parcels, it becomes even more complicated

PLAT WITH MULTIPLE TAX PARCELS

PLAT OF HARVEY'S ADDITION, IN THE NW1/4, S1/2 OF THE NE1/4, N1/2 OF THE SE1/4 AND THE NE1/4 OF THE SW1/4, SECTION 9, T99N, R57W OF THE 5TH. P.M., HUTCHINSON COUNTY, SOUTH DAKOTA.



PLAT WITH MULTIPLE TAX PARCELS



PLAT ISSUE – OWNER CERTIFICATE

- Increasing number of plats being recorded or attempted to be recorded with the incorrect party signing as the owner
- Two common issues
 - Someone signs individually but the property was actually owned by their trust, LLC, partnership, etc.
 - Only one owner signs when other parties had an ownership interest
 - Examples – one spouse signs when both own the property; parties with fractional interests are missed; life estate owners or contract for deed vendees do not sign
- Often the issue can be traced to either taking the owner's information as the truth or relying on the Treasurer's tax owner information

ACCESS EASEMENTS AND PLATS

- Often plats show access easements as part of the newly platted property
- For easements dedicated to the public, that usually works
- For private easements / rights of way – the easement area cannot legally be created until there is uncommon ownership
 - If the same party owns both the benefited and burdened property, the doctrine of merger applies so the easement goes away
- Easements are typically shown on the plat for reference purposes so that they can be created later by a separate instrument
 - BUT most owners think that because the easement is shown on the plat, it already exists

ACCESS EASEMENTS AND PLATS

- Sample Information Language
 - Please be aware that you must consult with an attorney regarding any private access easements or private rights of way that you wish to create. Additional documents will likely need to be drafted and recorded to validly create the shown easement. Private easements shown on the plat may have been included for reference purposes only.
- Owner misunderstanding creates numerous issues when it gets identified by the title company
 - Idea is to find ways to help customers understand what needs to happen

LEGAL DESCRIPTIONS AND UNRECORDED PLATS

- In Sioux Falls and some other markets, we are seeing more situations where property owners are wanting to make use of the to-be-platted legal description to conduct business before the plat has been recorded
 - It is okay to reference what the legal description is going to be on purchase agreements and other documents before closing
- Problem we are seeing is that deeds and mortgages are using the platted legal description and attempting to record those documents before the plat has been recorded
 - Most extreme cases involve developers not recording the plat until all lots have been sold and transferred

CORRECTING ISSUES WITH PLATS

- Surveyor Affidavits (SDCL 43-18-11) can help fix a variety of issues, but not everything
 - Limited to typographical errors and omitted dates
 - Specifically provides that “No affidavit of correction may be used to change or modify the plotted or recorded property lines as originally monumented.”
- Surveyor Affidavits are similar to other permitted affidavits for real estate transactions – immaterial issues can be fixed with an affidavit
 - Material issues have to be fixed through a corrective instrument signed by the relevant parties

CORRECTING ISSUES WITH PLATS

- When the incorrect owner has signed the Owner's Certificate, what can be done to fix it
 - An Affidavit does not work because the proper owner is a material requirement for the validity of the plat
- Most common fix we see – having the missing owner sign a Ratification of Plat
 - Ratifications of Plat should contain the exact same information that the original plat had for the Owner's Certificate, they should reference the recording information of the already recorded plat, and should detail what happened as to why the missing owner was omitted and that the Ratification of Plat is akin to that party signing the original plat

OTHER ISSUES

- Replats, Subdivisions, and Vacations
 - What happens when property is REPLATTED (a new plat that replaces part or all of an existing plat) but the new plat does not vacate the prior plat
- Voluntary Vacation of Plats
 - Rare situation, but when it happens, what is the legal description
- Foreclosure of Plats by Lessor Estate Holders
 - Mortgage lenders, judgment lienholders, easement holders, and others who don't join the platting process are not bound by the new plat
- Mortgage releases / satisfactions using prior legal descriptions

QUESTIONS

- Please feel free to contact Eric Hanson at Dakota Homestead Title Insurance Company with any questions regarding potential title insurance issues
 - Phone: 605-336-0388
 - Email: eric@dakotahomestead.com
- Please feel free to contact Sabrina Meierhenry at Land Title Guaranty Company with any title or closing questions
 - Phone: 605-336-1095
 - Email: smeierhenry@landtitleguaranty.com