

No. 73832-1-I

IN THE COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

SUSAN KEPPLER and RICHARD KEPPLER, husband and wife;
and TANYA KEPPLER KNAUS

Appellants

v.

DONNA DETAMORE and PAUL DWIGHT, husband and wife;
and JOHN ZIMMERMAN and TRACY ZIMMERMAN, husband
and wife,

Respondents

BRIEF OF APPELLANTS

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STATE OF WASHINGTON
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I. INTRODUCTION

The parties own contiguous parcels of real property in the Plat of Ledgewood Beach on Whidbey Island, Washington. Plaintiffs/Respondents Donna Detamore, Paul Dwight, Tracy Zimmerman, and John Zimmerman (together referred to herein “Detamore et al.”) own two “uphill” parcels of property adjacent to the Defendants/Appellants Susan Keppler, Richard Keppler, and Tanya Keppler-Knaus’ (together referred to as the “Kepplers”) property, which is located down slope and to the west. Detamore et al. brought suit alleging that the Kepplers’ large, mature trees around their property formed a “u-shaped hedge” and violated a restrictive covenant prohibiting hedges or fences over six feet tall. Detamore et al. requested an injunction that Keppler be required to remove or cut to six feet in height every tree in the asserted “hedge.” The Kepplers moved for summary judgment on multiple, independent legal theories asking the Court to dismiss the complaint as a matter of law. In response, Plaintiffs Detamore et al. also requested summary judgment.

The trial court rejected each of Kepplers’ legal arguments and found that the Kepplers’ large, mature trees spaced around

their property constituted a hedge. The court denied the Keplers' summary judgment and awarded Detamore et al. summary judgment, entering an injunction requiring Kepler to cut every evergreen tree on the north, east and south sides of their property and only leaving a handful of small, ornamental trees. The Keplers asserts that the trial court erred as a matter of law.

II. ASSIGNMENTS OF ERROR

The Keplers assign error to the trial court's order and judgment *denying* the Keplers summary judgment and *granting* summary judgment to Detamore et al., which included an injunction requiring the Keplers to cut all evergreen trees on the north, east and south sides of their property, and every mature tree, other than a handful of ornamental deciduous trees, well beyond what might be required to remove a "hedge" quality of the trees. Clerk's Papers ("CP") at 6-13 (SJ order). In addition, because the trial court was required by CR 65 to "find" facts supporting the issuance of a permanent injunction, the Keplers also assign error to findings of fact 1, and 3-8 in the summary judgment order. CP at 9-10.

Appellants Kepler raise the following issues in relation to those assignments of error:

1. Does the plain language of the hedge covenant,

which makes no reference to views, trees, or vegetation generally, considered in context with the only available evidence of the drafters' intent, which included express view protections elsewhere in related covenants, prohibit the Keplers' large, mature, well-spaced trees of assorted varieties throughout their property?

2. Would an interpretation of the hedge covenant to prohibit groups or rows of mature trees over six feet lead to absurd results where the homes in the subdivision are well over six feet in height and can be two stories depending on the slope of the property, and where there is a dedicated park subject to the same covenant with groups of large trees that would be prohibited?

3. Even if the subject covenant were intended to restrict rows or groups of large trees, has such interpretation been abandoned by the widespread existence and prevalence of groups and rows of large trees, which leads the objective person to assume that such trees are permitted?

4. Did the trial court improperly read into the hedge covenant additional provisions in order to reach its conclusion and avoid absurd results inherent in its interpretation as well as the conclusion that the asserted interpretation has been abandoned?

5. Even if the subject covenant were intended to restrict

rows or groups of large trees, and even if such interpretation has not been abandoned, did the trial court err in its application by requiring removal of all evergreen trees on the north, east and south sides of the Keppler Property, and all mature trees other than a handful of ornamental trees, many more trees than required to correct any “hedge-like” quality?

III. STATEMENT OF THE CASE¹

A. History of Plat Restrictions.

On June 1, 1953, developers Robert O. Keith and Patricia A. Keith, recorded the Plat of Ledgewood Beach under Island County Auditor’s File No. (“AFN”) 89867. Clerk’s papers (“CP”) at 495-97 (Loring Decl. Ex. A). On the face of the Plat of Ledgewood Beach were specific restrictions, including as to size and type of structure.

The plat expressly provided for view protections of specific properties as follows:

Property owners of Lots 1 to 9 inclusive, Block 2, shall not erect high fences or other obstructions which will in any way impair the view from Lots 20 to 39 inclusive of Block 2.

CP at 497 (Loring Decl., Ex. A at page 3). The drafters specifically referenced “high fences” in prohibiting the impairment of views. *Id.*

¹ While both parties brought motions to strike portions of declaration and the trial court ruled on those at length at the hearing on June 11, 2015, no order was entered formalizing such rulings. Nonetheless, the Kepplers do not cite to any portions of their evidence stricken by the trial court’s oral ruling.

On April 25, 1962, the same developers, Robert O. Keith and Patricia A. Keith, executed the Plat of Ledgewood Beach, Division No. 3, which was recorded May 29, 1962 under Island County AFN 144810. CP at 499-500 (Loring Decl., Ex. B). That plat contained restrictions, including that no structure or building be constructed closer than 20 feet to the margin of any street or road. *Id.* at 499. But no restriction therein referenced or protected the views from any properties. *Id.*

On July 8, 1963, the same developers, Robert O. Keith and Patricia A. Keith, declaring themselves to be the “owners of all property in Ledgewood Beach Division No. 3,” adopted, executed and recorded Supplemental Restrictive Covenants under Island County AFN 154152 (hereinafter the “Supplemental Covenants”). CP at 502 (Loring Decl., Ex. C). It is the interpretation of the Supplemental Covenants that are at issue in this litigation. The Supplemental Covenants contained numerous specific limitations as to “Land Use and Building Type” as follows:

All lots are for residential purposes only, excepting water supply and community recreation.

No animals, poultry, livestock, except household pets shall be raised on any lot.

All buildings shall be of new construction and shall have their exteriors finished, including painting, within one year after start of construction.

No building shall be erected on any lot exceeding one story in height above the highest existing ground level at the proposed building site, except lots 6, 7, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26 and 27 in Block 10.

The minimal habital main floor area of each dwelling, exclusive of garages carports, open entries, porches and patios, shall be not less than 800 square feet, except lots 1, 2, 3, 4, 5 and 6 Block 11, and lots 3, 4, 7, 8, 9, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26 and 27, in Block 10, which shall be a minimum of 400 square feet.

No building shall be located on any lot nearer than 5 feet from interior side lines, nor nearer than 20 feet from interior rear lot lines, eaves and open porches shall not be considered a part of a building, for the purposes of this covenant.

No fences or hedges shall be erected or permitted to grow to a height exceeding 6 feet.

No septic tank or sewage disposal system shall be located nearer than 100 feet of water well on lot 17, Block 10.

CP at 502 (Loring Decl., Ex. C). It is specifically the prohibition on “fences or hedges” over six feet in height that is at issue here (referred to herein as “the hedge covenant”).

On April 20, 1982, a “Ledgewood Beach Community Plan” was recorded at Island County AFN 395335, which purported to restrict properties within all divisions of the Plat of Ledgewood Beach. CP at 504-10 (Loring Decl., Ex. D). That “Community Plan” at section 6 addressed “trees shrubbery, planting, and fences”:

No fences or walls, shrubs, trees, or bushes shall be erected or allowed to grow to a height which unduly restricts the view from other Ledgewood property. The Board of Directors, at its discretion, after an investigation, may request any such offending shrub, tree, fence, wall, or bush to be pruned, trimmed, or removed.

CP at 506.

On October 28, 1986, a subsequent document was recorded at Island County AFN 86013618, which referred to the Ledgewood Beach Community Plan and its recording number, and declared it “rescinded” and “null and void.” CP at 512 (Loring Decl., Ex. E). Detamore et al. did not attempt to enforce the Ledgewood Beach Community Plan; however, it is referenced in some of the documents filed relating to purported enforcement, and it is extrinsic evidence relevant to interpretation of the covenants.

B. Wagner Park.

Early in its history and prior to 1982, three lots in Ledgewood Beach, Division No. 3 were transferred to the community for use as a park. CP at 516 (Loring Decl., Ex. F). Those lots are Ledgewood 3, Block 9, lots 29, 30, and 31. The Wagner Park lots are within Division 3 and are subject to the same Supplemental Covenants to which the other properties in Division 3 are subject, including the hedge covenant prohibiting hedges or fences over six feet in height.

Nonetheless, there are numerous rows of large, mature trees present in the park, particularly along its perimeter. CP at 157-160 (Reply Decl. Susan Keppler, Ex. R), attached hereto in color as Appendix B. Those trees exist in groups and rows to the same extent as the trees on the Kepplers' property. Further, those trees have the potential to inhibit the views of nearby properties.

C. The Keppler Property.

The Kepplers inherited their property, Lot 19, Block 9, Plat of Ledgewood Beach Division No. 3 (hereinafter the "Keppler Property"), from their mother, Mary Halsen, in approximately 2007. CP at 541-42 (Keppler Decl. ¶3).

The Keppler Property, Lot 19, is directly west of and down slope of Plaintiffs/Respondents Tracy and John Zimmermans' property, Ledgewood Beach Division No. 3, Block 9, Lot 10 ("the Zimmerman Property"). CP at 542 (Keppler Decl. ¶5). The Keppler Property is diagonal from and to the west and north of Plaintiffs/Respondents Dwight/Detamore's property, Ledgewood Beach, Division No. 3, Block 9, Lot 11 ("the Dwight/Detamore Property"), abutting at the southeast corner of the Keppler Property and the northwest corner of the Dwight/Detamore Property. *Id.* The parties' properties are separated by fences. *Id.* The Keppler

Property sits to the west, and towards the shoreline, from Detamore et al.'s properties, but is much lower than their properties.

The Keplers asserted at summary judgment that they have no hedge or fence that exceeds six feet in height. CP at 542 (Kepler Decl. ¶6). Rather, the Keplers have a number of mature trees, of mostly native varieties, with the vast majority having heights ranging from 20 to 55+ feet tall, and spaced from 10 to 48 feet apart—many with large gaps between foliage. The trees include mature cedars, maple, fir, and pine, and a few ornamental trees such as crab apple, apple, plum, and vine maple. *Id.* The majority of the trees on the Kepler Property have been in place for approximately thirty years. CP at 542-43 (Kepler Decl. ¶7).

The majority of the trees on the Kepler Property are well spaced and no physical boundary is created as to people, animals, or movement around the trees. CP at 544 (Kepler Decl. ¶12). The Keplers enjoy having natural vegetation. *Id.* Further, given the proximity of the Kepler Property to the bluff and the drainage issues in this area, including a relatively recent landslide, the Keplers seek to maintain as much vegetation as possible. *Id.*

Attached to the Declaration of Susan Kepler as Exhibit B, was a handwritten drawing depicting trees on the Kepler Property

over six feet tall, approximating their respective locations, distances apart, heights, and widths. CP at 553-54. That drawing was prepared at Detamore et al.'s demand during discovery, and was agreed to be a handwritten drawing, not to scale, with approximate heights, spreads, and distances between trees on the Keppler Property. CP at 132-33 (Reply Keppler Decl. ¶5). However, in response, Detamore et al. made much of the fact that the Kepplers underestimated the height of the large cedars and firs on their eastern boundary and asserted that the cedars on the eastern boundary of the Keppler property that abuts Plaintiffs' properties are in fact 55-65 feet tall. CP at 170 (Dwight Decl. ¶6).

The Kepplers did not dispute Detamore et al.'s estimations of the heights of the trees on the Keppler Property. However, the Kepplers did dispute Mr. Dwight's "graphical" representation of the trees at CP 189, and the assertion contained therein and in the accompanying declaration of Paul Dwight, that the vast majority of the Kepplers' trees had vegetation overlapping. CP at 134-35 (Reply Keppler Decl. ¶¶ 6-7). As Ms. Keppler specifically stated in her reply declaration starting at paragraph 5:

[I]f anything, I believe that estimating the height of these trees to be on the lower side was more appropriate than erring on the taller side, as our entire

position is that these trees are large, mature trees of native varieties that are by definition not “hedges.” The fact that the trees are actually 50 feet or taller only further supports that position.

For the other measurements, my husband and I did in fact use a 12-foot tape measure and worked together to measure the various distances. While Plaintiffs take great objection to our inaccurate estimate of the height of the cedar trees, they fail to note that our measurements and estimations of the distances between the trees were very accurate and consistent with Plaintiffs’ measurements taken on May 11, 2015.

6. Plaintiffs also assert that my drawing and measurements are misleading because they measure the distances between the trunks of the trees and do not measure or depict the distances or gaps between the spread of the foliage on each tree. However, as noted in my drawing attached to my declaration as Exhibit B, I did estimate the spread of the trees and I disagree with Mr. Dwight’s measurements as to the spread of the trees, which I believe over-estimates the actual spreads. Further, I maintain, as the photograph attached to Dwight’s declaration as Exhibit P 8-131 of the Zimmerman property from the May 11 site inspections confirms, that substantial light exists between the cedar trees along our eastern property line.

7. Mr. Dwight’s “graphic” depiction of the trees on our property, attached to his declaration as “P3-15,” which claims to be based on detailed measurements and to be drawn to scale, is inaccurate or at the very least misleading. That drawing shows continuous foliage on the north, east, and south sides of our property without any gaps between the foliage of the respective trees. That assertion, albeit “graphic” in nature, is simply false and misleading.

8. . . . [O]n May 11, 2015, during the CR 34 site inspections that we conducted on each party's property, we had a professional photographer, Michael Stadler, take photographs of each party's property. . . . I attach hereto as **Exhibit P** photographs taken by Mr. Stadler of each of our property lines from our back yard, as well as of the entire back yard – the primary area in dispute. Contrary to Mr. Dwight's asserted drawing to scale, these actual photos show that there are in fact large gaps between the foliage of the trees along the north and south property lines. There are even gaps between the cedar trees along the east boundary, though those trees are broader and therefore closer together.

In the front yard, the only large, dense trees are one hemlock and one cedar tree in our northwest property corner, which are approximately 21 feet apart. These two trees are shown in the first of the two photos attached as **Exhibit Q** taken by Mr. Stadler on May 11, 2015. There is another approximately 48 feet before the next tree on the north property line. . . .

As these photos attached in Exhibit P and Q show, combined with the photographs that I provided previously, there simply is no "hedge" surrounding our property. We have several large, mature trees of mostly native varieties placed throughout our property.

CP at 133-35 (Reply Keppler Decl. ¶¶ 5-8)

The Kepplers asserted that the Plaintiffs' "graphical" presentation was false and misleading and that the best evidence of the relative distances between the trees was the photographs themselves attached to the Reply Declaration of Susan Keppler as

Exhibit P. CP at 149-52; attached in color hereto as Appendix B. Nonetheless, the trial court expressly weighed the graphical exhibit more heavily than the Keplers' photographs.²

D. Evidence as to Lack of Enforcement of the "Hedge" Covenant.

Despite the hedge covenant being recorded in 1963, the only evidence of its "enforcement," if letters from the Ledgewood Beach Owners Association ("the Association") are constituted as such, is from the year 2000 forward. Further, the documentation provided confirmed that the Association has no authority to enforce the covenants. CP at 257, 264, 320 (Ex P-10-4, P-10-11, P-10-69, T. Zimmerman Decl.). The documentation relied on by Detamore et al. included merely voluntary requests and efforts to trim, top, or "window" trees as "good neighbors," not as required by covenant:

- In 1995 the Association urged property owners to voluntarily trim foliage—no reference is made to specific covenants or restrictions nor to any requirement to trim trees:

² In its oral ruling, the Court specifically relied upon the graphic representation, exhibit P-3-15, attached at CP 189, to the apparent exclusion of the photographic evidence: "A helpful exhibit in evidence is Exhibit P3-15 to the declaration of Paul Dwight. This shows the location of the trees on the defendants' property and the span of their branches. It further shows, as backed up by other evidence in the case, the span of the branches of the trees, such that the entire east boundary of the defendants' property, which is the Zimmermans' west boundary, is obscured by trees. Portions of the north and south boundaries of the defendants' property are also obscured by trees, though not as much. June 19, 2015 Verbatim Report of Proceedings ("RP") at 6:5-15.

“From time to time your Board of Directors receives inquiries regarding the view obstructions caused by growing trees and shrubbery – and how best to address the issue.

Your Board believes cooperation and mutual consideration is the best solution.

In that spirit, we ask each and all of you to:

- 1- Look critically at your own property. If your trees or shrubs are more than 10 to 15 feet tall, chances are they may be obstructing the views of your neighbors. Ask them and offer to cooperate in some reasonable pruning.
- 2- If your own views are being restricted by growth on someone else’s property, speak to them about it. Trimming, topping and removing large trees can be difficult. Offer to help your neighbor.
- 3- If the work appears hazardous, it is advisable to hire those who are capable of handling the job at minimum risk. Offer to share in the costs.
- 4- Practice periodic pruning – at least once every two years. Doing this will keep the job from becoming onerous or costly.

We appreciate your consideration of this issue. Your Board believes that by following these guidelines, we can all continue to enjoy this beautiful environment.”

CP at 272 (T. Zimmerman Decl., Ex. P-10-19) (emphasis added).

- Similarly, “Guide for Tree and Shrub Plantings for View Sensitive Neighborhoods” was distributed at the 2005 annual meeting. CP at 317 (*Id.*, Ex. P-10-64).
- Examples of trees in Wagner Park requested cut where property owners asserted blocked views; no covenant referenced, rather the Board just “agreed” voluntarily to cut the trees upon request. CP at 265-66 (*Id.*, Exs. P-10-12, 10-13).

- Request to cut fir tree in Wagner Park rejected. CP at 270 (*Id.*, Ex. P-10-17).
- In 2005, a large tree in Wagner Park removed at request of property owners and at agreement of the Association Board; no covenant restriction referenced. CP at 314 (*Id.*, Ex. P-10-61).
- Minutes from August 4, 2012 annual meeting suggest that “Neighbors should work together to talk about trees that may be in their view and how the view can be opened up.” No reference to any covenant made. CP at 332 (*Id.*, Ex. P-10-80).
- Indeed, on August 1, 2012, Plaintiff Paul Dwight specifically attended an Association Board meeting and asked whether “the covenants [sic] can be revised to cover trees and the view.” CP at 328 (*Id.*, Ex. P10-76) (emphasis added).

In 2000, the Board specifically agreed that removal of some trees to eliminate a “hedge”, rather than cutting all trees to six feet, complied with the covenant. CP at 276 (*Id.*, Ex. P-10-23).

In addition, the letter that was sent by the Association Board to the Keplers’ listing agent in 2007 and relied upon by Detamore et al. regarding efforts to enforce the hedge covenant and to require the Keplers to cut their trees referenced a wholly unrelated “restriction” contained in the recorded and rescinded “Community

Plan,” which did specifically attempt to protect views and restrict trees and other vegetation.³ CP at 323 (*Id.*, Ex. P-10-71A). The hedge covenant was not relied on in requesting the trees be cut. *Id.*

E. Equitable Defenses to Enforcement.

The parties agree that there are 88 lots within Ledgewood Beach, Division No. 3 (including Blocks 9, 10, and 11). CP at 629 (Mot. For Summ. J. at 8); CP at 179 (Dwight Decl. ¶18).

The Keplers identified at least nine properties within Ledgewood Beach, Division 3 that have true “hedges” that appear to be six feet in height or taller. CP at 548 (Keppler Decl. ¶21); CP at 611-621, attached in color at Appendix A) (*Id.*, Ex. O). Detamore et al. disputed that those violations should be considered, because the hedges at issue run east to west or otherwise purportedly do not block views (though the hedge covenant contains no such limitation). CP at 190-83 (Dwight Decl.). But they did not deny that nine properties violated the face of the “hedge” covenant with “traditional” hedges. *Id.*

But more importantly for purposes of summary judgment, the Keplers identified a vast number of properties in Ledgewood

³ At various times Article II, Item 6 of the Community Plan regarding “Protection of View” was relied upon to encourage cutting vegetation to protect views. This again supports the conclusion that the “hedge” covenant was never intended to restrict the height of trees generally or to protect views.

Beach, Division No. 3 that have groups or rows of large, mature trees over six feet in height, of those species naturally occurring in the Pacific Northwest, very similar to the Keplers' trees. Keplers provided photographic evidence that more than 50 of the 88 properties within Division No. 3, or 57% of the total properties, have groups or rows of large, mature trees over six feet in height similar to the Keplers' trees (though in most cases much more densely growing than the Keplers' trees). CP at 585-609, attached hereto in color at Appendix A (Kepler Decl., Ex. N). The Keplers showed that at least 22 of the 42 lots in Block 9, at least 15 of the 27 lots in Block 10, and at least 16 of the 19 lots in Block 11, have vegetation that would violate the covenant under Plaintiffs' interpretation. CP at 73-74 (Defs' Reply).

Detamore et al. asserted in a conclusory fashion that the Keplers' photographs, taken primarily in late August 2014 and September 2014, were not representative of the properties presently. CP at 179 (Dwight Decl. at ¶18). But Ms. Kepler specifically asserted that they were representative. CP at 139 (Kepler Reply Decl. ¶17) Mr. Dwight made no attempt to identify individual photographs that did not accurately represent the respective properties. CP at 179. Mr. Dwight's conclusory assertion

did not create a dispute of fact on this issue, and Plaintiffs provided no evidence to contradict the Kepplers' evidence of the widespread existence of rows or groups of large, mature trees constituting hedges within their interpretation of the hedge covenant.

F. Prior Case.

Detamore et al. previously sued Kepplers' neighbor to the south, Cynthia Johnson, under Island County Superior Court Cause No. 12-2-00964-8, to enforce the same covenant to require Ms. Johnson to cut a dense row of cypress trees planted by her in recent years as a border around her yard. The two cases are factually distinct and the prior case has no precedential value.

G. Summary Judgment.

Defendants Keppler moved for summary judgment, asking the trial court to rule as a matter of law that: (1) the plain meaning of the hedge covenant did not include the Kepplers' trees; (2) there was no evidence of the drafters' intent to prohibit large, mature trees over six feet in height, and the supplemental covenants read in their entirety did not create a "view" restriction; (3) extrinsic evidence suggested that the drafters did not intend to prohibit the Kepplers' trees with the hedge covenant or to create view restrictions; (4) any interpretation of the covenant to prohibit rows or

groups of large, mature trees over six feet in height would lead to absurd results; and (5) any interpretation of the covenant to prohibit rows or groups of trees over six feet tall had been abandoned. The Keplers argued in the alternative that even if the “hedge” covenant remained enforceable and some of their trees were a hedge, only a handful of trees need be removed to eliminate the “hedge.”

In Detamore et al.’s response to the Keplers’ motion for summary judgment, they requested summary judgment.

The trial court rejected each of the Keplers’ legal arguments on their face, weighed Detamore et al.’s evidence depicting the relative sizes and locations of trees more heavily than the Keplers’ declaration testimony and photograph evidence, and concluded that the Keplers trees formed a “hedge” on three sides of their property. CP at 9 (SJ Order, Finding of Fact No. 3).

Along the rear or east line of the Kepler Property, the side directly abutting the Zimmerman Property, there are four cedars, approximately 55-65 tall, which are spaced between 14 and 27 feet apart. CP at 553 (Kepler Decl., Ex. B); CP at 149, attached in color at Appendix B (Reply Kepler Decl, Ex. P). A plum tree is also planted inside the cedars, towards the interior of the Keplers’ backyard at a height of approximately 12 feet. CP at 543 (Kepler

Decl. ¶8). Finally, a large fir tree also over 55 feet tall exists on the boundary between the Keppler Property and the property to the north. *Id.* (Keppler Decl. ¶9). Of those six trees along the eastern side of the Keppler Property, the Court allowed only one tree – the 12-foot tall plum tree—to remain. CP at 6-15; compare CP 189-90. Not one of the evergreens was allowed to remain.

On the northern Keppler Property line there are two large gaps of 48 feet between trees in two separate places. CP at 554 (Keppler Decl., Ex. B); CP at 150 & 154, attached in color at Appendix B (Reply Keppler Decl, Ex. P & Q). Towards the rear of the Keppler Property or northeast corner, on the north Keppler boundary, exist only a pine “bush-like” tree and a maple tree, and as the photographs attached as Exhibit P to the Keppler Reply Declaration show, there are gaps and spacing between these trees. CP at 150 & 154, attached in color at Appendix B. Towards the front, or northwest corner of the property along the northern property line, there are only two large trees, a hemlock and a cedar. CP at 135 (Keppler Reply Decl. ¶8); CP at 154, attached in color at Appendix B (Reply Keppler Decl, Ex. Q). Nonetheless, the Court allowed none of these trees to remain. Along the entire northern property line, the Court allowed only one small vine maple directly

adjacent to the Keplers' house to remain and a 7-foot cypress recently planted at the road). CP at 6-15; compare CP 189-90.

On the south property line, there are three small crab apple trees planted by the Keplers in the front of their property near the road that are approximately 7 feet tall. CP at 554 (Kepler Decl., Ex. B & ¶10). In addition, are a handful of other trees—three pine bushes or trees of varying sizes, two vine maples into the interior of the Keplers' front yard, one maple, and one apple tree not in a line, but inside the backyard. CP at 553-54; see *also* CP 149, 151, 152, attached in color as Appendix B. As the photos show, the trees were well spaced and have large gaps. Of these trees along the southern property of the Kepler Property, the Court allowed only the small apple tree in the backyard and the two small vine maples in the front yard to remain, in addition to the three crab apples in the front yard that are just 7 feet tall. No evergreen tree or bush was allowed to remain.

As described, the trial court's injunction required the removal of five of the six trees on the east property line, leaving only a small, ornamental plum tree planted inside the property towards the interior of the Kepler Property. Further, the injunction required the removal of every cedar, fir, pine or hemlock tree on the north, east,

and south sides of the Keppler Property. Likewise, it required the removal of trees that had large gaps between them, as the photos confirmed. The Kepplers were allowed to keep only a handful of small, ornamental trees. Even if the trial court's interpretation of the hedge covenant is legally correct, which the Kepplers dispute, and was not abandoned, which the Kepplers dispute, the trial court erred as a matter of law in requiring the cutting of many more trees than required to eliminate any hedge-like quality of the trees.

The Kepplers appeal the trial court's summary judgment order and injunction and address the individual reasoning below.

IV. ARGUMENT

A. Standard of Review.

The Court of Appeals reviews summary judgment rulings de novo, engaging in the same inquiry into the evidence and issues as the trial court. *Dowler v. Clover Park Sch. Dist. No. 400*, 172 Wn.2d 471, 485, 258 P.3d 676 (2011). Summary judgment will be affirmed if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Id.* If reasonable minds can differ on facts controlling the outcome of the litigation, then there is a genuine issue of material fact and summary judgment is improper. *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552,

192 P.3d 886 (2008). Summary Judgment is improper if the issues require weighing “competing, apparently competent evidence.” *Larson v. Nelson*, 118 Wn. App. 797, 810, 77 P.3d 671 (2003).

The trial court improperly granted Detamore et al.’s request for summary judgment. Based on the undisputed evidence, the Keplers were entitled to an order on summary judgment *dismissing* the plaintiffs’ claim. At the very least, the Keplers established a dispute of material fact by presenting competent photographic evidence and declaration testimony, that when viewed in the light most favorable to them, created a dispute of material fact as to whether their trees had foliage that overlapped sufficiently to create hedges, and whether the asserted interpretation of the hedge covenant had been abandoned.

B. The Trial Court Erred in Concluding that the Hedge Covenant Prohibits the Keplers’ Trees.

The Washington Supreme Court re-articulated the principles of interpretation of restrictive covenants in *Wilkinson v. Chiwawa Communities Ass’n*, 180 Wn.2d 241, 327 P.3d 614 (2014). The interpretation of a restrictive covenant is a question of law. *Id.* at 249. In interpreting a covenant, the courts apply the rules of contract interpretation, with the primary objective to determine the

drafters' intent. *Id.* at 250. Contract interpretation is a question of law, but the drafters' intent is a question of fact. *Id.* However, where reasonable minds could reach but one conclusion, questions of fact may be interpreted as a matter of law. *Id.*

The courts are instructed to "examine the language of the restrictive covenant and consider the instrument in its entirety." *Wilkinson*, 180 Wn.2d at 250. "In determining the drafters' intent, we give covenant language its ordinary and common usage and will not construe a term in such a way so as to defeat the plain and obvious meaning." *Id.* (internal quotation omitted). The court must give covenant words their ordinary, usual, and popular meaning unless the entirety of the document clearly demonstrates contrary intent. *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 504, 115 P.3d 262 (2005).

Further, in interpreting a covenant, the court should reject "forced or strained" interpretations of covenant language leading to absurd results. *Wilkinson*, 180 Wn.2d at 255. The lack of an express term with the inclusion of other similar terms is evidence of the drafters' intent. *Burton v. Douglas County*, 65 Wash.2d 619, 622, 399 P.2d 68 (1965). The court also should not read into the covenant at issue language or distinctions that are not present in

the unambiguous language of the covenants. *Crystal Ridge Homeowners Assoc. v. City of Bothell*, 182 Wn.2d 665, 751, 343 P.3d 746 (2015).

Here, the trial court erred as a matter of law in concluding that the subject covenant prohibits the Kepplers' trees.

1. The Plain Meaning of the Subject Covenant Does Not prohibit the Kepplers' Trees.

The Supplemental Covenants state in pertinent part:

No fences or hedges shall be erected or permitted to grow to a height exceeding 6 feet.

CP at 502 (Loring Decl., Ex. C). The language expressly groups "fences" and "hedges" in one category. It also expressly includes fences or hedges that are both "erected," or "allowed to grow," suggesting that it would include naturally occurring or existing vegetation. But the covenant does not define "fence" or "hedge."

The term "hedge" is one that has a generic, commonly understood, plain meaning, which is assumed to have been that meaning intended by the drafters of the hedge covenant absent a contrary definition provided in the Supplemental Covenants.

- Webster's College Dictionary defines "hedge" as: "a row of **bushes or small trees planted close together**, esp. when forming a fence or boundary; hedgerow." (Random House 1991) (Emphasis added).

- Merriam-Webster's Dictionary defines "hedge" as: "a fence or boundary formed by a **dense row of shrubs or low trees.**" (Emphasis added).
- The "free dictionary" online defines "hedge" as: "a row of **closely planted shrubs or low-growing trees** forming a fence or boundary." <http://www.thefreedictionary.com/hedge>. (Emphasis added).
- "A fence or boundary formed by **closely growing bushes or shrubs,**" www.oxforddictionaries.com/definition/english/hedge. (Emphasis added).
- "A *hedge* is a living fence made of **closely planted bushes,** which, as they grow and get trimmed and shaped, form a **wall** of green." <http://www.vocabulary.com/dictionary/hedge>. (Emphasis added).

The common elements in these very similar definitions include:

- (1) Inclusion of shrubs, bushes, or low growing trees, which connote a manageable size;
- (2) Vegetation that is close together and dense;
- (3) Vegetation forming a boundary without large gaps.

In addition, a commonly understood component of hedges is that they are "intentional" and they are generally maintained, manipulated, trimmed, or shaped by the property owner. See CP at 537-39 (Loring Decl., Ex. H). The hedges depicted therein are very different and distinct from the trees on the Keppler Property.

Here, the primary trees at issue are mature cedars, firs, pines, maple, and hemlock. CP at 553-54 (Keppler Decl., Ex. B);

CP at 149, attached in color at Appendix B (Keppler Reply Decl., Ex. P). These trees range in height from approximately 20-55+ feet; they are not trimmed or manicured, but are naturally growing. These trees were in place long before the defendants acquired their property, and for approximately 30 years or more. The trees are not densely or closely planted forming an impenetrable wall or fence of vegetation. The trees are well spaced with large gaps in most places, allowing persons, animals, and light to move around.

As the photographs confirm, the trees are simply not within the ordinary and plain meaning of the term “hedge.” The plain meaning of the term “hedge” or “fence” simply does not apply to the large, mature trees, well-spaced throughout the Keppler Property. See *e.g.*, CP at 149-152, attached in color at Appendix B.

2. The Ordinary, Common Meaning Does Not Create a “View” Covenant or Put Property Owners On Notice of View Restrictions.

The “right to a view” is a significant and valuable benefit to a property, and a significant and detrimental burden to the corresponding property. The courts have not and will not “imply” rights to views absent specific, enforceable agreements providing such rights. *Pierce v. Northeast Lake Washington Sewer and Water Dist.*, 123 Wn.2d 550, 559, 564, 870 P.2d 305, 310 (1994) (the

courts have not recognized a right to a view absent an easement, restrictive covenant or other document creating an affirmative right); *Collinson v. John L. Scott, Inc.*, 55 Wn. App. 481, 778 P.2d 534 (1989) (absent view easement or restrictive covenant, landowner has no right to unobstructed view over adjoining property).

Here, the drafters could have created a view covenant, but did not do so, instead creating a specific, narrow covenant limiting the height of “fences” and “hedges” to six feet. No view covenant or view easement should be implied, and the trial court’s ruling erred as a matter of law in enforcing a view covenant and in applying the covenant to require the removal of all large, mature trees.

3. The Supplemental Covenants Read In their Entirety Do Not Evidence the Drafters’ Intent to Restrict the Height of Trees or to Protect Views.

a. The Supplemental Covenants Had Detailed Restrictions and Chose Not to Address Vegetation Other than Hedges.

In the Supplemental Covenants, the drafters provided considerable detail as to use and development of property, and yet they chose not to restrict vegetation generally. See CP at 502. If they had intended to do so, they would have done so, given the expansive vegetation throughout the plat. See *Wilkinson*, 180

Wn.2d at 251. There is no indication that the drafters intended to restrict vegetation other than commonly defined hedges.

b. The Drafters Restricted Other Height Limitations to Specific Lots Where View Was the Purpose.

Plaintiffs will likely assert that restriction on dwellings to one story above the highest point on a lot indicates a general intent to protect views. However, the restriction as to height of buildings was specifically tailored to certain lots and excepted as to others.

No building shall be erected on any lot exceeding one story in height above the highest existing ground level at the proposed building site, except lots 6, 7, 7, 18, 19, 20, 21, 22, 23, 24, 25, 26 and 27 in Block 10.

CP at 502.

The specific exceptions for certain lots from the height requirement for buildings most likely relates to the fact that the lots excepted, all within Block 10, are in the “back” of that block, or furthest from the shoreline, and have no properties within Division 3 behind them from which a view would be impeded. Therefore, the height restriction for houses was removed where properties would not impede the views of other benefited properties.

But in the case of restriction of fences/hedges, there was no limitation to except properties in the back of the subdivision where the views of other properties could not be impacted.

Likewise, there was no provision that height of fences/hedges would be measured from the highest existing ground level, as was the case with home height, which would mean that a home could be two stories or more depending on the slope of the property, but no fence anywhere on the property could be more than six feet tall regardless of the slope of the property.

Therefore, the only reasonable inference is that the restriction on fences and hedges was not to protect “views” of the shore. Rather, the restriction as to fences and hedges was a restriction regarding the appearance and aesthetic quality throughout the subdivision, which would have equal application to all lots within the development and regardless of the height of the ground on a given lot or the height of the actual home.

A proper reading of the Supplemental Covenants in their entirety leads to the only reasonable conclusion as a matter of law that the restriction on hedges and fences to six feet in height was not intended primarily to protect views of the shoreline and cannot be interpreted or extended to prohibit groups of trees over six feet in height. These drafters knew how to protect views, and they did not do so with respect to this covenant. Such intent should not be implied where it is contrary to the evidence of the drafters’ intent

when the Supplemental Covenants are read as a whole.⁴

4. Extrinsic Evidence Confirms the Kepplers' Interpretation of the Hedge Covenant.

Extrinsic evidence should be used to “illuminate what was written.” *Wilkinson*, 180 Wn.2d at 251 (quoting *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 694, 974 P.2d 836 (1999)). Here, we have limited evidence of the drafters’ intent of the hedge covenant adopted in 1963, over fifty years ago. The original drafters, Robert Keith and Patricia Keith, are believed to be deceased. Therefore, we are limited to the subject Supplemental Covenants, and the other contemporaneous and related documents prepared by the drafters, for evidence of their intent.

a. View Restrictions Were Expressly Provided Elsewhere.

The relevant starting place is the original Plat of Ledgewood Beach, recorded in 1953. In that plat, in addition to other specific limitations and restrictions, Mr. and Mrs. Keith specifically created view restrictions on specifically identified properties:

⁴ See, e.g., *Ross v. Bennett*, 148 Wn. App. 40, 50-51, 203 P.3d 383 (2009), where the Court of Appeals affirmed the trial court’s refusal at summary judgment to imply an intent to prohibit short term rental of property based on covenant limiting use of property to residential rather than commercial purposes. The court concluded that the text of the covenant did not prohibit short term rentals, and that there was no proper contextual evidence to support implying or assuming such intent by the drafters.

Property owners of Lots 1 to 9 inclusive, Block 2, shall not erect high fences or other obstructions which will in any way impair the view from Lots 20 to 39 inclusive of Block 2.

CP at 497 (Loring Decl., Ex. A).

As the courts routinely hold, where a drafter shows knowledge and intent to provide for a provision in one place, and does not do so in another location, it can be inferred that the drafter did not intend to include such provision. Indeed, in *Day v. Santorsola*, 118 Wn. App. 746, 755-56, 76 P.3d 1190 (2003), the Court of Appeals reasoned that a restriction of homes to “two stories,” where such term was un-defined, could not reasonably be interpreted to have a primary purpose of protecting views in the context of the covenants as a whole. There, another covenant expressly limited the height of vegetation to preserve views, restricting the height of bushes and shrubs to a maximum height of 20 feet or a height that would not block the views of other properties. *Id.* The Court of Appeals concluded that “[t]he trial court was correct in finding that the only reference to view in the covenants is with respect to the heights of trees and shrubs.” Therefore, where the drafters expressly included reference to views in the vegetation covenant but chose not to do so with respect to

the limit on homes to “two stories,” the court concluded that the context required the conclusion that the drafter did not intend the restriction to two story homes primarily to protect views. *Id.* at 756 (“Had the developer intended to make view a specific consideration with respect to the permissible height of houses, it could have included a provision similar to the one regarding the height of shrubs and trees.”)⁵

Further, indication that drafters considered or anticipated an area of behavior, and did not expressly restrict or limit the scope of that behavior, is evidence that the drafters did not intend to limit the behavior. *Wilkinson*, 180 Wn.2d at 251-52 (where there was evidence that the drafters considered rental of property because they provided for placement of rental signs, but did not provide any restrictions as to type or duration of rentals, the Washington

⁵ The trial court here distinguished *Day* on the ground that the “committee” approving structures had previously approved plans allowing homes to impact the views from other properties. RP at 20:17-25. While the trial court in *Day* did rely upon extrinsic evidence of the committee’s interpretation, such consideration was only after looking at the language of the covenants as contextual evidence of the drafter’s intent. Further, reliance on the committee’s interpretation was questionable because it was not relevant to the drafter’s intent for a covenant and plat recorded in 1958. *See Day*, 118 Wn. App. at 749. This Court has held that evidence of events after the drafting of the covenants is not relevant to the drafter’s intent for the covenants. *See, e.g., Bauman v. Turpen*, 139 Wn. App. 78, 82, 160 P.3d 1050 (2007) (holding that the trial court properly concluded that 1997 building codes were not relevant in construing 1949 deed restrictions and the drafter’s intent therefore).

Supreme Court concluded as a matter of law that short term rentals were not intended to be prohibited).

Here, where the drafters clearly knew how to protect views and did so in the original plat with respect to certain properties, but chose not to do so in the case of Division No. 3, the resulting conclusion must be that the drafters did not intend to protect views by restricting hedges and fences to six feet. Indeed, a much more plausible intent would be for aesthetic purposes and uniformity.

b. Additional Attempts Were Made to Restrict Vegetation and Trees.

Section 6 of the 1982 “Ledgewood Beach Community Plan,” recorded in 1982 at AFN 395335, expressly restricted the height of trees and other vegetation that would impact views:

No fences or walls, shrubs, trees, or bushes shall be erected or allowed to grow to a height which unduly restricts the view from other Ledgewood property. The Board of Directors, at its discretion, after an investigation, may request any such offending shrub, tree, fence, wall, or bush to be pruned, trimmed, or removed.

CP at 506 (Loring Decl., Ex. D, Section 6).

Therefore, at a time less than 20 years after the drafting of the subject Supplemental Covenants, members of the same subdivision attempted to create much more detailed covenants that would have specifically provided for the restriction on vegetation to

prevent impacts on views that is advocated here. This document suggests that the 1963 Supplemental Covenants therefore were not intended or understood to so limit vegetation as of 1982.

5. The Association's Interpretation During the Last 20-30 Years is Not Relevant to the Drafters' Intent.

As the Washington Supreme Court has repeatedly and routinely held, the courts interpret real covenants by applying the rules of contract interpretation, with the primary objective to determine the drafters' intent. *Wilkinson*, 180 Wn.2d at 250. While the "context" of the drafting of the covenant may be used to interpret the intent, there is no legal basis to conclude that an association's interpretation of a covenant 40 years after it was drafted should be considered in interpreting the drafters' intent.

Therefore, the records of the Association are not relevant to the interpretation of the "hedge" covenant. If anything, the business records provided merely show that:

- No "enforcement" or even attempted application of the "hedge" covenant to trees until approximately 2000, 37 years after the covenant was enacted;
- The Association does not believe it has enforcement authority and has taken a position of "education" and requested voluntary compliance a handful of times;
- The Association and property owners encourage working together in the spirit of "community" to cut, top, or trim trees to enhance neighbors views; no reference to the "hedge" covenant was made in the vast majority of these situations;

- If anything, the Association records indicate that it was the Board's position that removing a handful of trees in a row of trees would negate any "hedge" quality; and
- When the Association did write to the Keplers' realtor in 2007, it relied upon the rescinded and unenforceable "Community Plan" which did in fact have a specific view protection and limitation on trees and other vegetation.

6. The Trial Court's Interpretation Would Lead to Absurd Results.

The Washington Supreme Court has held that it will reject "forced or strained" interpretations of covenant language leading to absurd results. *Wilkinson*, 180 Wn.2d at 255.

Here, there is a limitation in the Supplemental Covenants as to the height of buildings on certain properties, requiring them to be no more than one story "above the highest existing ground level." Given that language, a home could still effectively be two stories, so long as one story is below the highest grade, as is the case for Detamore et al.s' properties. No similar variation for the "highest existing ground level" was made as to fences and hedges. This height limitation, allowing the equivalent of two story homes, demonstrates how unreasonable and unlikely that the drafters would have intended the restriction on fences and hedges to limit groups or rows of trees spaced around a property to under six feet in height, where homes on properties could be much higher the six

feet tall, and even two stories tall, particularly with the sloping nature of the properties at issue, dwarfing the trees.

Further, it is a “forced and strained” interpretation to assume that the drafters intended no rows or groups of trees over six feet tall to exist within an entire residential subdivision.

Likewise, the asserted interpretation would require the cutting or removal of vast numbers of trees in Wagner Park, which is located on Lots 29, 30, and 31 of Block 9, and is subject to the hedge covenant. CP at 157-160, attached in color at Appendix B (Keppler Reply Decl., Ex. R); CP at 137-48 (Keppler Reply Decl. ¶14). Again, it is a “forced and strained” interpretation leading to absurd results that would require all groups of trees in a dedicated park to be cut to six feet in height, almost certainly killing the trees.

C. Even if the Covenant is Interpreted to Restrict the Height of Groups or Rows of Trees, Enforcement Here is Inequitable Because Any Such Interpretation Has Been Abandoned.

“If a covenant which applies to an entire tract has been habitually and substantially violated so as to create an impression that it has been abandoned, equity will not enforce the covenant.” *White v. Wilhelm*, 34 Wn. App. 763, 769, 665 P.2d 407 (1983) (internal quotation omitted) (holding that where there was presently

no architectural control committee in existence and where the requirement to obtain approval of building plans by the architectural control committee had been violated several times, the requirement to obtain such approval had been abandoned). Where the “common plan” has broken down due to substantial unchecked prior violations of the covenant, the covenant may be deemed to have been terminated by abandonment. *Id.* (citing *Mount Baker Park Club v. Colcock*, 45 Wn.2d 467, 275 P.2d 733 (1954); *St. Luke's Evangelical Lutheran Ch. v. Hales*, 13 Wn. App. 483, 534 P.2d 1379 (1975)).

There are relatively few published Washington cases analyzing the abandonment of real covenants. However, case law from other jurisdictions provides helpful examples of such analysis. See CP at 517-535 (attached to the Loring Decl.).

For example, in an Ohio Court of Appeals case, *Landen Farm Community Services Ass'n v Schube*, 78 Ohio App.3d 231, 604 N.E.2d 235 (1992), abandonment of a covenant prohibiting free-standing basketball hoops was found where evidence was presented that approximately 50 out of 2,000 homes had free-standing basketball hoops. The court there reasoned that the issue was “whether in view of what has happened there is still a

substantial value in the restriction, which is to be protected.” *Id.* at 235. Although the number of homes in violation was only 2.5% of the properties subject to the covenant at issue, the court found that the presence of free-standing basketball hoops had been “integrated into the community.” *Id.* at 236. As a result, the right to enforce the covenant had been abandoned. *Id.*

Similarly, the Utah Court of Appeals analyzed a covenant requirement to utilize wood shingles as a building material in *Fink v. Miller*, 896 P.2d 649, 653-654 (Utah App.1995). The court considered number, nature, and severity of violations of that covenant to determine whether it had been in effect abandoned. The court considered whether upon inspection of a subdivision and knowing of a certain restriction, the average person would readily observe sufficient violations so that he or she would logically infer that the property owners neither adhere to nor enforce the subject restriction. In that case, the court found 23 out of 81 homes in the subdivision had roofs that did not conform to the wood shingle restriction. The court rejected attempts to “weigh” violations as being more or less in violation depending on whether the shingles in place were tile (which was considered more upscale) or asphalt in material, as both violated the plain meaning of the covenant.

Accordingly, the court concluded that violations of the wood shingle restrictive covenant were sufficiently widespread that it must be concluded, as a matter of law, that the restriction had been abandoned and was unenforceable. *Fink v. Miller*, 896 P.2d 649, 653-654 (Utah App.1995).

While the Keplers reject the assertion that the subject covenant can be reasonably interpreted to prohibit their trees or any trees from being over six feet tall, even if that interpretation was originally intended it has since been abandoned. Defendant Susan Kepler presented un-rebutted photographs and declaration testimony that over half of the properties in Division No. 3 have rows or groups of large, mature trees of naturally occurring varieties like cedar, pine, and hemlock. CP at 582-609, attached in color at Appendix A (Kepler Decl., Ex. N); CP at 73-74 (Defs' Reply at 14-15). No reasonable person travelling though the subdivision, even if they knew of the restriction as to the height of hedges, would assume that it applied to large, mature trees of the nature at issue. CP at 546-47 (Kepler Decl. ¶¶ 17-19). Enforcing the restriction here would not be of substantial benefit to this community, as such trees proliferate throughout the subdivision.

Detamore et al. provided no legal or factual evidence to refute this assertion.

Further, Plaintiffs—and the trial court—have “read into” the subject covenant exceptions and assumptions in order to weigh or justify existing violations under their interpretation. As the court in *Fink v. Miller* held above, such “weighing” of violations is not appropriate where the covenant provides no such distinction.

D. The Trial Court Erred By “Reading Into” the Hedge Covenant Exceptions in Order to Reject Abandonment or Absurd Results.

The “hedge” covenant at issue states solely as follows:

No fences or hedges shall be erected or permitted to grow to a height exceeding 6 feet.

CP at 502. The covenant does not refer to the directional orientation of hedge or fences, whether the properties are developed, or any other qualification or limitation. *Id.*

Further, additional restrictions in the same set of supplemental covenants provide extensive detail. See CP at 502.

Detamore et al. and the trial court assumed that the following exceptions or clarifications should be read into the hedge covenant, but provide no evidence of the drafters’ intent to do so, and such interpretation would be contrary to the evidence of the drafters’

intent provided and to the substantial detail provided in other covenants in contrast to the simplicity of the hedge covenant:

- The hedge covenant should not apply unless the property has been developed;
- The hedge covenant should not apply unless the hedge runs in a north to south direction;
- The hedge covenant should not apply where a hedge does not obstruct views;
- The hedge covenant should not apply unless the offending hedge exists on a boundary line rather than towards the interior of a property.

See CP at 486-87 (Pls' Response at 24-25); CP at 180-83 (Dwight Decl. at 13-16); *see also e.g.*, RP at 24:13-25:4; 28:3-29:1; 29:17-30:17 (concluding that the covenant is only violated if a view is restricted, and not if undeveloped properties are at issue, etc.).

None of these "exceptions" or "assumptions" has support in the hedge covenant, in the remaining covenants included in the 1963 Supplemental Covenants, or in the other documents drafted by the developers for the same plat, which constitutes the only evidence of the drafters' intent available to the parties.

Further, many of the lots may never be developed (and they have not been developed in over 50 years since platting). It would be an interpretation leading to absurd results to allow unfettered,

dense vegetation to exist on undeveloped lots, but require owners of developed properties to cut essentially all large trees.

There is no evidence that the direction of the “hedges” or whether or not they block the views of others is relevant to enforcement; no such limitation is made within the covenants. In fact, reading the *entire* 1963 Supplemental Covenants requires the opposite conclusion. In the same supplemental covenants, the drafters expressly excluded certain properties that were not required to comply with the 800-square foot minimum floor area requirement. CP at 502. No similar exception was made as to properties that need not comply with the hedge restriction. Similarly, and even more importantly, the same Supplemental Covenants expressly excluded specific properties that did not need to comply with the home height restriction—and such properties were specifically those at the “back” of the subdivision which would not block the views of other properties within Division No. 3. No such exception is present with respect to the hedge restriction. Further, in the original plat, the developers specifically created a view restriction and applied it to specifically defined lots. Again, no such effort was made here. The only evidence available of the drafters’ intent—and the proper, contextual reading of the subject

covenant—requires the conclusions that (1) the hedge/fence restriction is not specifically targeted at views; (2) no properties were intended to be excluded from the hedge restriction; and (3) no “orientation” of the hedges is included in the restriction, including as limited to “boundaries” of properties.

The Washington Supreme Court has repeatedly refused to “read into” covenants language, restrictions, or clarification that are not provided in a plain reading of the entire covenants, particularly where contextual or extrinsic evidence suggests a contrary intent. See e.g., *Crystal Ridge Homeowners Assoc. v. City of Bothell*, 182 Wn.2d 665, 343 P.3d 746 (2015) (concluding that the Court would not “read a distinction into the plat” between treatment of storm water and ground water “where the record is completely devoid of evidence suggesting that the plat’s drafters contemplated the distinction.”); *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 696-97, 974 P.2d 836 (1999) (rejecting an interpretation of a restrictive covenant because adopting the interpretation “would require this court to redraft or add to the language of the covenant.”).

E. Even if the Hedge Covenant Applies to the Keplers' Trees and was Not Abandoned, the Trial Court Erred as a Matter of Law in Application of the Hedge Covenant.

While the Keplers assert that the trial court erred in concluding that the hedge covenant applied to their trees and in concluding that the hedge covenant had not been abandoned, even if this Court finds that the covenant remains enforceable and applies to their trees, the trial court erred as a matter of law in applying the covenant. Specifically, the trial court erred by requiring the cutting or removal of all trees on the Keplers' east property line other than a small apple tree set into the interior of the property, and in requiring removal of well-spaced, non-hedge-like trees on the north and south property lines or at the very least requiring the removal of all evergreens and large, mature trees on the north and south boundaries rather than merely a handful of the already well-spaced trees.

At most, the covenant should only apply to the five evergreen trees along the Keplers' east property line, and not all of those trees need to be removed in order to remove any hedge quality and to bring the property into compliance. A reasonable application of the hedge covenant would have allowed at least two

of the five evergreens on the east property line to remain, even if perhaps only the two trees closed to the northeast and southeast corners. Indeed, removing all five evergreens along that line does not merely remove a “hedge,” it eliminates any and every large, mature tree of native varietal that could be left standing as single trees.

Further, while the trees along the northern and southern boundaries are not close enough, dense enough, or of the type or size to connote a “hedge” within the plain meaning of that term, even if they did, the trial court erred as a matter of law by requiring the removal of all evergreens and all large, mature trees of native varietals on the north and south boundaries, leaving a handful of only small, ornamental trees of apple, plum, crab apple, and vine maple. If the two cedar and hemlock near the road on the northern property line could truly be deemed part of a “hedge,” then only one of those two trees need be cut or removed. Likewise, if the mature maple and leggy pine “bush” towards the northeastern corner along the northern property line could be interpreted to be part of a “hedge,” only one of those two specimens should have been required to be cut or removed. Finally, the trees on the southern property line in the Keplers’ backyard are so well-spaced and of

such differing varieties that they cannot reasonably be deemed to be a “hedge,” but if they are, then only one to two of those trees need be cut or removed.

The conclusion that the trial court erred in its application of the hedge covenant—even accepting the flawed interpretation of the covenant—flows directly from the case on which Detamore et al. relied most heavily at summary judgment, *Town of Clyde Hill v. Roisen*, 111 Wn.2d 912, 914, 767 P.2d 1375 (1989). That case involved interpretation of a municipal ordinance prohibiting “naturally grown fences” exceeding eight feet in height. The municipal code defined the term “fence” as “any barrier which is naturally grown or constructed for purposes of confinement, means of protection or use as a boundary.” *Id.*

The evidence in *Clyde Hill* was that 13 trees were planted along the boundary line, and were of heights 16-20 feet tall, not over 50-feet tall. *Id.* at 913. The trial court there specifically found that the trees were “more massive and dense” than a fence and constituted a “wall.” *Id.* at 915. The trial court concluded that the row of trees did confine (though small animals could get through) and that humans were in fact restricted. *Id.* Each of those factual conclusions are factually distinct here: the primary trees in dispute

are four cedars and a fir along the east boundary line. The Kepplers' trees are over 50 feet tall and mature, not 16-20 feet tall as would more likely be a fence or hedge. They are spaced apart so that they are not "more massive and dense" than a fence and do not confine or restrict people or animals.⁶

But regardless, Detamore et al. and the trial court failed to acknowledge that the trial court in the *Town of Clyde Hill* case did not order that all of the trees forming the "massive and dense" "wall" be cut down to eight feet in height to comply with the ordinance. Instead, the trial court required that the property owner remove 6 of the 13 trees at issue. *Id.* at 915. This was ordered despite the trial court's conclusions that the trees were so massive and dense as to form a wall, and despite the fact that they were only 16-20 feet in height and would continue to grow.⁷ *See id.*

⁶ In addition, legally, the court in *Clyde Hill* was conducting a distinct legislative analysis with the benefit of a defined term; the court there was not constricted to interpretations of the "drafters" intent, considering contextual and extrinsic evidence, as we are here.

⁷ While not precedential authority pursuant to GR 14.1 because it is an unpublished decision, the only other case that Appellants could locate analyzing a similar issue of application of a vegetation covenant, which is useful as merely a factual example, is *Menard v. Brossard*, 1998 WL 251784, 90 Wn. App. 1051 (Div. I, May 18, 1998). There, this Court interpreted a restrictive covenant that "no fence, wall, hedge, or mass planting" shall extend higher than six feet. *Id.* at *3. The Court contrasted "specimen trees" with "mass plantings," and concluded that while two trees, a large and bushy cedar and fir with intertwined branches, did constitute a "mass planting" within the meaning of the covenant, the trial court erred as a matter of law in requiring the removal of both trees in order to correct the violation, as if one of the two trees were removed, the other would constitute

The reasoning and conclusion in *Town of Clyde Hill* is directly contrary to the trial court's application of the hedge covenant here, where the trial court required the removal of all evergreen trees on the north, east and south sides of the Keppler Property, all trees on the east boundary line other than a small apple tree set inside the east property line, and all larger, mature trees of any varietal, leaving only small trees of a mostly ornamental nature.

V. CONCLUSION

The trial court improperly granted Detamore et al.'s request for summary judgment. Based on the undisputed evidence, the Kepplers were entitled to an order on summary judgment *dismissing* the plaintiffs' claim because the plain meaning of the hedge covenant, when read together with the entire Supplemental Covenants and in context with the only other evidence of the drafters' intent, did not apply to the Kepplers' large, mature trees spaced throughout the property without creating absurd results. But even if the hedge covenant were to apply, the asserted

a "specimen tree," not a "mass planting." *Id.* at *4-5. Further, the Court even reasoned that with "judicious limbing or pruning, the two trees might become specimen trees rather than a mass planting" and required that option. *Id.* at *5.

This is essentially the same error here, where after a "hedge" was found, the trial court required removal or cutting of not merely sufficient trees to remove the hedge, but all evergreen trees and all large, mature, non-ornamental trees on the north, east, and south boundaries.

interpretation has been abandoned. The trial court had to read into the covenant assumptions and distinctions not supported by the evidence of the drafters' intent in order to conclude that the interpretation did not lead to absurd results and that the asserted interpretation of the covenant had not been abandoned. Finally, even if the covenant applies and remains, the trial court erred as a matter of law in its application to require the removal or cutting to 6 feet of all evergreens and of all large, mature, native varietal trees.

At the very least, the Keplers established a dispute of material fact with competent photographic evidence and declaration testimony, that when viewed in the light most favorable to them, created a dispute as to whether their trees had foliage that overlapped sufficiently to create hedges, and whether the asserted interpretation of the hedge covenant had been abandoned. The summary judgment order should therefore be reversed.

Respectfully submitted this 21st day of December, 2015.


KATHRYN C. LORING, WSBA # 37662
Attorney for Appellants

APPENDICES

Appendix A: Color copies of photograph exhibits to the May 11, 2015, Declaration of Susan Keppler in Support of Defendants' Motion for Summary Judgment (these color photos are labelled in the Appendix with the corresponding clerk's paper designations).

Appendix B: Color copies of photograph exhibits to the June 5, 2015, Replt Declaration of Susan Keppler in Support of Defendants' Motion for Summary Judgment (these color photos are labelled in the Appendix with the corresponding clerk's paper designations).

Appendix C: 1963 Supplemental Restrictive Covenants for Ledgewood Beach Division No. 3 (CP 502, attached as Exhibit C to the Declaration of Kathryn C. Loring).

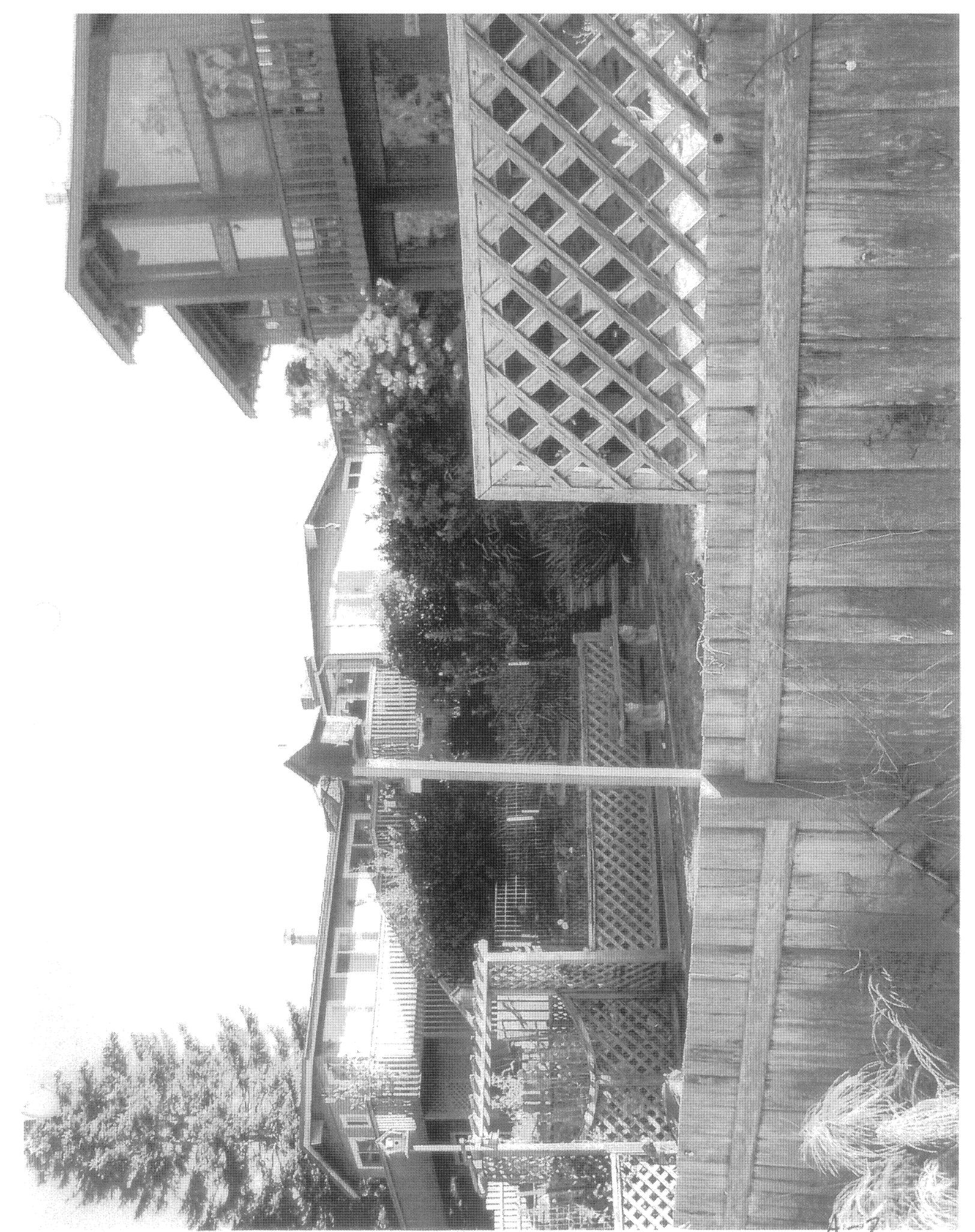
APPENDIX A

(Color copies of photograph exhibits to the May 11, 2015
Declaration of Susan Keppler in Support of Defendants'
Motion for Summary Judgment)

EXHIBIT A



11 1 550

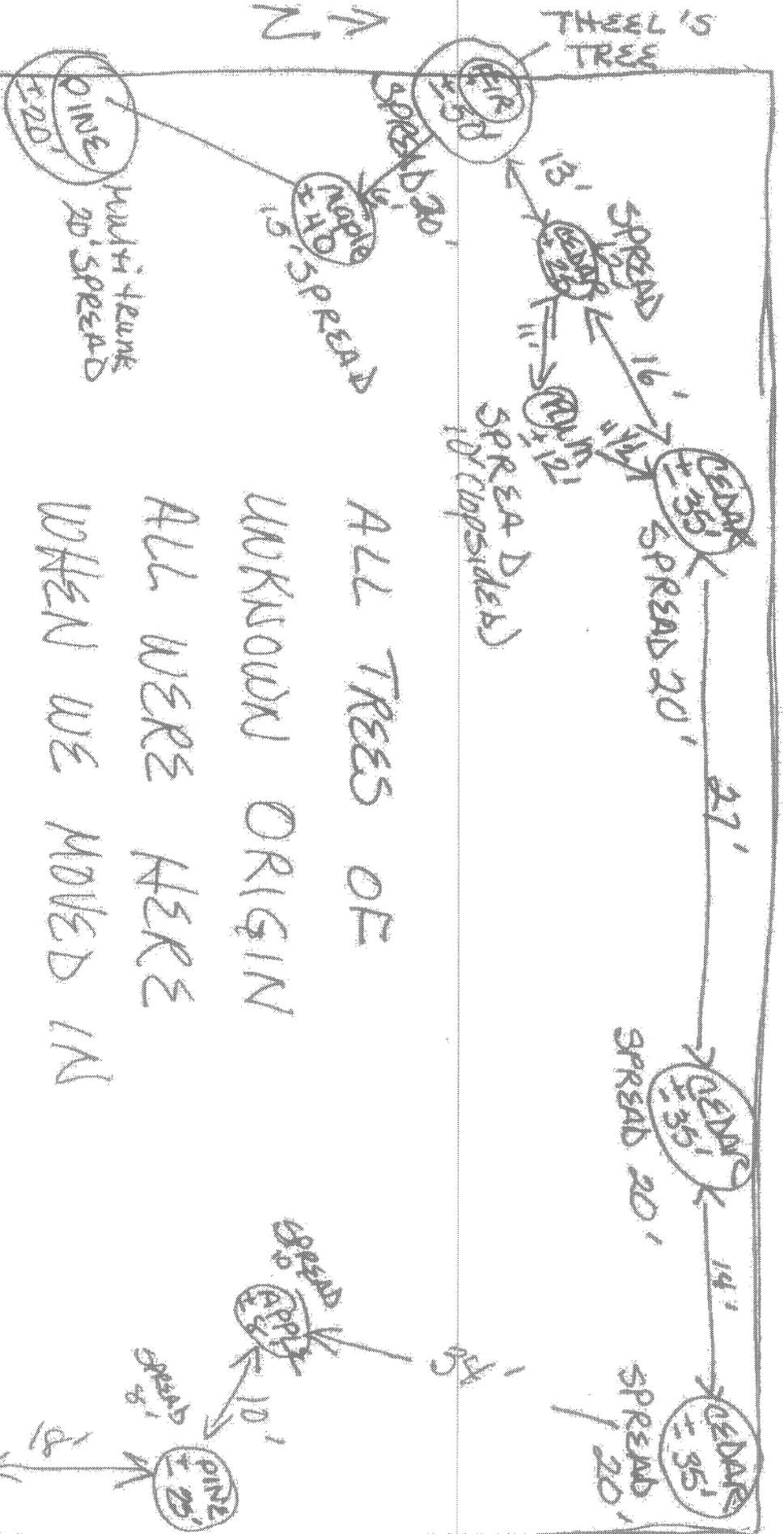


551

A-2

EXHIBIT B

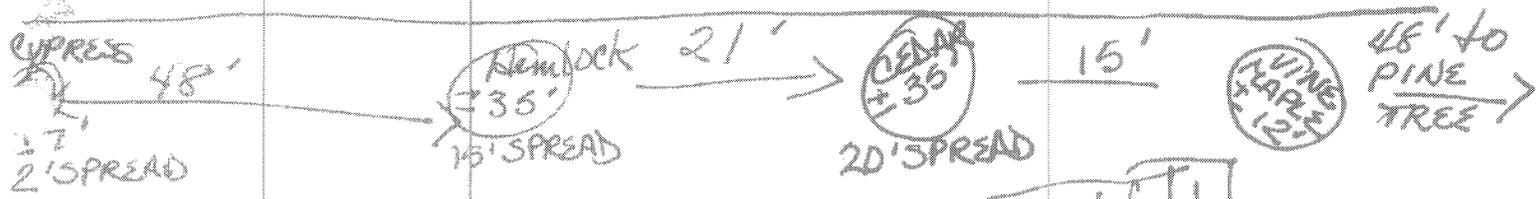
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ALL TREES OF
 UNKNOWN ORIGIN
 ALL WERE HERE
 WHEN WE MOVED IN

HOUSE

S



DRIVEWAY

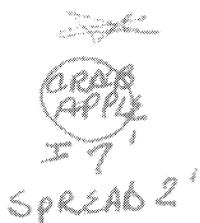
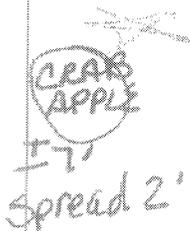
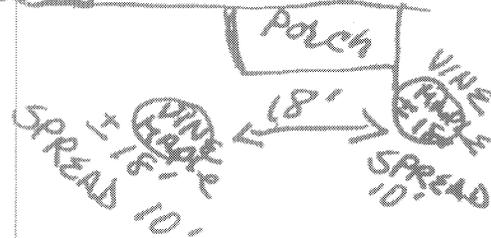
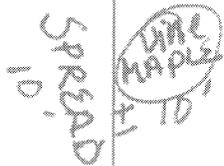
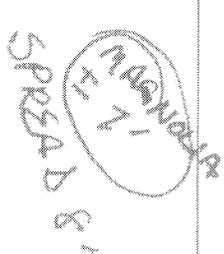
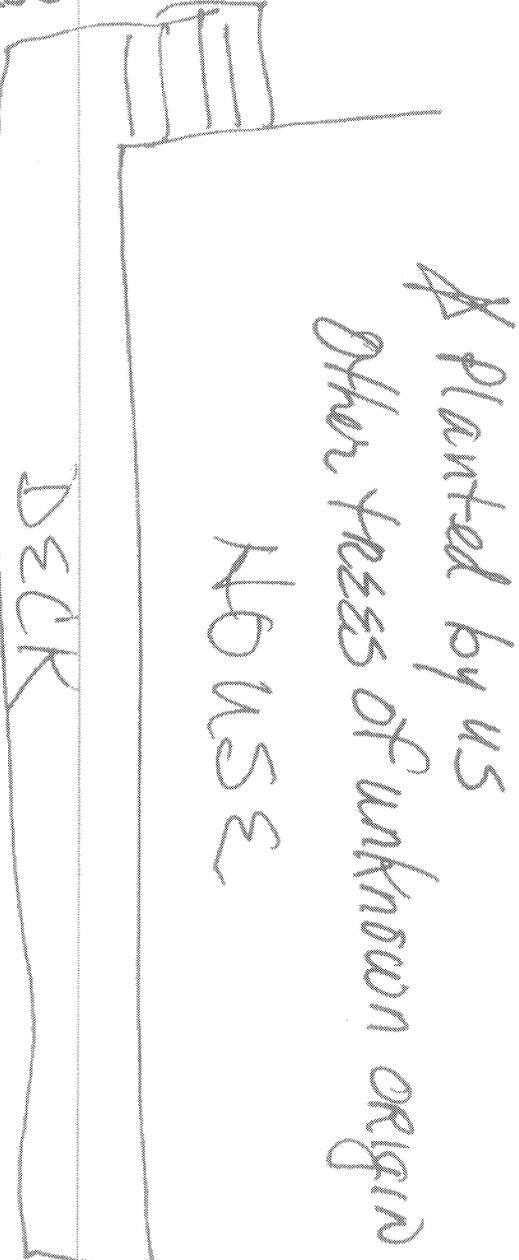
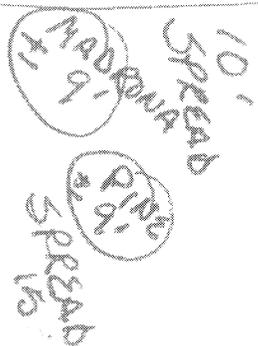
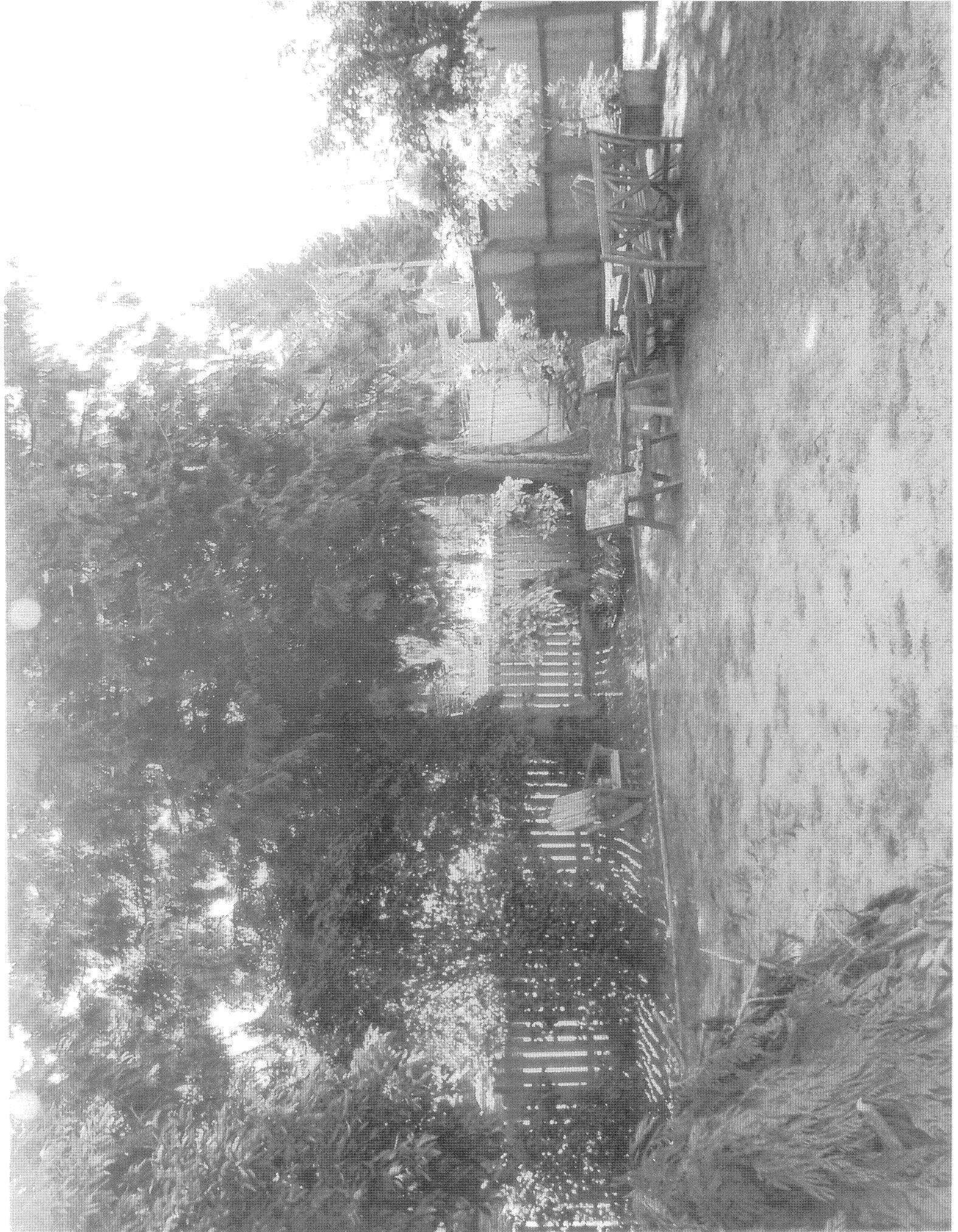


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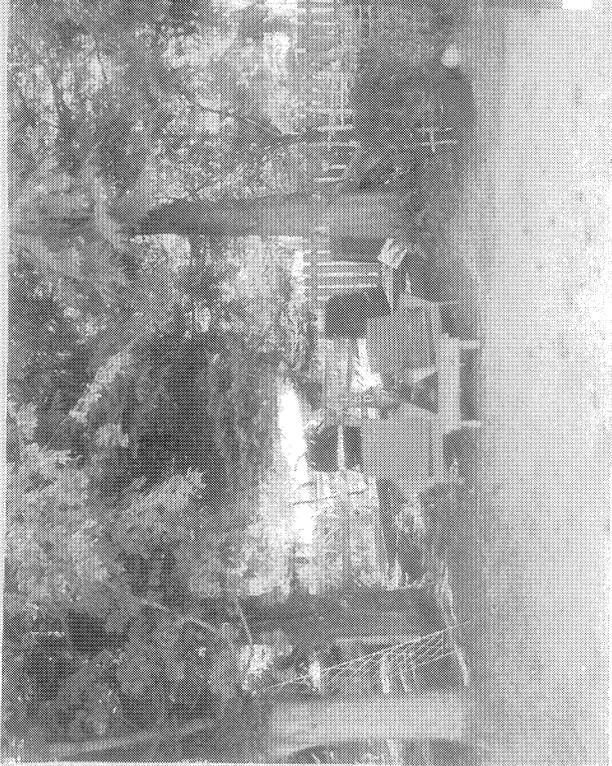


EXHIBIT D



EAST FEN

SOUTH EAST CORNER



NORTH EAST CORNER

EXHIBIT E



562

E-1



563

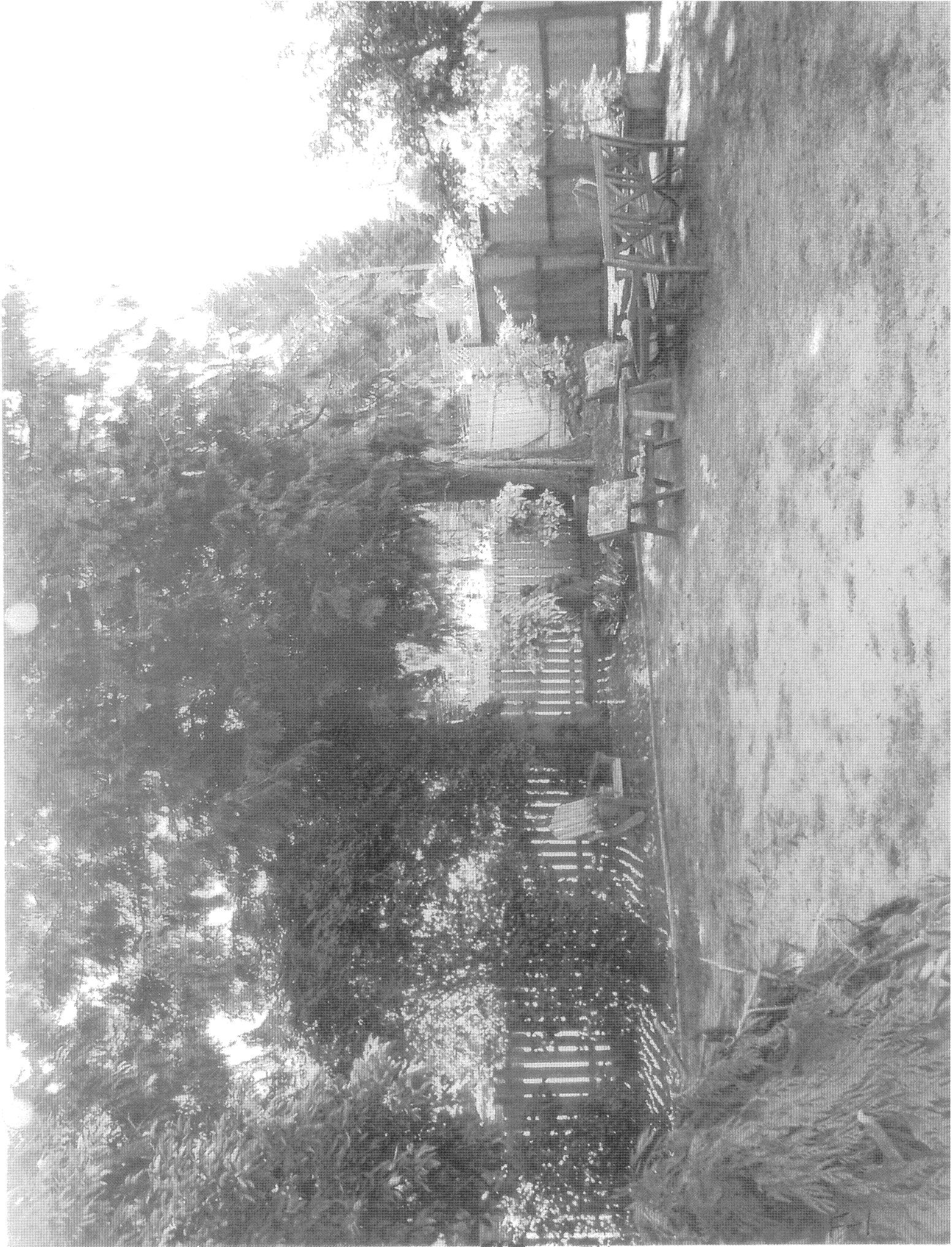
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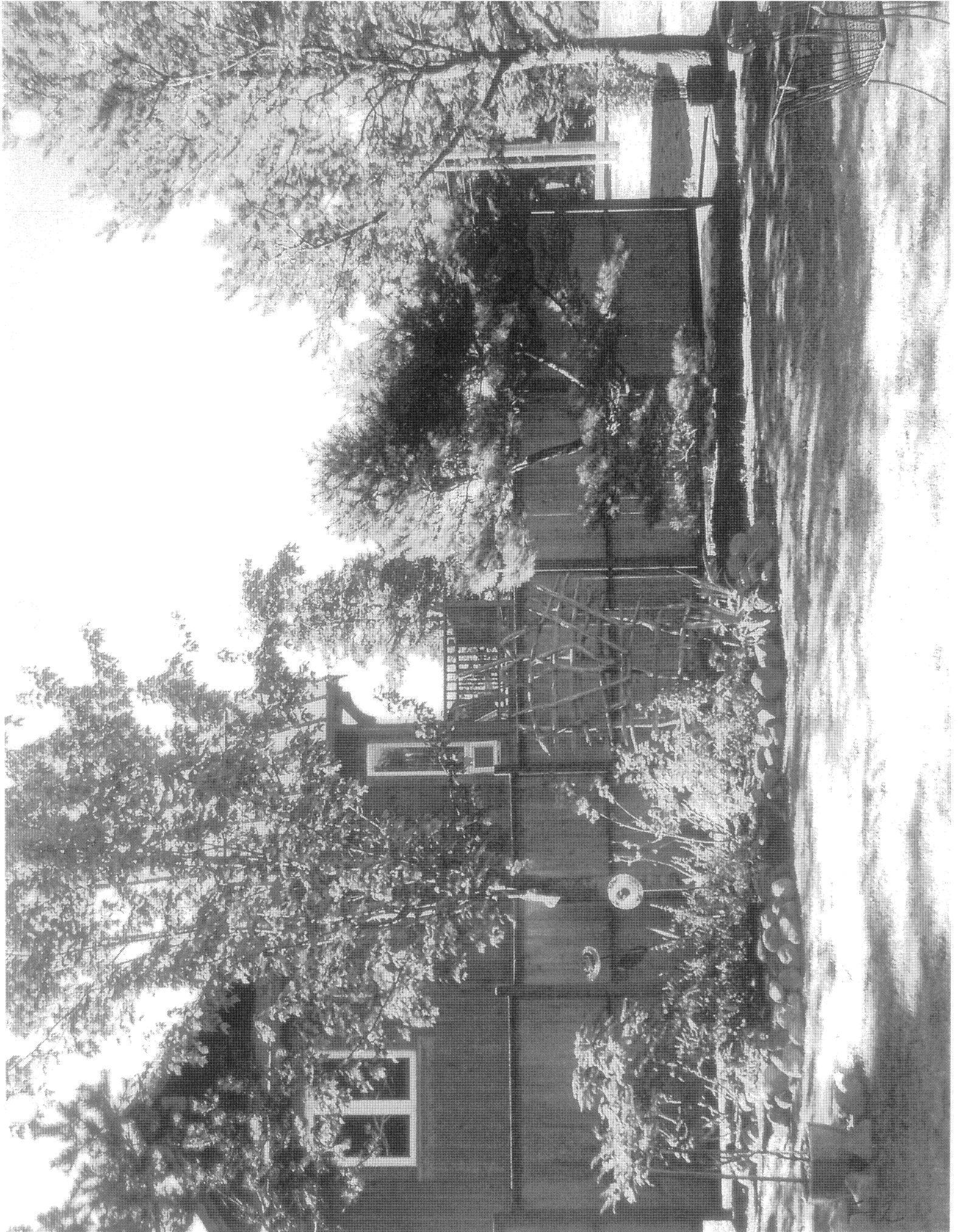


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E-3

EXHIBIT F





567

EXHIBIT G



EXHIBIT I

P-7-20

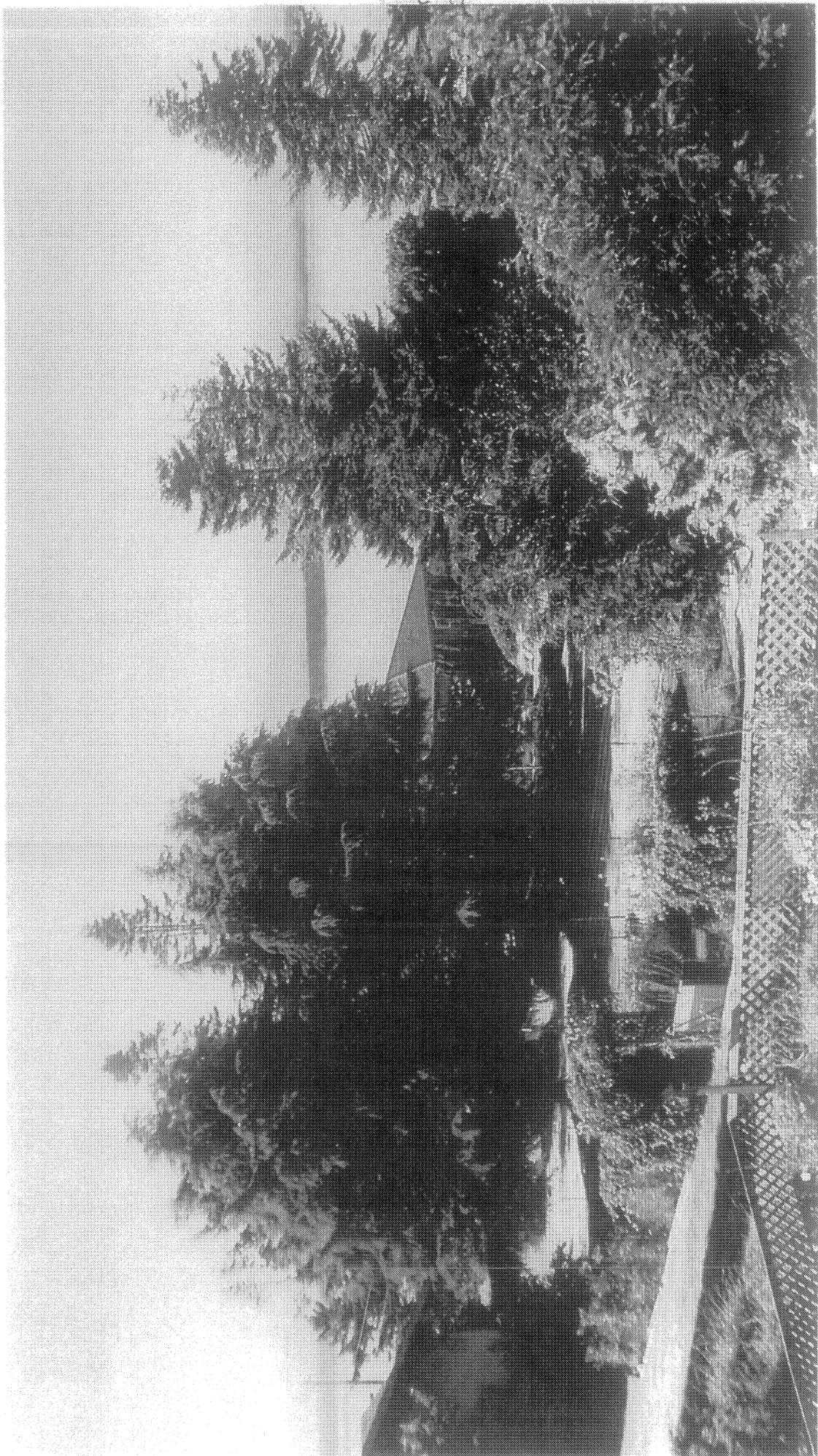
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EXHIBIT J

P-7-13



P-7-13

576

EXHIBIT K



P-7041

578

EXHIBIT L

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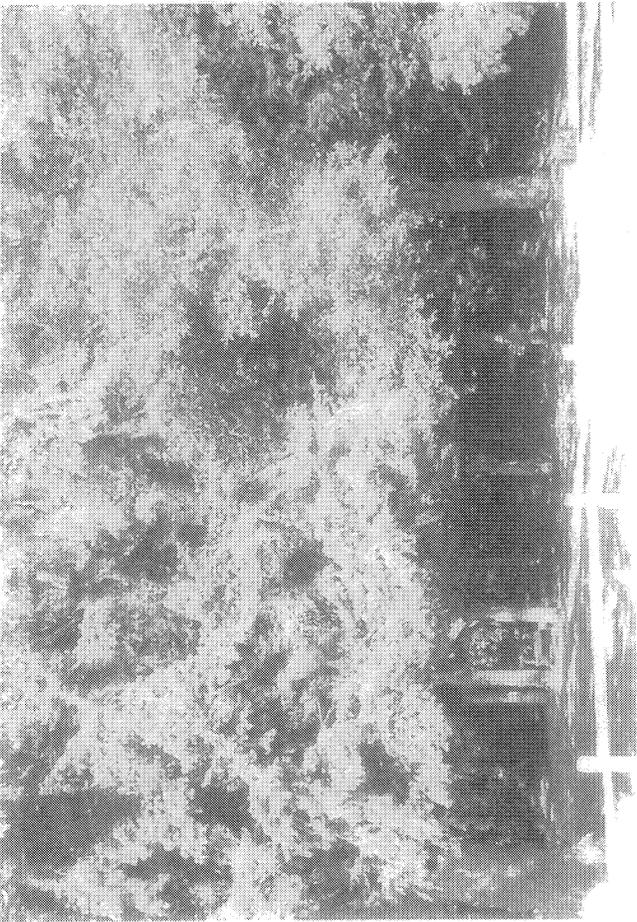
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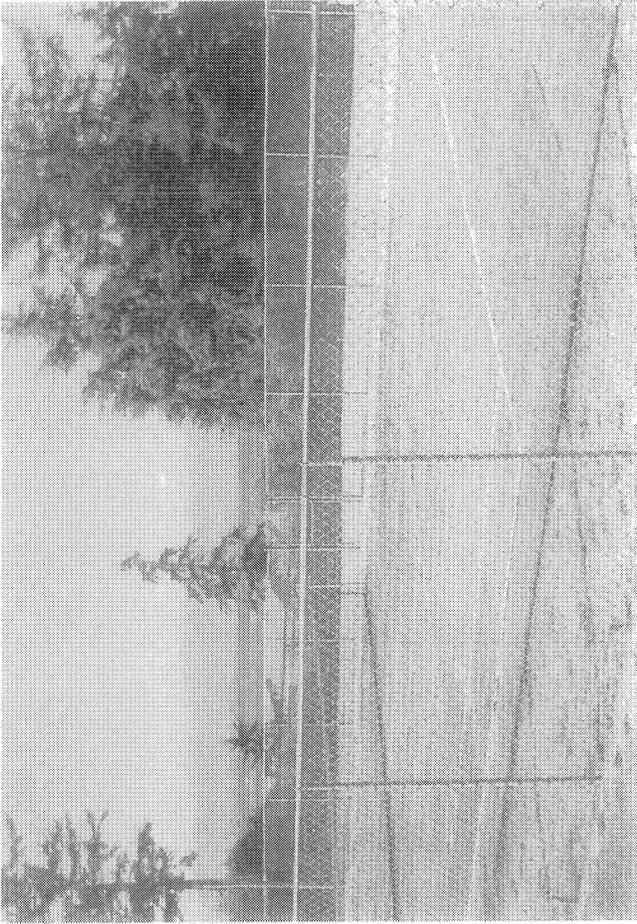
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EXHIBIT M

WAGNER PARK



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3-09-29,30,31

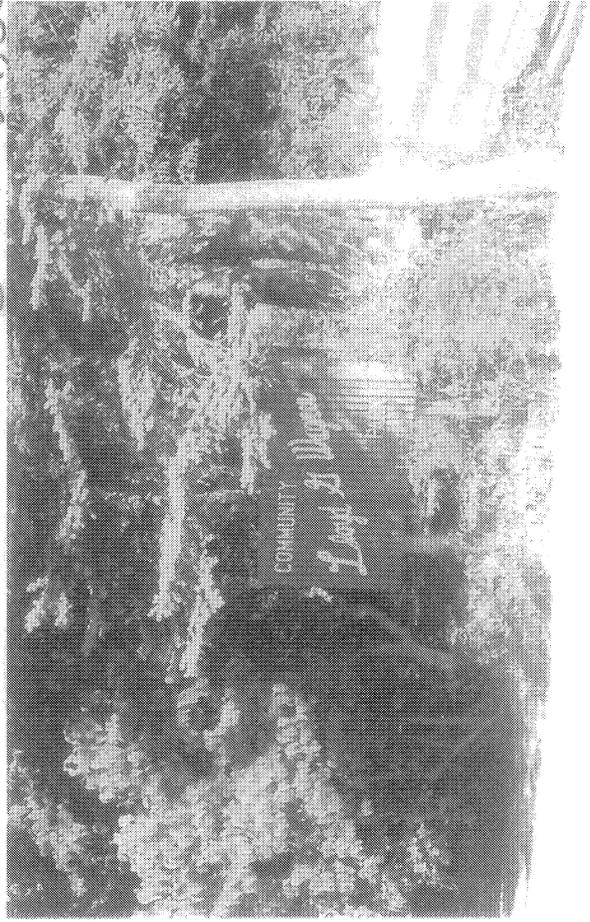


EXHIBIT N



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3-09-01B

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3-09-02A



3-09-02B

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3-09-04

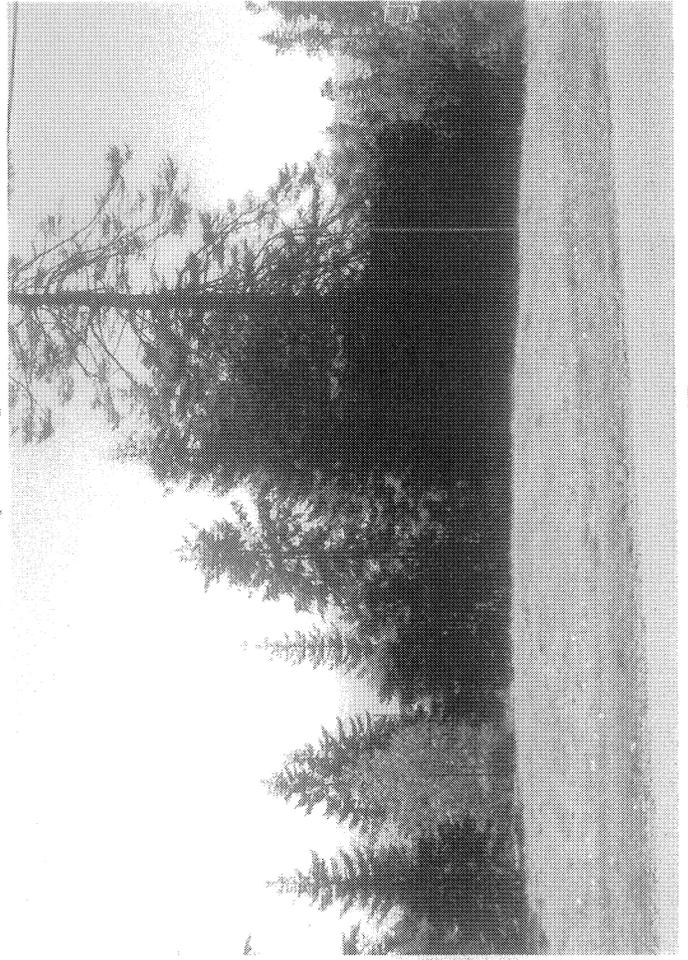


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3-09-09



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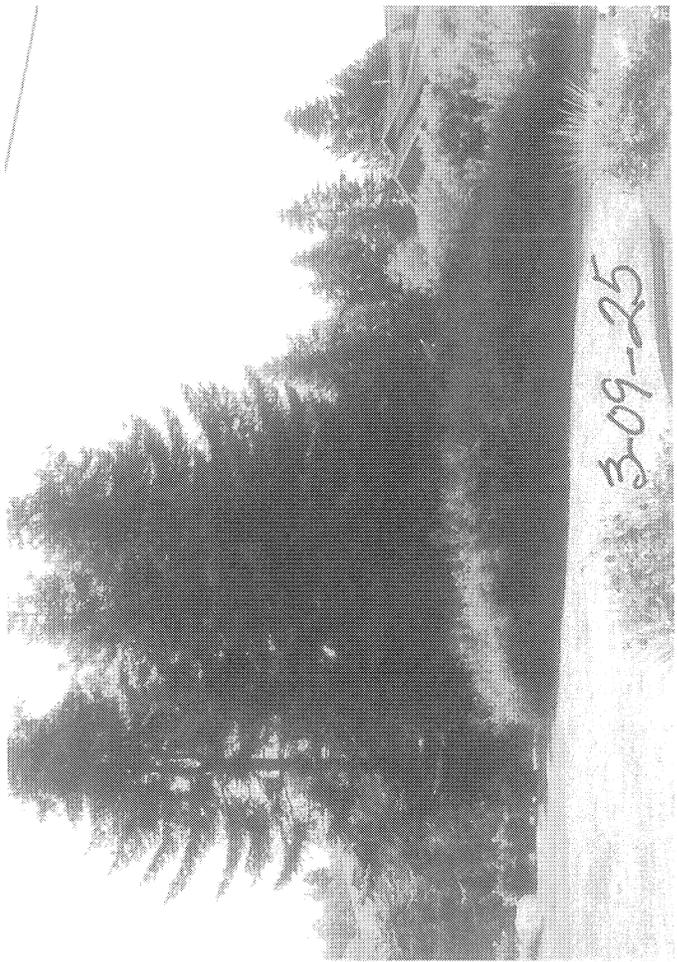
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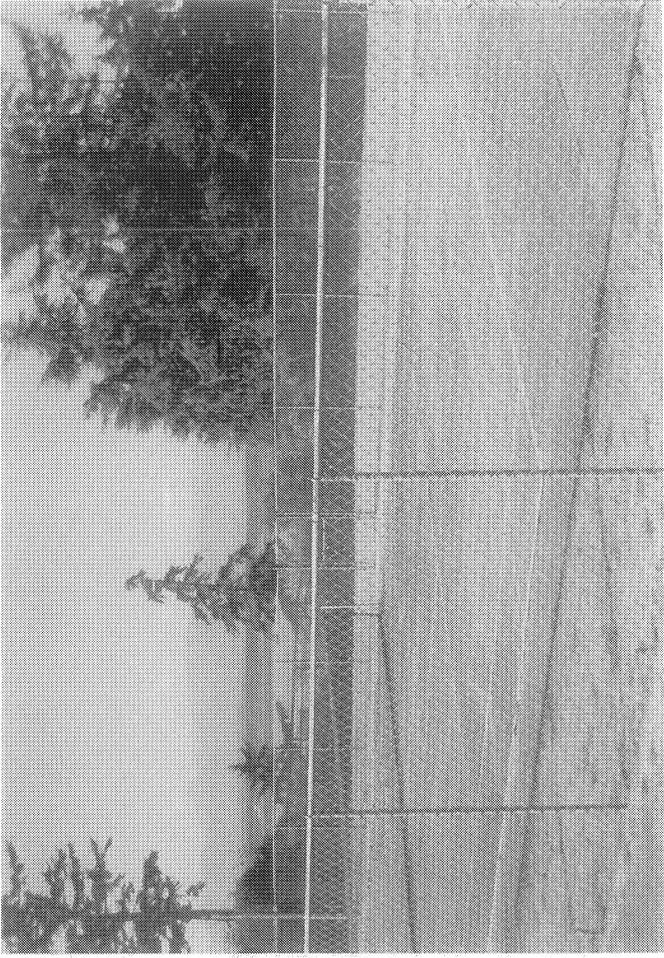


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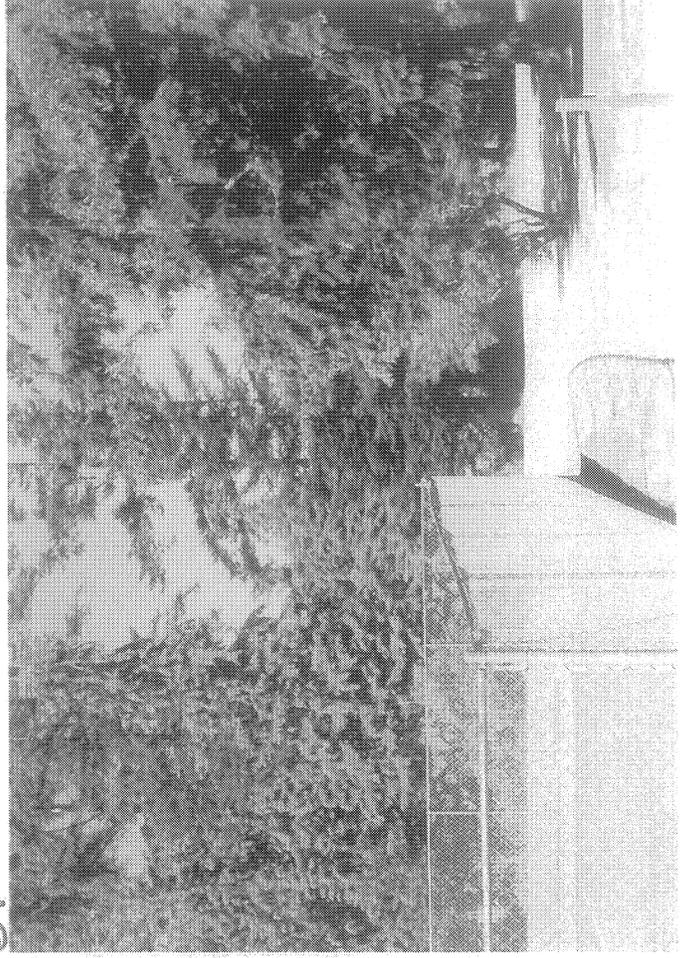
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3-09-29,30,31





3-09-34



593





3-09-38

HEDGE ON PROPERTY LINE

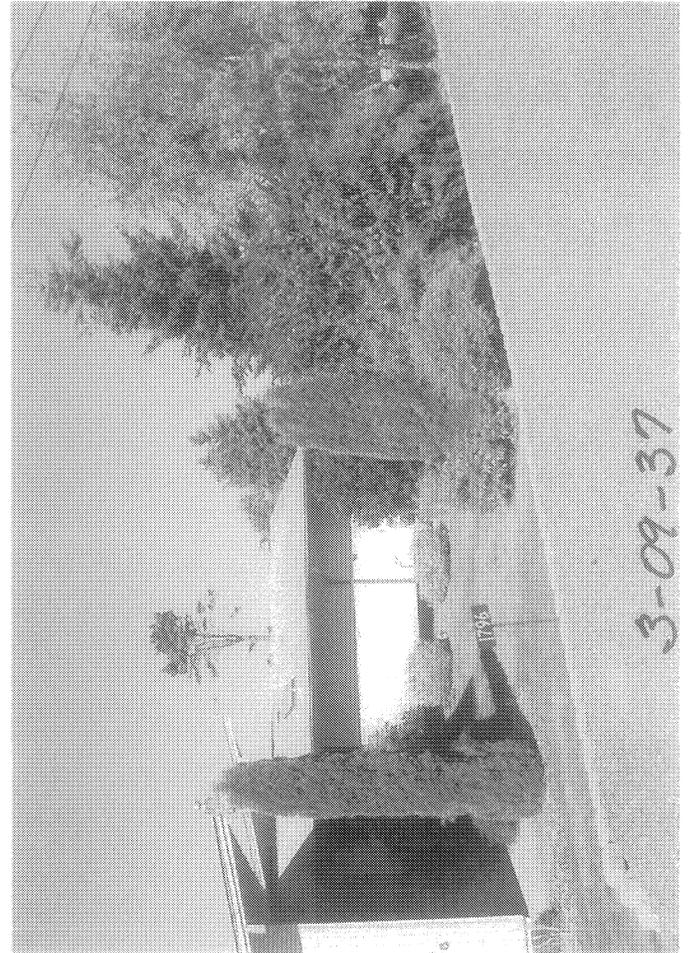


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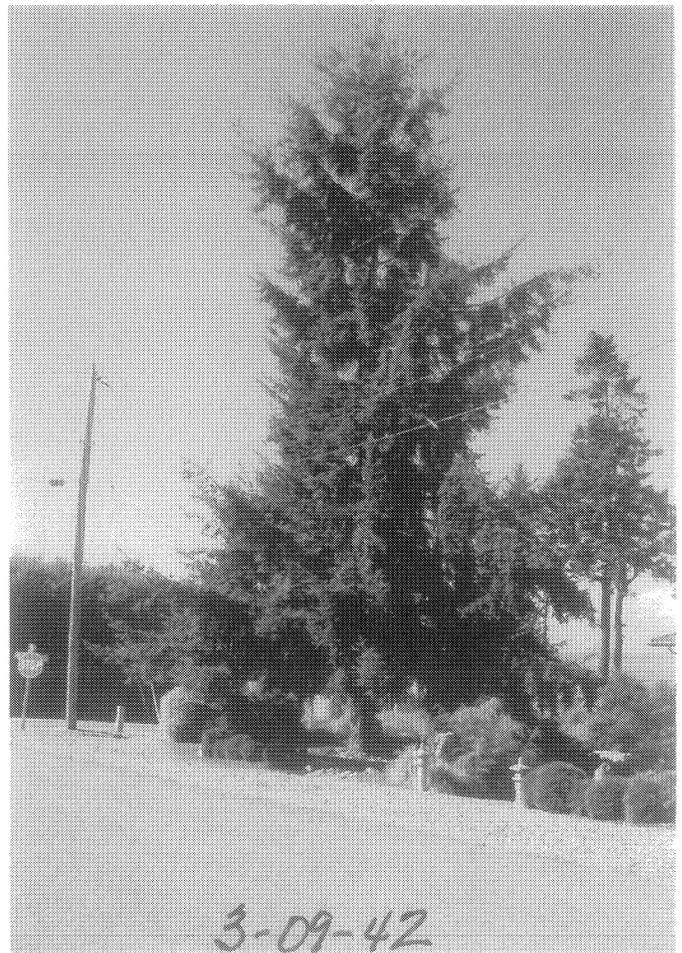
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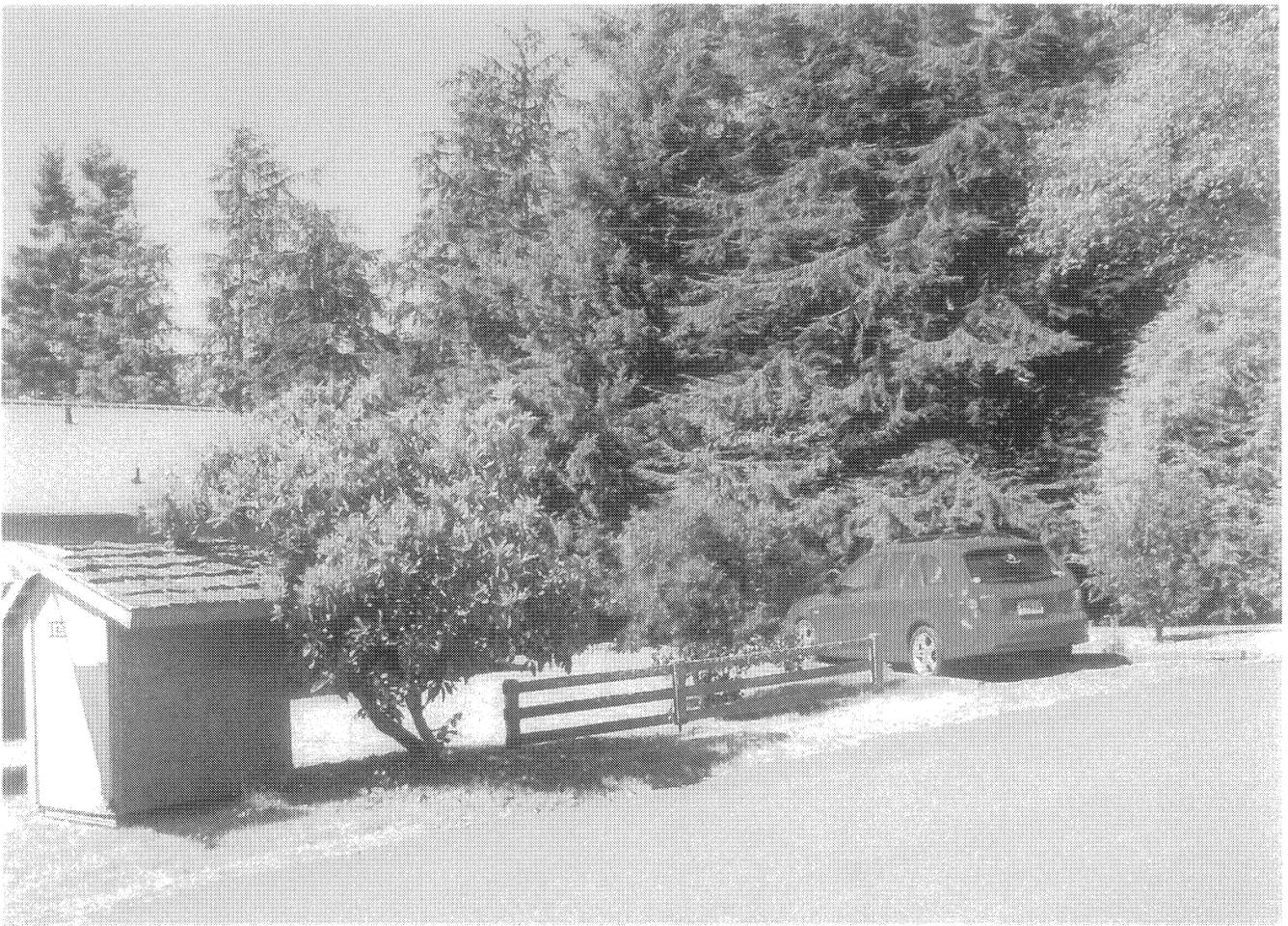


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3-10-03, 04, 05



598



3-10-06



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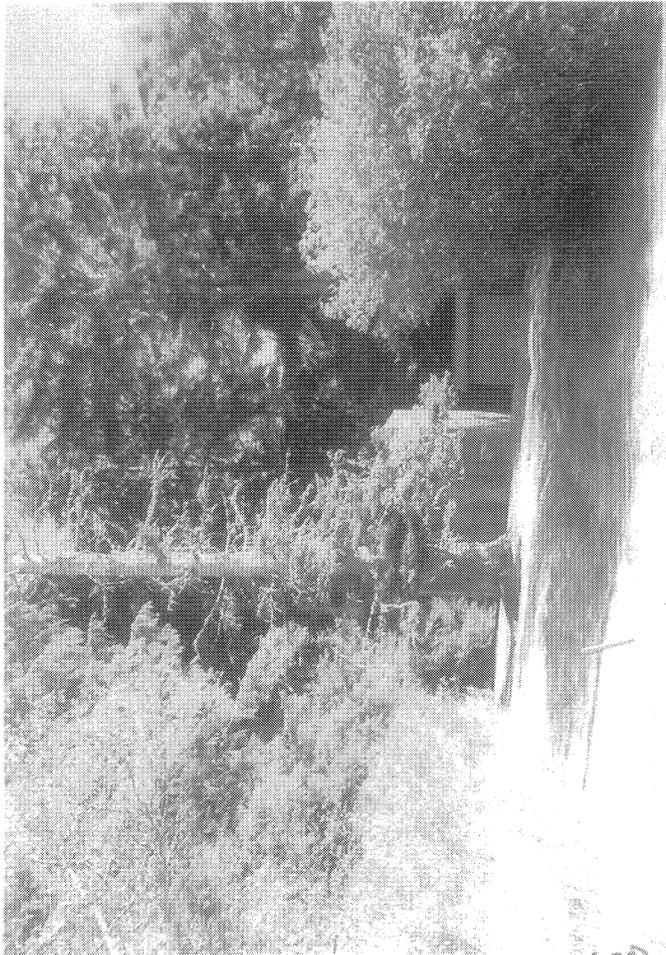
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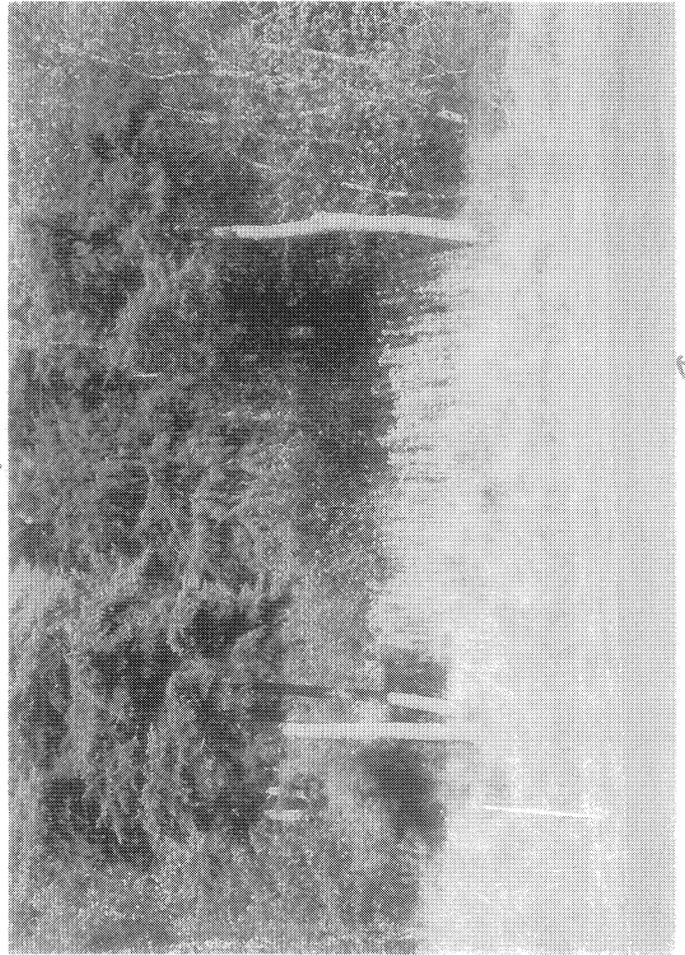


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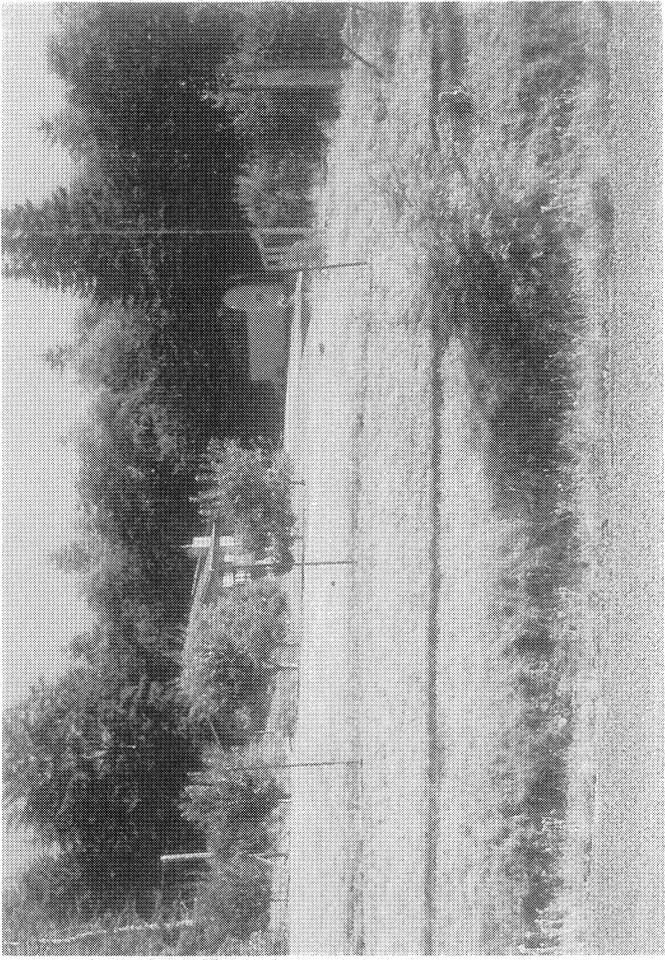


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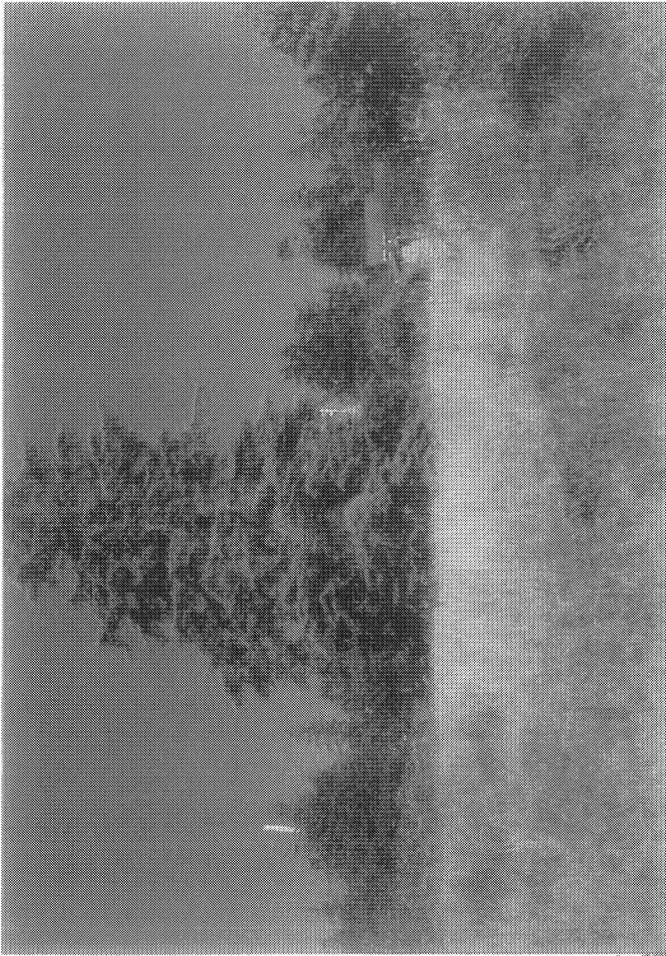
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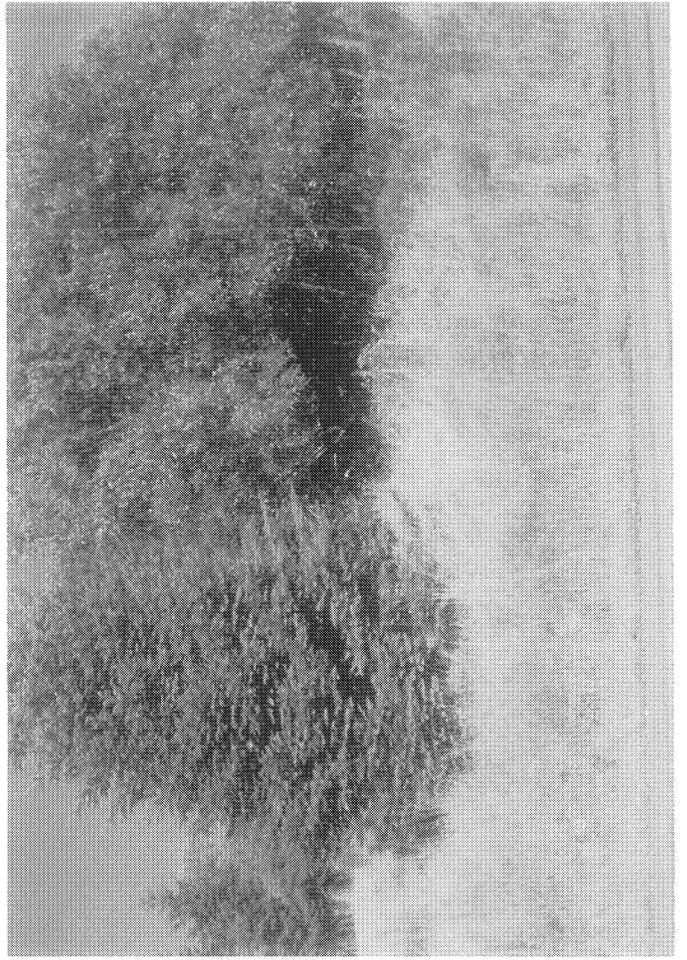


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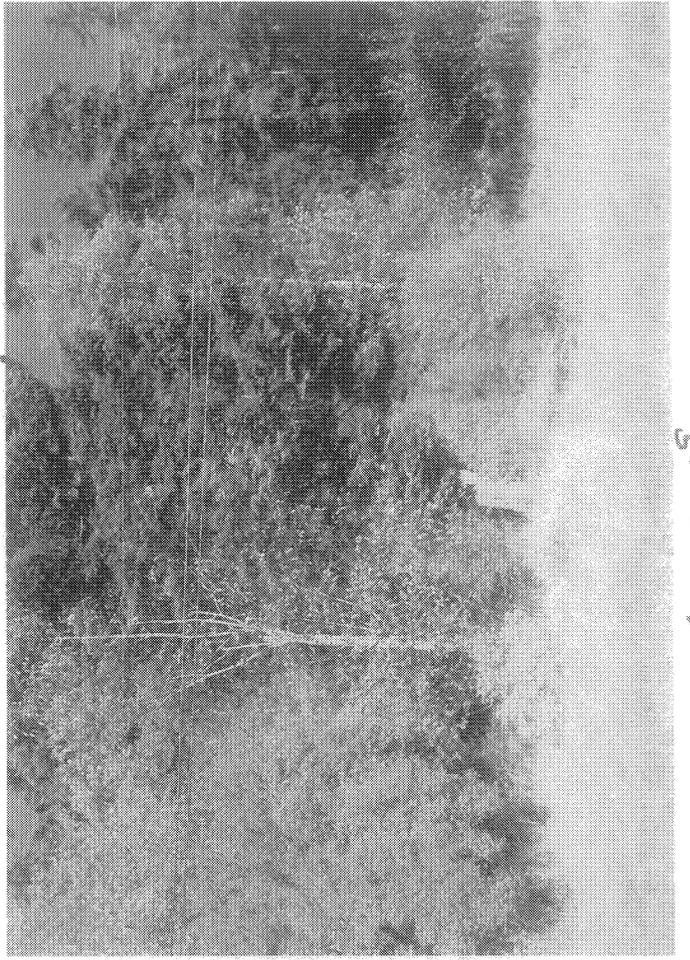
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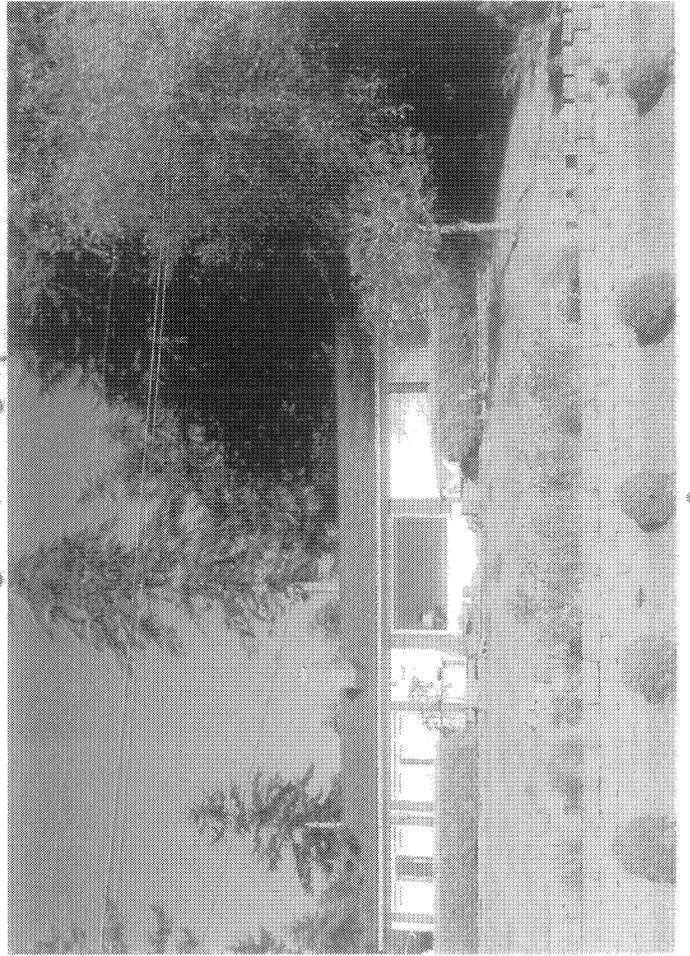
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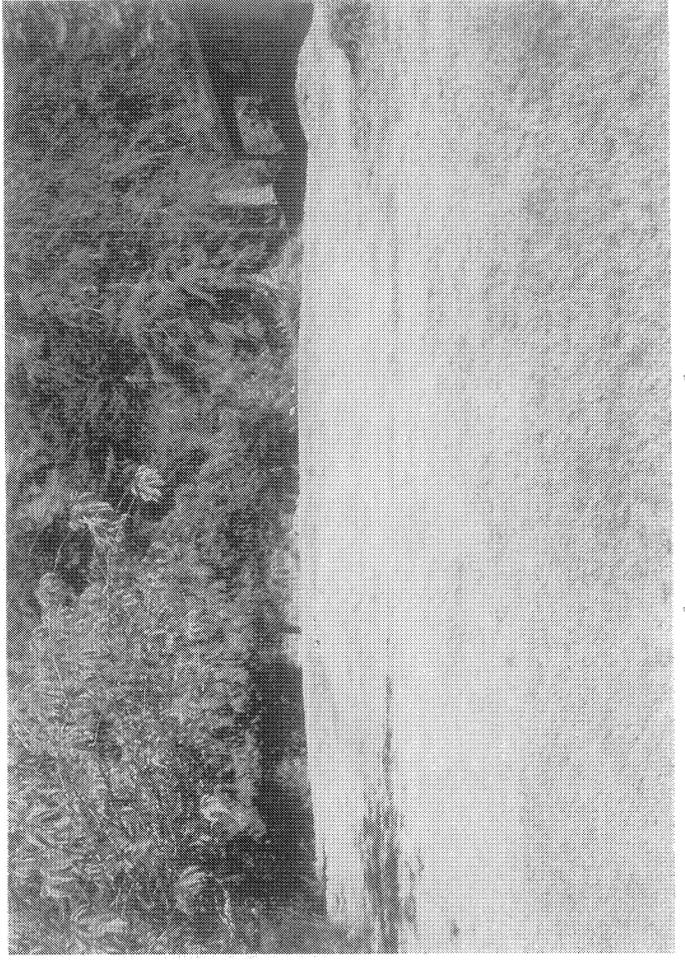
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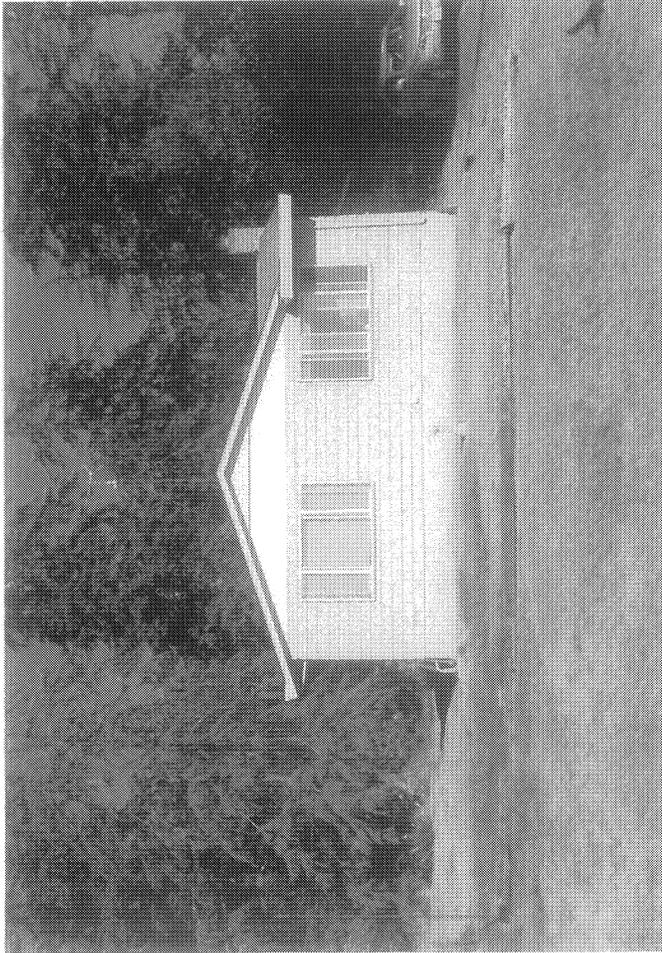
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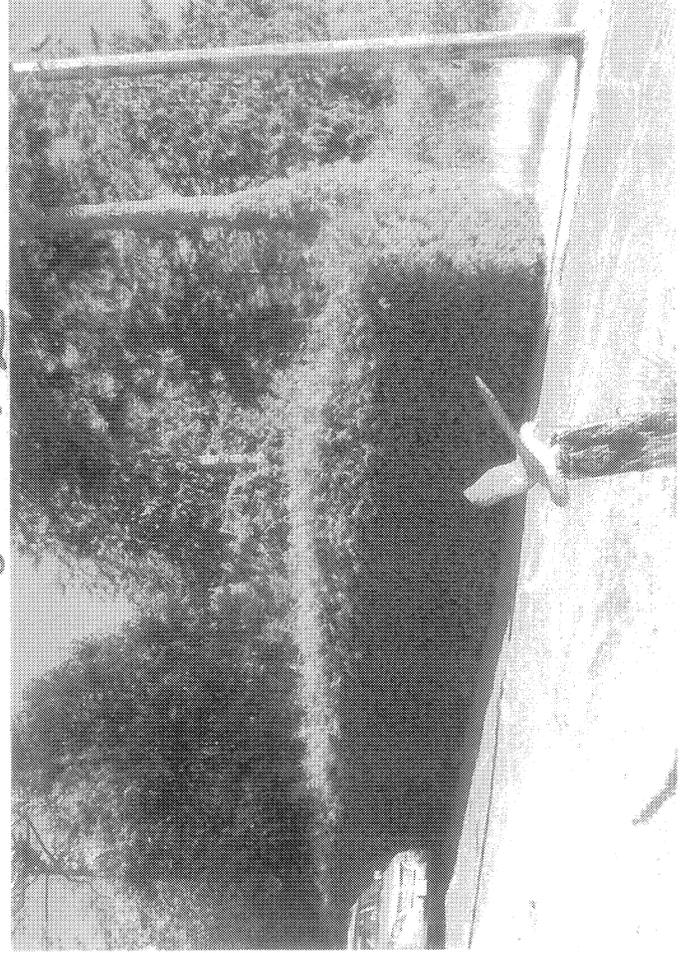


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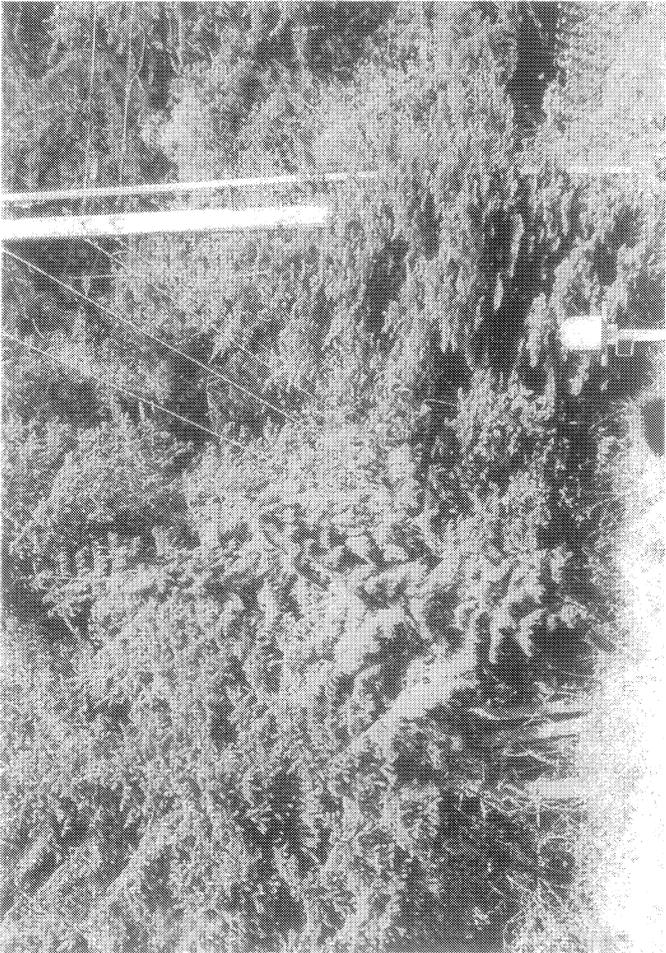


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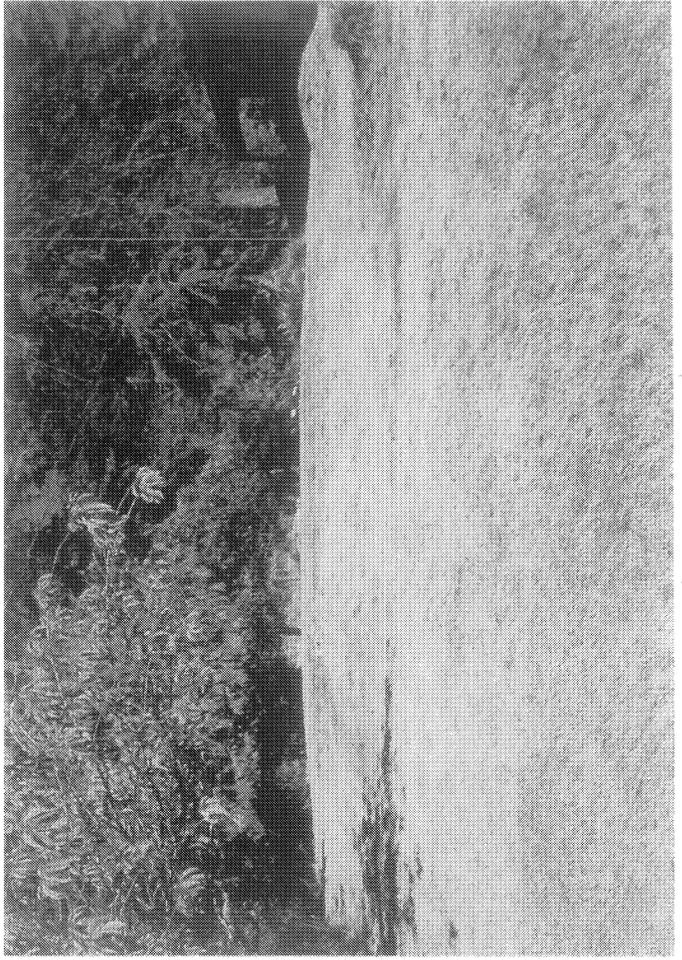
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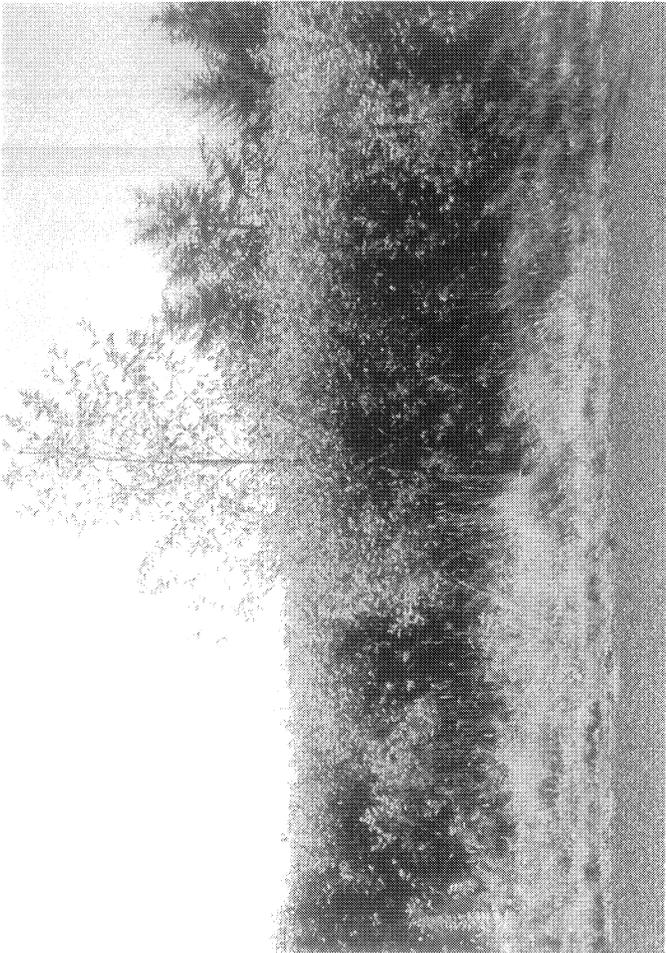
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Block 10 Lot 24

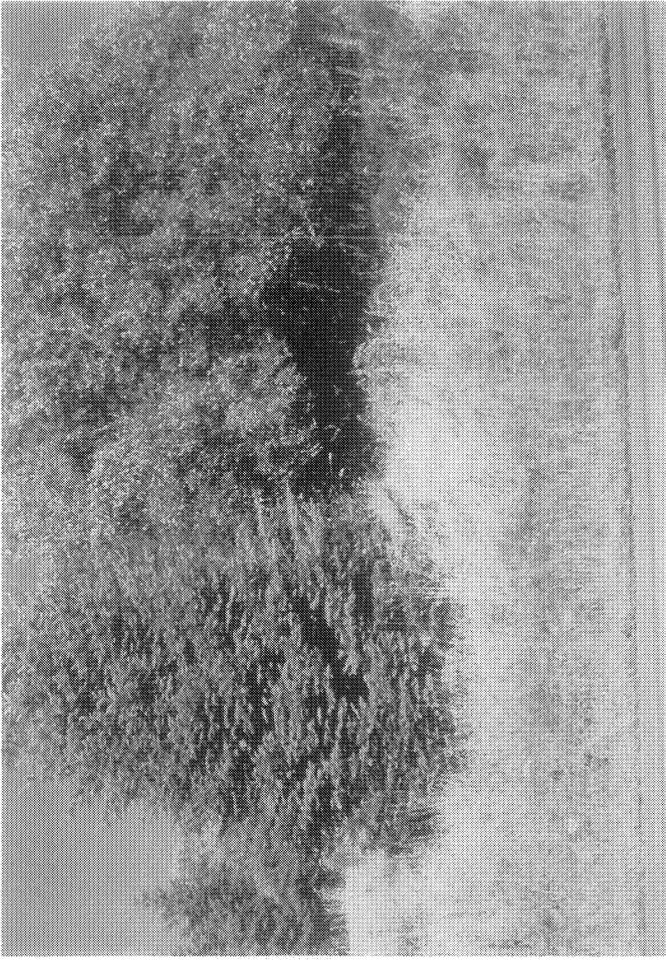
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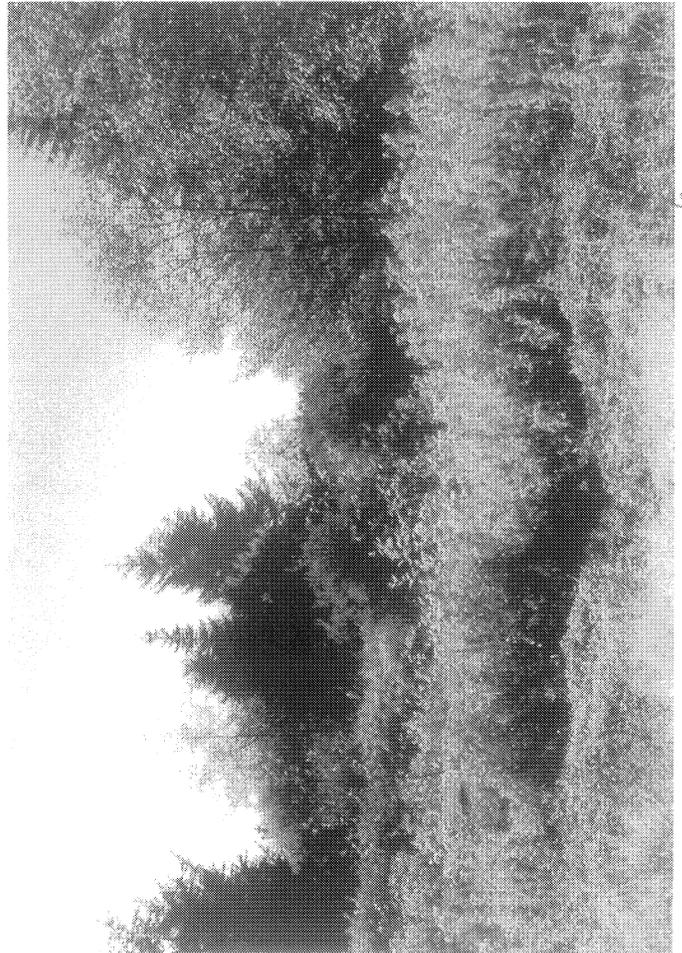
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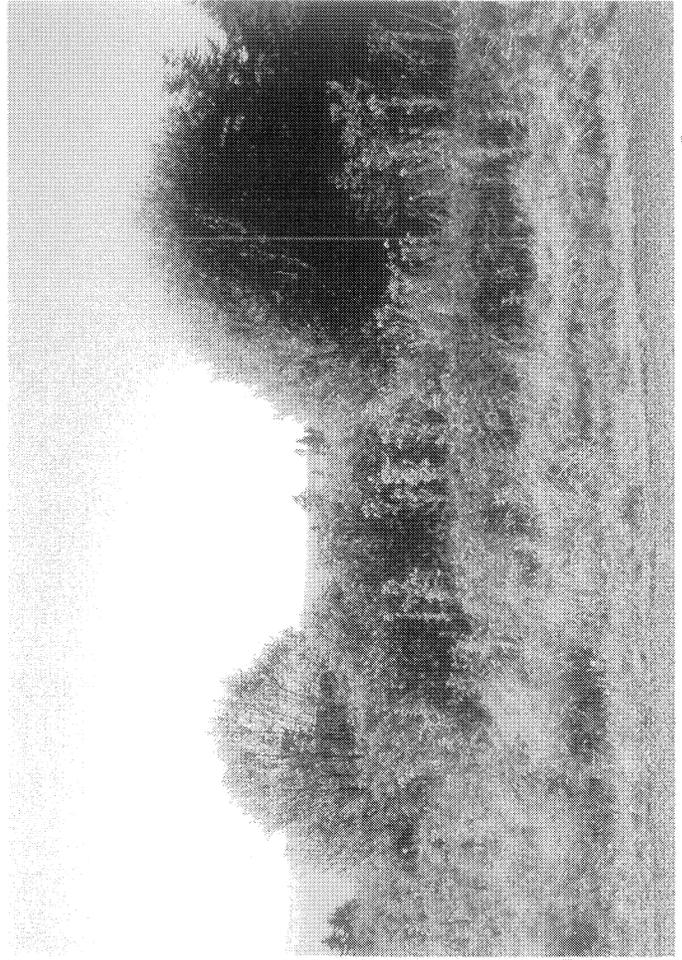
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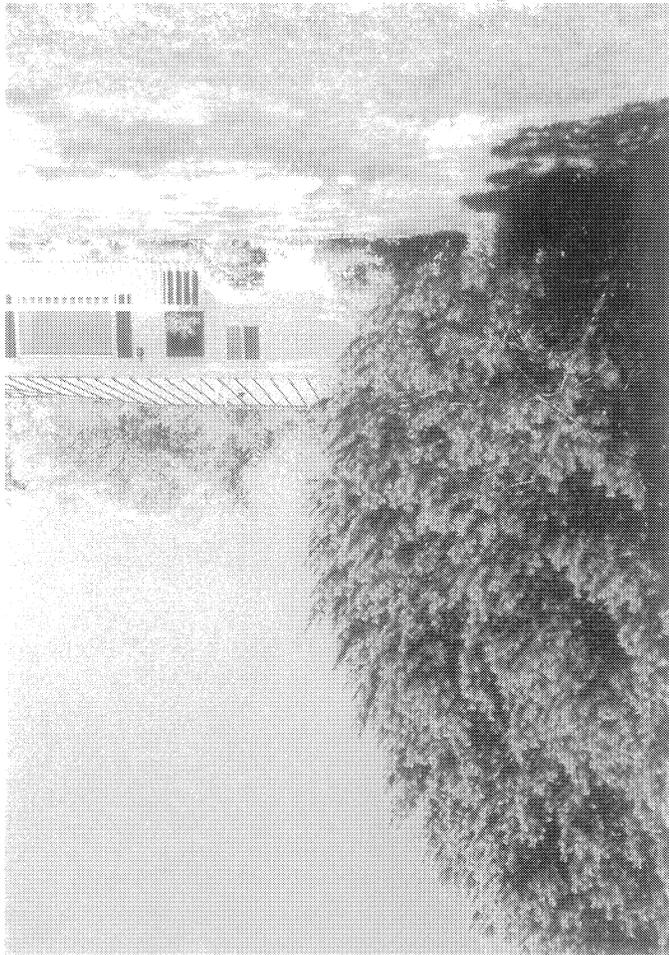
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Block 11 Lot 7

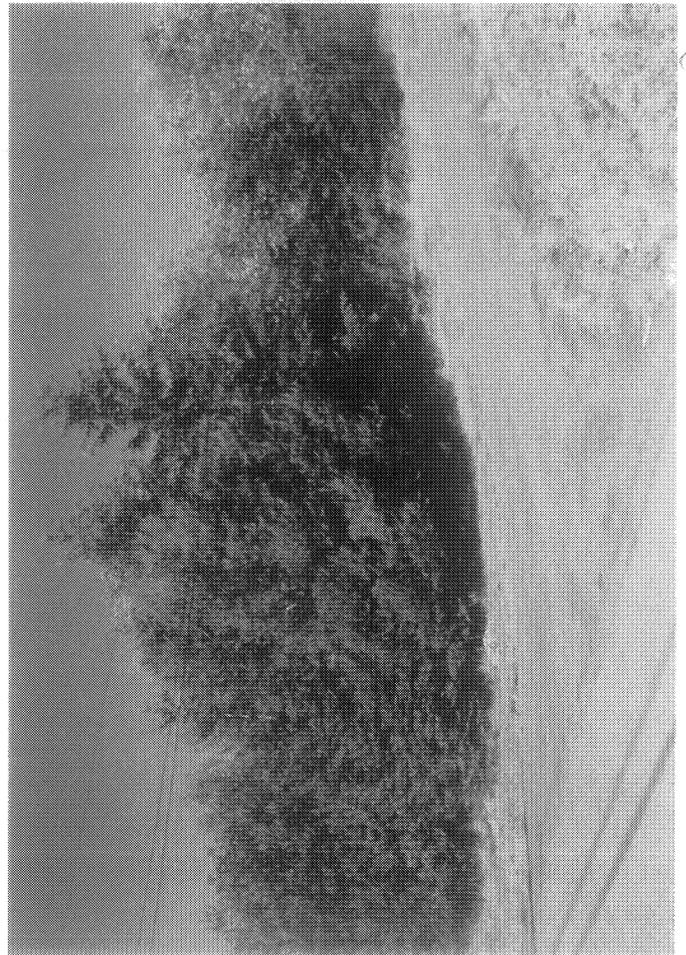
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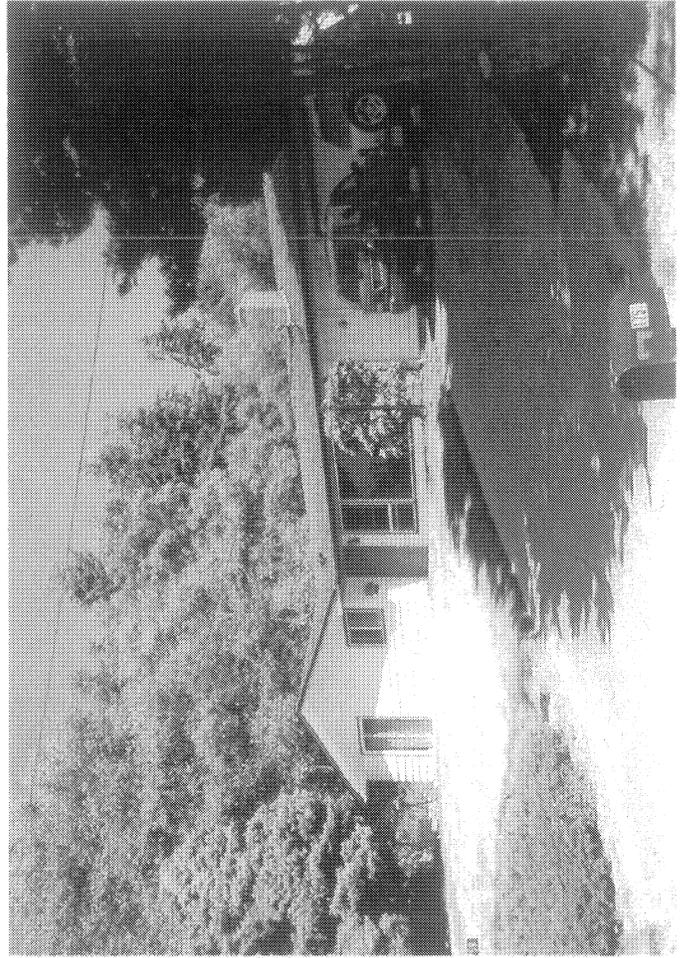
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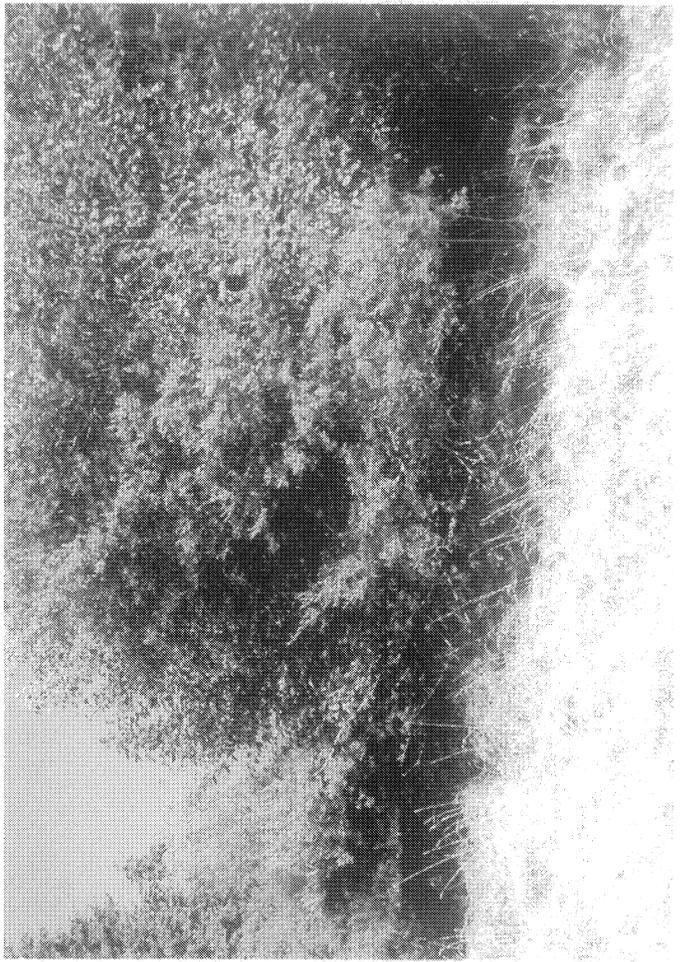
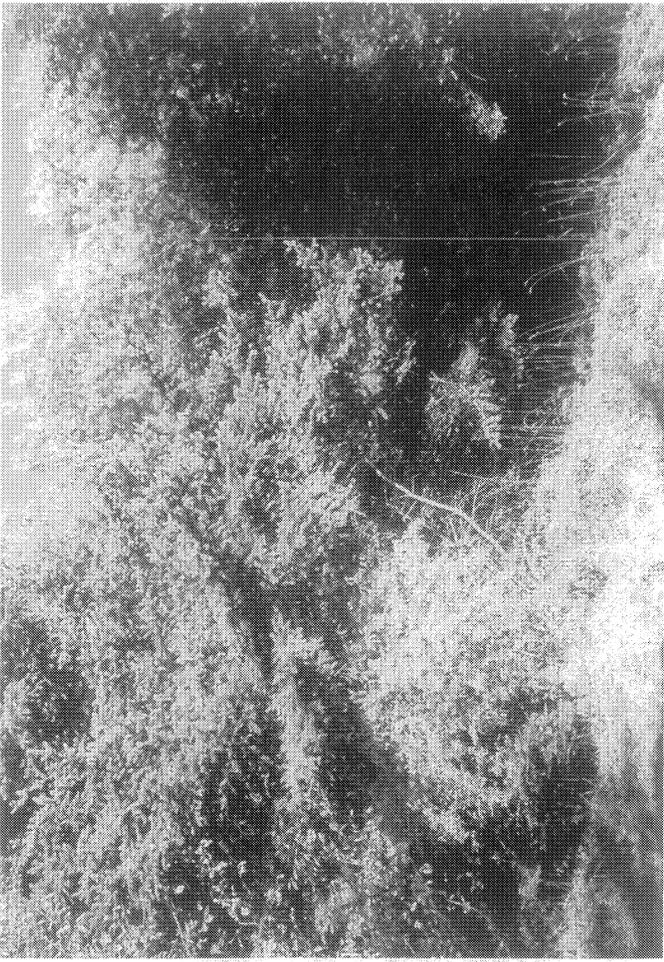


Block II Lot 16

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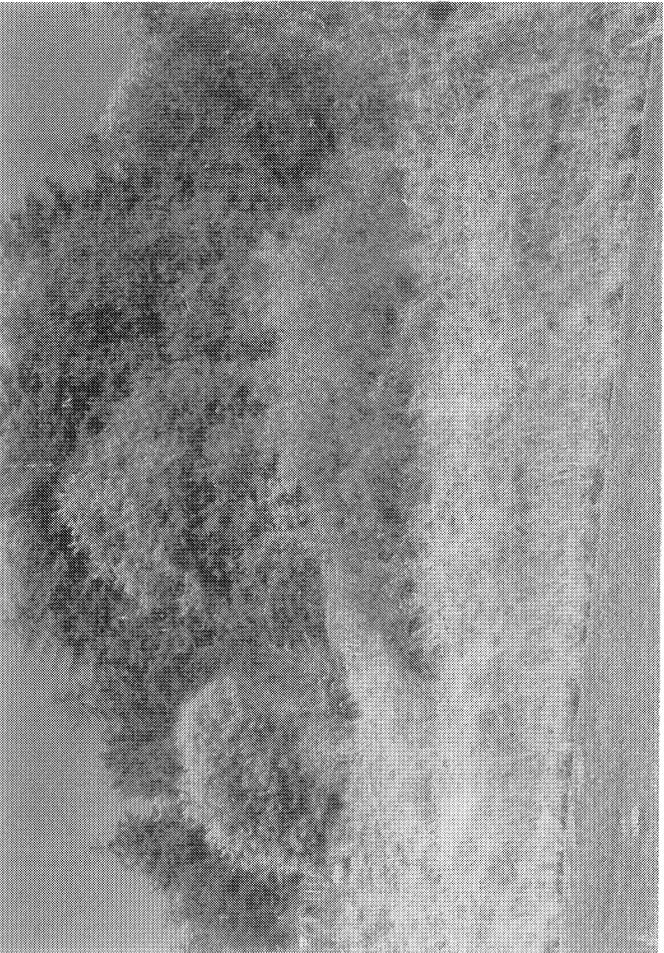


Block II Lot 18 25



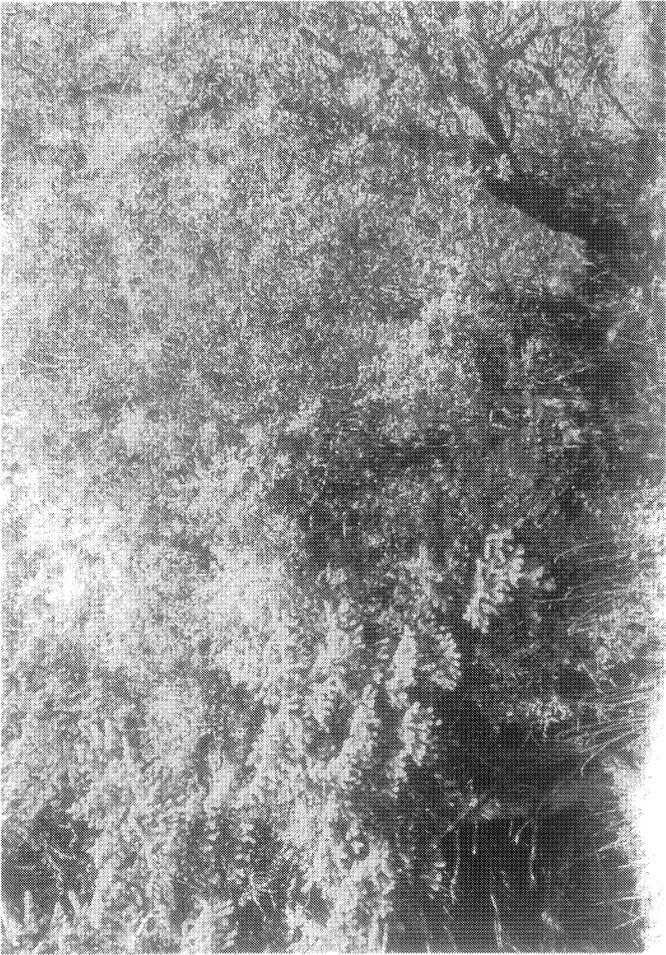
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51-9-15

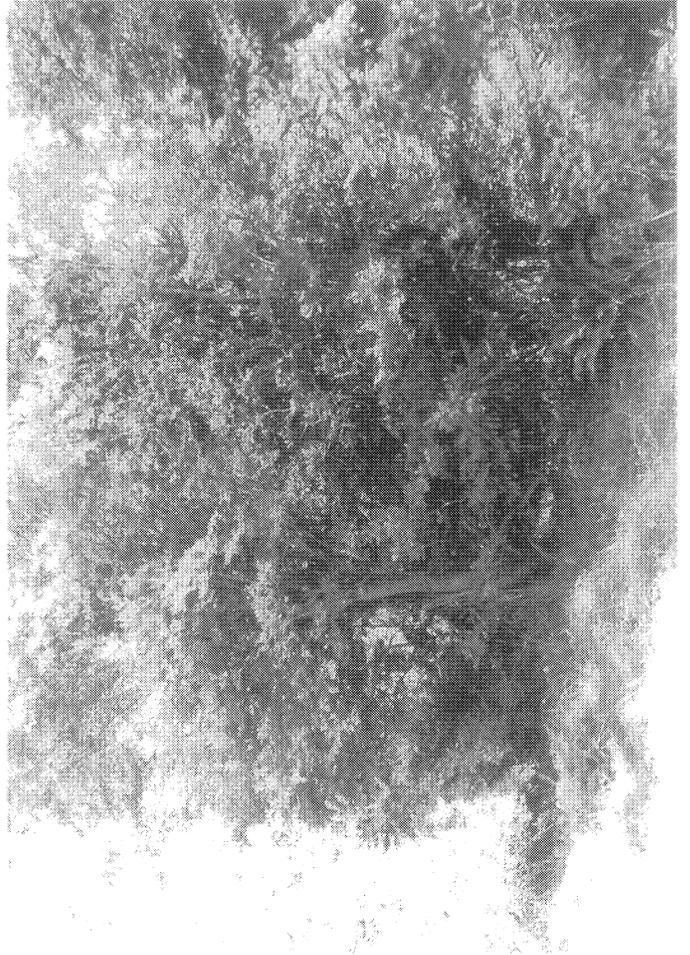


Block 11 Lots 9-15

608



609



Block 11 Lots



9-15

123-129

EXHIBIT O

720920



3-9-35



3-9-5

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3-9-13



3-9-14



3-9-32



3-9-32

613



3-9-39



3-9-41

614



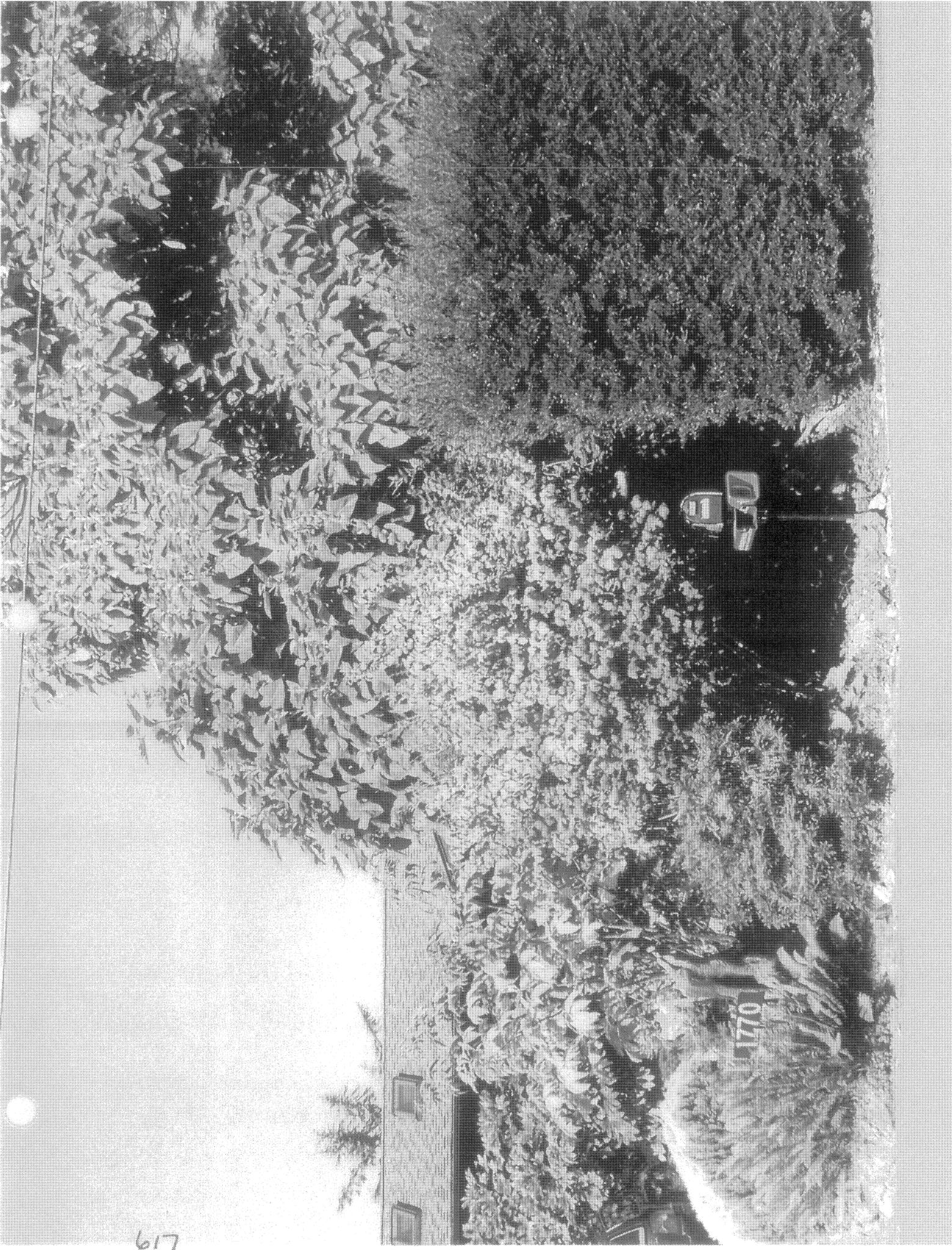
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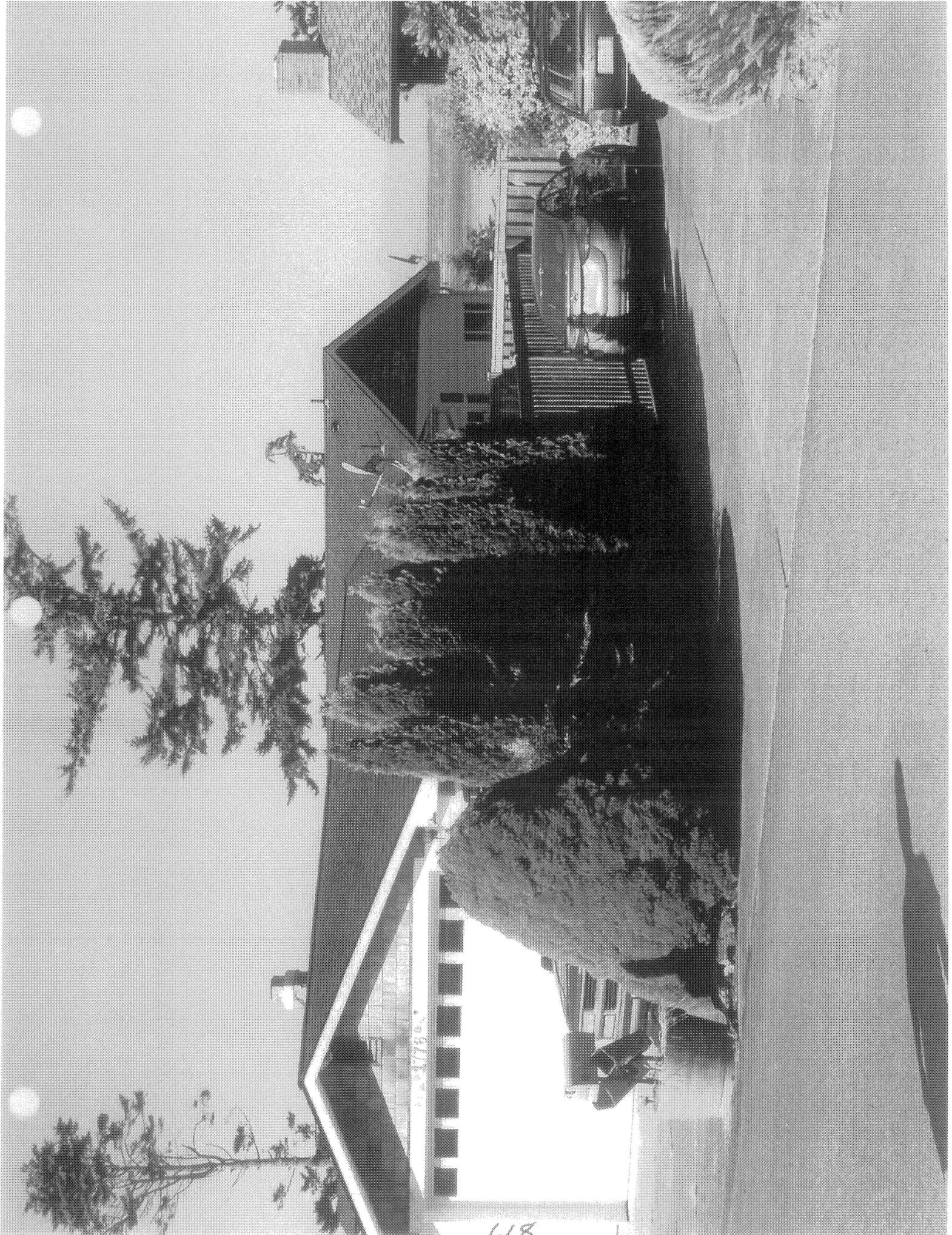


3-10-~~20~~22

616



617



819



619



620



621

APPENDIX B

(Color copies of photograph exhibits to the June 5, 2015
Reply Declaration of Susan Keppler in Support of
Defendants' Motion for Summary Judgment)

EXHIBIT P



149

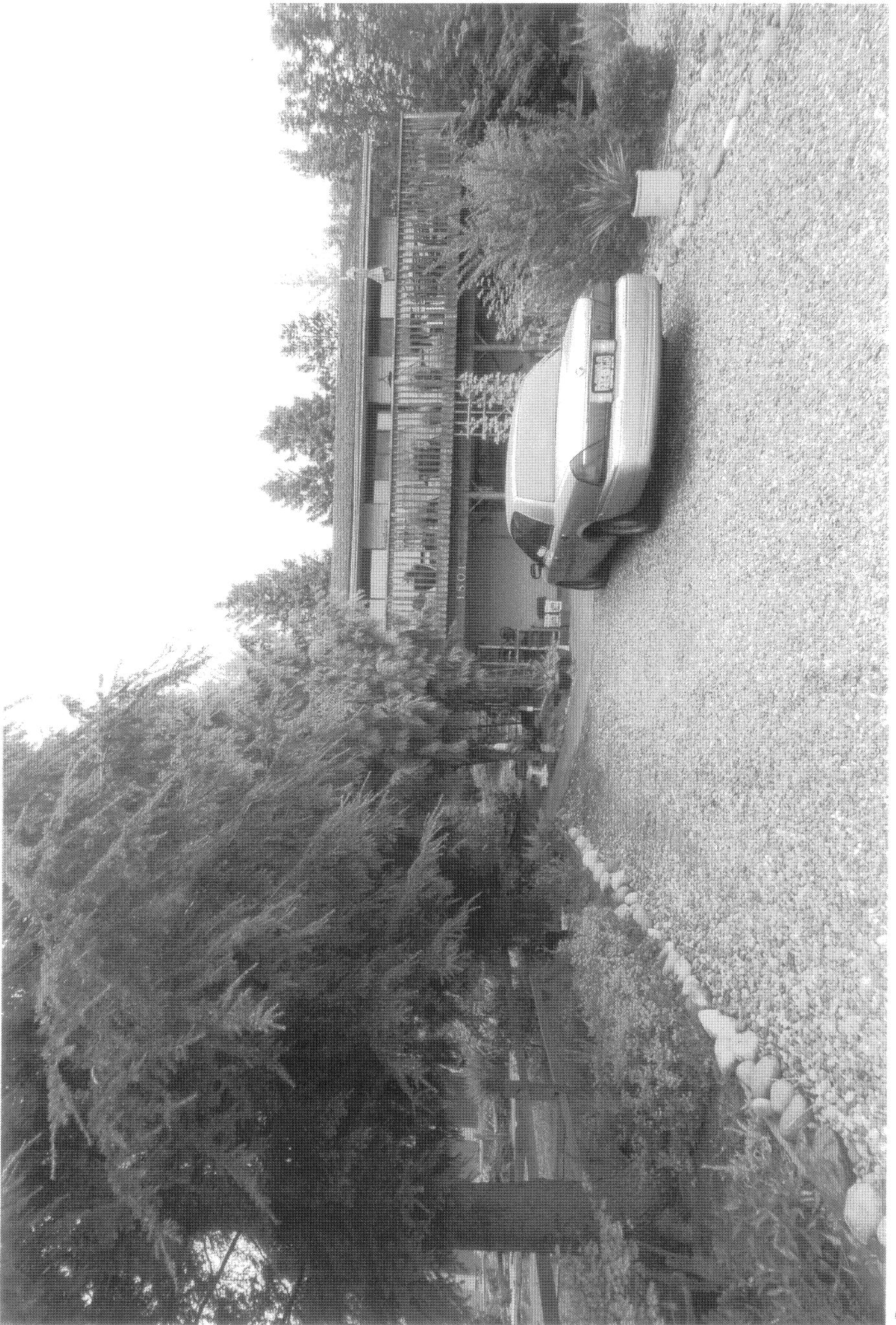


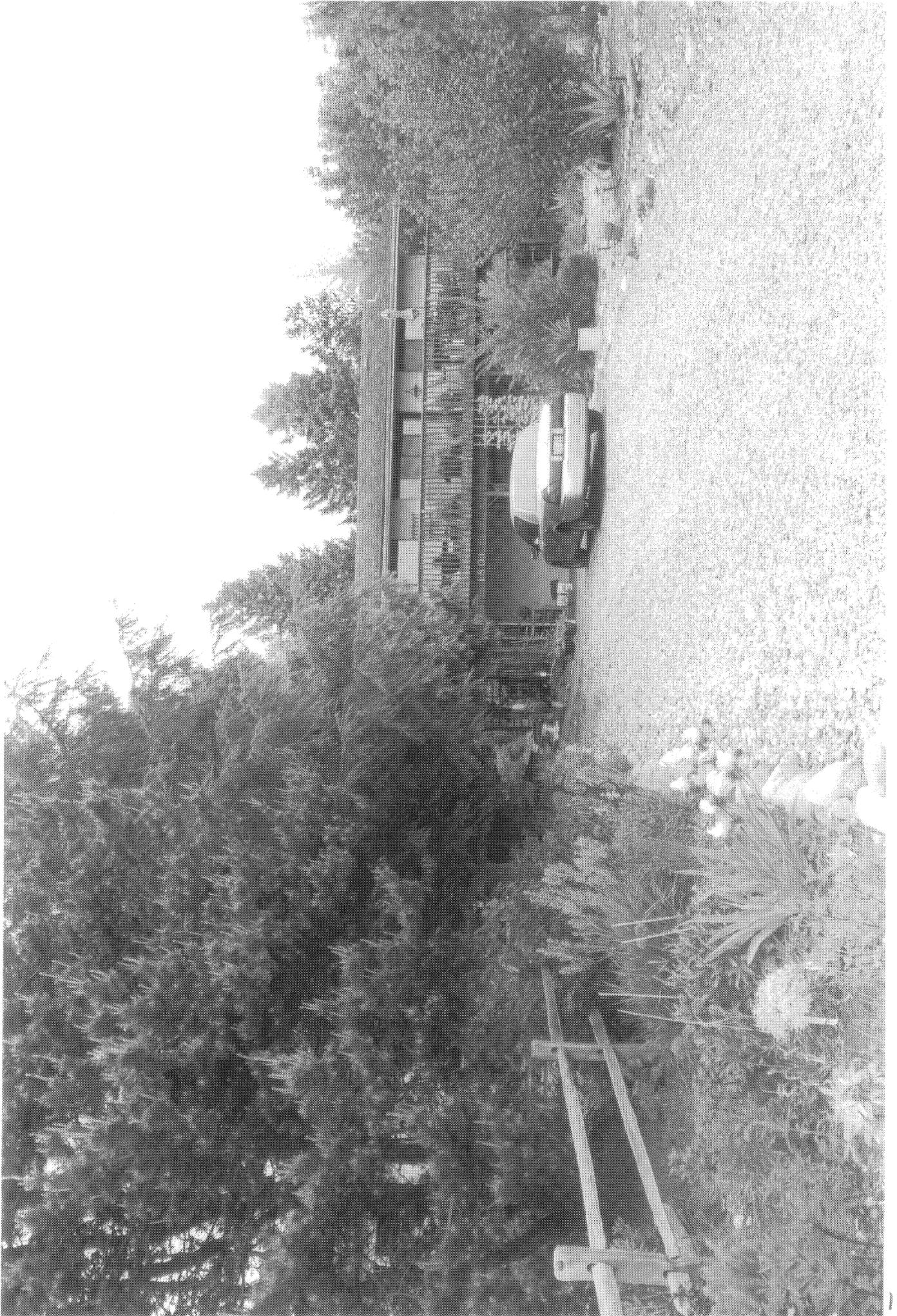
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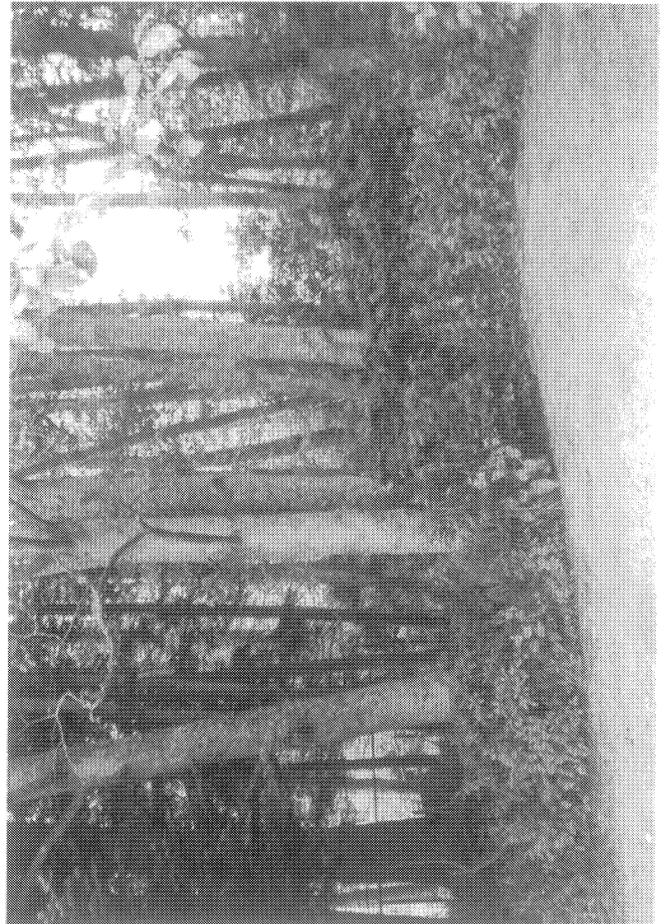
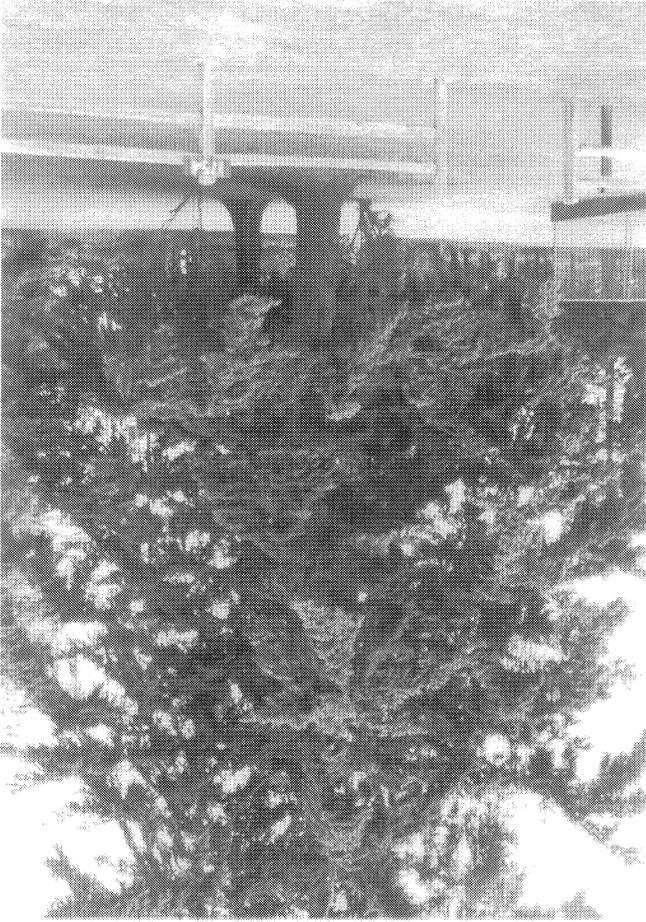


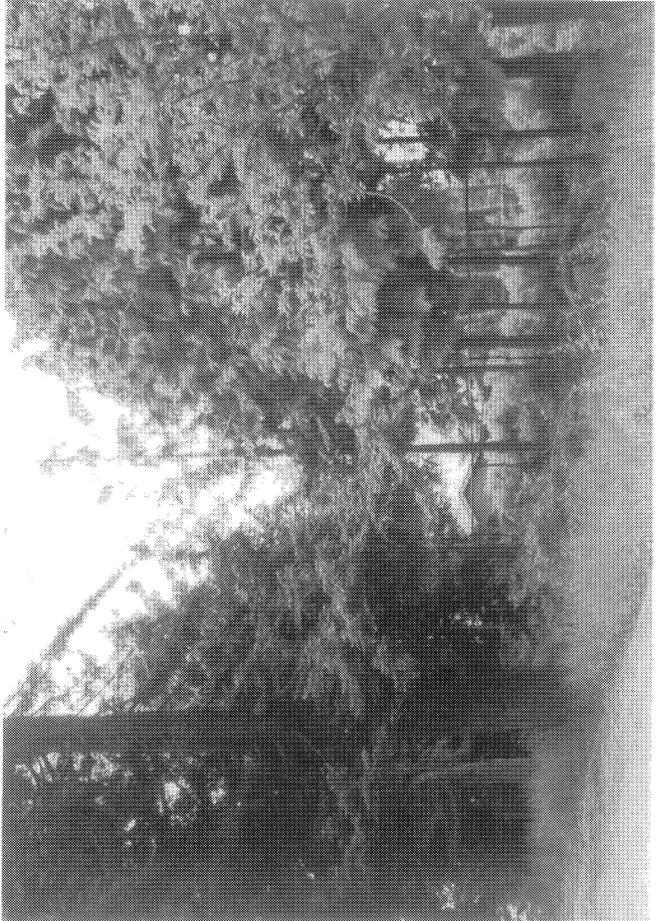


EXHIBIT Q









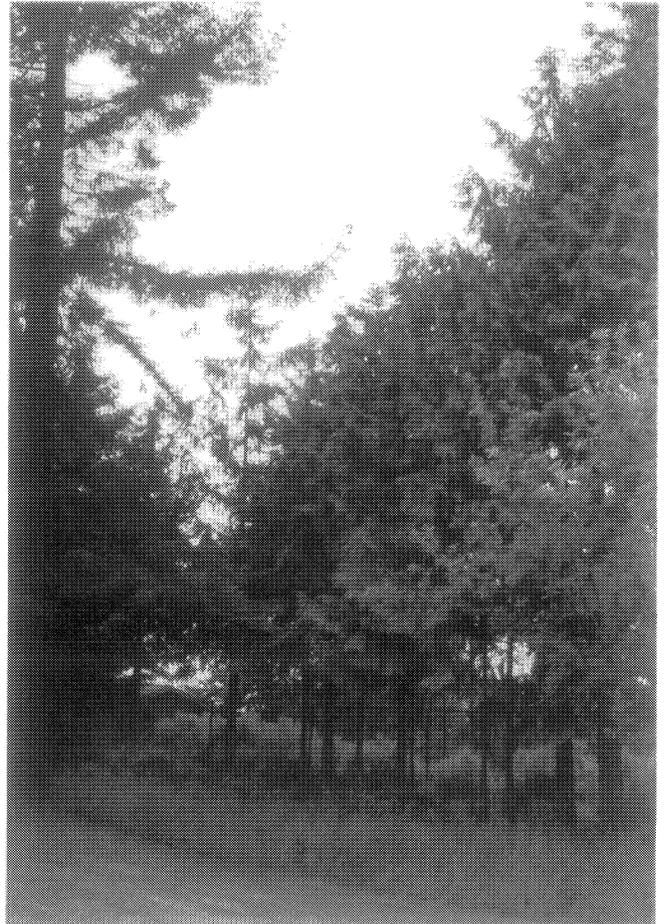
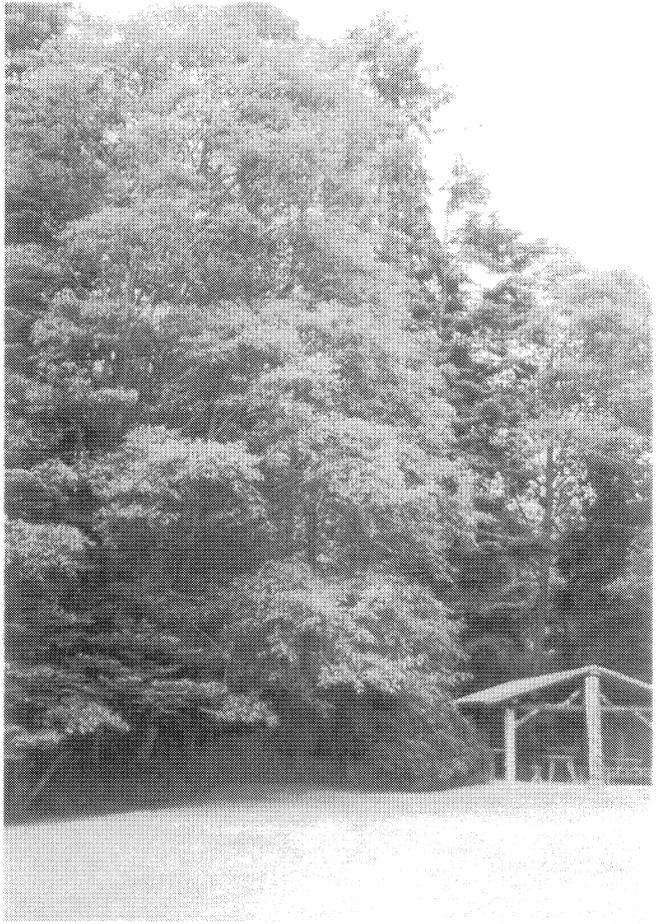




EXHIBIT S



EXHIBIT T



164

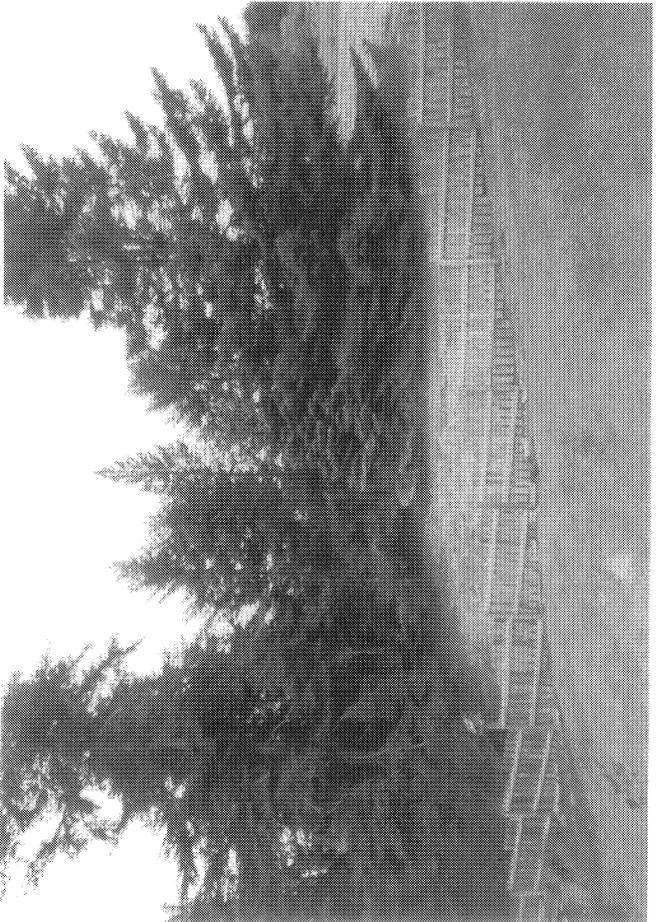
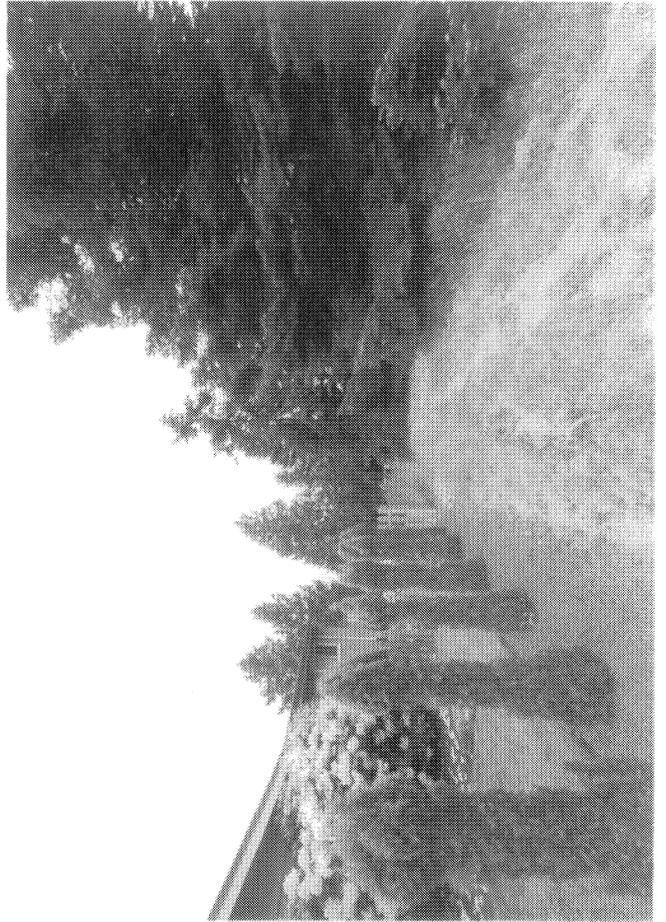


EXHIBIT U



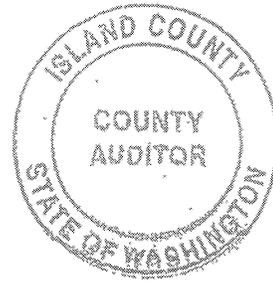
167

APPENDIX C

(1963 Supplemental Restrictive Covenants for Ledgewood Beach Division No. #3, Recorded at Island County AFN 154152, found at CP 502, Ex. C to the Declaration of Kathryn C. Loring)

(STATE OF WASHINGTON) SS
(COUNTY OF ISLAND)

I, DO HEREBY CERTIFY THAT THE
FORGING INSTRUMENT IS A TRUE AND
CORRECT COPY OF THE DOCUMENT NOW
ON FILE OR RECORDED IN MY OFFICE
IN WITNESS WHEREOF, I HEREUNTO SET MY
HAND THIS 21 DAY OF April, 2015
COUNTY AUDITOR
DEPUTY



07/08/1963 11:33:00 AM 154152
Recording Fee \$ Page 1 of 1
Restrictions
Island County Washington



154152

SUPPLEMENTAL RESTRICTIVE COVENANTS FOR LEDGEWOOD BEACH DIVISION NO. #3

ROBERT O. KEITH AND PATRICIA A. KEITH, his wife, being the owners of all property in LEDGEWOOD BEACH DIVISION NO. 3; an addition situate in Section 30, Township 31, North Range 2, East of Willamette Meridian, Island County, Washington, hereby place the following restrictive covenants on lands in said addition.

LAND USE AND BUILDING TYPE.

All lots are for residential purposes only, excepting water supply and community recreation. No animals, poultry, livestock, except household pets shall be raised on any lot. All buildings shall be of new construction and shall have their exteriors finished, including painting, within one year after start of construction. No building shall be erected on any lot, exceeding one story in height above the highest existing ground level at the proposed building site, except lots 6, 7, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26 and 27 in Block 10. The minimum habitable main floor area of each dwelling, exclusive of garages, carports, open entries, porches and patios, shall be not less than 800 square feet, except lots 1, 2, 3, 4, 5, and 6 Block 11, and lots 3, 4, 7, 8, 9, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, and 27 in Block 10, which shall be a minimum of 400 square feet. No building shall be located on any lot nearer than 5 feet from interior side lines, nor nearer than 20 feet from interior rear lot lines, eaves and open porches shall not be considered as part of a building, for the purposes of this covenant. No fences or hedges shall be erected or permitted to grow to a height exceeding 6 feet. No septic tank or sewage disposal system shall be located nearer than 100 feet of water well on lot 17, Block 10.

EASEMENTS.

A 10 foot easement, centering upon the boundary lines between lots 6 and 7, Block 9, and lots 22 and 23 Block nine, also between Lots 8 and 9, Block 10, and 4 and 7, Block 10, for the purpose of installing and maintaining water lines over and across said lots.

ENFORCEMENT AND TERM.

Enforcement shall be by proceedings at law or in equity against any person or persons violating or attempting to violate any covenant, either to restrain violation or recover damages. These covenants are to run with the land and shall be binding on all parties and all persons claiming under them for a period of five years from the date these covenants are recorded, after which time said covenants shall be automatically extended for successive periods of five years, unless an instrument signed by a majority of the owners of the lots has been recorded, agreeing to change said covenants in whole or in part.

In witness whereof, we have hereunto set our hands and seal this 8th day of July, 1963.



Robert O. Keith
Patricia A. Keith

STATE OF WASHINGTON) SS
COUNTY OF ISLAND

On this day personally appeared before me Robert O. Keith and Patricia A. Keith to me known to be the individuals described in and who executed the within and foregoing instrument, and acknowledge that they signed the same as their free and voluntary act and deed, for the purpose therein mentioned.

GIVEN under my hand and official seal this 8th day of July, 1963

FILED FOR RECORD AT 11:33 AM
July 8 1963 at request of
Robert O. Keith
J. W. LISSEY, AUDITOR
ISLAND COUNTY, WASH.

Lucille M. Paul
Notary Public in and for the State
of Washington, residing at Coupeville.

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