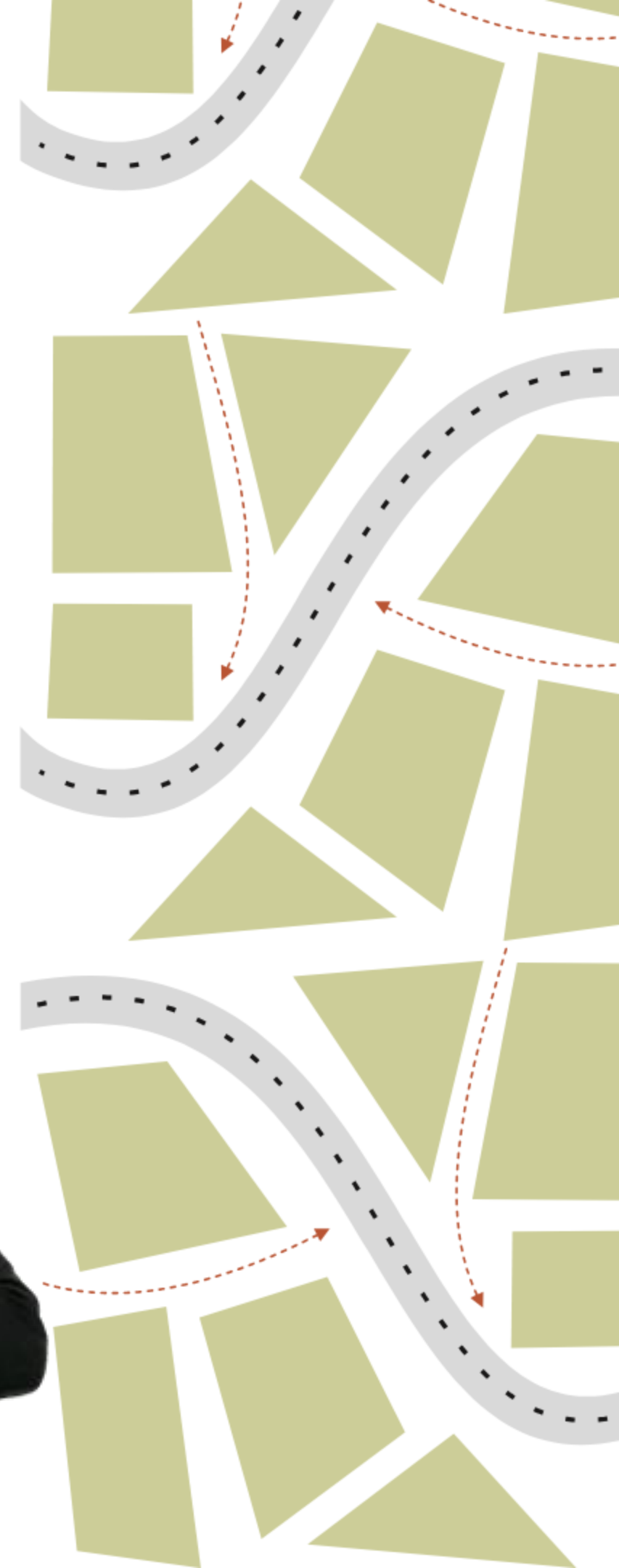


Accessible Access and Easy Easements



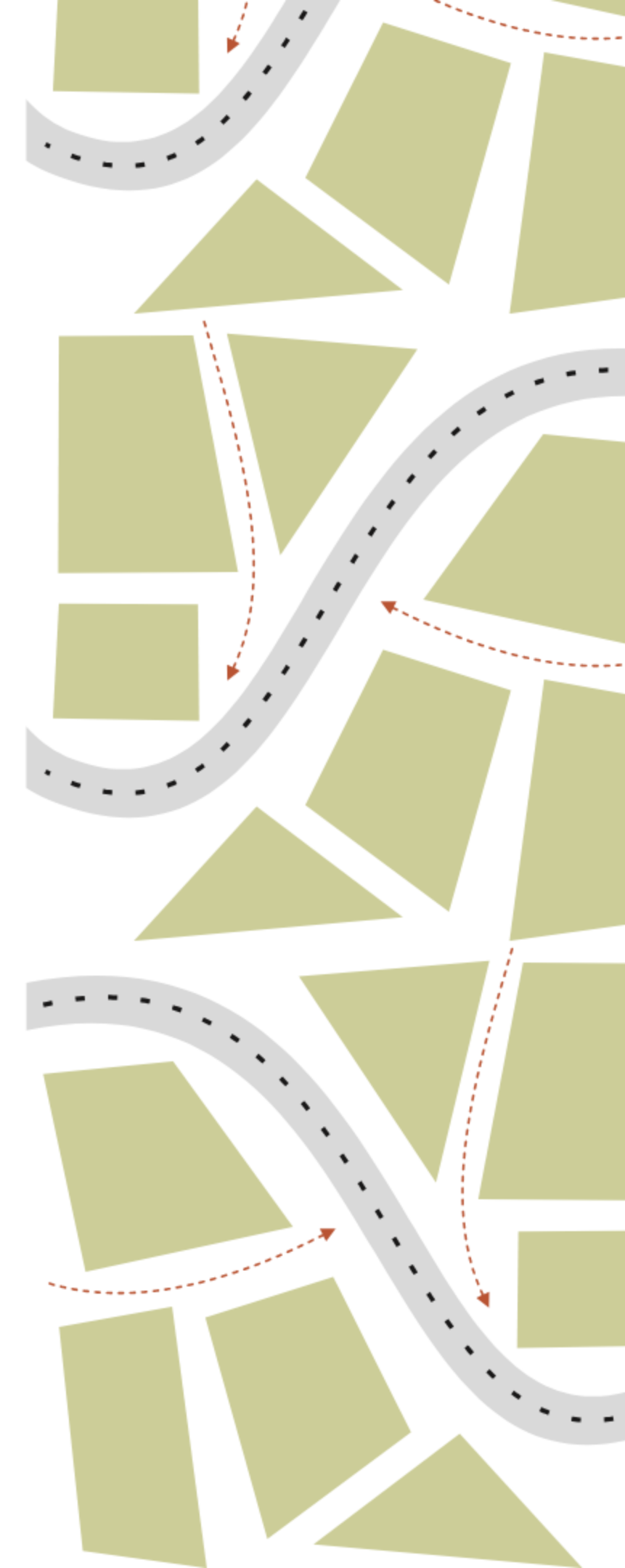
By **Justin Carter**
and **Charlie Cookson**

Underwriters @ Fidelity National Title
Group



Road Map

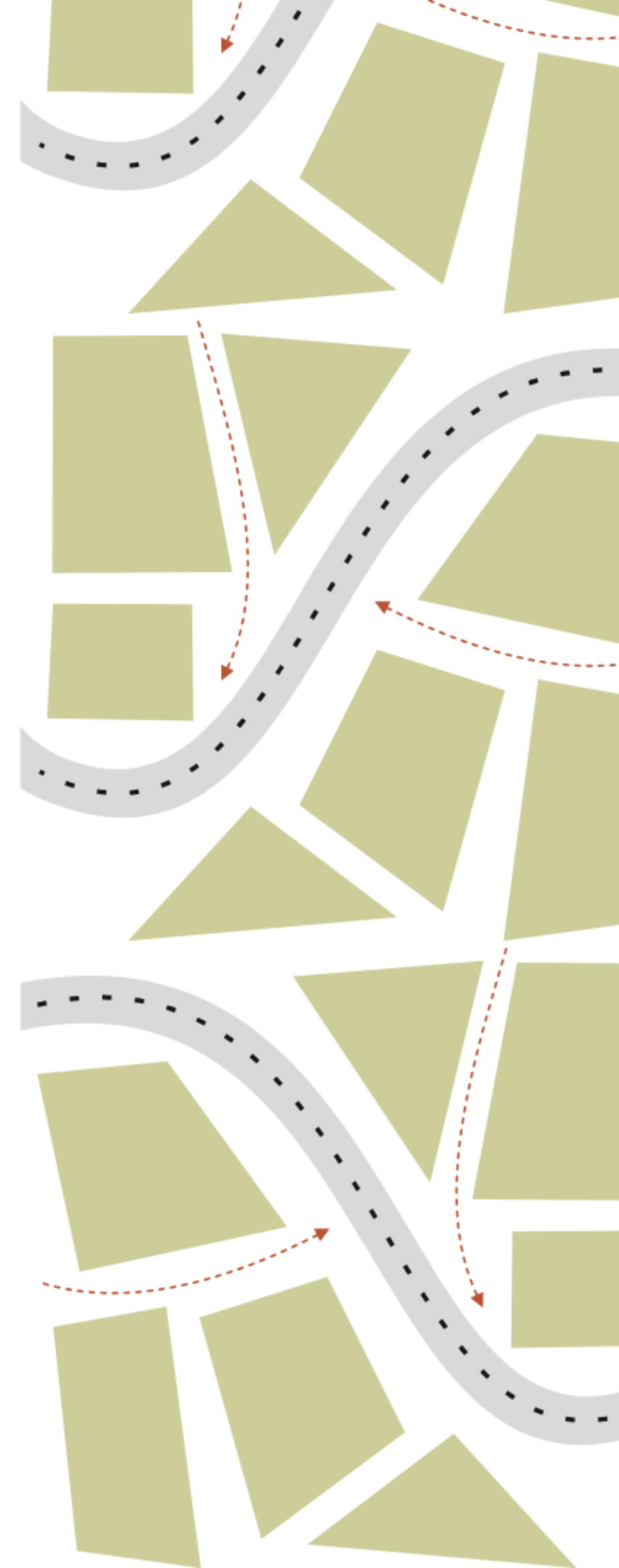
- Access Coverage through policies and endorsements
- Easement in gross vs. easement appurtenant
- Unwritten easements
 - Prescriptive easement
 - Implied easement
 - Easement by Necessity
- Express easements
 - Creation and termination including the *Partney* decision



Policy Access Coverage

Covered Risk 4, both Owners and Loan Policies

No right of access to and from the Land



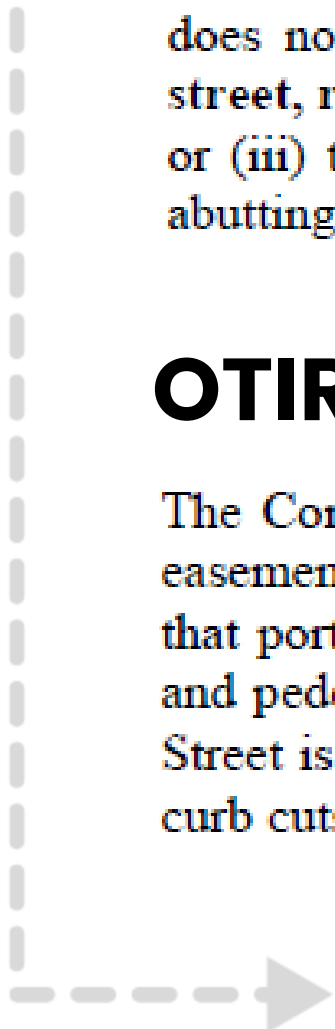
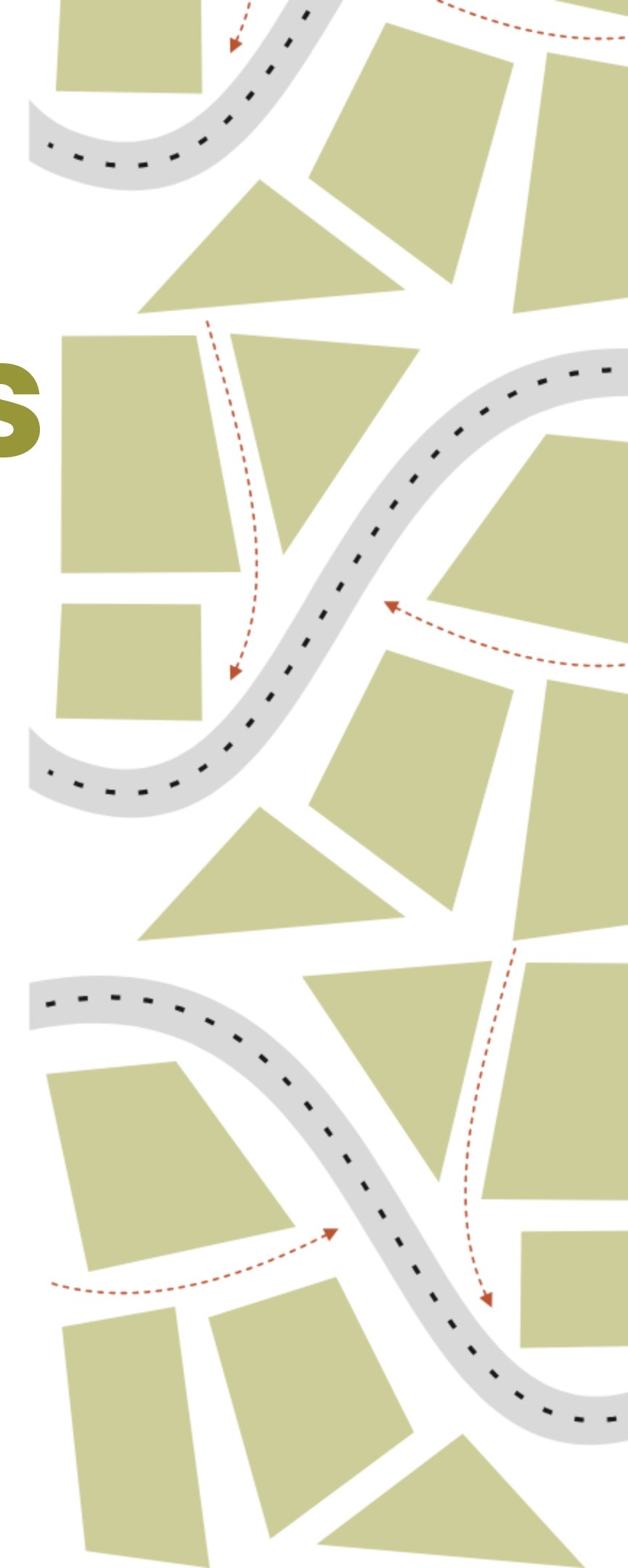
OTIRO 217 Endorsements

OTIRO 217-06 Access and Entry Endorsement

The Company insures against loss or damage sustained by the Insured if, at Date of Policy (i) the Land does not abut and have both actual vehicular and pedestrian access to and from [insert name of street, road, or highway] (the "Street"), (ii) the Street is not physically open and publicly maintained, or (iii) the Insured has no right to use existing curb cuts or entries along that portion of the Street abutting the Land.

OTIRO 217.1-06 Indirect Access and Entry Endorsement

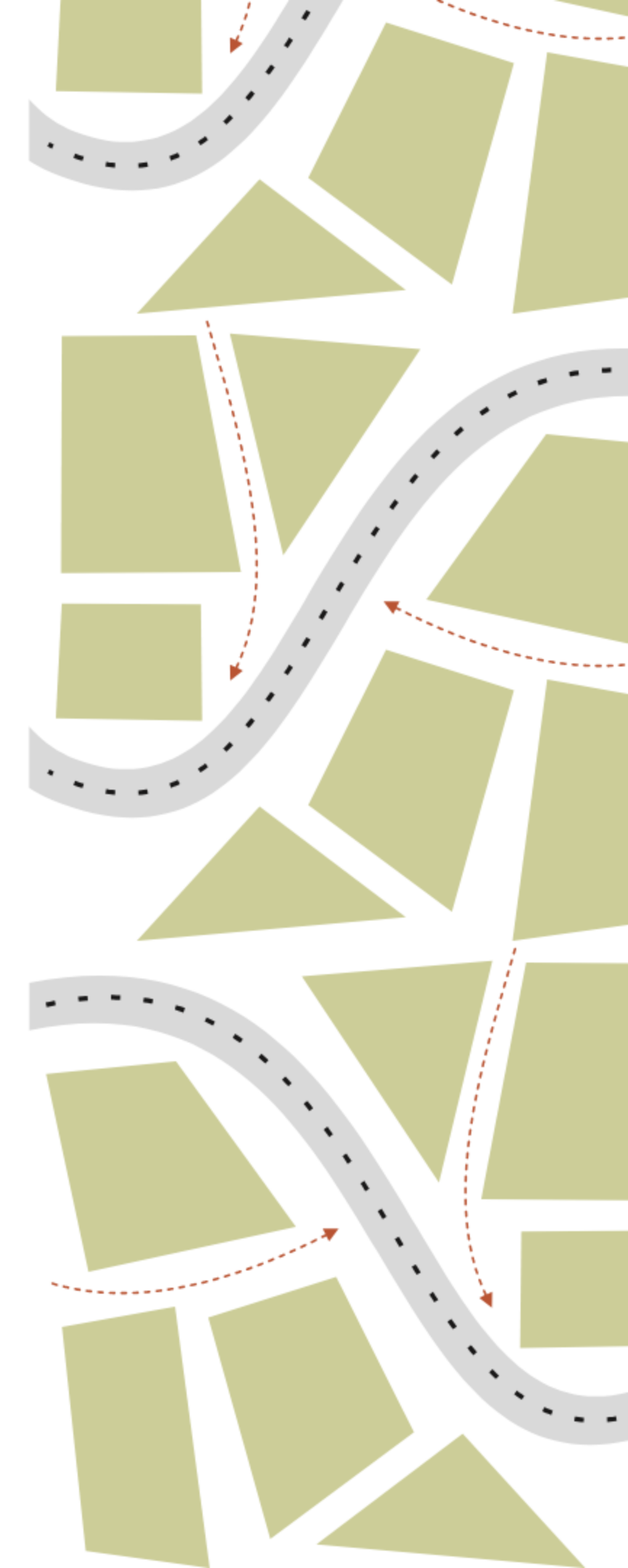
The Company insures against loss or damage sustained by the Insured if, at Date of Policy (i) the easement identified [as Parcel _____] in Schedule A (the "Easement") does not provide that portion of the Land identified [as Parcel _____] in Schedule A both actual vehicular and pedestrian access to and from [insert name of street, road, or highway] (the "Street"), (ii) the Street is not physically open and publicly maintained, or (iii) the Insured has no right to use existing curb cuts or entries along that portion of the Street abutting the Easement.



Access Coverage

Policy Access vs. Endorsement Access

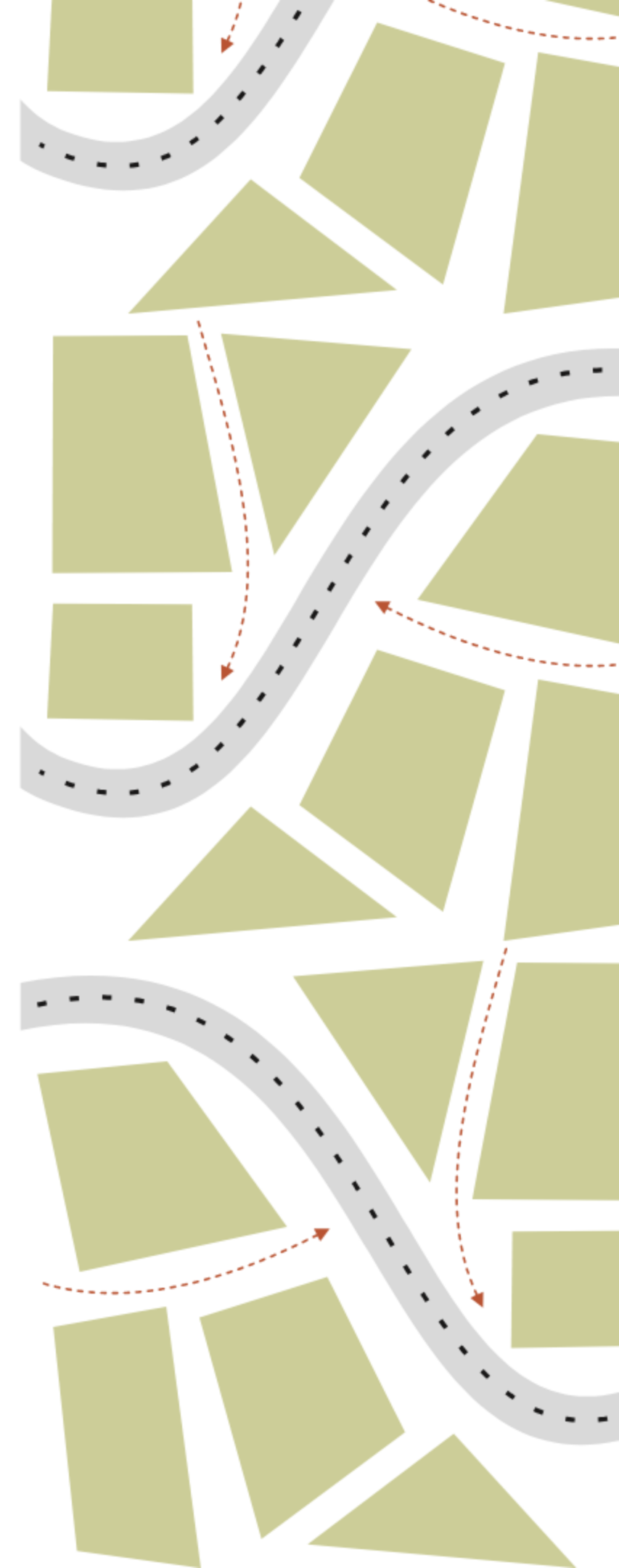
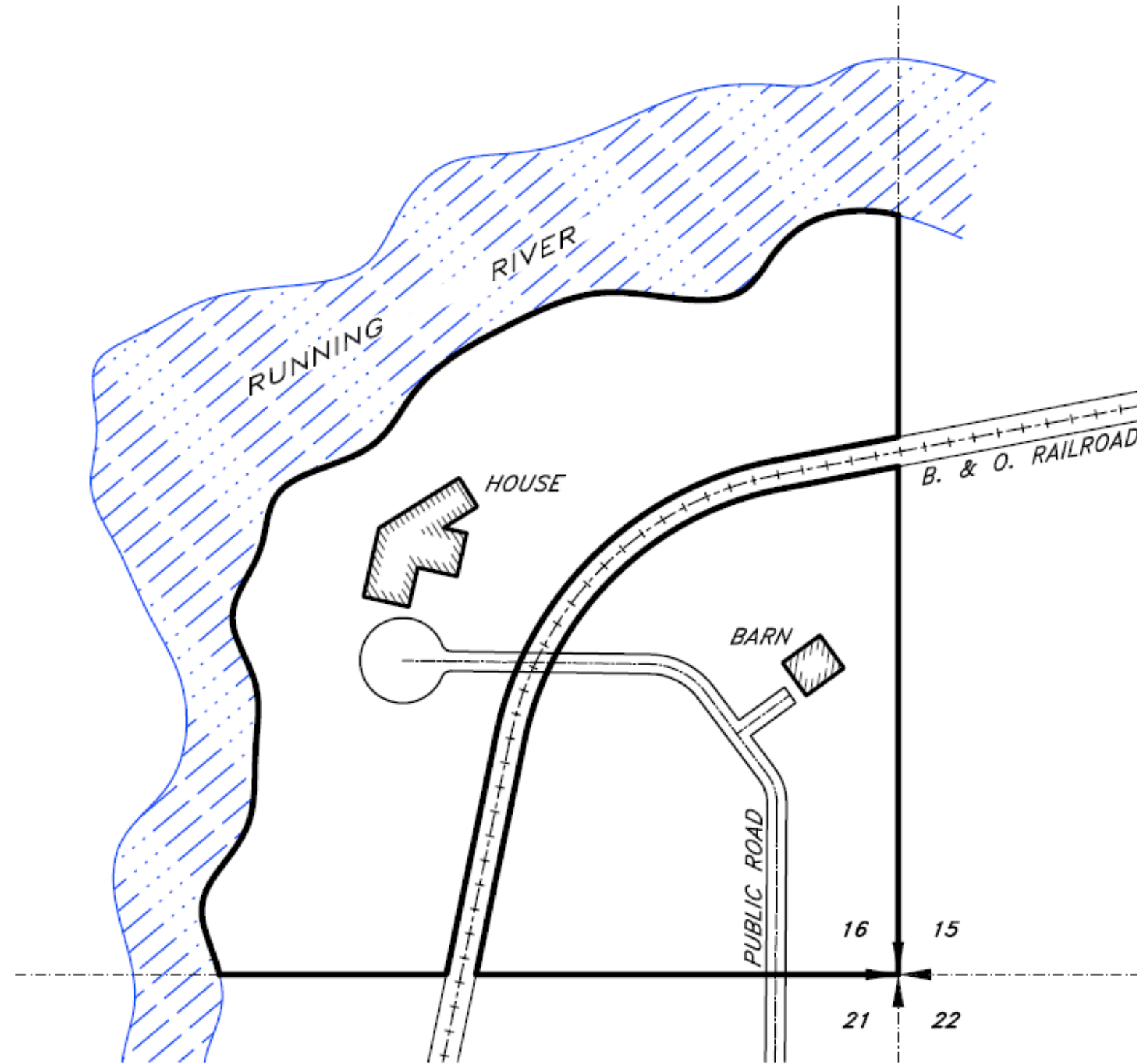
- Two Differences
 - Policy access does not specify source of legal access
 - Policy access does not insure physical access



ISSUE:

Common Access Issues

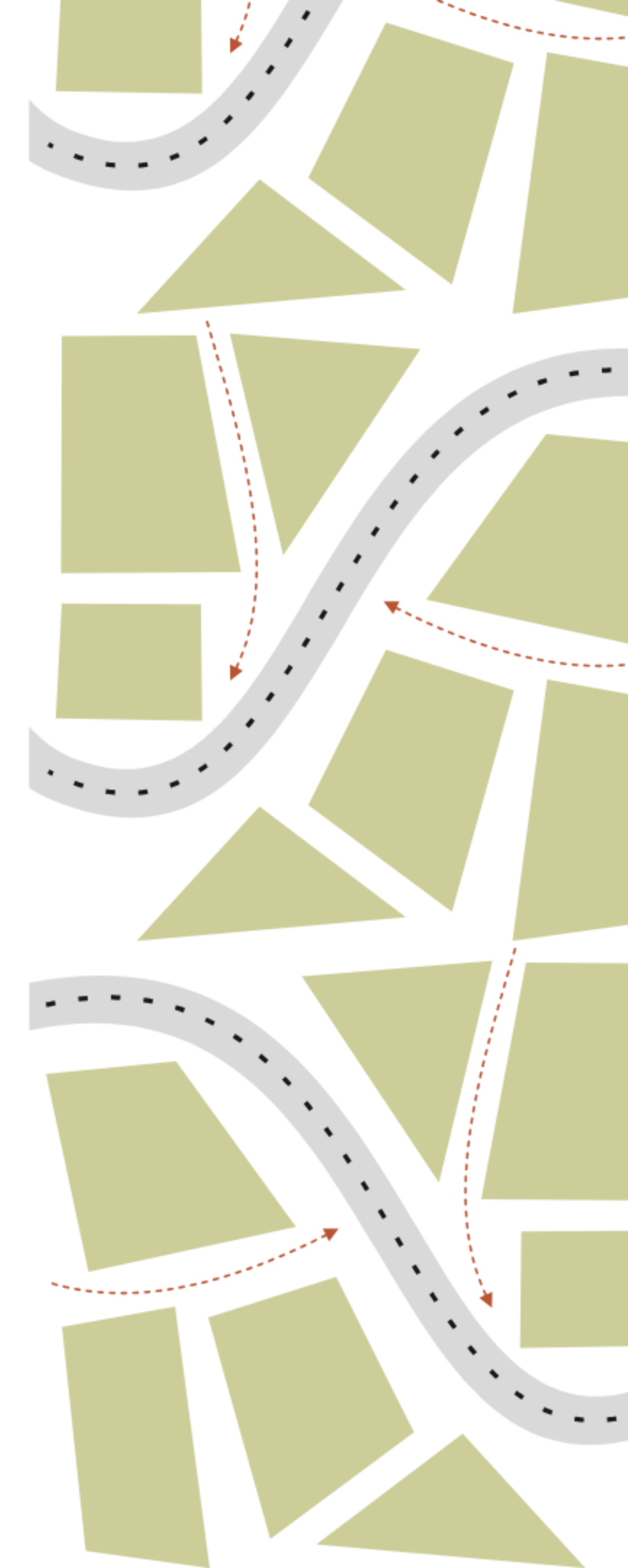
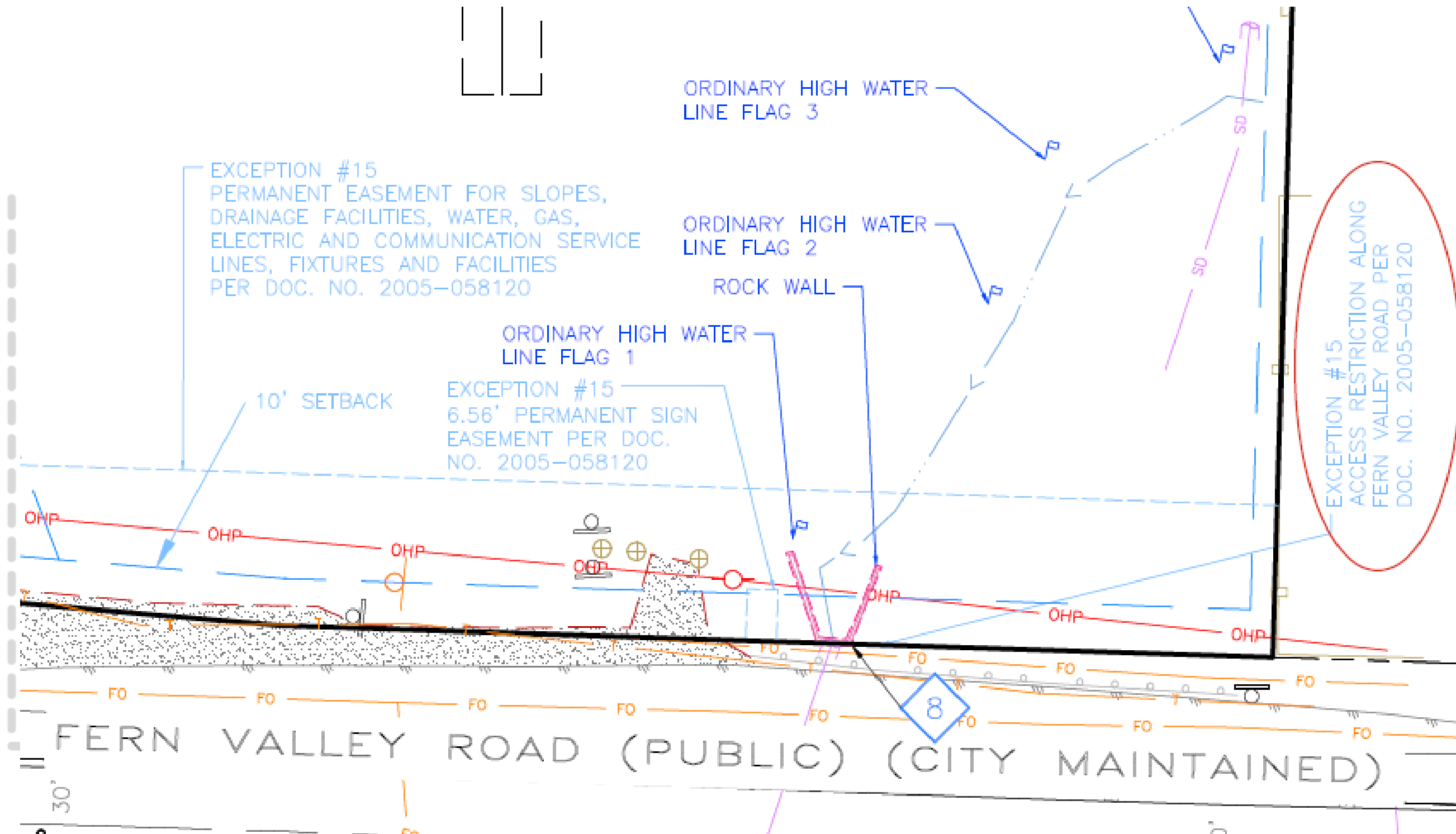
**Railroads and
Rivers**



ISSUE:

Common Issues

Recorded Access Limitations



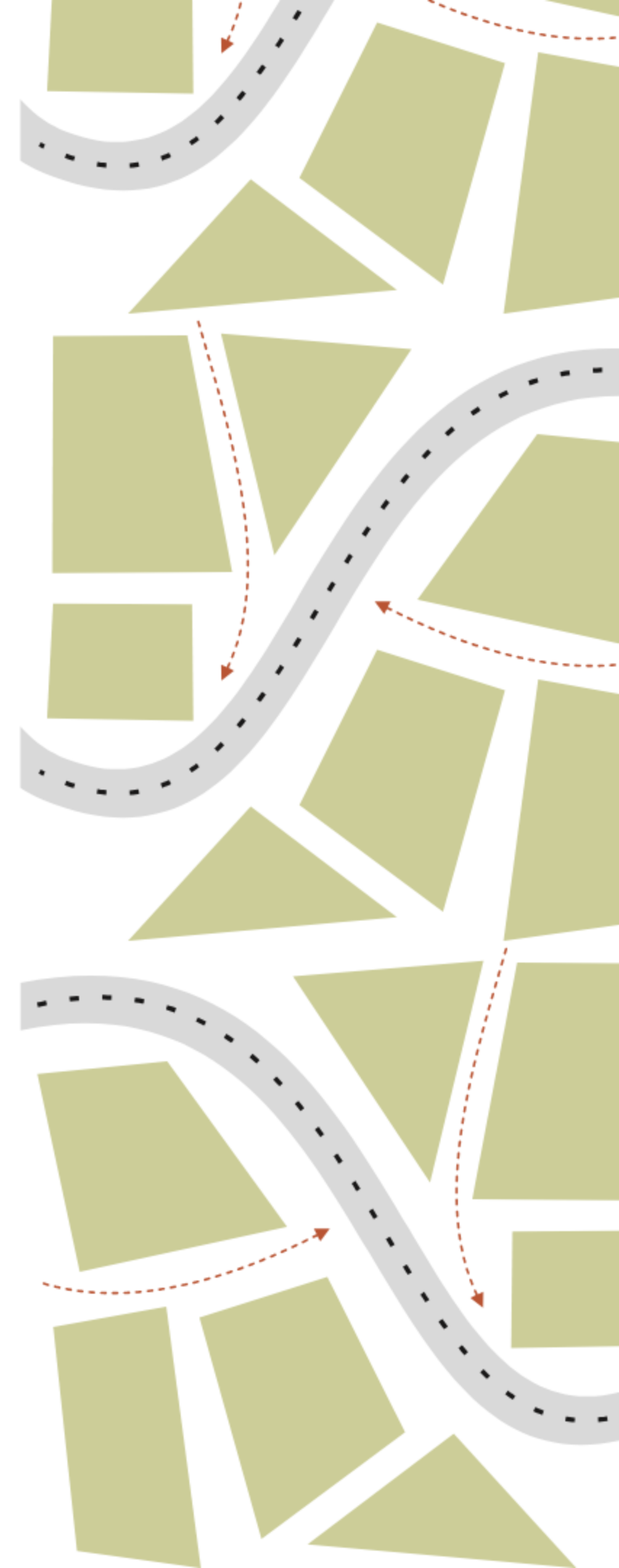
ISSUE:

Common Issues

Recorded Access Limitations

ODOT Access Limitations and Easement locations can be located by searching for surveys or strip maps on their website.

<https://ecmnet.odot.state.or.us/MapCenter/RWMapSearch>



What type of Access?

Policy issued
without an
exception for lack
of access.

217 endorsement
requested

217.1
Endorsement
requested. What
is Required?

Physical access
varies from legal
access

Issuing policy without an
exception for “Lack of
Access”



Let's see a real world
example



Physical access
varies from
legal access

How does that
example work with
a 217
endorsement?



What Endorsement can we issue?

- How about with the 217.1 endorsement?

Does your Prelim have an easement parcel in the legal description?

The endorsement requires an Easement parcel in addition to the Fee parcel





What if
there is not
a recorded
Easement?

A large, semi-transparent red circle with a thin white border, partially visible on the left side of the slide.

Physical access
varies from
legal access

Another example of
physical access and
legal access being
located in different
locations



CHAD
CYNTHIA
LOUISE

DICKINSON
NORMAN
G & JUDY L

DICKINSON
NORMAN
GEORGE
TRUSTEE

GODDARD
WILLIAM E
& TAMARA
A

HATFIELD
ARDEN &
KATHLEEN

WILSON
TIMOTHY
CHARLES
TRUSTEE

MARINO-
BLAIR
BONNIE

HATFIELD
ARDEN &
KATHLEEN

Too

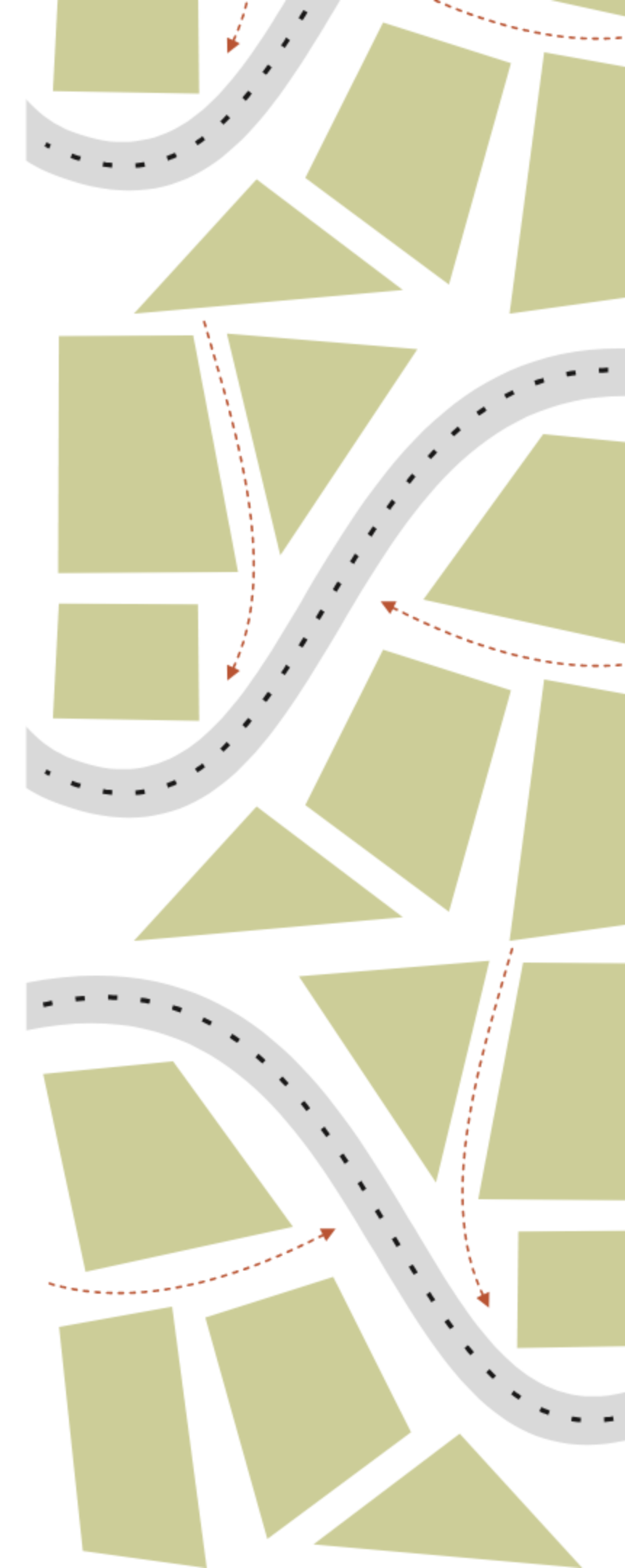


Easements

What is an Easement?



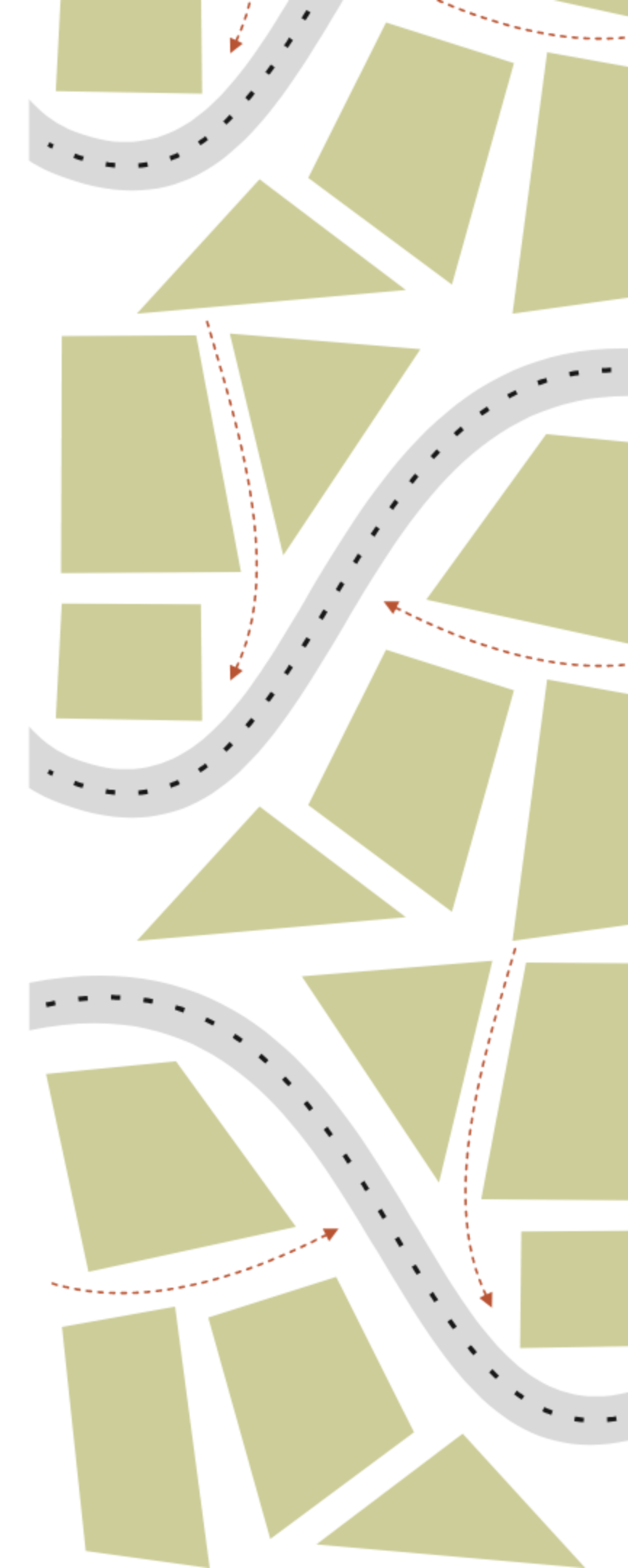
- An easement is a nonpossessory interest in the land of another that entitles the owner of the interest to a limited use or enjoyment of the other's land and to protection from interference with this use. ORS 105.170(1).
- The interest, once created, may be irrevocable and generally is not subject to the will of the landowner.
- Bundle of sticks – all of the interests in a property
- Single stick – an easement interest held by an easement holder



Appurtenant vs. In Gross

APPURTENANT – THE EASEMENT IS GIVEN FOR THE BENEFIT OF ANOTHER PROPERTY

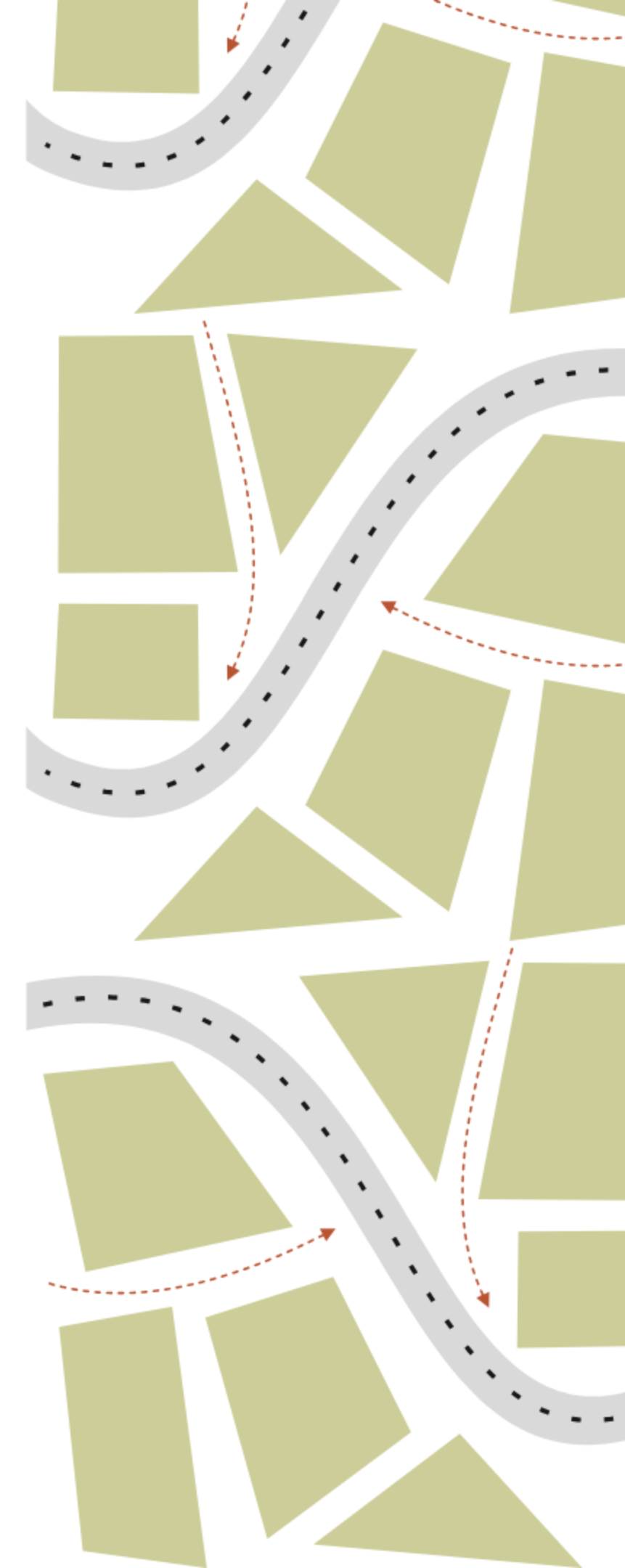
- DOMINANT ESTATE – BENEFITED PROPERTY
- SERVIANT ESTATE – BURDENED PROPERTY
- CARRIED IN CHAIN OF TITLE – ONCE GRANTED DOES NOT NEED TO APPEAR IN SUCCEEDING DEEDS. *Braat v. Aylett*, 278 Or 549, 552 (1977) (“If the dominant estate is sold or otherwise transferred to another, the easement over the servient land is transferred as well.”). (Note-rather short case pertaining to an easement by necessity that had already been granted by the court.)
- Appurtenant easements are not transferable apart from the dominant estate. *Hall v. Meyer*, 270 Or 335 (2002) (where reservation of a spring and pipeline easement was found appurtenant, easement could not then be transferred to another property).



Appurtenant vs. In Gross

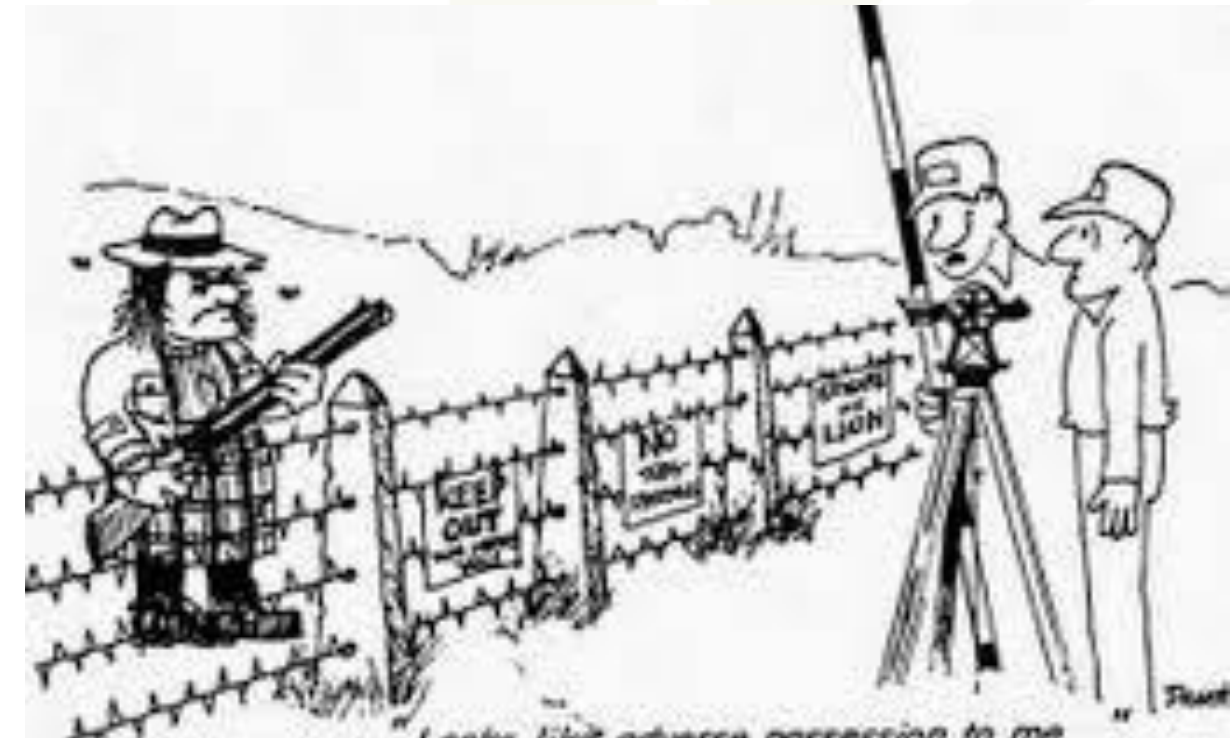
In gross – easement is unrelated to the easement holder's possession or ownership of land. Primary Example – utility lines

- Transferability
- Personal – non-transferable
- Commercial – transferable
- Public policy considerations – think easement to access pond on friend's property for fishing versus gas pipeline.
 - Test – is the easement a natural adjunct of the use of the land (appurtenant) or is it personal in nature (In Gross)? *Tusi v. Jacobsen*, 134 Or 505, 293 P 587 (1930).
 - With a presumption of appurtenant. *Menstell v. Johnston*, 125 Or 150, 165 (1927).



Prescriptive Easement

- Requirements – essentially the same as adverse possession
- Acquirer's use of another's land must be:
 - Open and Notorious – owner knows or should know of use
 - Adverse (or hostile) – not permissive
 - Continuous – 10 year period in Oregon
 - *Thompson v. Scott*, 270 Or 542, 546 (1974) (Burden of proof is clear and convincing evidence, not mere preponderance of evidence).
- Analysis generally starts at p's – or predecessor's – first use and progresses forward to the present.
 - Tacking – successive landowners meeting the requirement elements.
- Primary element often adversity –
 - when use is initially permissive, P must show that the character of the use clearly changed. *Thompson*.
 - If several owners are using the property (road), there is a presumption that the use is permissive. *Thompson*.

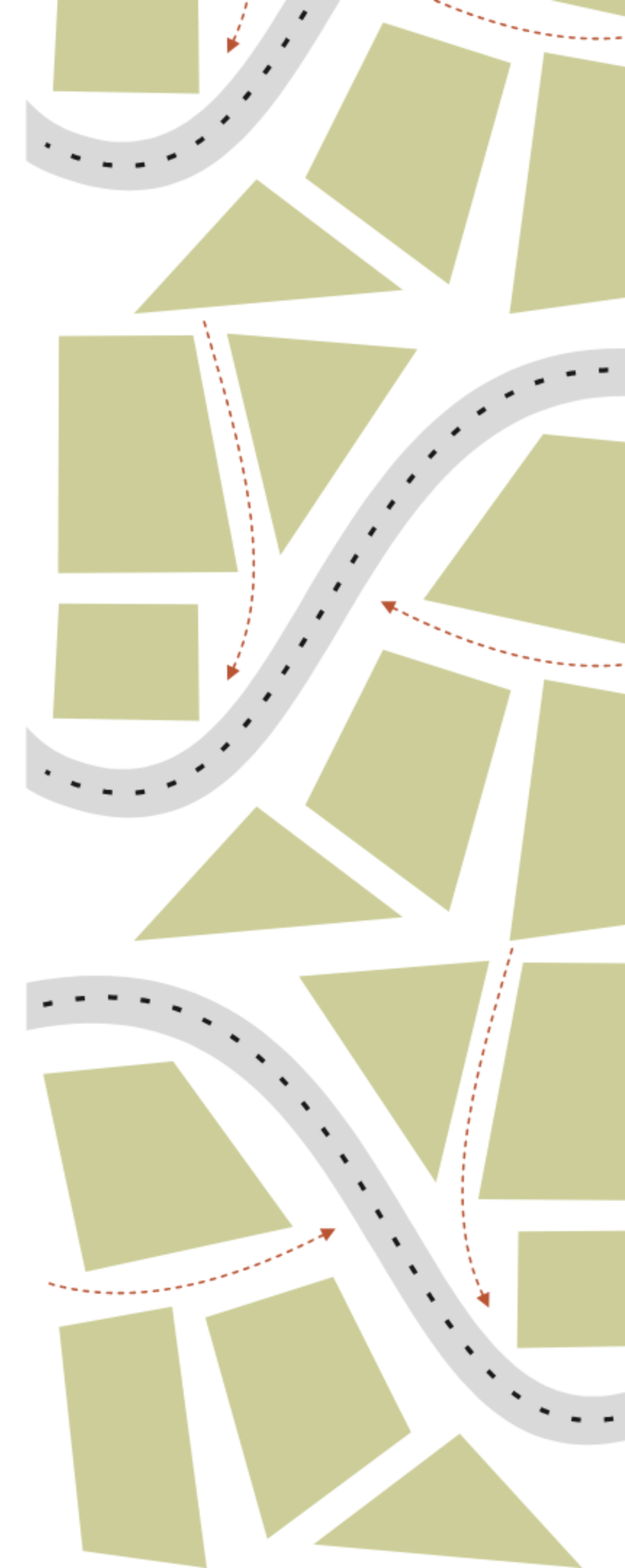


Easement by Necessity

An easement can arise if access to or from a property is impossible without the easement (i.e.. the easement's existence becomes necessary)

Two Types

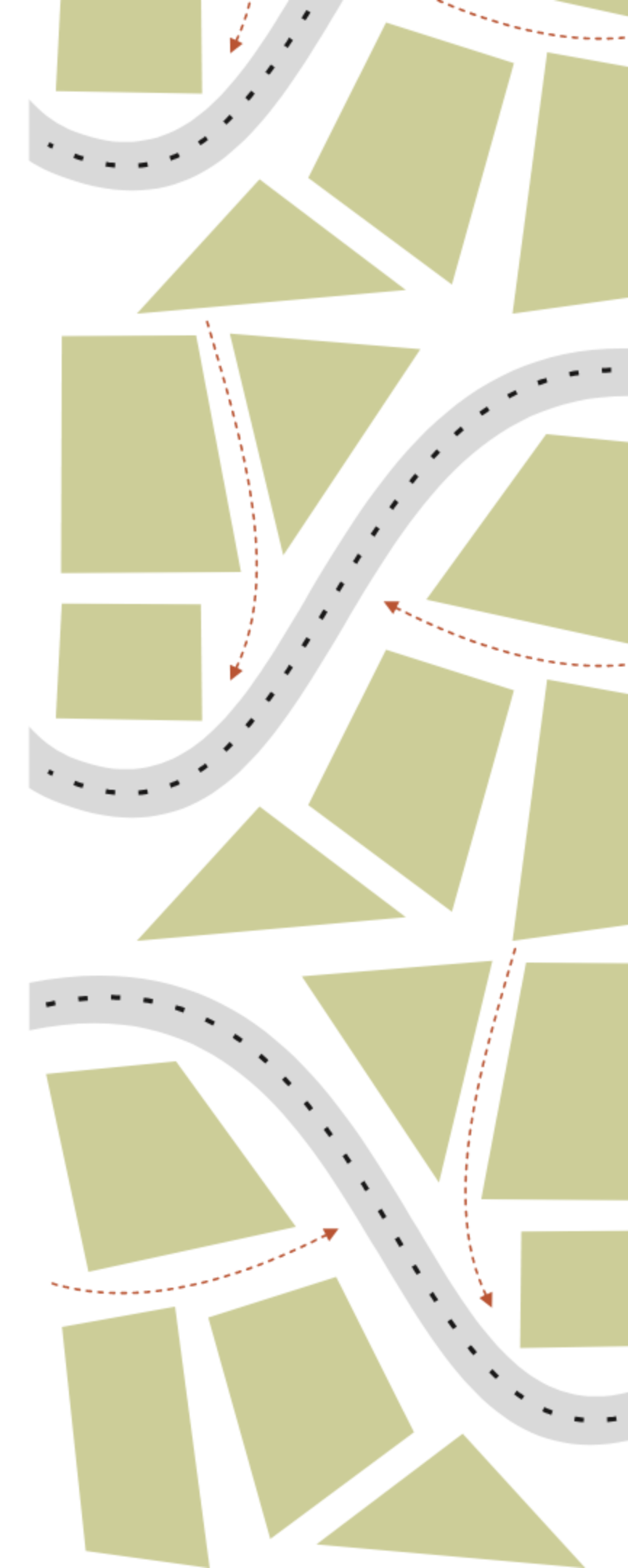
- Common law – arises when a landowner sells a portion of her property, and the resulting division deprives one lot owner of access to a public road or utility
- Statutory – ORS 376.150-.200 (does not require common ownership of dominant and servient estates).
 - Primary method for creation in Oregon.
 - Not over public land without consent of the governing body. ORS 376.185(1).



Implied Easement

AKA easement by prior use

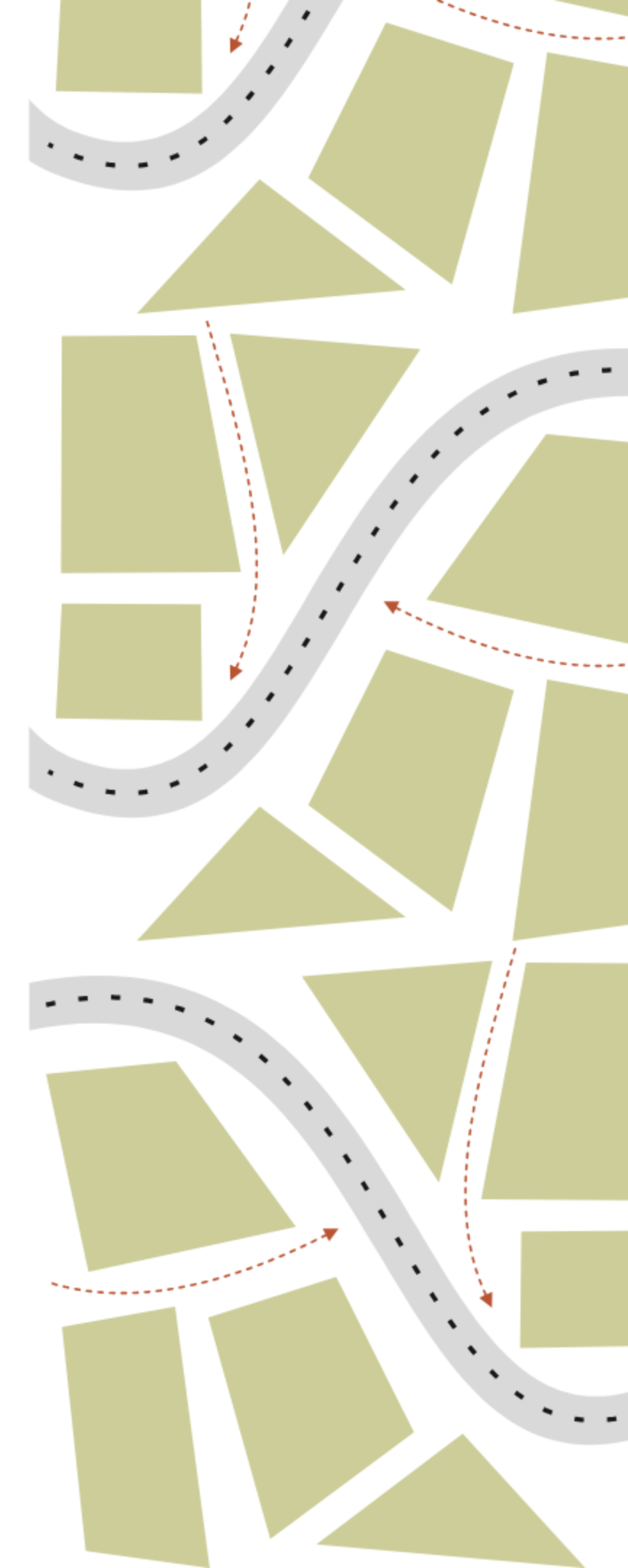
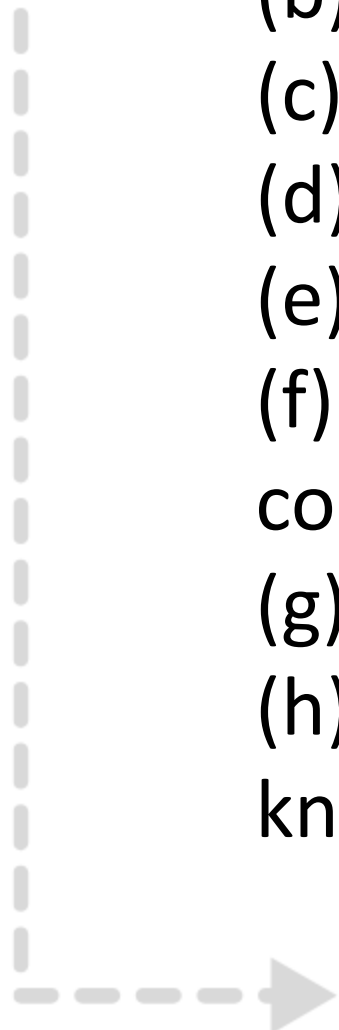
- An easement legally implied based on prior use by a common grantor on land subsequently divided into multiple lots
- Requirements –
 - Easement exists prior to division of a single tract
 - Common grantor's use is continuous and apparent
 - Use is reasonably necessary for enjoyment of the dominant estate
 - Parties intended the use to continue after division
- Instead of traditional common law, Oregon has adopted a multi-factor test that gets at intent of the former common owner and equity of granting the easement



Implied Easement

**Factors from *Cheyney v. Mueller*, 259 Or 108 (1971)
from Restatement (First) of Property § 476 (1944) –**

- (a) whether the claimant is the conveyor or the conveyee,
- (b) the terms of the conveyance,
- (c) the consideration given for it,
- (d) whether the claim is made against a simultaneous conveyee,
- (e) the extent of necessity of the easement to the claimant,
- (f) whether reciprocal benefits result to the conveyor and the conveyee,
- (g) the manner in which the land was used prior to its conveyance, and
- (h) the extent to which the manner of prior use was or might have been known to the parties.



Access
should be
fine. They
have been
using that
road for 20
years!

- Historically, a lack of access was often passed on or insured over based on “long time use” of established roads.
- Recent court cases have found that “Prescriptive Easement” rights are difficult to prove.
- It was Permissive use!!

Access should be fine. They have been using that road for 20 years!

- There used to only be one neighbor crossing our property, now there are 20!
- I don't like the new neighbors! I am no longer going to let them use the road.
- The neighbor's kids is tearing up the road with his dirt bike! I just graded it! That's it! No more access!!!

Can't we insure based on Prescriptive Easements

Easement connecting the south portion of [REDACTED] Lane with the east end of [REDACTED] Drive. The Easement has been used by property owners who access their property from [REDACTED] Drive and [REDACTED] Lane, adjoining neighbors, landowners, their predecessors in interest, private and public services and utilities, and others, openly and continuously for a period of more than 30 years.



6 NOW, therefore, it is ordered and adjudged that:

7 (1) Plaintiffs do not have an easement by implication to connect [REDACTED] Lane with
8 [REDACTED] Drive over Defendant's property, as was alleged in the Second Amended Complaint;

9 (2) Plaintiffs do not have a prescriptive easement to connect [REDACTED] Lane with [REDACTED]
10 Drive over Defendant's property, as was alleged in the Second Amended Complaint;



Did the burdened or benefitted property convey first?

- Together with an Easement for ingress & egress over the North 30 feet.
- Reserving an Easement for ingress & egress over the North 30 Feet

Our neighbor has placed logs across the road and says we do not have the right to cross his property. HELP!!



EGNER
BETH A
TRUSTEE(
S)

CHRISTA A
NEWTON
TRUST
#314
DATED 3/
14/1994

ROSEBURG
RESOURCES
CO

WATSON
RILEY &
HEATHER S

25

FUGATE
RYAN D

BEAM
JIMMIE I
& MARY
ALICE

BURKE
WILLIAM
M & SCOTT
CELIA M
TRUSTEE(
S)

MCCONAUGHY
SMITH
CINDY A

OTTO
WILLIAM
PAUL
ERNEST
TRUSTEE(
S)

MOFFETT
NATALIE
& MEYERS
DUSTIN

FARLEY
DARRYL D &
JANICE A



What was granted/reserved?

- Together with an easement over the North 30 feet
- Subject to a 30 foot easement along the North Property line

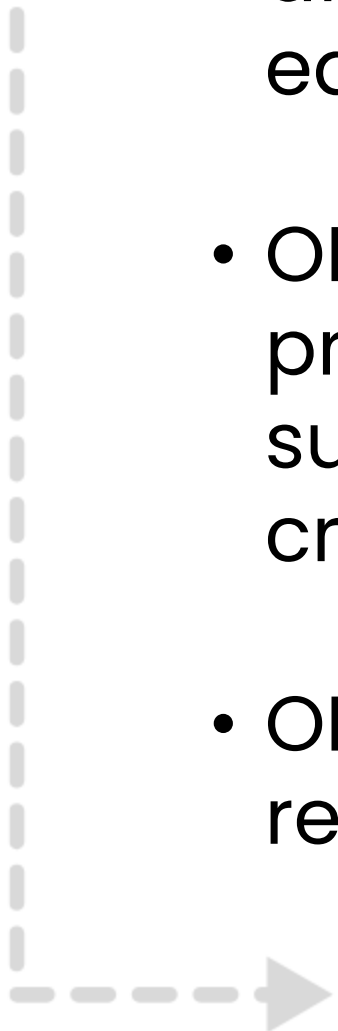
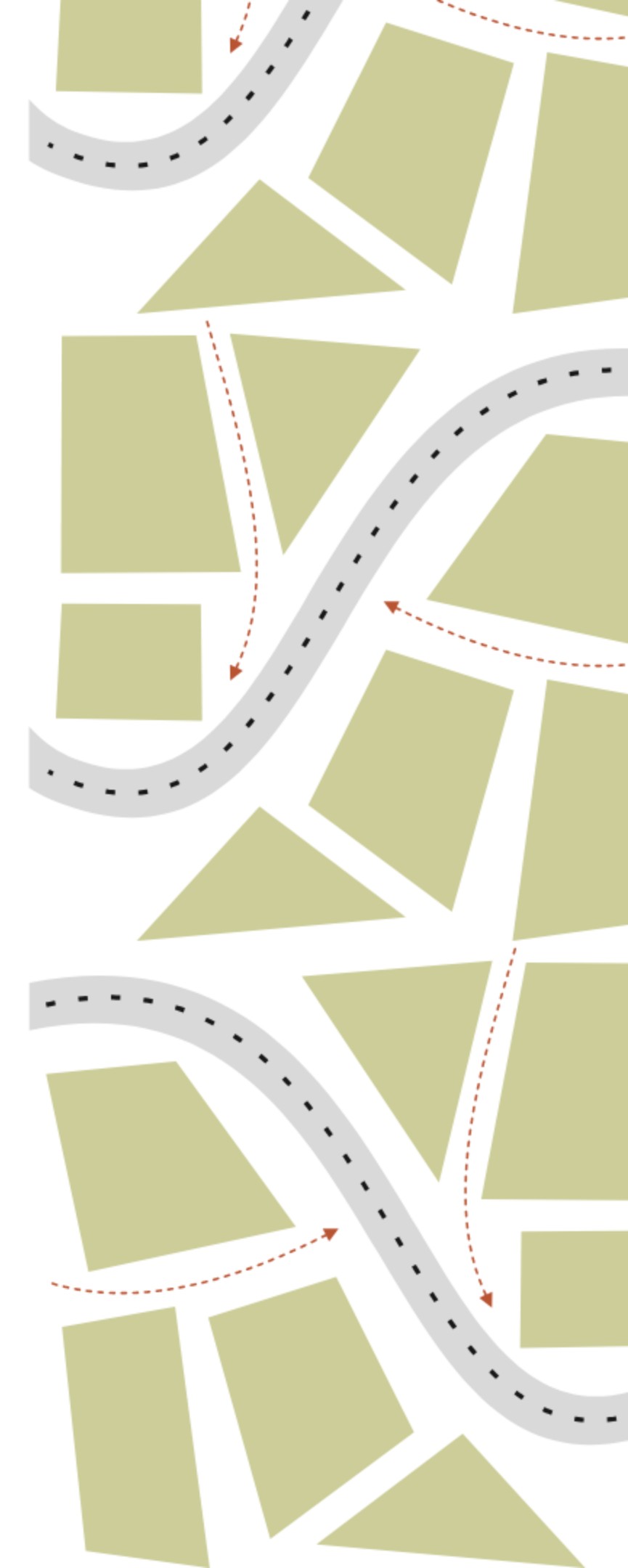
Is This Acceptable as a Reservation of Easement?

The Southwest quarter of the Northeast quarter of the Northwest quarter of Section 2, Township 25 South, Range 6 West, Willamette Meridian, Douglas County, Oregon.

TOGETHER WITH and subject to a non-exclusive thirty foot easement on an existing access road.

Easement Creation Via Plat

- A valid easement is created upon recording a subdivision or partition plat with the easement location depicted and affirmative language in the plat declaration creating the easement.
- ORS 92.075(1) (“The location, dimensions and purpose of all . . . proposed public and private easements must be shown on the subdivision or partition plat. [A]ny public or private easement created . . . shall be stated in the declaration.”)
- ORS 92.050(6) (“Private easements become effective upon the recording of the plat.”)



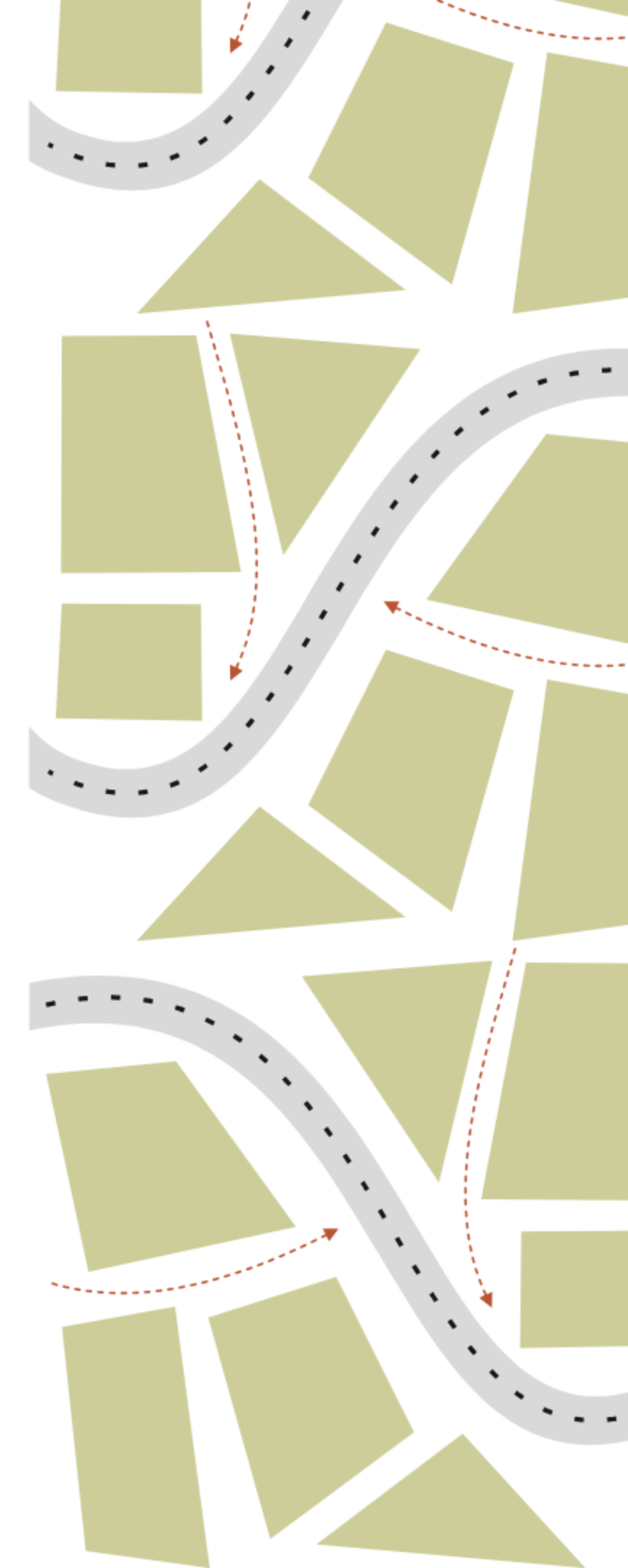
Creation of an Express Easement

Requirements – Generally same requirements as deed

- Writing (statute of frauds) ORS 93.020; ORS 45.580.
 - Reservation, together with, or separate document (or even through declaration or CC&Rs if merger does not apply)
- Grantor and grantee
 - Signed by grantor (the owner of the servient estate)
- Lawfully executed and delivered
- Conveyance language – some affirmative language granting the easement
- Specific Purpose
- Describes the land encumbered by the easement (servient estate)
 - Title insurance – If there is no definitive description, an exception for lack of definitive location may be applicable

Best practices

- Recorded – charges succeeding servient estate holders with constructive notice of the easement. ORS 93.710(1).
 - Requires notarization. Also ORS 93.710(1).
- Describes dominant estate if appurtenant easement



Fee or Easement?

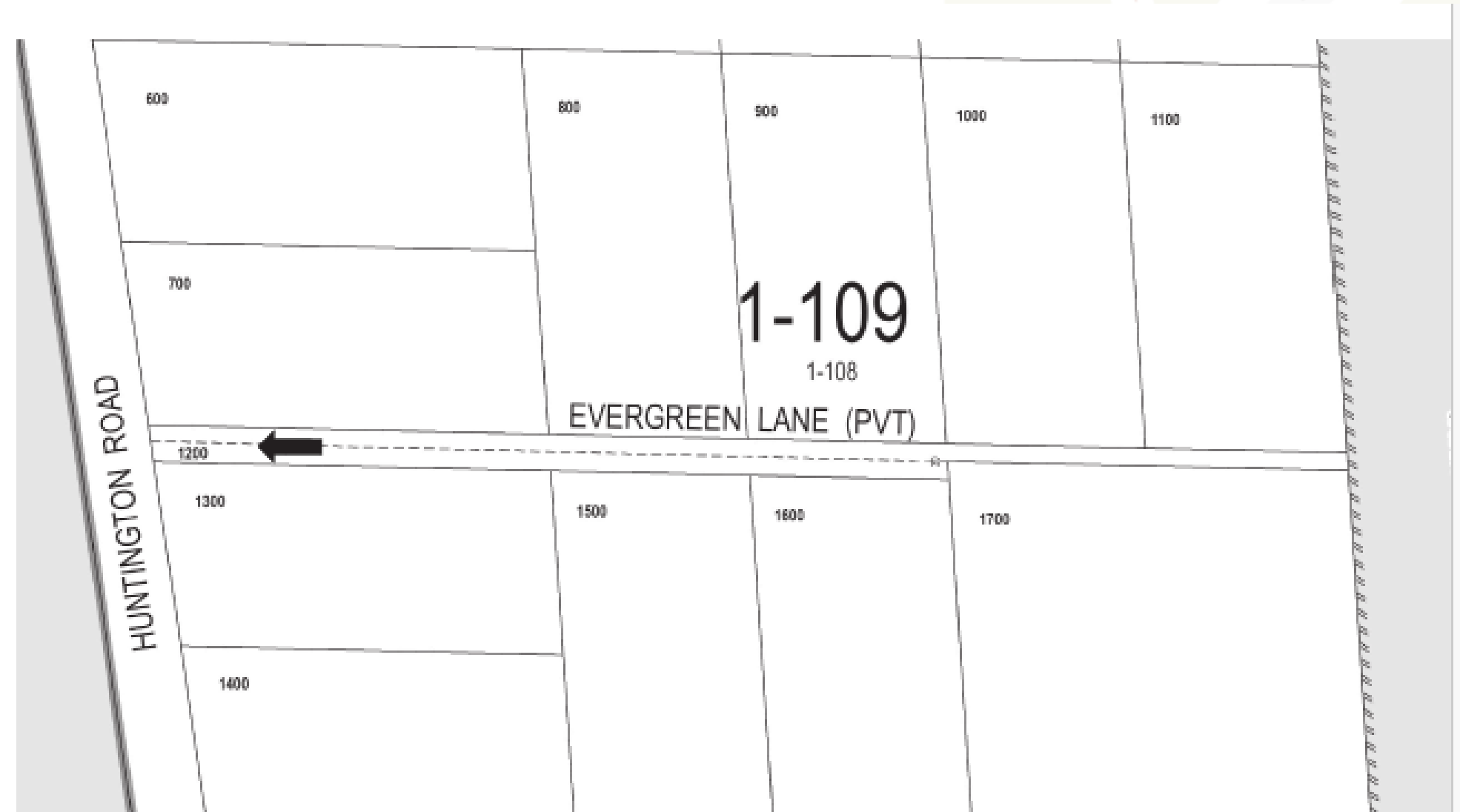
- Does the conveyance or reservation create a fee or easement?
 - Often an issue with railroads
- Any conveyance of real estate passes all the estate of the grantor, unless the intent to pass a lesser estate appears by express terms, or is necessarily implied in the terms of the grant. ORS 93.120.
 - Follows a common law principle of interpreting a conveyance in favor of the grantee
- A conveyance of a strip of land without limitation or purpose presumably creates a fee interest. *Bouche v. Wagner* 206 Or 621 (1956).
- Statement of a specific purpose of the conveyance makes the grantor's intent more likely a conveyance of an easement than fee. *Rall v. Purcell*, 131 Or 19 (1929) (If the conveyance had not indicated the strip was "to be used as a roadway" the court would have held for fee instead of easement).
- The term right of way does not necessarily create an easement. *Cappelli v. Justice* 262 Or 120 (1972).



ISSUE:

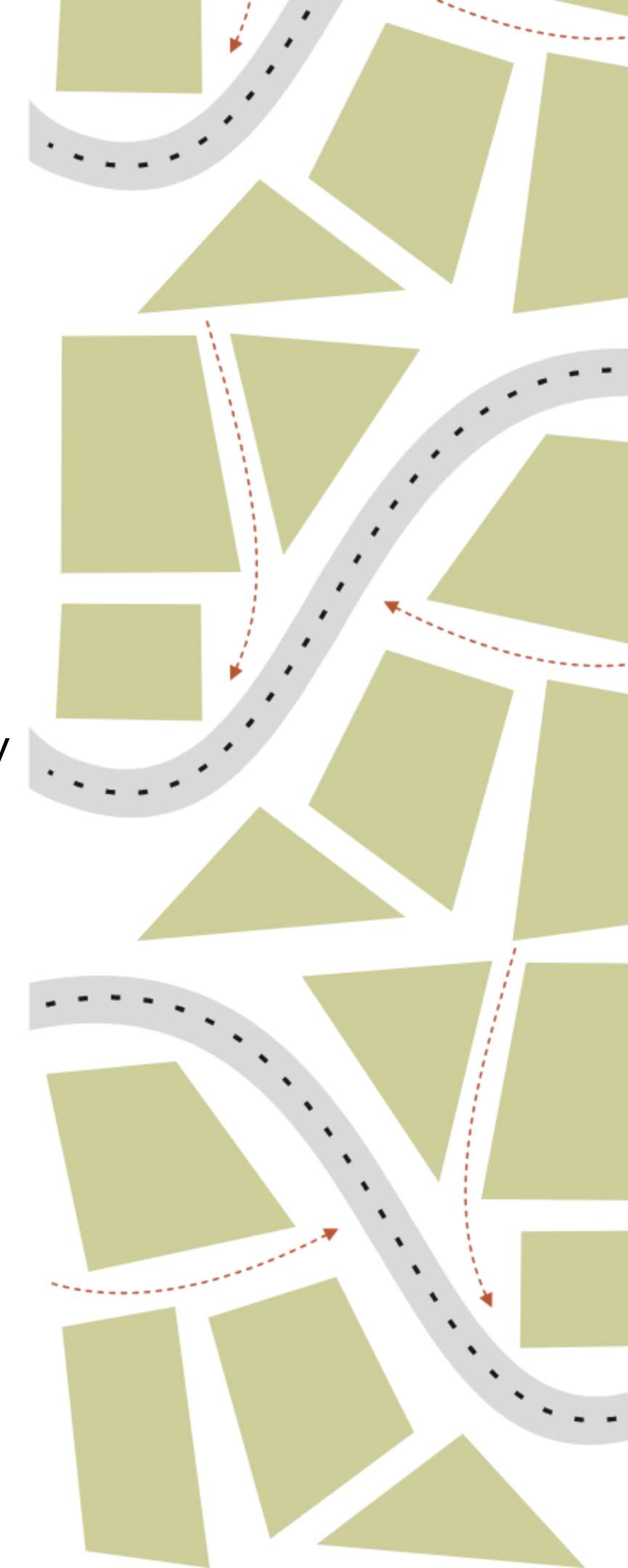
Fee or Easement?

- Anderson owned all property that eventually became all tax lots on the map
- Anderson conveyed lots adjoining road with varying forms of “excepting the [north or south] 15 ft. to be used for, subject to, or reserved for road purposes.”
 - Tax Lot 1700 had no excepting clause
 - Tax Lots 800 and 1300 had excepting clause under “subject to” section
- 2018 Anderson conveys entire strip to Taylor. County creates a separate tax lot for strip.
- Subsequent deeds for all tax lots either “excepting therefrom . . . for road purposes” or include the road.
- Likely easements –
 - Vested in owners of tax lots
 - Used legal description that included to CL of road
 - Took exception to “easements”
 - Took exception to RTI of Taylor as disclosed by deed



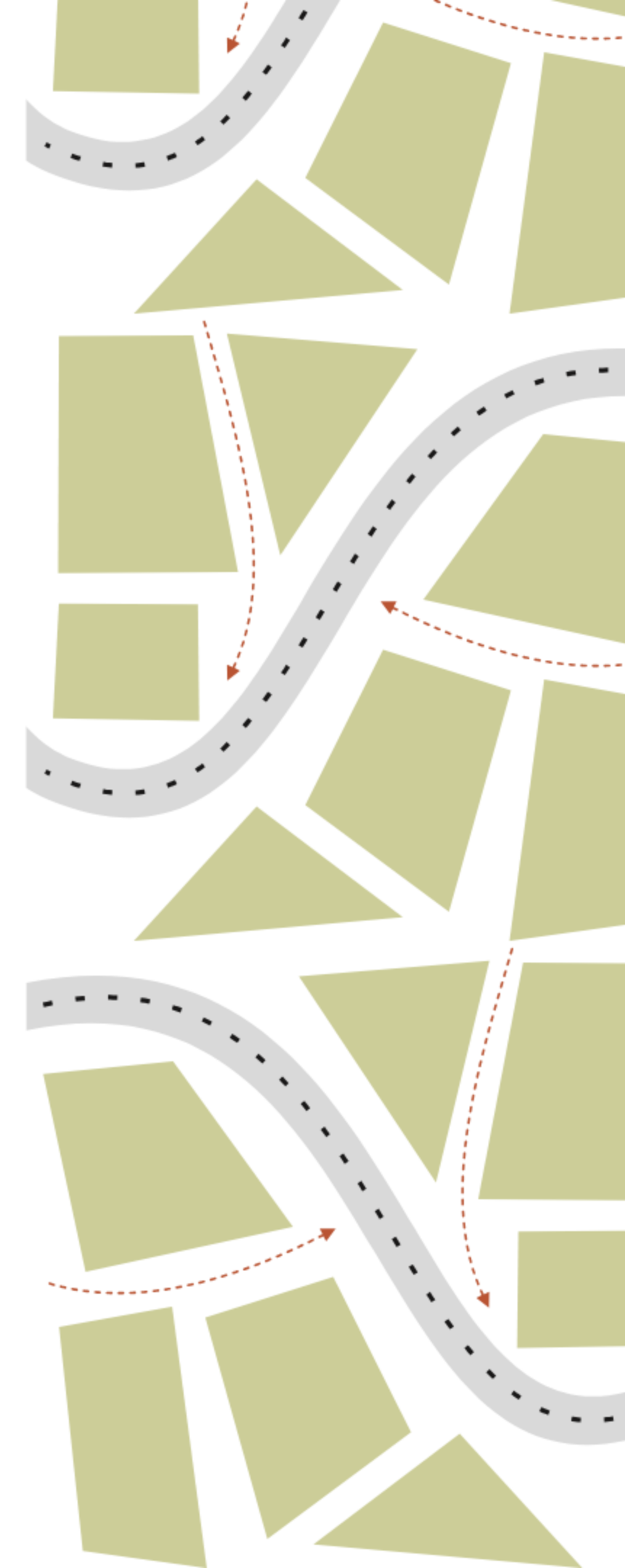
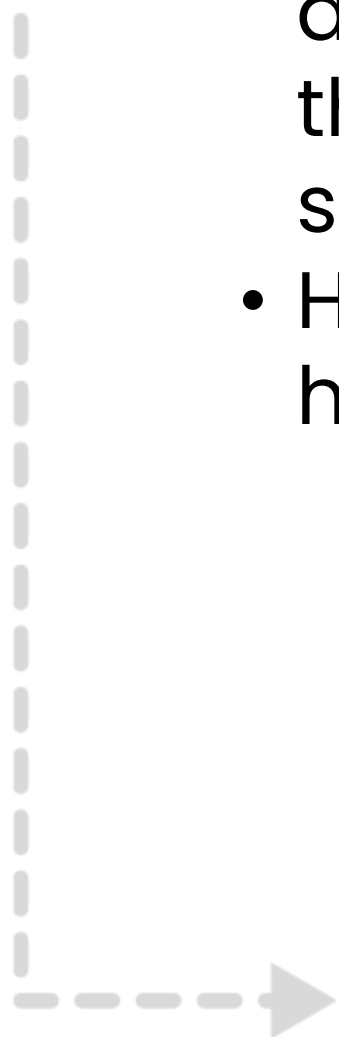
Termination Easement

- Expiration by own terms – time period or condition.
- Conveyance from dominant estate releasing interest (quitclaim deed).
- Prescription – this is the flip of acquiring an easement by prescription in that the servient estate becomes the adverse party. The servient owner's use must be clearly inconsistent with the easement holders use of the easement. *Horency v. Rachl*, 280 Or 405 (1977)(D building a fence and locking a gate over road for access easement was inconsistent with P's use, but this only satisfied four years prior to trial).
- Abandonment – Intent to permanently abandon easement shown by clear and convincing evidence. *Shields v. Villareal*, 177 Or App 687, (2001)
 - Generally title companies will not remove exception based on abandonment
 - Nonuse alone is insufficient.
- Merger – easement terminates with unity of title of the dominant and servient estates. *Witt v. Reavis*, 284 Or. 503, 508-09 (1978).



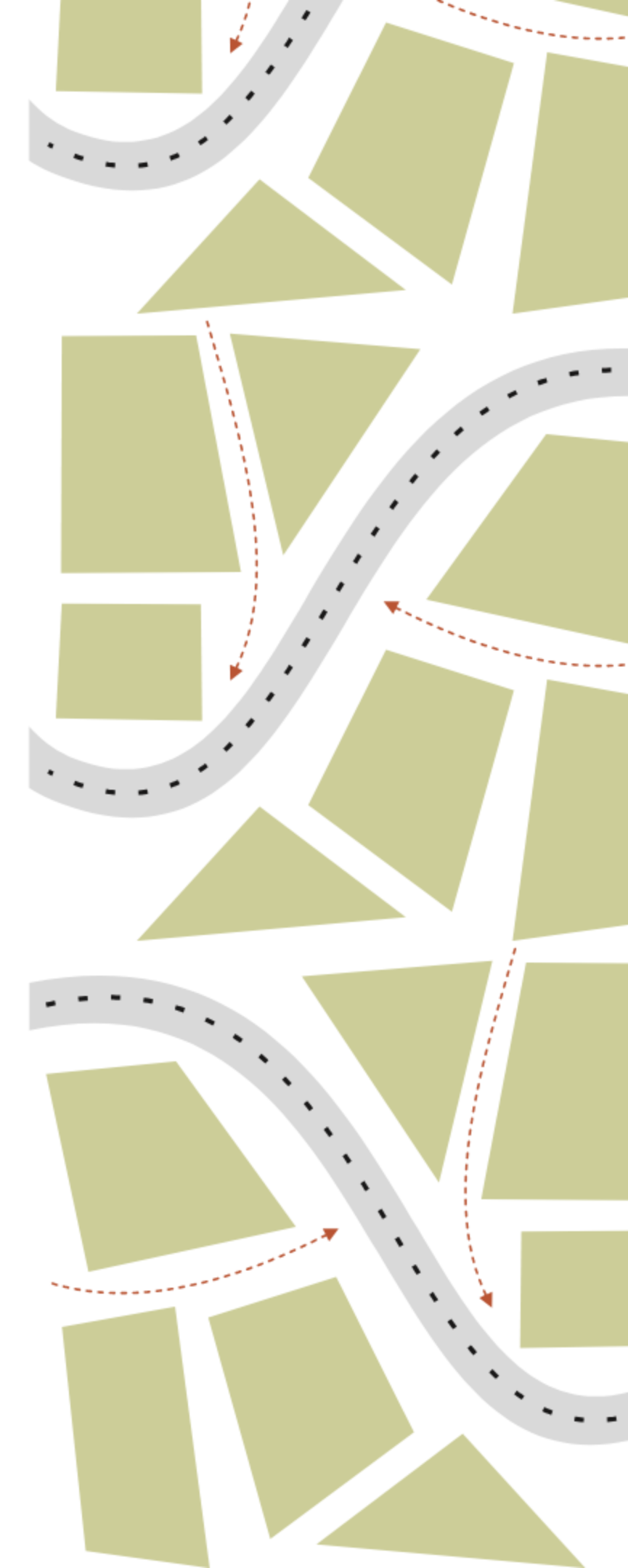
Extinguishment of an easement by merger of title

- *Witt v. Reavis*, 284 Or 503 (1978)
 - Facts – After valid creation of an easement, title to both the dominant and servient estate was held by one owner. Title to the properties was later separated and the owner of the servient estate claimed the easement was unenforceable.
 - Holding – Basically, an owner cannot retain in easement in her own property.



Extinguishment of an easement by merger of title

- *Partney v. Russell*, 304 Or App 679 (2020)
 - Facts – convoluted, but essentially suit to enforce an express easement where the grantor and grantee were the same party.
 - Holding – The Court finds the easement unenforceable based on the doctrine of merger
 - A valid easement can be created if the extinguished easement is later incorporated by reference in a granting or reserving clause in a subsequent deed.
 - A subsequent “subject to” list including the “merged” easement does not create the easement.
 - Dicta – Inference from circumstances – “the intent to convey a lot or unit subject to a declaration may also be inferred from the circumstances.”

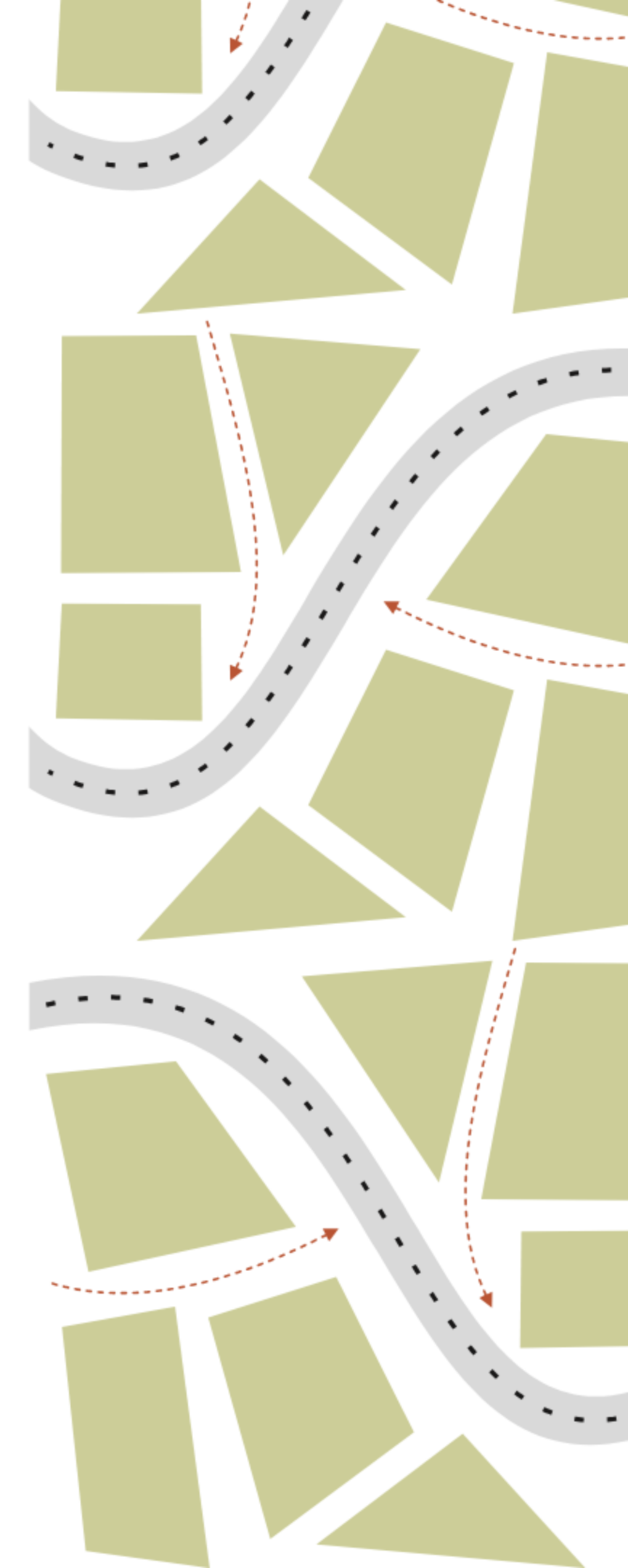


ISSUE:

Partney Issue



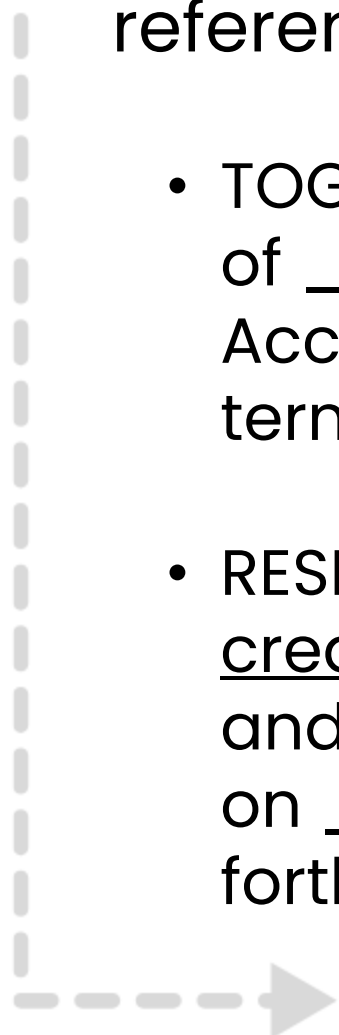
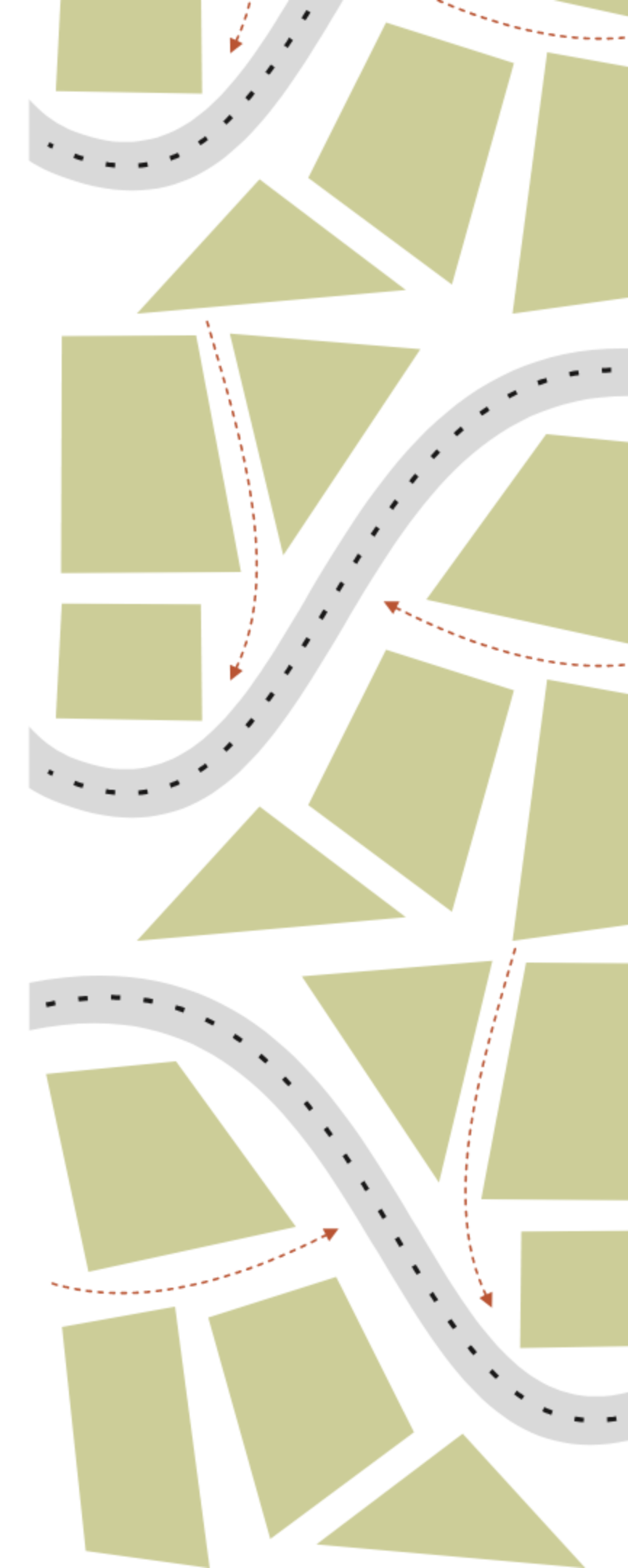
- Lot 11 has access to Downs View Ct. over Lot 28
- CCRs give Lot 11 easement over Lot 28
- No easement depicted or declaration on Plat
- Deed from subdivider to builder lacks together with easement
- Deed from builder to first owner lacks together with easement
- *Partney* likely applies



Recreating the Easement – *Partney*

Perhaps this meets the *Partney* criteria for creation of an easement through reference to the declaration that attempted to create the easement...

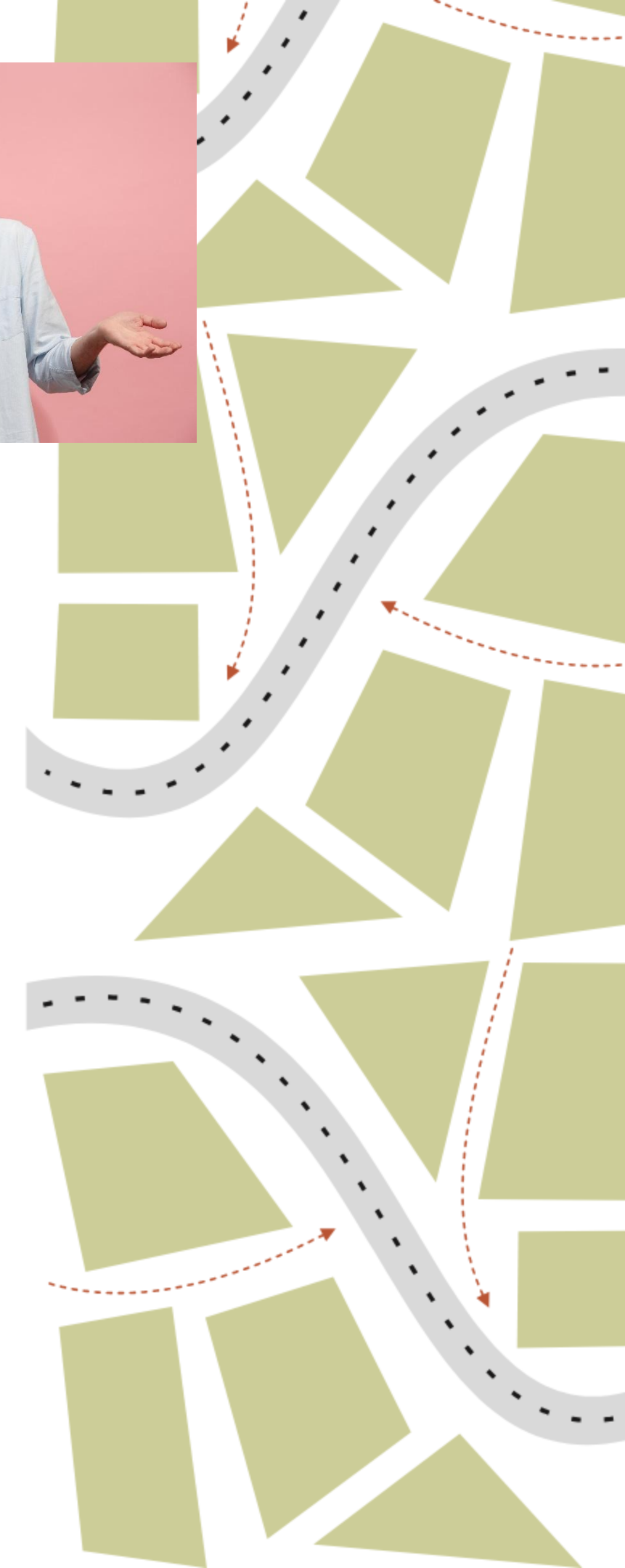
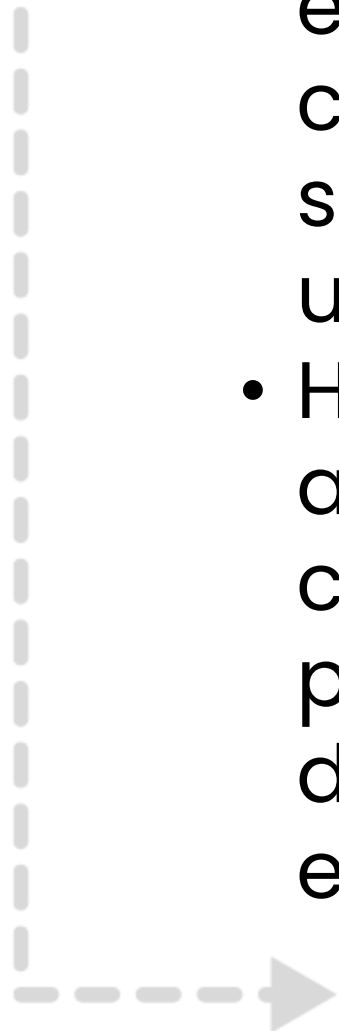
- TOGETHER WITH an Easement, created herein, over, under, and across a portion of _____, as described in and for the purposes set forth in the Declaration of Access Easement recorded on _____, as Instr. No. _____, and subject to the terms and conditions set forth in said instrument.
- RESERVING to the Grantor and to Grantor's successors and assigns, easements, created herein, under, over, and across a portion of _____, as described in and for the purposes set forth in the Declaration of Access Easement recorded on _____, as Instr. No. _____, and subject to the terms and conditions set forth in said instrument.



Merger Confusion – Lute

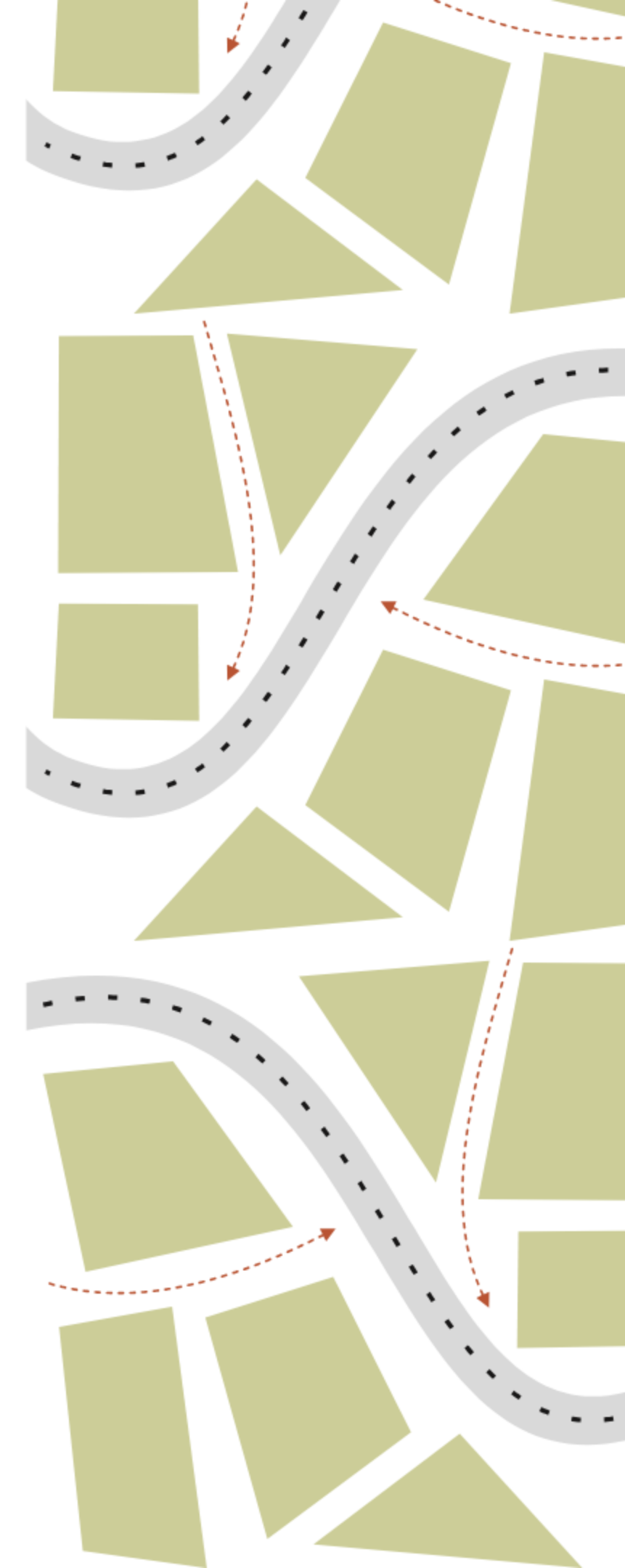
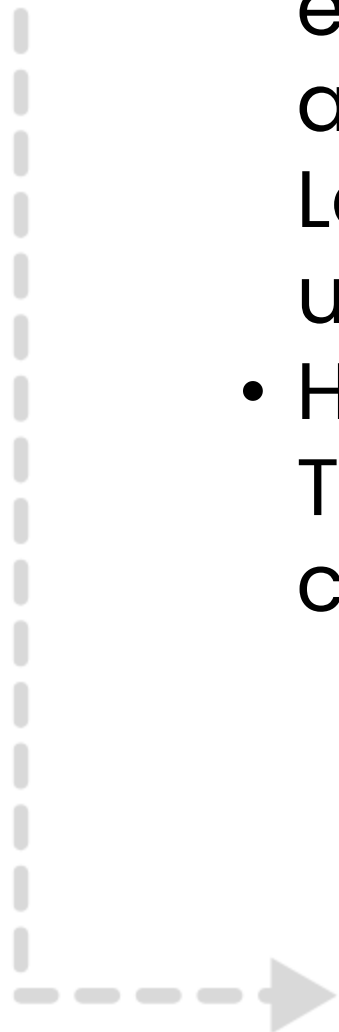


- *Lute v. Cascadia Tower Incorporated*, 336 Or App 155 (2024)
 - Facts – A cell tower company recorded a declaration of easement for a tower on property it owned. The cell company sold the property “subject to” the easement. A subsequent owner claimed the easement was unenforceable due to merger.
 - Holding – The 2015 easement declaration itself did not create an easement, but “the terms of the warranty deed and the circumstances surrounding defendant’s conveyance of the property to the Bodtkers [predecessor in title to the defendant, Lute] demonstrated the intent to create the easement.”



Merger Confusion – Humphreys

- *Humphreys v. Huls*, 343 Or App 683 (2025)
 - Facts – Property owner recorded a declaration of access easement. Property was subdivided. Owner conveyed “free and clear of all encumbrances EXCEPT those items of record.” Later owner of servient estate claimed the declaration was unenforceable due to merger.
 - Holding – the declaration was unenforceable due to merger. The “generic reference” to items of record was not sufficient create the easement per the *Lute* analysis.



Questions?



Contact Info

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- Charlie.cookson@fnf.com
- 541-280-7525

THANK
YOU!

