

# THE CASE OF THE MISSING CHURCH

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Lenders often encounter borrowers who want to get a loan with minimum expense. These borrowers may have owned property for years and believe that it does not need to be surveyed. Case in point: The minister of a church approaches a lender for a loan. Desiring to save expense for all parties, the lender makes the loan, waives the survey requirement, documents the loan in-house and does not obtain mortgagee's title insurance. When times grow difficult for the church, the church defaults on the loan. The church and the lender become adverse, and the lender threatens foreclosure. Only during the foreclosure process does the lender discover that the property upon which it has a lien contains only half of the church building, due to a defect in the vesting deed. The other half of the church building is on an adjacent piece of land owned by the church. The tables are now turned on the lender who is now at the mercy of the church.

Although the lender has a valid and enforceable lien on real estate, the improvements straddle the property subject to the deed of trust as well as the adjoining property upon which the lender does not have a lien. This makes foreclosure and resale of the collateral virtually impossible.

Could the lender have protected itself with an appraisal? The answer is "no." An appraiser will more or less assume that improvements are located entirely on the tract of land to be mortgaged. **Unless there is some obvious indication of overlap or encroachments, appraisers may not (and typically will not) pick up property that overhangs or encroachments.**

Could the lender have protected itself by buying a mortgagee's title insurance policy? The answer is "no." **A title policy in and of itself does not insure that the improvements are located wholly upon the real estate securing a loan.** A Texas title insurance policy insures title to the real estate only and contains a standard "overlapping improvement, encroachments and protrusions" exclusion. This means that unless a survey acceptable to the title company is approved by their underwriting and the statutory premium for the "survey deletion" coverage is paid, a title policy does not insure that all improvements are located on the property.

**The primary way in which a lender can protect itself from this problem is to obtain a survey.** A survey prepared by a licensed Texas surveyor will display both the outlines of the land upon which the lien is proposed and any improvements located on that land.

Surveys reveal numerous defects, including overlapping improvements, protrusions and encroachments, as well as potential violations of building setback lines or permanent improvements located over (or under) easements. This problem is more common than one might

think and can result in such unfortunate scenarios as liens on vacant land owned by the debtor adjacent to the improved land and liens on improvements which “straddle” the debtor’s property and another lot.

Lenders should be aware of the problem and exercise caution in making real estate secured loans without requiring current surveys. The waiver of the survey requirement on real estate loans may accommodate borrowers, but it can have adverse effects.

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