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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

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No. 49329-2-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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TAZMINA VERJEE-VAN and BRIAN VAN,

Appellants,

v.

PIERCE COUNTY; NEIL BORGERT;  
and DAN and PHYLLIS ABERCROMBIE,

Respondents.

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BRIEF OF RESPONDENTS BORGERT AND ABERCROMBIE

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## I. INTRODUCTION

Neil Borgert and Dan and Phyllis Abercrombie (“Neighbors”) are the adjoining neighbors on either side of the property where the Appellants Tazmina Verjee-Van and Brian Van (“Appellants”) seek after-the-fact authorization for a dock they built without approval. The Neighbors are parties under RCW 36.70C.040(2)(d) and submit this brief in support of the Hearing Examiner’s decision.

The Neighbors agree with and adopt the brief submitted by Pierce County. The Neighbors wish to offer some additional history for context, and to make three arguments: (1) the only issues raised by the Appellants in this case have already been decided and those decisions are binding on them under *res judicata*; (2) those decisions that have previously been decided are the only issues properly raised in this case; all other potential issues have been waived because they were not briefed; and (3) to the extent that the Hearing Examiner’s decision upheld additional restrictions imposed by Pierce County on the Appellants’ dock, that decision was well supported by evidence in the record and may not be overturned under the Land Use Petition Act, Chapter 36.70C RCW (“LUPA”).

## II. ADDITIONAL FACTUAL BACKGROUND

The Hearing Examiner process under review is the latest chapter in a long-standing dispute that began when the Appellants bought their property—actually even before they closed on the purchase.

The Appellants' property lies at the end of a small cove. The property is now and was when they bought it served by a "cutout" area that functions like an inset dock. A photo depicting this as it existed in 2014 is at Clerk's Papers ("CP") 462 and is attached to this brief as Appendix A. See also CP 505, attached as Appendix B, for an aerial view. At the time Appellants looked at the property, the Borgert dock was in existence and had been for a number of years. CP 549. In fact, they complained about it to the County before they bought. CP 471. In a 2007 proceeding, the Hearing Examiner found that the price Appellants paid for the property reflected those conditions—a cutout on Appellants' property, and a dock next door. CP 555.

In 2007, the Appellants constructed a dock without permits. In fact, the dock constructed by Appellants actually went up to and over the Borgert dock. CP 474. A photo of that illegal dock is at CP 467 and is attached as Appendix C. The County ordered removal of the dock and Appellants appealed to the Hearing Examiner. The Examiner

denied the appeal and required the Appellants to remove the dock. CP 468-479.

There was subsequent litigation between Mr. Borgert and the Appellants that resulted in a Settlement Agreement in 2008. CP 491-504. Under the Settlement Agreement, the Appellants paid Mr. Borgert \$10,000 and Mr. Borgert agreed to modify his dock in a modest way by removing a small area on the Appellants' side of the dock, and modifying the fenders. *See* Declaration of Neil Borgert, at CP 531-34. Even though the minor width reduction was done at the request of the Appellants, and to meet obligations of the Settlement Agreement, Appellant Van "turned in" Mr. Borgert to the County for making that required modification without a permit. CP 75, at lines 1-2. No permit was required since this was a non-substantive change. WAC 173-27-100.

In 2009 the Appellants brought a motion to "enforce" the Settlement Agreement. They essentially claimed that, when the Settlement Agreement allowed Mr. Borgert to moor on the "side," the parties meant that he should park at the end of the dock. Judge Worswick disagreed that "side" meant "end," denied the motion and awarded Mr. Borgert his fees for having to defend against the "enforcement" claim. CP 523-24.

More recently, the Appellants constructed the current dock, again without a permit. As the Examiner found at CP 218:

Therefore, [A]ppellants in constructing their pier prior to obtaining an exemption from PALS violated the SMP [Shoreline Master Program], SUR [Shoreline Use Regulations], WAC and SMA [Shoreline Management Act].

Although we will discuss this in further detail below, there are several photographs in the record that help explain the physical circumstances that limit navigability in and around the Borgert pier, Appellants' residence and the Abercrombie property on the opposite side. The photographs attached as Appendix D depict how the current Appellants' dock precludes safe navigation. CP 463, 514, 483, and 487. These photos can also reasonably be construed to show a deliberate attempt by Appellants to obstruct access to the Borgert property. The red canoe depicted in several photos was moored by Appellants at the fixed angle depicted. In fact, Mr. Borgert testified that he is unable to use his dock because of the Appellants' dock. CP 122, at lines 19-24.

These deliberate actions also violate the Settlement Agreement, which specifically precludes Appellants from using a buoy/boat so as to block access to the Borgert property. The photographs referenced above depict at least two different boats in that location.

Navigability at the Abercrombie property is also adversely affected by Appellants' dock. The photos at CP 510-11, attached as Appendix E, are taken directly in front of Abercrombies' lawn. CP 141-143. Consistent with the photos, Mr. Abercrombie testified that the dock "cuts off my access" and renders his waterfront property merely "a place to stick your feet in." CP 144, at lines 15-19.

There is, of course, much more evidence in the record and are other photos depicting the impact of the dock. This history, though, and the attached photos provide information we ask the Court to consider.

### III. ARGUMENT

#### A. The primary issue addressed in Appellants' Brief, the lawfulness of the Borgert Pier, is barred as untimely.

The only arguments briefed in this case by the Appellants relate to either the lawfulness of the Borgert pier or the takings claim. They claim Mr. Borgert's 1997 dock should be removed so they have better water access than they did when they bought their home. After several pages contending that the Borgert pier was built without permits, the brief asserts that there has not ever been a final decision regarding the legality of the Borgert pier. That argument continues until page 21 of the brief where there is a short argument about a taking. No other arguments are briefed by the Appellants.

The lawfulness of the Borgert dock and Appellants' ability to challenge that now were decided in *Tazmina Verjee-Van v Pierce County*, Pierce County Superior Court cause number 14-2-09794-3, which has separately been appealed to this Court under case number 48947-3-II (the "Mandamus Case"). The lawfulness of the Borgert pier was expressly at issue in that case and the claims were found time-barred. The trial court ruled:

"[T]he Court finds that the Petitioner did not timely exercise her right to an appeal, which was her exclusive remedy. . ."

*See* Decision on Pierce County's Motion to Lift Stay and Dismiss Petition for Writ of Mandamus, at CP 647-51; *see also*, Order Dismissing Petition for Writ of Mandamus, at CP 652-53.

As a result of the recent decision in the Mandamus Case, Appellants' arguments about the lawfulness of the Borgert dock are barred by the doctrine of res judicata. Principles of res judicata apply in land use cases. *Hilltop Terrace Homeowner's Ass'n v. Island County*, 126 Wn.2d 22, 30-31, 891 P.2d 29 (1995); *Davidson v. Kitsap County*, 86 Wn. App. 673, 681-82, 937 P.2d 673 (1997). For example, Washington courts have held that if a land use application is denied and is not appealed, principles of res judicata will preclude the applicant from subsequently submitting another application for the

same proposed development unless there is a substantial change in circumstances or in the application itself. *Id.* The rationale for this rule is strong:

The most purely public purpose served by *res judicata* lies in preserving the acceptability of judicial dispute resolution against the corrosive disrespect that would follow if the same matter were twice litigated to inconsistent results....

A second largely public purpose has been found in preserving courts against the burdens of repetitious litigation....

The judicial interest in avoiding the public burdens of repetitious litigation is allied with the interest of former litigants in avoiding the parallel private burdens. For the most part, attention is focused on the need to protect a victorious party against oppression by a wealthy ... adversary....

The deepest interests underlying the conclusive effect of prior adjudication draw from the purpose to provide a means of finally ending private disputes. The central role of adversary litigation in our society is to provide binding answers. We want to free people from the uncertain prospect of litigation, with all its costs to emotional peace and the ordering of future affairs. Repose is the most important product of *res judicata*.

*Hilltop Terrace Homeowner's Ass'n*, 126 Wn.2d at 30-31 (quoting 18 Charles A. Wright, et al., *Federal Practice and Procedure* § 4403, at 12-15 (1981)).

One of the bases for the decision in the Mandamus Case applies directly here: appellants are barred from challenging the approval of the Borgert pier under the doctrine of finality. Appellants raise a number of largely procedural arguments regarding the approval of the Borgert pier, none of which are properly raised before in this action.<sup>1</sup> Even if the approval process for the Borgert dock was imperfect, the time for challenging those approvals has long since passed.

In *Chelan Cty. v. Nykriem*, the Supreme Court made it clear that even an improperly issued land use decision is final and may not be challenged under LUPA once the 21-day appeal period has passed:

Respondents rely on the ministerial/quasi-judicial distinction in arguing that a county cannot be prevented from revoking an improperly issued land use approval under *res judicata* or in the interest of administrative finality. They maintain that *res judicata* applies only in the quasi-judicial context and never applies to purely ministerial approvals.<sup>115</sup> However, language used by this court referring specifically to land use decisions and a plain reading of LUPA leads to a contrary conclusion.<sup>116</sup>....

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<sup>1</sup> The only issues addressed in the Hearing Examiner's decision that is the subject of this appeal were the validity of two conditions imposed on Appellants' shoreline exemption, under which they are required to remove portions of their pier that interfere with navigability to the Neighbors' adjacent piers.

This court has also recognized a strong public policy supporting administrative finality in land use decisions. In fact, this court has stated that “[i]f there were not finality [in land use decisions], no owner of land would ever be safe in proceeding with development of his property.... To make an exception ... would completely \*932 defeat the purpose and policy of the law in making a definite time limit.”<sup>117</sup>....

To allow Respondents to challenge a land use decision beyond the statutory period of 21 days is inconsistent with the Legislature's declared purpose in enacting LUPA. Leaving land use decisions open to reconsideration long after the decisions are finalized places property owners in a precarious position and undermines the Legislature's intent to provide expedited appeal procedures in a consistent, predictable and timely manner.<sup>120</sup>

As *amici curiae* point out, if this court allows local government to rescind a previous land use approval without concern of finality, innocent property owners relying on a county's land use decision will be subject to change in policy whenever a new County Planning Director disagrees with a decision of the predecessor director.<sup>121</sup> They also assert that land use decisions from this court emphasize the need for property owners to rely on an agency's determinations with reasonable certainty.<sup>122</sup>

*Chelan Cty. v. Nykreim*, 146 Wn.2d 904, 931-33, 52 P.3d 1 (2002) (internal citations omitted). Thus, even if the almost 20-year-old permitting process for the Borgert pier was flawed in some way—

though there is no evidence in the record to suggest that it was—the expiration of the appeal period bars further review.<sup>2</sup>

It should also be noted that in the 2007 Hearing Examiner's decision, which resulted in the Appellants' removal of their first unlawfully constructed dock, the Hearing Examiner made the following finding:

The next door neighbor [Mr. Borgert] applied for a dock. They were granted the use of the dock.... [Mr. Borgert] then purchased their property which had beach access via a dock.... [Both Mr. Borgert and Appellants] would appear to be bound by what their predecessor selected and the condition of the property when they purchased it.

CP 476-77. Appellants did not appeal this finding, just as they and their predecessors-in-interest did not appeal any of the permits and approvals issued for the Borgert pier. CP 19-20; CP 102-103. Appellants may not now bring an untimely appeal.

The lawfulness of the Borgert pier was already determined in the prior action involving the same parties, and the permits issued for

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<sup>2</sup> Appellants' assertion that the County did not provide proper notice of the SEPA Determination of Non-Significance ("DNS") is disingenuous. *See* Brief of Appellants at 15, 18-19. Appellants raised the same issue in the Mandamus Case. In that case, a copy of the Affidavit of Publication of the DNS was filed with the Court as an exhibit to the Declaration of Adonais Clark, Senior Planner. These documents are not contained in the administrative record for this matter because Appellants did not raise the issue below, and thus it is not properly before the Court.

the Borgert pier are final and no longer appealable. The Court did not err in affirming the Hearing Examiner's decisions on both points.

**B. Any other issues that could potentially have been raised in this case have been waived.**

As noted above, the only arguments briefed in this case relate to the lawfulness of the Borgert pier, along with takings claim. Other assignments of errors were included in the Petition for Review and those assignments were even noted in Appellants' Brief. However, the only arguments briefed were those related to the pier and to the "takings."

On appeal, the party who filed the LUPA petition bears the burden of establishing one of the errors set forth in RCW 36.70C.130(1). *See Tahoma Audubon Society v. Park Junction Partners*, 128 Wn. App. 671, 681, 116 P.3d 1046 (2005); *Pinecrest Homeowners Ass'n v. Glen A. Cloninger & Associates*, 151 Wn.2d 279, 288, 87 P.3d 1176 (2004). A party abandons an issue on appeal by failing to brief the issue. *See Holder v. City of Vancouver*, 136 Wn. App. 104, 107, 147 P.3d 641 (2006), *review denied*, 162 Wn.2d 1011 (2008) (internal citations omitted). Thus, in evaluating appeals, courts have consistently held that they will not consider assignments of error that are not supported by argument and authority. *See, e.g., State v. Kroll*, 87 Wn.2d 829, 838, 558 P.2d 173 (1976); *Northern State*

*Constr. Co. v. Robbins*, 76 Wn.2d 357, 366-67, 457 P.2d 187 (1969);  
*State v. Bell*, 59 Wn.2d 338, 352, 368 P.2d 177 (1962).

By failing to present any argument on the only issues not already decided, Appellants have waived those issues and have failed to meet their burden on this LUPA appeal. The Hearing Examiner and the trial court did not err in denying their appeal.

**C. There is ample support in the law and the record for the Hearing Examiner's Decision upholding the limits on the Appellants' dock.**

Although the Appellants have waived other arguments, we will briefly address the support in the record for the Hearing Examiner's Decision. Primarily, we adopt the County's brief, which sets forth ample legal authority and factual support in the record for the Decision.

Even though the Appellants' dock is "exempt" from permit requirements, it still must meet statutory standards. The term exempt must be understood in the context of the Shoreline Management Act and its preservation of navigability for all properties:

An exemption from the substantial development permit process is not an exemption from compliance with the Act or the local Shoreline Master Program, nor from any other regulatory requirements. To be authorized, all uses and developments must be consistent with the policies and provisions of the applicable Shoreline Master Program and the Shoreline Management Act.

WAC 173-27-040(1)(b); *see also State Dep't of Ecology v. City of Spokane Valley*, 167 Wn. App. 952, 964, 275 P.3d 367 (2012).

A principal purpose of the SMA is safeguarding the public's rights in the State's navigable waters. RCW 90.58.020.<sup>3</sup> "Interference with the public's rights of navigation, or creation of a hazard for boaters, is contrary to the policies of the Act." *Harborview Marina, et al. v. City of Gig Harbor*, SHB No. 99-013, 2000 WL 284394 at \*3 (Feb. 29, 2000) (internal citations omitted). The Shorelines Hearings Board has repeatedly recognized that preserving navigability is a priority of the SMA, and has reversed permits where the proposed project impermissibly interfered with safe navigation by boaters. *See, e.g., Harborview Marina, supra; Mukai v. City of Seattle*, SHB Nos. 00-029 and 00-032, 2001 WL 587619 (Apr. 19, 2001); *see also Bennett, et al. v. Department of Ecology*, SHB No. 92-51, 1996 WL 382103 (Jun. 18, 1996) (denying variance for construction of a pier and dock where applicant failed to demonstrate that proposal would not interfere with

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<sup>3</sup> "It is the policy of the state to provide for the management of the shorelines of the state by planning for and fostering all reasonable and appropriate uses. This policy is designed to insure the development of these shorelines in a manner which, while allowing for limited reduction of rights of the public in the navigable waters, will promote and enhance the public interest. This policy contemplates protecting against adverse effects to the public health, the land and its vegetation and wildlife, and the waters of the state and their aquatic life, while protecting generally public rights of navigation and corollary rights incidental thereto." RCW 90.58.020.

public's right to navigate through the affected area or compromise the safety of the boating public).

There is certainly substantial evidence to support the Examiner's findings. Appellants' dock impairs navigation contrary to these laws and policies. The attached photographs themselves are sufficient, and they are completely corroborated by the testimony of Senior Planner Mike Erkinen, Mr. Borgert and Mr. Abercrombie. *See* CP 10-14; CP 122, at lines 19-24; CP 144, at lines 15-19.

There was in fact undisputed evidence that navigation was impaired.

**D. The Neighbors are entitled to reasonable attorneys' fees and costs.**

RCW 4.84.370 provides an avenue for recovery of attorneys' fees and costs on appeal:

[R]easonable attorneys' fees and costs shall be awarded to the prevailing party or substantially prevailing party on appeal before the court of appeals or the supreme court of a decision by a county, city, or town to issue, condition, or deny a development permit involving a site-specific rezone, zoning, plat, conditional use, variance, shoreline permit, building permit, site plan, or similar land use approval or decision.

RCW 4.84.370(1). The "prevailing party" on appeal is defined as the prevailing party before the county and in all prior judicial proceedings.

*Id.* The Neighbors were the prevailing party before both the Hearing Examiner and the Superior Court. Thus, they are entitled to an award of their reasonable attorneys' fees and costs associated with defending this appeal. *See J.L. Storedahl & Sons, Inc. v. Cowlitz Cty.*, 125 Wn. App. 1, 13, 103 P.3d 802 (2004), *as amended on denial of reconsideration* (Dec. 21, 2004).

#### IV. CONCLUSION

The conditional approval of Appellants' dock was a generous outcome for them, giving them a dock that is far more than they bargained for when they bought their property. Appellants have failed to meet any of the conditions that would allow relief, and the LUPA petition should be denied.

Dated this 30th day of March, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE  
STATE OF WASHINGTON

I, Lisa Blakeney, declare under penalty of perjury of the laws of the State of Washington that on March 30, 2017, I caused this Brief of Respondents Borgert and Abercrombie to be served by personal delivery as follows:

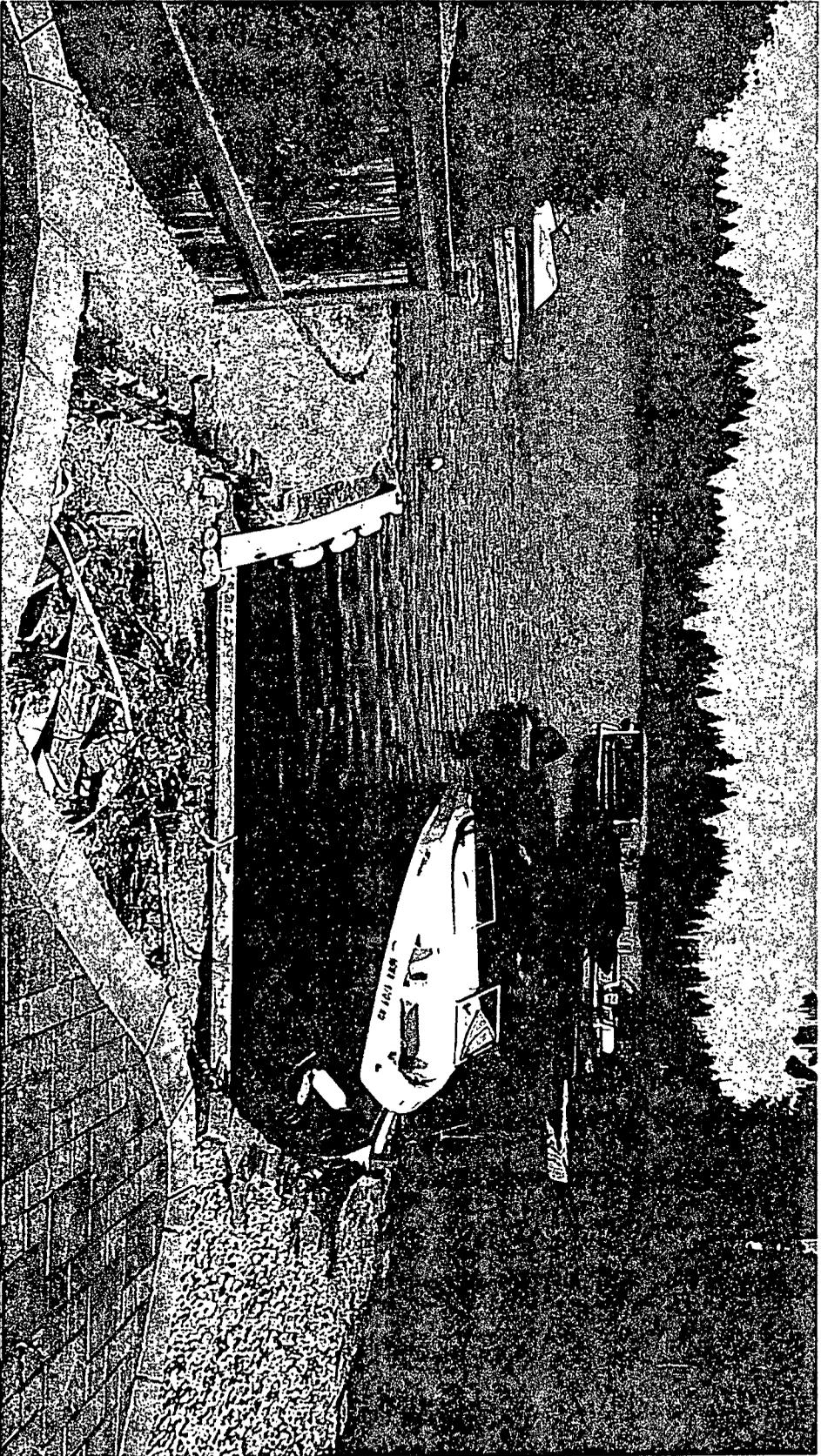
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# APPENDIX A

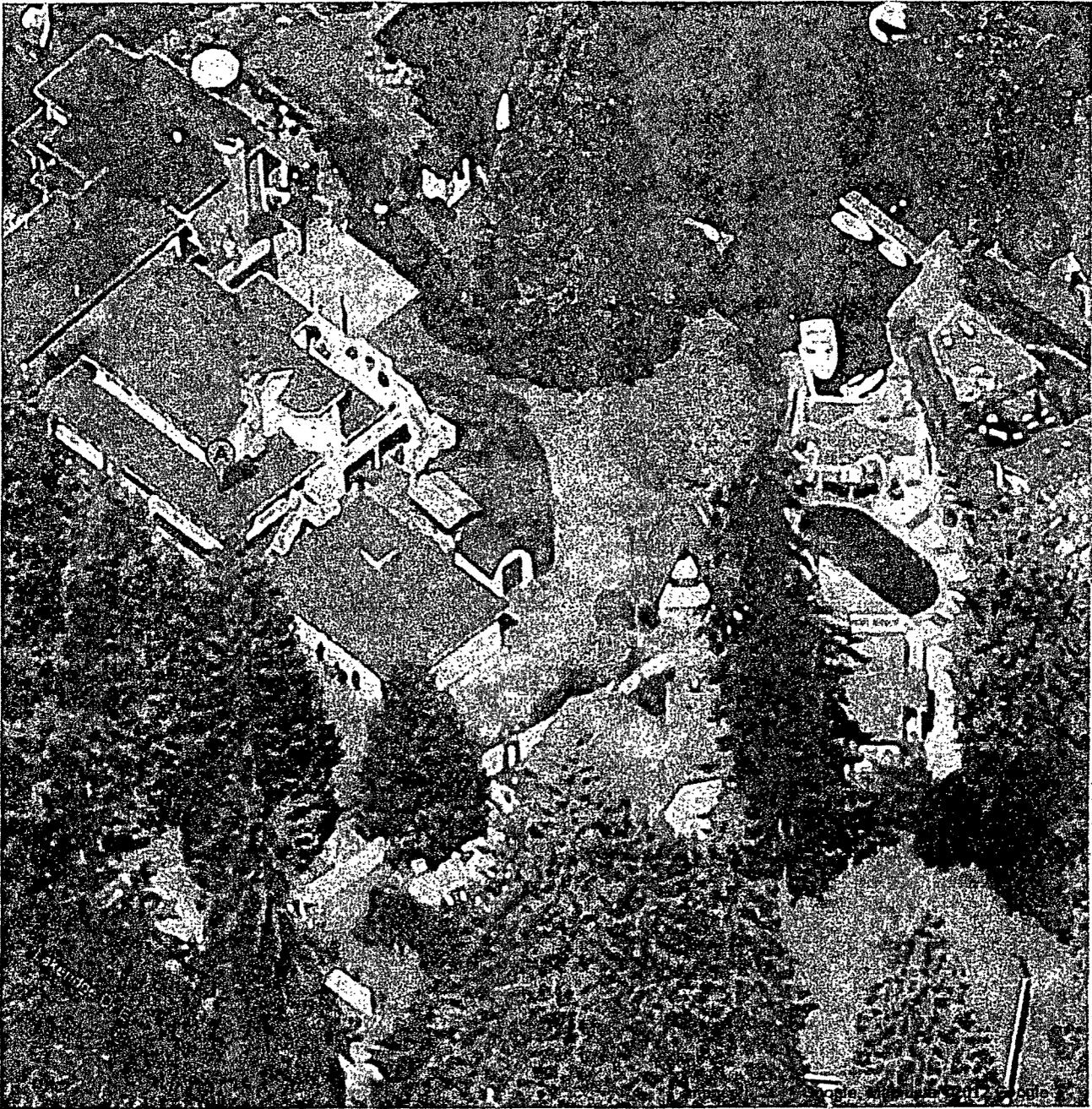
Mike Erkkinen photo, 7/9/14



# APPENDIX B

Google

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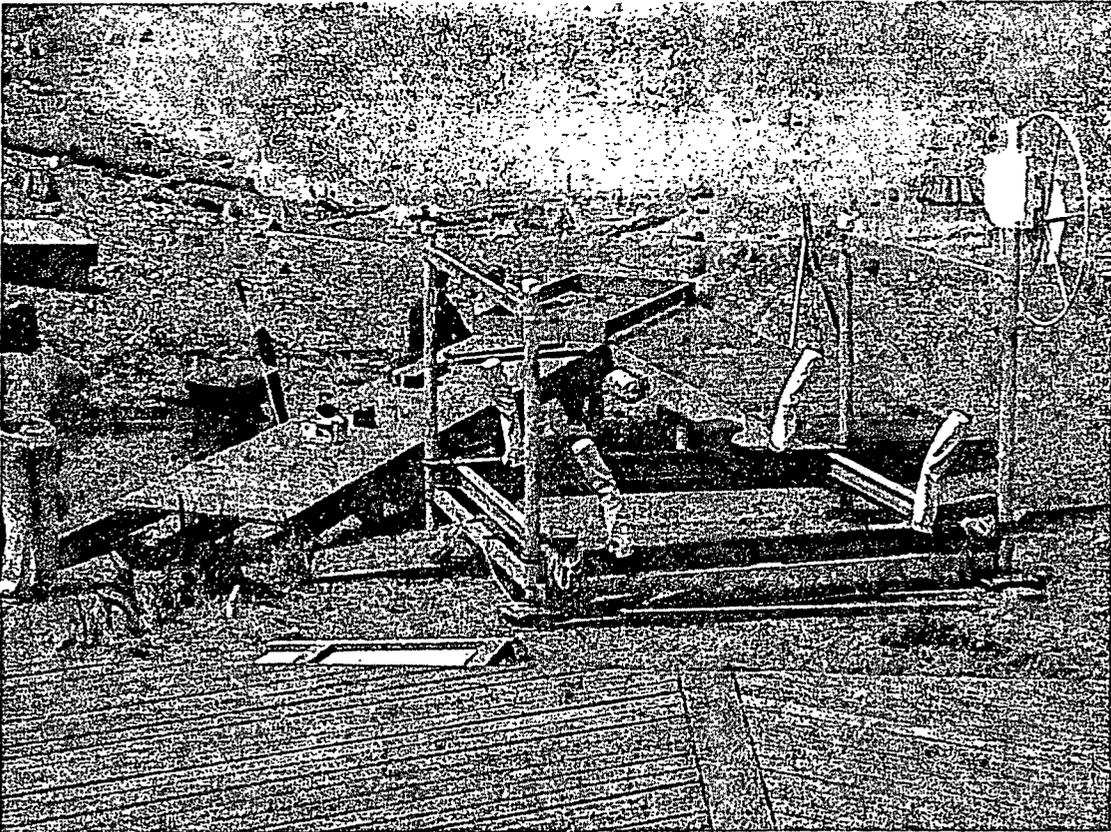
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# APPENDIX C

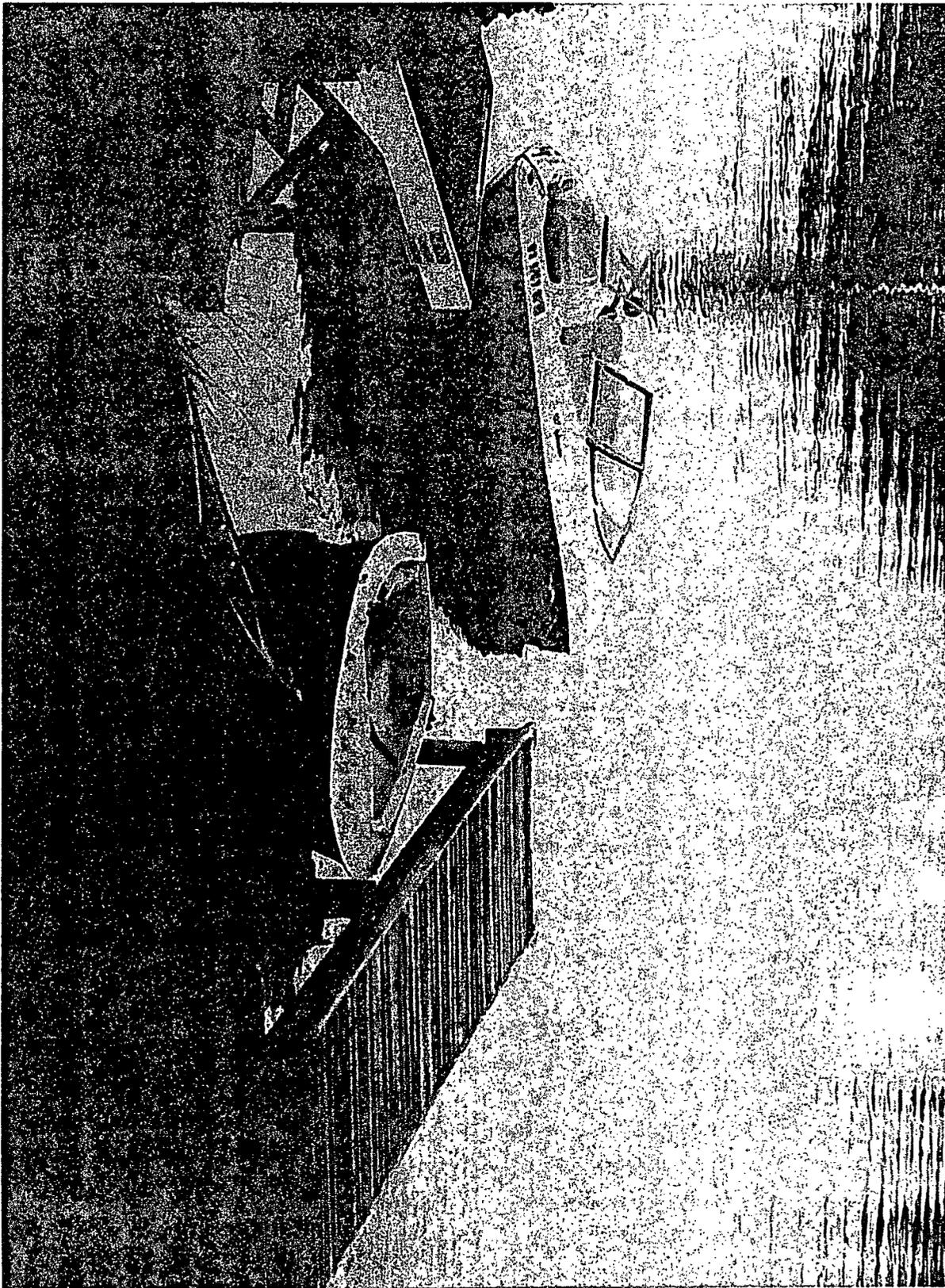
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# APPENDIX D

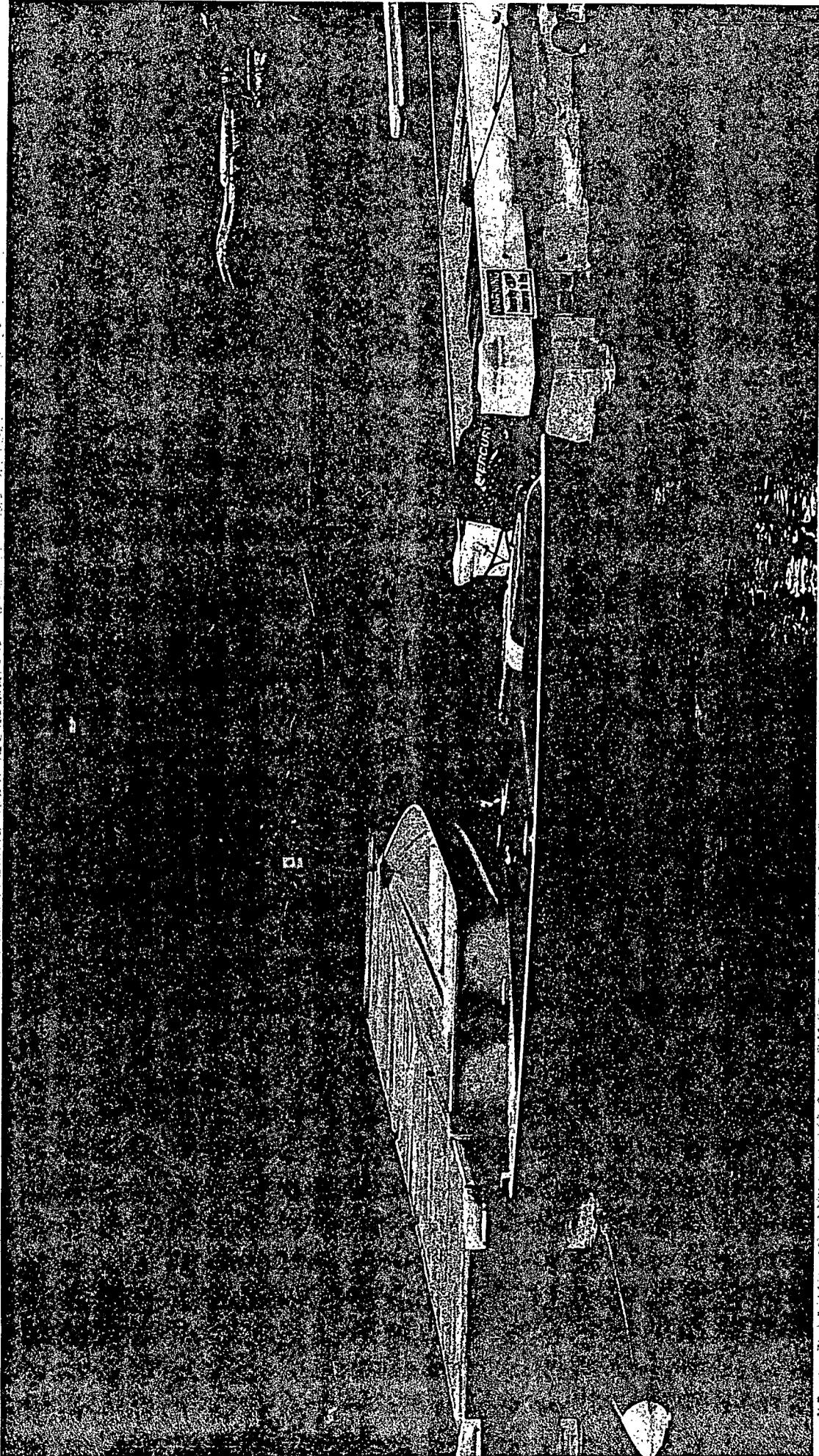
Neil Borgert photo submitted to Pierce County, 7/20/15



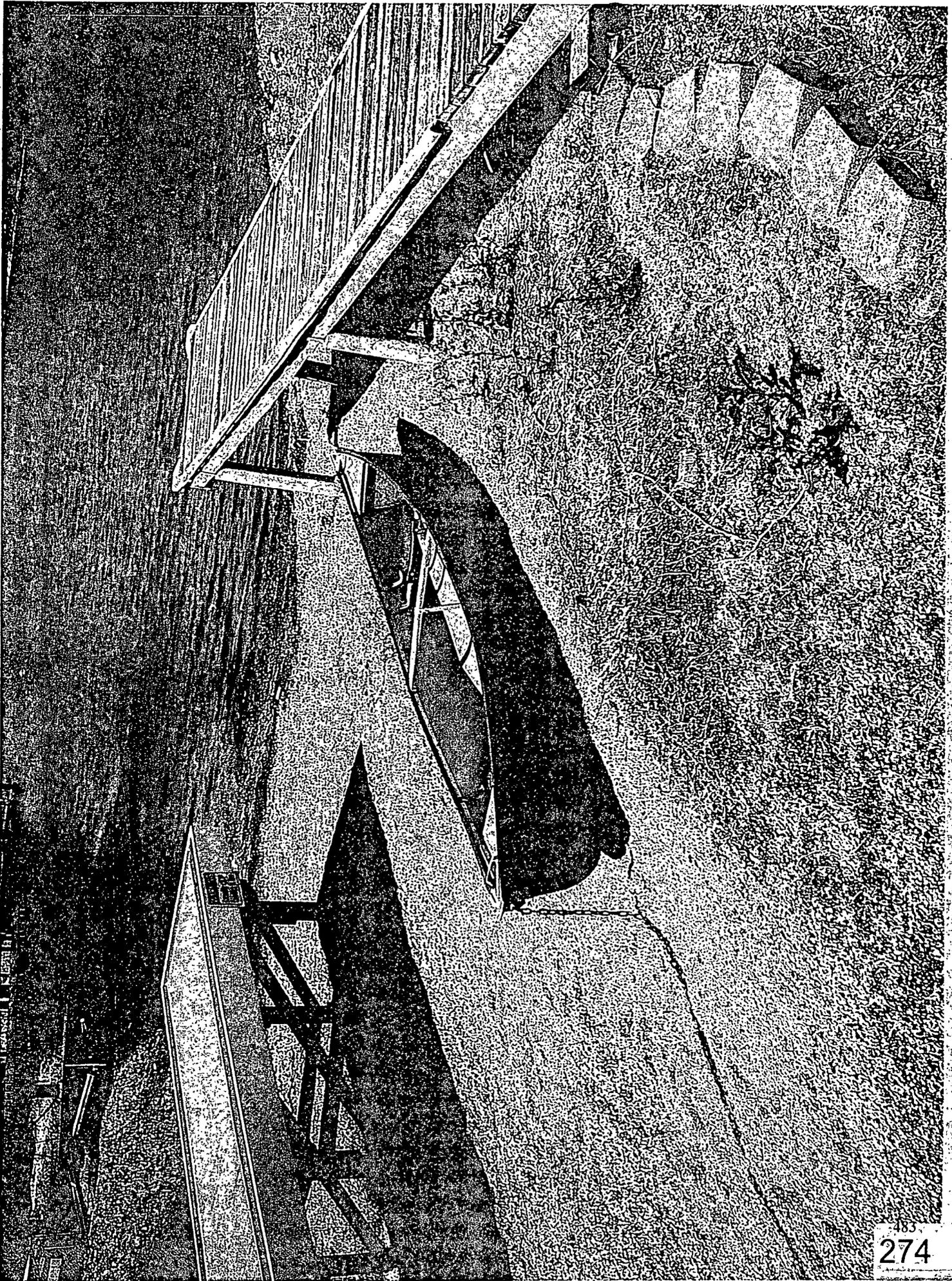
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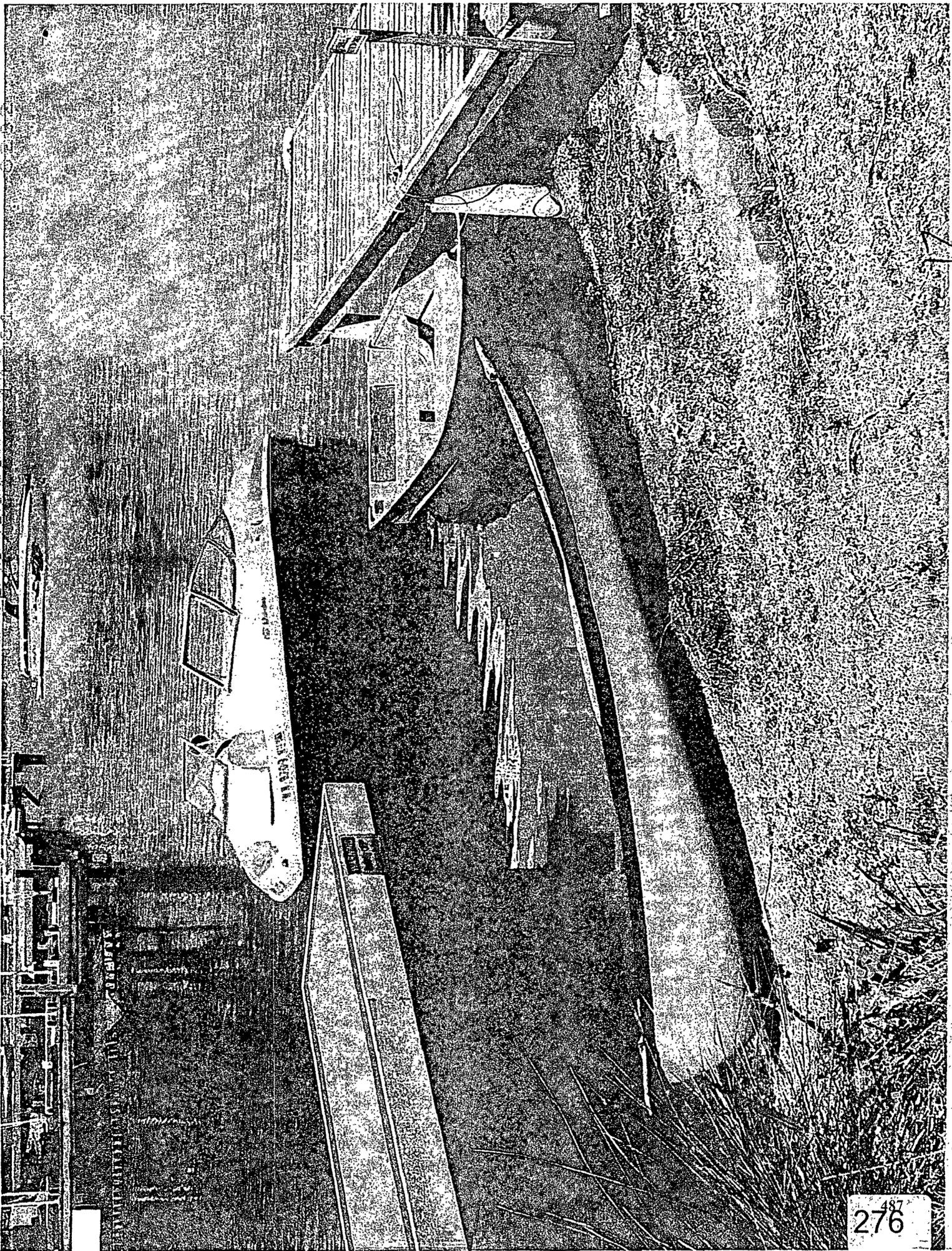
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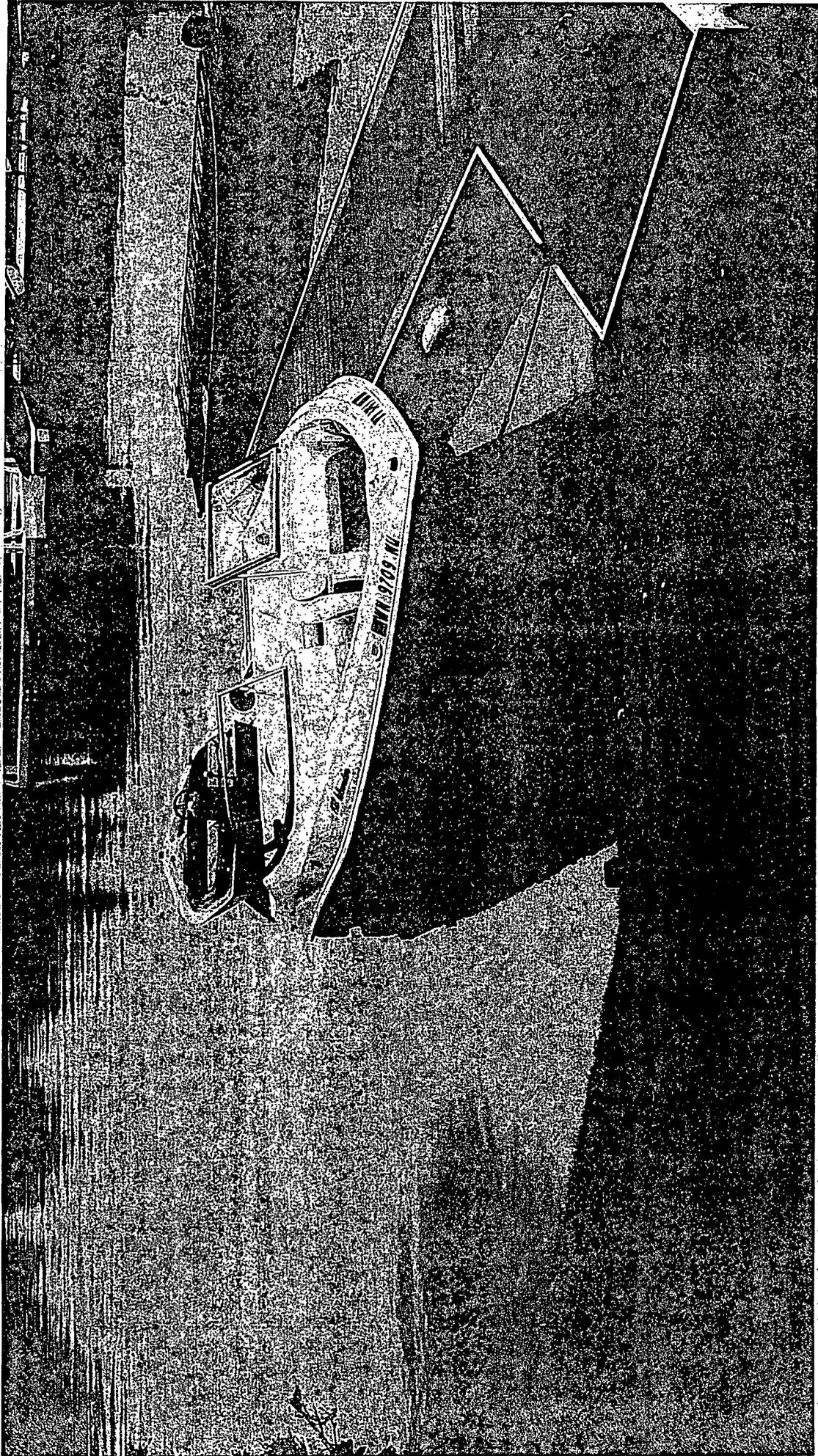
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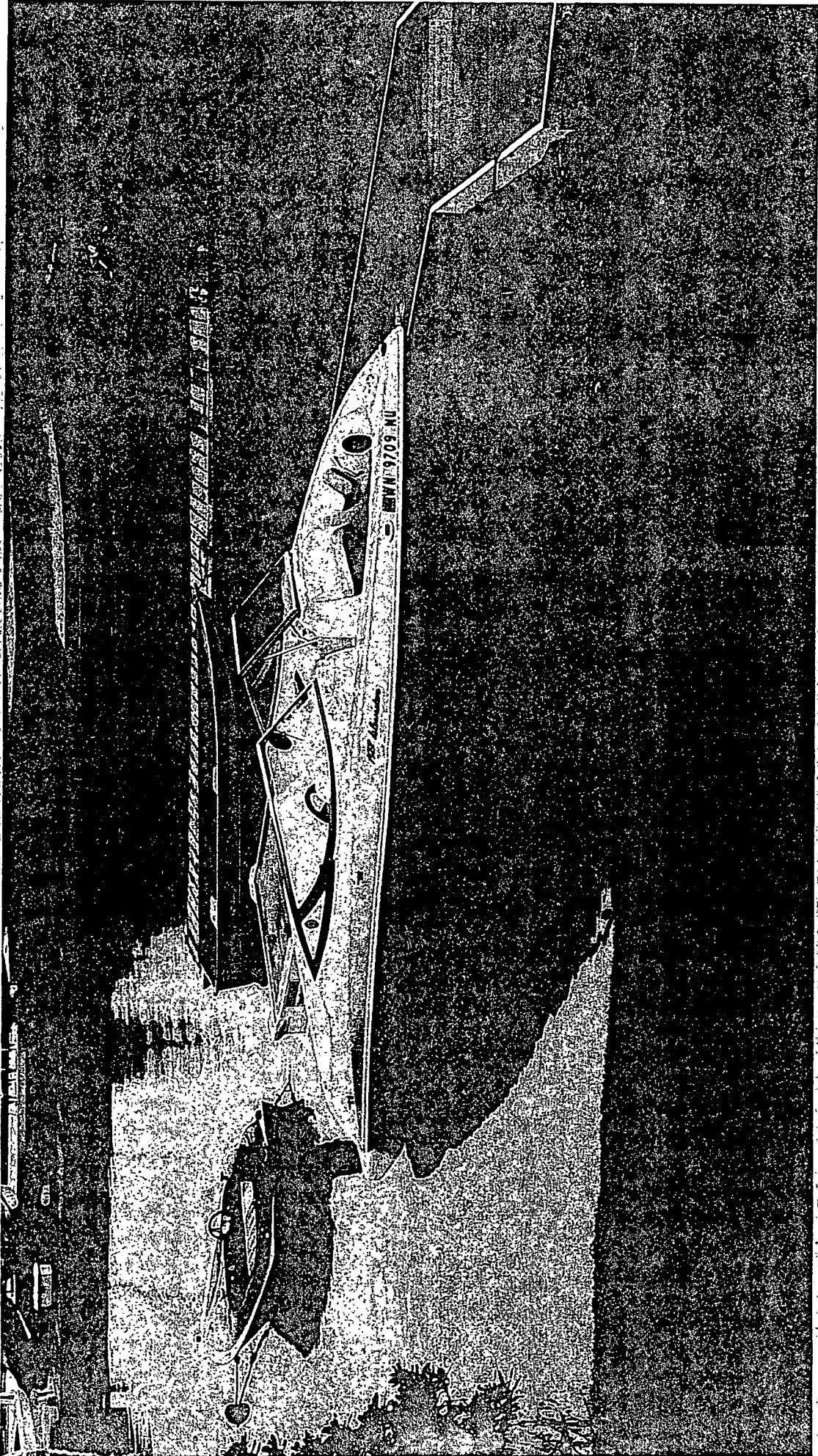
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# APPENDIX E



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Exhibit No.: 23



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Case No.: \_\_\_\_\_  
Exhibit No.: 24