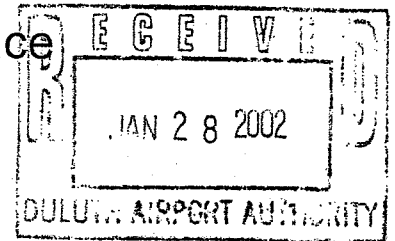


Inter-Department Correspondence  
City of Duluth, Minnesota



**Date:** January 24, 2002  
**To:** Ray Klosowski, Airport Director  
Russ Stewart, City Councilor  
**From:** Bryan F. Brown  
City Attorney  
**Subject:** Opinion Regarding Location of Boundaries of Sky Harbor Airport

Each of you has, at different times, requested my opinion on the location of the boundaries of Sky Harbor Airport in Duluth. Councilor Stewart also asked how the boundaries are set. I will now give you my opinion on these issues.

As you may know, this office often renders opinions upon land titles and parcel descriptions. Usually it is a matter of survey for others to measure out the location of the land that the legal description applies to. In this case, an ordinance that could have shown the boundaries by a diagram failed to do so. That event complicates the matter and makes this opinion more difficult than it need be.

We must also realize that the exact boundaries are subject to change by use. As determined by our Supreme Court in MAC v. McCabe, 135 N.W.2d 48 (1965), the boundaries of airports (in this case the use right-of-way) change as the uses or equipment change. This phenomenon will become more clear as we explore the legal framework of airport regulation.

I have been assisted by Joan Christensen of this office. We have consulted the following authorities in our efforts to reach a conclusion on these issues:

- Laws of 1969, Chapter 577
- Minnesota Statutes Chapter 360
- Minnesota Rules 8800.0100, et seq
- United States Code Title 49 §47102
- District Court Order entered April 27, 1938, and recorded in the office of the St. Louis County Register of Deeds on May 3, 1938 in Book 670 of Deeds, Page 16 and filed in the office of the St. Louis County Registrar of Titles on May 7, 1938 as Document No. 141830
- Certificate of Title No. 78751
- Resolution adopted April 15, 1940, accepting property from the State of Minnesota
- September 26, 1996 letter from Representative Willard Munger to Attorney General Herbert H. Humphrey
- January 28, 1997 letter from Assistant Attorney General Andrew Tourville to Representative Munger
- City of Duluth Ordinance 9215 (1994) - Sky Harbor Airport Zoning

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- Minnesota Department of Transportation, Office of Aeronautics - Order dated July 8, 1994, approving proposed ordinance of the City of Duluth
- Duluth City Code Section 50 including zoning map 30
- Airport Layout Plans prepared by Salo Engineering originally drawn 9-24-76 and last updated 8-27-84
- Airport Layout Plans prepared by Salo Engineering originally drawn 9-24-76 and last updated 3-23-89
- Preliminary Land Use Safety Zones prepared by Salo dated 4-19-94
- Land Use Safety Zones prepared by Salo dated 4-19-94
- Airport Layout Plan prepared by City Engineer 1964, revised April 1965
- Airport Layout Plan prepared by City Engineer drawn April, 1970
- Construction Plans Duluth Sky Harbor Airport certified by City Engineer on 2-03-64 and approved by Mayor on 2-05-64 (denotes airport property boundary)
- Records and Maps in the City Assessor's Office
- City Code Section 50
- City Code Section 50-181
- City Code Section 50-178 Ex. A
- Resolution 97-0176 supporting adoption by the Minnesota legislature of legislation aimed at protecting old growth forest on Park Point
- Resolution adopted June 21, 1950 entering into a Sponsor's Assurance Agreement for the purpose of obtaining Federal aid in developing a landing strip at the Municipal Airport on Minnesota Point
- Minnesota Point Environmental Management Plan (MPEMP) and Maps and Data in support thereof (on Compact Disc)
- Official Proceedings of the City Council for 1950 - Presentations of Petitions and Other Communications - No. 38282
- Official Proceedings of the City Council for 1950 - Presentations of Petitions and Other Communications - No. 37779
- March 8, 1997 memorandum from Gary Glass and Noel Knudson to Mayor and City Councilors
- September 4, 1996 Letter from Darrell Lewis to Dave Johnson and Noel Knudson
- November 16, 1983 Memorandum from Bill Dinan re: permits for proposed improvements at Sky Harbor Airport
- September 4, 1996 letter from Sam Solon to Noel Knudson
- Addendum to Agreement between City of Duluth and City of Cloquet dated July 21, 1967
- June 9, 1969 City Council Resolution authorizing lease with Skyharbor Flying Service, Inc.
- June 16, 1969 City Council Resolution authorizing appointments to the DAA
- Memorandum of Understanding re: location of fence dated December 11, 2001
- Deed dated September 13, 1939 from the State of Minnesota to the City of Duluth and filed for record on April 16, 1940 in Book of Deeds 697, page 181
- Aerial photos used in the MPEMP
- Minnesota Power Transparency
- City Planning Commission Plat and Land Use Maps
- Minnesota Department of Highway Map

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- Three meetings with concerned citizens and neighbors
- Letter from Klosowski 11-29-01
- Photo of area in 1950's.

In the United States, airports and air transportation are regulated by the Federal government. The Federal government has left much authority to the states, but state regulation is required to be consistent with Federal law. Most, if not all, states have adopted laws modeled on the Uniform Aeronautic Act of 1943. Minnesota has done so by adopting the State Aeronautics Code, Chapter 360.01 et. seq. This law contains a definition of "airport" which reads as follows:

360.013, Subd. 5:

Airport means any area of land or water, except a restricted landing area, which is designated for the landing and takeoff of aircraft, whether or not facilities are provided for the shelter servicing or repair of aircraft, or for receiving or discharging passengers or cargo, and all appurtenant areas used or suitable for airport buildings or other airport facilities, including facilities described in section 116R.02, Subd. 6, and all appurtenant rights of way whether hereto fore or hereafter established.

Other relevant definitions in the State code are "air navigation facility," "airport hazard area," "airport purposes." These definitions are attached.

We also find relevant description of airport territory and uses in Minnesota Rules (which have been adopted) 8800-0100 et seq. Of special interest are the definitions of the primary and horizontal surfaces, 8800.1200, Subp. 5.

I should also mention that the Federal law, at 49 USCS §47102(2) defines "airport" to include "appurtenant areas, rights of way, buildings, and facilities."

The City has also enacted ordinances that define the Airport. The zoning maps, the airport zoning code (§50-178) and §50-181 all define the area of Sky Harbor Airport. Code §50-178 refers to an exhibit. We investigated and found that there is no exhibit that shows the boundaries. §50-181 refers to an engineering drawing. We located that, but it is ambiguous as to the exact boundaries.

One important consideration is found in M.S.A. §360.015, Subd. 3. That law states that if a local ordinance conflicts with State rules, the State rule prevails. And, of course, the State or Federal statutes prevail over any local law. We see the operation of this principle in Mr. Dinan's opinion of November 16, 1983 concerning the application of City Code §50 and §51 to Airport property (attached).

In 1969, the Legislature passed Chapter 577, which created the Duluth Airport Authority. It was approved by the City Council. Parts of this act are relevant to our issues.

Section 1 sets out the purposes of the act, one of them being to “. . . promote air navigation and transportation.” The significance of this provision is that it establishes that the act should be applied and interpreted so as to carry out the stated purpose of promoting air navigation.

Section 2, Subd. 8, defines “airport” (attached) and includes areas for activities related to or supporting air travel, and facilities that are available for use in air travel.

Section 5, Subd. 1, also defines airport. This includes areas that were Sky Harbor Airport in 1969, any area or facility or “appurtenances incidental and necessary to the operation of such airport . . .” and anything acquired after 1969 to be part of the airport operation. This section also empowers the City Council to change the Airport boundaries.

Chapter 577 gives total control of the Airport land and Airport operations to the DAA. This grant of power is authorized by Chapter 360 of the State code.

All of the various definitions of “airport” include “appurtenant” facilities and rights. An “appurtenant” thing, according to Black’s Law Dictionary, is something belonging to, accessory, or incident to; adjunct, appended, or annexed to; answering to accessorium in the civil law. Easements and rights of way are appurtenant to land, the use of which they serve. It is clear that the use easements or rights for aviation, which rights are created by state or local law, are appurtenant to the use of land for an airport. This has significant implications for airport boundaries, because state law defines the primary, horizontal, and safety zones. These are appurtenant rights, and they are large in area.

The conclusion that appears from this statutory scheme is that an airport in Duluth, under applicable law, has boundaries established by three forces. They are:

1. Boundaries that existed in 1969.
2. Boundaries set by the City Council.
3. Boundaries of the use of the land for airport, and appurtenant, purposes.

Let us examine number 3, the boundary of airport use. This is the most difficult to define. First, we must recognize that the Duluth Airport Authority determines the use. Chapter 577 gives it that exclusive right. Next, the State MnDot and FAA define many uses, including safety and use zones. The State licenses airports, and the area licensed is an airport use. The boundaries must include the licensed area. Under the McCabe case, supra, if an airport operation or facility requires a greater or lesser area, the boundaries will change to accommodate the operation.

I have been asked about whether the land where the Sky Harbor Airport exists is limited to non-airport uses by restrictions on the title of the land transferred from the State to the City. Most of the land was acquired from the State for recreational use.

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This office, and the State Attorney General's office, have examined this. General aviation is a recreational use. There is no prohibition against the land being used as a general aviation airport. The reasoning and authorities are found in the 1997 letter from Assistant Attorney General Tourville to Rep. Willard Munger.

I have been asked whether the road that traverses the Airport is a public road. By separate written opinion, I have explained why it is not. In addition, the 1967 contract between Duluth and Cloquet does not create public rights in the road. In fact, the DAA, not the City, is in control of the road.

The operations and other factors, as that term is defined in Chapter 360, that determine what boundaries are established by Airport use are all under the control of DAA. Should they determine to create a "facility," that area would be part of the Airport. This circumstance is disturbing when we consider the evidence that in the 1950's there was an airport use from the shore of Lake Superior to the shore of St. Louis Bay. At that time, under the current definitions, the Airport filled the whole available peninsula.

Which brings us to item number 1, the boundaries that existed in 1969. Duluth Zoning Code indicates that at that time the Airport occupied the entire peninsula.

We have only one map that actually shows the City's record of the Airport's boundaries prior to 1969. That map is the one dated 1964, signed by Mayor Johnson and City Engineer Davidson. It includes the following parcel numbers: 5, 6, 7, 8, 10, 14, 15, 16, 17, 18, 19, 20. I have reviewed many maps and diagrams of the area, and this is the only one that, on its face, shows boundaries in place at about the time of the passage of Chapter 577.

Now let us consider number 2, above boundaries set by the Council. As already pointed out, the Council has passed two ordinances that purport to depict boundaries. The only one that actually shows lines that are boundaries is the zoning map. That zoning map is consistent with the 1964 map mentioned above.

The Council's power to set the boundaries is found in Chapter 577, Section 5, Subd. 2. The law gives the Council the power to "change" the boundaries "... in its sole discretion ...". I have heard opinions that this indicates that the Council has unfettered license to set airport boundaries. This opinion is wrong. The Council is subject to State and Federal law. Any boundaries set by the Council must be consistent with existing regulation. For example, it could not set a boundary that doesn't leave room for the State required primary zone, or safety zone.

It could not set a boundary that left an airport facility outside of the control of DAA. I am specifically not giving an opinion on whether the Council could eliminate an airport or set a boundary that eliminates a DAA airport operation. With good practice, such a conflict need never arise.

One aspect of boundary setting is Safety Zone A. The use restrictions are so sever in that zone (Minn. Rule 8800.2400 and City Code §50-180(b)(2)), and it is so clearly an appurtenant use, that

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I believe it should be a part of the Airport, subject to the limitations in Chapter 50 as to existing uses and in M.S.A. §360.066 as to protection of neighborhoods. It would be convenient to exclude them, but this would ignore the fact that Zone A uses must be consistent with and controlled by Airport uses. The problem is that the safety zone is so large, and as the approach plane ascends, the allowed uses become more feasible. The safest conclusion is to include all of Zone A in the boundaries of the Airport. However, in an unusual exercise of interpretation of "airport use," I conclude that only the clear zone must be within the boundaries and the rest of Zone A can be an appurtenant easement. Zones B and C are multiple use areas. The horizontal zone is also an appurtenant use, but it is 150' off the ground, and I don't believe it is so clearly a part of an airport that it must be within the boundaries.

One major challenge is determining the width of the Airport. The only clear evidence indicates that the Council set the width as being from shore to shore as shown on the zoning map and the 1964-65 map. However, the evidence of use and planning, testimonial, and documentary, indicate that the primary government survey line has been the extent of use and of planned use since the 1950's. The documents used for Airport business have used diagrams from Salo Engineering. State, Federal, and local units have all used these diagrams. The City ordinance refers to them.

It is not a City Attorney's role to legislate. It is not our practice to interpolate from evidence what a legislative decision will be or should be. For these reasons, it is with reluctance that I would opine that a boundary is anything other than the boundary shown on the 1964 map, modified for State and operational compliance. However, the evidence is so compelling that DAA does not intend to ever operate from shore to shore, that I must make an exception. A facility that has been built in the area near Lake Superior beach is the utilities and easement that run near the government survey line. That is the east boundary that has consistently appeared in project and planning documents of the last 15 or more years, and that is my opinion of what the east boundary currently is. I am aware that the Minnesota DNR has discussed with DAA using this area for a path, so the State has seen this area as within DAA operational decisions, but suitable for non-airport uses.

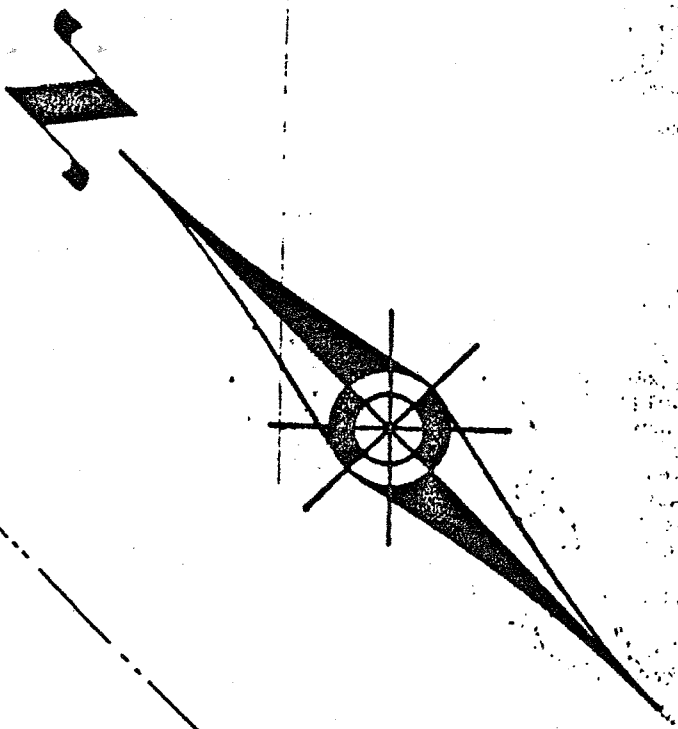
I have been told that the Council may take up the matter of boundaries. Obviously, the Council can delineate boundaries that are consistent with State and Federal regulation and DAA operation. I do not intend to suggest what those boundaries should be. My conclusion of where they now are is contained in the attached diagram. This includes parcels that are fee Airport property separated from other Airport property. Where they should be changed to, if at all, is a matter for the Council and DAA.

BFB:nmj

Attachment

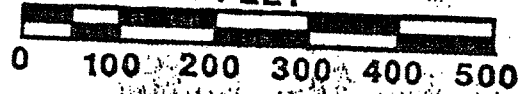
cc Mark Winson



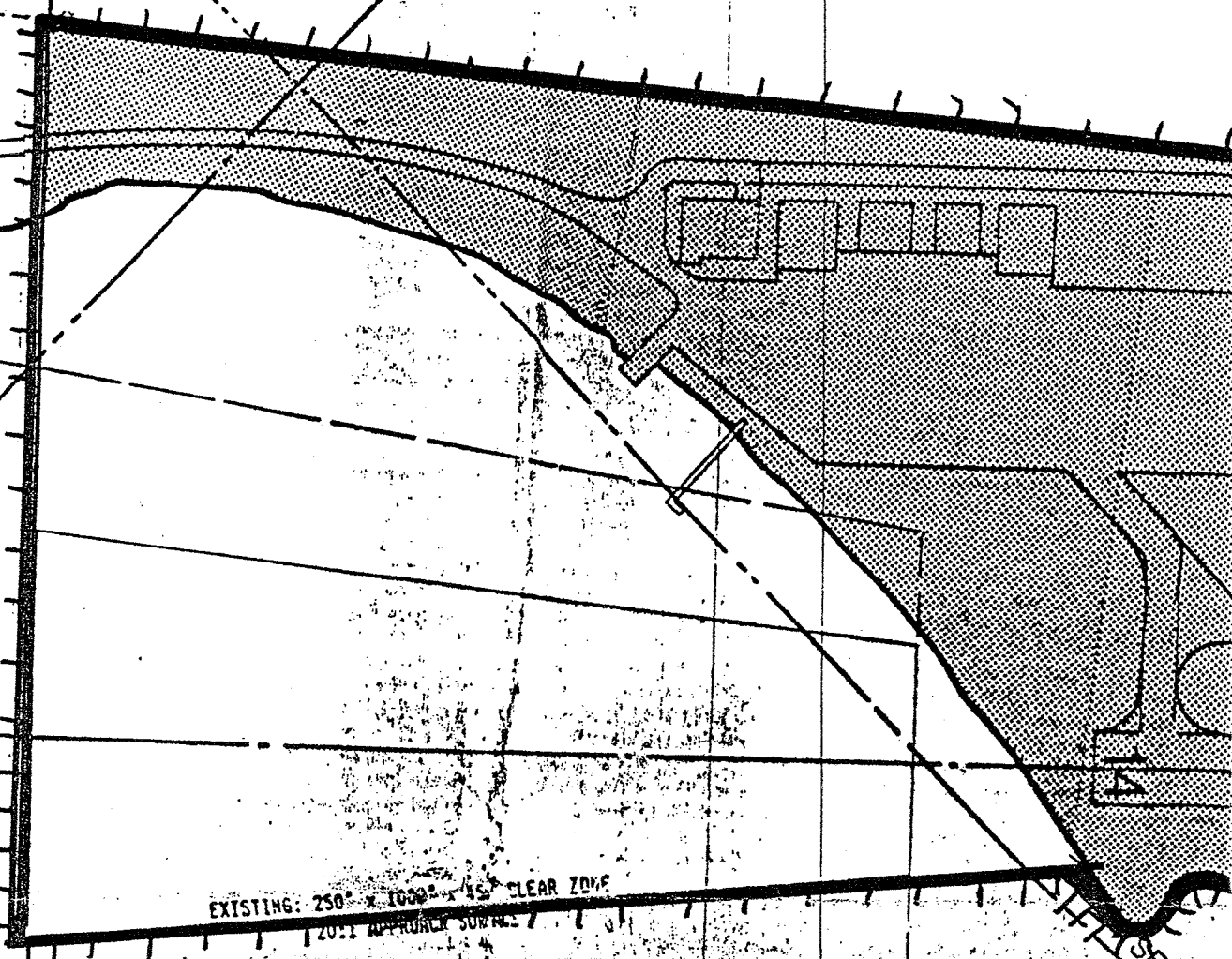


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SCALE IN FEET



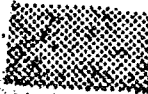
1/4 LINE



EXISTING: 250' x 1000' CLEAR ZONE  
2011 APPROACH SURFACE



# LEGEND



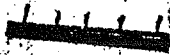
FEE AIRPORT PROPERTY



EASEMENT (AVIATION)  
GRANTED TO CITY OF DULUTH FROM  
SUPERIOR WATER, LIGHT & POWER CO.



UTILITY EASEMENT  
GRANTED TO CITY OF CLOQUET FROM CITY OF DULUTH



AIRPORT BOUNDARY  
(DOES NOT INCLUDE OFF-SHORE)

## PROPERTY OWNERSHIP

CITY OF DULUTH, PARCELS 5, 6, 7, 8, 10, 14,  
15, 16, 17, 18, 19, 20, 21, 22, 23 & 24

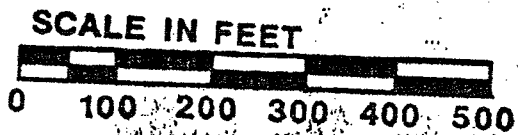
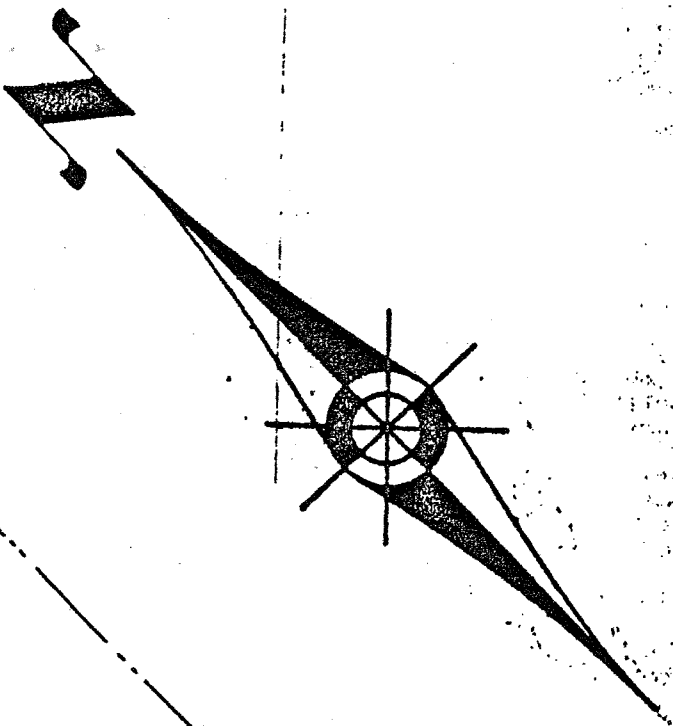
CITY OF SUPERIOR, PARCELS  
8A, 9, 11, 12, 13, 16A & 16B

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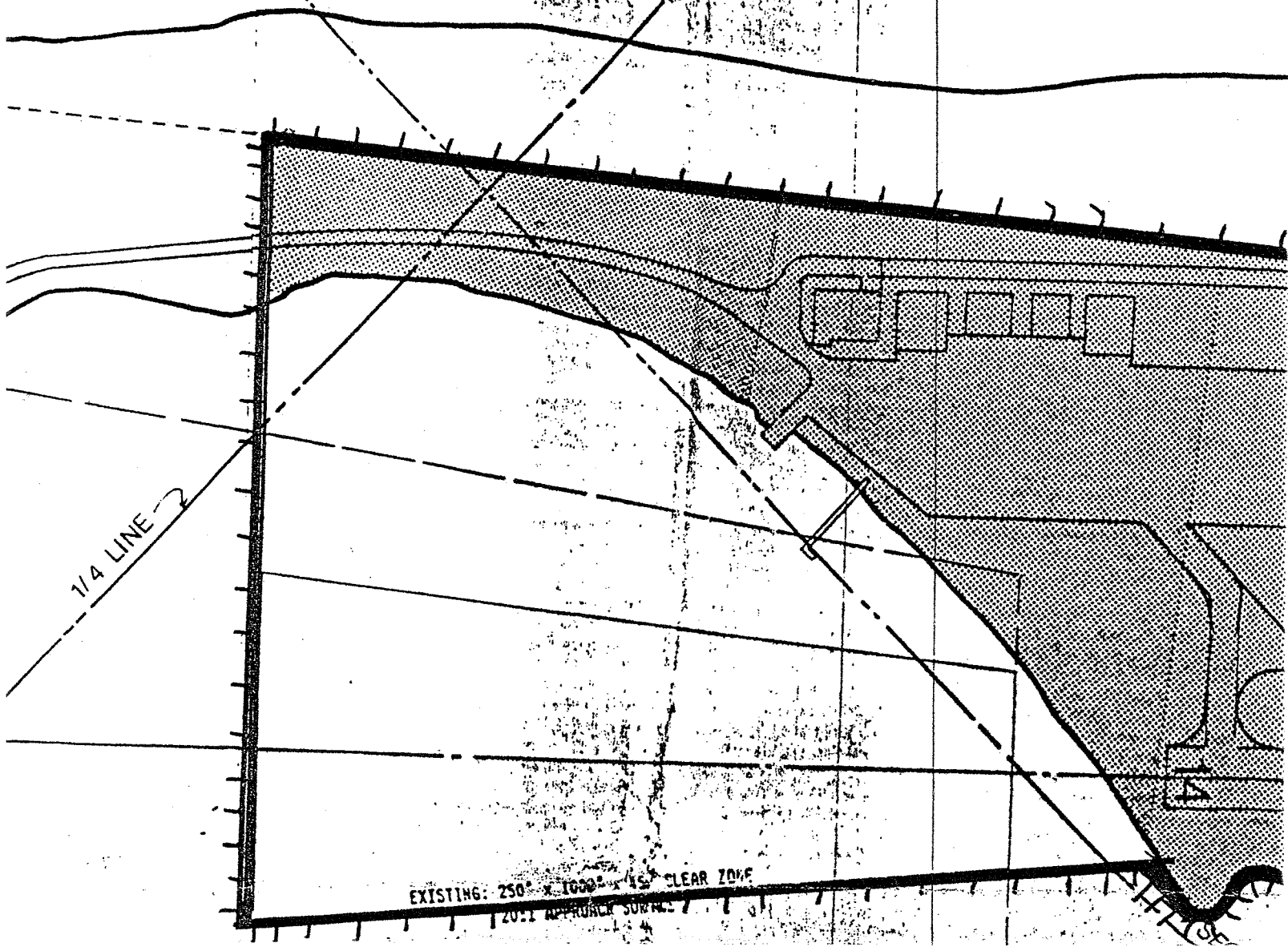


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1/4 LINE

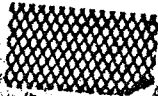
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20:1 APPROACH SURFACE



# LEGEND



**FEE AIRPORT PROPERTY**



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GRANTED TO CITY OF CLOQUET FROM CITY OF DULUTH



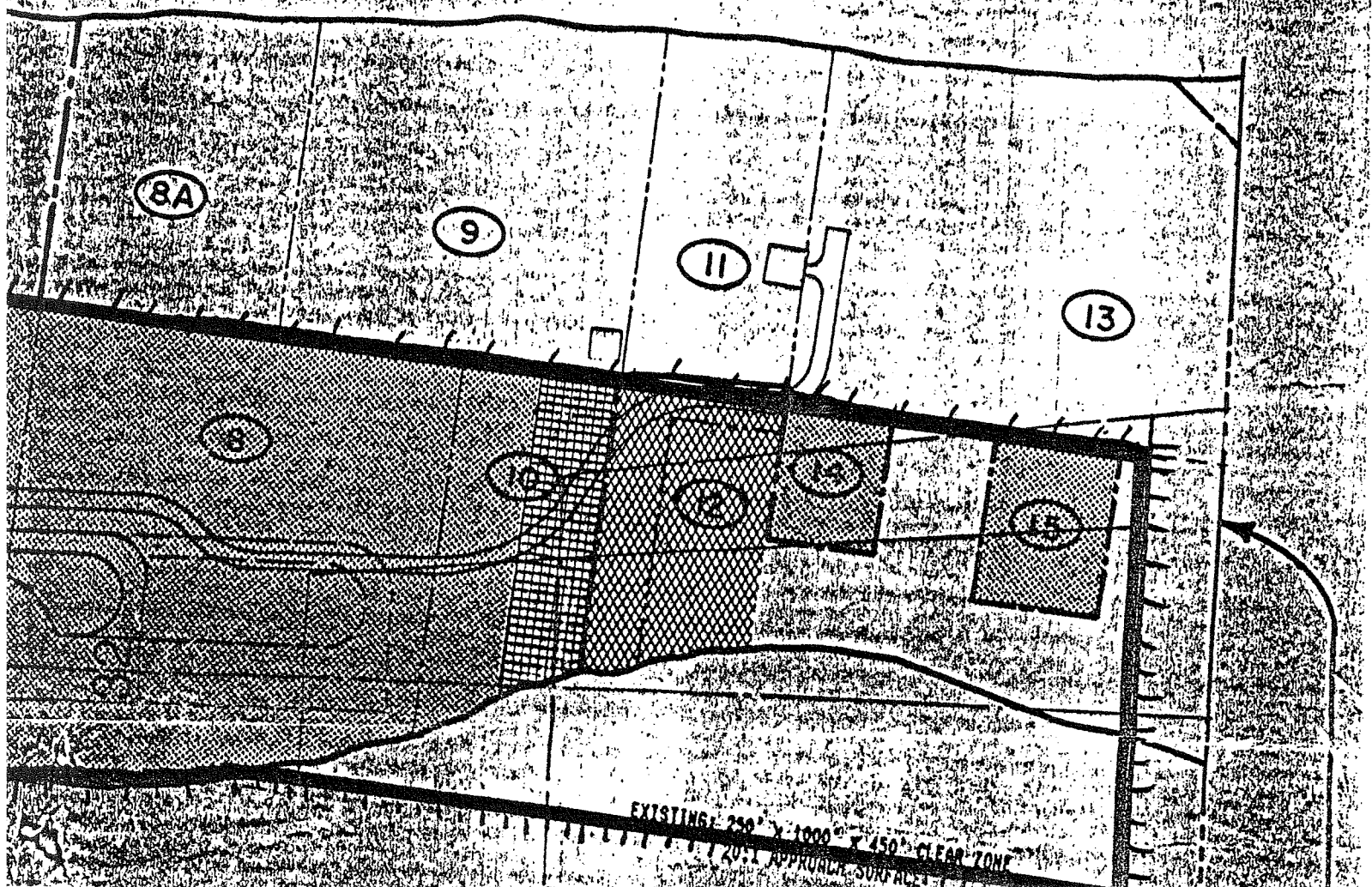
**AIRPORT BOUNDARY**  
(DOES NOT INCLUDE OFF-SHORE  
PROPERTY OWNERSHIP)

## PROPERTY OWNERSHIP

CITY OF DULUTH, PARCELS 5, 6, 7, 8, 10, 14,  
15, 16, 17, 18, 19, 20, 21, 22, 23 & 24

CITY OF SUPERIOR, PARCELS  
8A, 9, 11, 12, 13, 16A & 16B

R



EXISTING 250' X 1000' X 450' CLEAR ZONE