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DISTRICT OF COLUMBIA GOVERNMENT
BOARD OF ZONING ADJUSTMENT

D.C. OFFICE OF ZONING

2008 APR 24 AM 9:01

Appeal of:
Stephanie Wallace)
)
)
Re: 5013 Belt Road, NW)
)
)

Appeal No. 17747

**MOTION TO DISMISS
BY APPLICANTS FOR PARTY STATUS
AND FOR RELATED RELIEF**

Mary Grumbine and Jack Simmons, applicants for party status ("Applicants")¹ in the referenced matter, move the Board of Zoning Adjustment ("BZA") to dismiss the above-captioned appeal on the ground that the appeal fails to set forth a claim on which relief can be granted and an order directing that the current structure be razed.

Ms. Stephanie Wallace ("Developer"), the owner of 5013 Belt Road, NW ("property"), appeals from the decision of the Zoning Administrator to deny her a building permit for a structure with non-conforming side-yard set-backs. The Zoning Administrator denied the permit because the pre-existing structure, that was built prior to 1933² and that had non-conforming side yard set-backs, has been completely razed and the destruction was due to lack of maintenance, not to a casualty or an Act of God.

¹ Ms. Grumbine and Mr. Simmons are co-owners of 3952 Garrison St., NW (and have lived there for thirty years), one of the properties that abuts the 5013 Belt Road property at issue here, are directly and adversely affected by the activities of the Developer, and appear in support of the decision of the Zoning Administrator.

² Applicants have just learned that the house, in fact, may be pre-1900. See Letter to BZA from Tenleytown Historical Society that is attached as Exhibit F to Applicant's Opposition to Appellant's Motion for Summary Judgment.

BOARD OF ZONING ADJUSTMENT
District of Columbia

CASE NO. 17747
EXHIBIT NO. 25

Board of Zoning Adjustment
District of Columbia
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Because the absence of a pre-existing structure precludes the “grandfather” application of pre-existing non-conforming side yard set-backs, the decision of the Zoning Administrator is correct as a matter of law. With no structure from which non-conforming side yard setbacks could be grandfathered, the Developer is required to conform to the current side-yard set back requirements, eight feet in this R-1-B zone. 11 DCMR § 405.9. Moreover, the zoning regulations do not permit grandfathering from a pre-existing structure where that structure was razed because of casualty or Act of God, as asserted by the Developer, even assuming that these circumstances constituted a casualty or Act of God. Finally, even if such grandfathering were permissible from a casualty or Act of God, the termite damage that allegedly led to the razing of the last remaining portion of the building does not constitute either a casualty or an Act of God. Accordingly, the determination of the Zoning Administrator should be upheld as a matter of law and this appeal should be dismissed for failure to state a claim on which relief may be granted.

Facts

While Developer provides a lengthy (and largely irrelevant) history of the property from April 2004, when she purchased the property, to September 2007, when the Zoning Administrator denied her permit application, the pertinent facts from the notice of appeal are simple and straightforward.³ When Developer acquired the property, there was a pre-existing wood-frame farm house on the property with non-conforming side yard setbacks. Developer made no effort to

³ While the facts set forth in the notice of appeal must be treated as true for the purposes of this motion, Applicants do not concede that they are correct. For example, Developer claims that on March 5-8, 2005, when she “removed” the rear of the house, she “took measures to brace the remaining structure of the single family house.” Notice of Appeal at 5. The statement is demonstrably incorrect, as can be attested by both witness testimony and photographs.

Accordingly, in the event that this motion is not granted or ruling on it is reserved by the BZA and the matter proceeds to a hearing, Applicants reserve the right to make their own factual presentation and contest all facts alleged by the Developer.

determine the condition of the property at that time – for example, she did not conduct a groundwater inspection, a structural inspection, or a termite inspection; in fact, she claims to have learned of these problems only over the course of construction. Notice of Appeal at 9.

Developer applied for and, in December 2004, was granted a building permit that encompassed an addition to the existing structure. That permit was premised on the existence of the pre-1933 farm house and grandfathered non-conforming side-yard setbacks for that addition. It should be noted that Developer had time from the purchase of the property in March 2004 to the time that the first building permit was issued in December 2004 to conduct all such necessary inspections, as a reasonably prudent investor would have done including, but not limited to, termite inspections, engineering and structural inspections to determine whether the existing structure could support the addition, and groundwater inspections prior to excavating a large hole for the basement where no basement existed before.

Developer acknowledges that severe termite damage was discovered on March 3 and 4, 2005. Notice of Appeal at 5. Importantly, while the Developer did not take any steps to exterminate such termites or call a termite inspector, she continuously relies on the presence of those termites for more than two years as the reason for requiring the step-by-step destruction of the original house.

A stop work order was issued on March 17, 2005, for working beyond the scope of the permit (demolishing part of the building).

On October 4, 2005, a new building permit was issued to remove and replace the damaged wood and to preserve the integrity of the structure. By no later than March 10, 2006, Developer was again under a stop work order. On March 21, 2006, yet another building permit was issued and, yet again there were violations issued against the Developer. According to the sequence set

out in the Notice of Appeal, all of the building permits issued after the first one were issued to address problems that Developer discovered during the construction process.⁴

The end result of this process is that the original pre-1933 structure – from which the side-yard setbacks were grandfathered – was step-by-step razed by the Developer until, by early 2007, only a small portion of the front two stories of the original structure remained. Notice of Appeal at 6-7.

In March 2007, Developer razed that final portion of the original structure. See Notice of Appeal at 9. (Note that Developer carefully uses the word “demolish” instead of the word “raze” because she had a demolition permit, not a raze permit). The District, when it became aware of the Developer’s activity, issued a stop work order for violating the final building permit.⁵ By then, however, it was simply too late; as of March 15, 2007, the entire original structure, foundation and all, had ceased to exist.

In her Notice of Appeal, Developer clearly states that the rear of the original house was removed March 5-8, 2005, Notice of Appeal at 3, and that the front of the existing house was demolished March 12-15, 2007. Notice of Appeal at 4 (“Front of existing single house demolished”). Developer does not allege that any portion of the original structure remains. In

⁴ Each and every one of those problems would have been readily apparent if the Developer had acted prudently and conducted proper groundwater tests, structural inspections, and termite inspections before applying for the first building permit.

Her failure to conduct structural and termite tests, at the very least, evidence her intention to dismantle the pre-1933 farm house and replace it with a McMansion from the very outset of the process. Developer took other actions to ensure that the original house would fall apart, such as leaving the partially demolished house open to the elements.

⁵ While Developer acknowledges that a stop work order was issued, she asserts that it was issued because the permit was a “fake,” a proposition for which she provides no support. Notice of Appeal at 7. In fact, the stop work order was issued because the Developer’s activities “Exceed[ed] Scope of Building Permit. Building All New SFD [Single Family Dwelling]” . . . A copy of the stop work notice is appended to Developer’s Notice of Appeal at Exhibit 7.

fact, Developer confirms that the original structure has been fully razed when she asserts, elsewhere in her Notice of Appeal, that she has a right to replace the original structure. Notice of Appeal at 9-10. Developer has subsequently made statements that confirm that no part of the original structure or its foundation remains. See attached Affidavit of Mary Grumbine and statement from Mr. John Lemoine (Exhibits 1-2). Finally, the photographic record further confirms Developer's statements that no part of the original structure or foundation remains. See attached picture of the house in 2004 (Exhibit 3), a picture of the new construction as it looks today (Exhibit 4), and pictures taken by D.C. building inspectors on March 21, 2007, indicating that this is an all new construction (Exhibit 5). See also Resolution by Advisory Neighborhood Commission 3E filed in this matter.

Developer applied for a new building permit in April 2007. See Notice of Appeal at 9. In September 2007, her application was denied on the ground that the structure which no longer existed had been intentionally destroyed, that the application did not qualify for application of the grandfather provision of 11 DCMR § 405.8, and that the termite damage does not constitute a casualty or Act of God under 11 DCMR § 2001.6 giving rise to certain reconstruction rights. This appeal followed.

Argument

Construction in the District of Columbia must conform to the Zoning Regulations. As applicable here, those Regulations require that all construction after May 12, 1958, in an R-1-B zone have at least eight foot side yard setbacks, i.e., the side walls of the structure must be at least eight feet from the property line. 11 DCMR § 405.9. There is one narrow exception – the grandfather provisions, 11 DCMR § 405.8 – which permits side yard setbacks of less than eight feet, but at least five feet, for an extension or addition to a pre-existing structure.

The BZA has determined that a grandfather provision, such as section 405.8, may be applicable only where the pre-existing structure continues to exist. Once a pre-existing structure is razed, the Developer may not construct a non-conforming structure as a matter or right under a grandfather provision. Appeal of 1231 Morse St., Inc., Appeal No. 17657.

In 1231 Morse St., Inc., the BZA was faced with the question of whether the property owner could construct an 11-unit apartment building, under a grandfather regulation, where the original structure had been totally destroyed. Under the applicable zoning regulation, such an apartment building would have been permissible under the applicable grandfather provisions. However, several walls, the last remaining portion of the pre-May 12, 1958, structure, collapsed in February 2006. The BZA, in its oral analysis of the case, determined that without a pre-existing structure, there was nothing from which to grandfather and the owner was properly precluded from building the apartment building. See Transcript of BZA meeting of Jan. 8, 2008, at 61-93. In other words, once the structure from which the grandfathering would occur ceased to exist, the ability of the owner to avail itself of the grandfather provision ceased to exist.

The decision of the BZA in 1231 Morse St., Inc., follows well-established case law that once a non-conforming structure has been destroyed, even without fault of the property owner, it may not be replaced (except as may be specifically provided for in applicable zoning ordinance). Goyonaga v. Bd. of Zoning Appeals for the City of Falls Church, 657 S.E.2d 153, 159, 275 Va. 232, 242 (Va. 2008) (“demolition of [Plaintiffs’] home, except for portions of the foundation, resulted in the loss of the right to continue the nonconforming use of the property.”); City of Emporia Bd. of Zoning Appeals v. Mangum, 263 Va. 38, 52, 556 S.E.2d 779, 782 (Va. 2002); Korngold v. Zoning Bd. of Adjustment of the City of Philadelphia, 147 Pa. Cmwlth. 93, 103, 606 A.2d 1276, 1280-81 (Pa. Cmwlth. 1992) (“ . . . Sign C, including its superstructure, was totally

destroyed. Therefore, when the sign ceased to exist, the nonconforming use of that sign was also extinguished.”), appeal denied by Korngold v. Zoning Bd. of Adjustment of City of Philadelphia, 533 Pa. 614, 618 A.2d 404) (Pa. 1992) (Table), and appeal denied by, Korngold Reagan National Advertising, Inc., v. Zoning Bd. of Adjustment of City of Philadelphia, 533 Pa. 652, 618 A.2d 111 (Pa. 1993) (Table); Industrial Lessors, Inc. v. City of Garfield, 119 N.J. Super. 135, 183, 290 A2d 737, 738 (N.J. Super. 1972) (“[N]onconforming uses and structures are disfavored in the law and the total destruction of a nonconforming building terminates the right to continue the use.”), certif. denied, 61 N.J. 160, 293 A2d 390 (N.J. 1972); Service Oil Co. v. Rhodus, 500 P.2d 807, 813, 179 Colo. 335, 348 (Colo. 1972) (“On the other hand, if the improvements are destroyed or abandoned, he has lost the value of his investment independently of the ordinance and there is no reason why his relationship to the zoning ordinance should be any different from that of his neighbor whose property was unimproved.”).

Moreover, the BZA’s analysis in 1231 Morse St., Inc., makes clear that the mere issuance of a building permit does not give rise to any vested right in that permit where there is a subsequent change in the factual predicate to that permit. Such vested rights exist, if at all, only where there was an intervening change in the law since the initial permit was issued, not where there was only a change in the facts. Transcript of BZA meeting of Jan. 8, 2008, at 61-93. See also Service Oil Co. v. Rhodus, 500 P.2d at 813, 179 Colo. at 348.

1231 Morse St., Inc., is even more compelling because of its facts. In that case, the ability to construct an apartment building was grandfathered from a pre-existing structure on the property. According to the owner, however, the last remaining walls of that structure collapsed because of a very severe storm, which was at least arguably a casualty or an Act of God. In this case, on the other hand, the last remaining vestiges of the original pre-1933 farm house did not collapse in a

violent storm or merely disintegrate in the rain; the last portion of the original farm house was intentionally dismantled and the foundation was taken out over three days, March 15-17, 2007, by Developer's own crew. Moreover, it was done under the authority of a demolition permit in circumstances where a raze permit was unambiguously required. 12A DCMR § 105.1.7.1. If there can be no grandfathering where the original structure ceases to exist under the Morse St. circumstances, there can be no grandfathering here.

Under 1231 Morse St., Inc. it is irrelevant whether the ultimate destruction of the pre-existing structure was the result of a casualty or Act of God, on the one hand, or was the result of a deliberate or negligent act of the Developer, on the other. The result remains the same in either case: once the pre-existing structure ceases to exist, the ability to grandfather from that pre-existing structure ceases to exist.

Finally, even if a casualty or Act of God destruction of the property could be deemed to give rise to a right of a Developer to avail itself of a grandfather provision, there is no casualty or Act of God here. A casualty or an Act of God is a sudden occurrence, not something that takes place over time; it is like an earthquake, not like erosion. Termite damage is not a sudden occurrence; it does not occur over night, it occurs over time. Moreover, the application of casualty or Act of God to the present circumstances – where the Developer acknowledges that she not only knew of the termite damage in March 2005, more than *two years* before she razed the final part of the building, but also where she took no action to deal with the termites – would be particularly egregious and would improperly reward Developer for her inaction.⁶

⁶ In fact, Developer intended, from the time the property was first purchased in 2004 to raze the original small charming pre-1933 farm house and to cram an all-new McMansion into the tiny lot. She was able to accomplish the destruction of the entire original house by “discovering” groundwater problems that had to be remedied, structural problems that had to be remedied, termite problems that had to be remedied, and by continuously working beyond the scope of city

The fact that termite damage is not a casualty or an Act of God also fully disposes of Developer's argument that she may avail herself of certain reconstruction rights under 11 DCMR § 2001.6. The provisions of section 2001.6 are applicable only to losses due to a casualty or an Act of God.

In any event, there is no reason to reach Developer's reconstruction argument under section 2001.6 because reconstruction is precisely what the Developer seeks to avoid doing. She does not seek to reconstruct the prior structure; she seeks to "reconstruct" only the very small portion of the original house she razed in March 2007. She asks the Board, in effect, to permit her to retain the frame of the McMansion she has built (with non-conforming side yard setbacks) and to engraft this small reconstruction to it. In sum, she seeks authorization for a wholly new structure, not a reconstruction. (Applicants would have no objection whatsoever if Developer were to reconstruct the charming pre-1933 farm house on the property as long as the newly laid foundation and the framed in McMansion are removed, whether or not such construction were predicated on section 2001.6.)

Finally, Developer asserts that the government is barred by laches or is estopped from denying the building permit she seeks. Aside from the fact that laches and estoppel are very rarely ever applied against the government and because of the public interest in the enforcement of the zoning laws, Sisson v. D.C. Bd. of Zoning Adjustment, 805 A.2d 964, 971(D.C. 2002); Beins v. D.C. Bd. of Zoning Adjustment, 572 A.2d 122, 126 (D.C. 1992); 4 Rathkop, *The Law of Zoning and Planning*, § 65:27 (4th ed.), there are many reasons why they are not applicable in this situation. We address only two of them and do so very briefly.

permits (and she was stopped by city stop work orders for exceeding the scope of those permits), before she was ultimately stopped by the Zoning Administrator's decision.

First, the Developer does not come to the BZA with clean hands. Temple v. D.C. Rental Housing Comm'n, 536 A.2d 1024 (D.C. 1987). As noted above, and as carefully sidestepped in the factual recitals in Developer's Notice of Appeal, it is abundantly clear that the Developer took no effort to determine whether there were any structural problems, groundwater problems, or termite problems at the property, as any reasonably prudent Developer would do. Had the Developer done so, of course, there would have been ample opportunity to take appropriate steps to deal with those problems. The Developer may not now come to the BZA, claiming that those problems suddenly appeared, and that, because of these problems, she is entitled to build a brand-new, non-conforming McMansion on the property. The Developer may not profit from her own failure to take reasonable steps to ascertain the condition of the property and to plan her construction project accordingly. Clay Properties, Inc., v. Washington Post, 604 A.2d 890, 895 (D.C. 1992); Rosenthal v. J. Leo Kolb, Inc., 97 A.2d 924 (D.C. Muni. App. 1953) ("The knowledge of facts or circumstances reasonably sufficient to put a person of ordinary prudence upon inquiry which, if pursued with proper diligence, would lead to the discovery of the actual condition . . . is equivalent to knowledge direct and certain). See Rafferty v. D.C. Zoning Commission, 583 A.2d 169, 176 (D.C. 1990).

Similarly, the government has not slept on its rights. The government issued building permits grandfathering non-conforming side yard setbacks throughout the entire time that Developer asserted that the pre-existing structure remained (at least in part) on the property. It denied a building permit only when that pre-existing structure no longer existed. After that application, there was lengthy communication between DCRA and the Developer on the questions raised by the application. The Zoning Administrator's decision was issued only four months after the permit was first applied for. Moreover, Developer has not been prejudiced by this because a

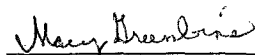
stop work order had been issued and because Developer undertook no activity of its own during this period. Sisson v. D.C. Bd. of Zoning Adjustment, 805 A.2d at 972; Nathanson v. D.C. Bd. of Zoning Adjustment, 289 A.2d 881 (D.C. 1972).

Finally, under the regulations, grandfathered side-yard setbacks must be at least five feet and new construction setbacks must be at least eight feet. 11 DCMR §§ 405.8 and 405.9. The pre-1933 farm house, the house that no longer exists, had five foot setbacks. Developer's new structure, however, has side walls far less than five feet from the lot lines, as shown in Exhibit 7. Thus, the current McMansion is not in compliance with either the eight foot setbacks for current structures or the five foot setbacks for grandfathered structures and additions. Moreover, the record reflects that at each stage of the way, her construction/demolition activities that led to the erection of the current foundation and side walls resulted in stop work orders for exceeding the scope of work under the building permits. Finally, the current structure has been standing for more than a year, is badly weather-beaten and is unprotected. Accordingly, the BZA should order that the structure be razed immediately.

Conclusion

For all of the foregoing reasons, the Notice of Appeal in this matter fails to set forth a claim upon which relief may be granted and the appeal should be dismissed and the current structure on the property razed.

Respectfully submitted,



Mary Grumbine
3952 Garrison St., NW
Washington, DC 20016
Applicant for Party Status



Jack Simmons
3952 Garrison St., NW
Washington, DC 20016
Applicant for Party Status

Certificate of Service

This is to certify that the foregoing Motion to Dismiss with attachments was served on each of the following by first class mail, postage prepaid, on April 24, 2008:

J. Patrick Brown, Esq.
Greenstein DeLorme & Luchs, PC
1620 L. St., NW, Suite 900
Washington, DC 20036

Matthew J. Green, Esq.
Assistant Attorney General
D.C.R.A.
941 North Capitol St., NE, Ninth Floor
Washington, DC 20002

Mr. John Lemoine
5011 Belt Road, NW
Washington, DC 20016



Jack Simmons

A

DISTRICT OF COLUMBIA GOVERNMENT
BOARD OF ZONING ADJUSTMENT

Appeal of:

Stephanie Wallace

Appeal No. 17747

Re: 5013 Belt Road, NW

AFFIDAVIT OF MARY GRUMBINE

I, Mary Grumbine, being duly sworn, depose and state as follows:

1. I am over 21 years of age and make this affidavit on the basis of personal knowledge of the facts set forth herein.

2. My husband and I own, and ^{have} lived in, a house at 3952 Garrison St., NW. *for 30 years. It*

3. Our property line is shared by the property at 5013 Belt Road, NW ("the property").

4. Stephanie Wallace ("Developer") bought the property at 5013 Belt Road in April 2004. At that time, the property contained a charming ^{pre} 1933 wood farm house.

5. I have observed Developer's crew and activities at the property on a daily basis *when I am in town* because I work from home. *all*

6. Developer, through her crew, has demolished and razed the entirety of the original house and the entirety of the original foundation piece by piece from 2005 through 2007.

7. I had called the Stop Line and the Zoning Office in February and early March 2007 to express concerns about the activities of Developer's crew and whether they were permissible. It looked to me like the Developer was razing the only remaining portion of the original structure.

8. Developer's crew completed the total destruction of every fragment of the

original structure, including the original foundation, by March 15, 2007.

9. Developer razed the original small farm house piece by piece while throwing together a flimsy new wood frame for a McMansion that is both too large for the small lot and that is out character with the neighborhood.

9. A Stop Work order was posted on the property on March 21, 2007.

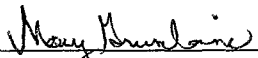
11. The Stop Work Order posted on March 21, 2007, stated that the Developer had exceeded the scope of the building permit by razing the entirety of the original structure.

12. The only structure and foundation on the property after March 15, 2007, are an entirely new foundation and an entirely new three-story flimsy wood frame for a McMansion. This particleboard and wood frame structure is totally open to the elements, ~~unprotected~~ and is not protected by any form of security fencing or barricade.

13. The property is located in ANC3E. Ms. Lucy Eldredge, ANC Commissioner, arranged for a meeting at the property with the Developer and the neighbors to take place on Saturday, April 5, at 10:00am.

14. Ms. Eldredge, at that meeting and while standing in front of the property, asked the Developer a series of questions regarding whether any part of the original structure or foundation remained. The Developer responded "No," "nothing is left," and "not even a piece of the foundation."

Further affiant sayeth not.

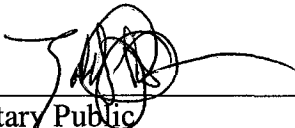


Mary Grumbine

Dated: April 18, 2008

County of Montgomery)
State of Maryland)

Subscribed and sworn to before me this 18 day of April, 2008



Notary Public

My commission expires: 3/5/2011

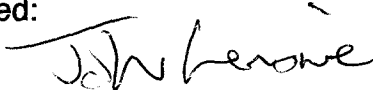
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Regarding BZA Appeal No. 17747
Appeal of Ms. Stephanie Wallace
Public Hearing: April 29, 2008

STATEMENT

On Saturday, April 5, 2008 a meeting was held at the construction site at 5013 Belt Rd. NW. This meeting was arranged and attended by ANC 3E representatives Lucy Eldridge and Carolyn Sherman. Also in attendance were: Stephanie Wallace, myself, and several neighbors who live in properties adjacent or near 5013 Belt. While standing next to the construction, Ms. Eldridge asked Ms. Wallace if there was any part remaining of the existing original house. Ms. Wallace replied "No, there's nothing left of the old house". Ms. Eldridge then asked if there was anything left of the original foundation. Ms. Wallace answered, "No".

Signed:



Date:

4/17/08

John Lemoine
5011 Belt Rd. NW
Washington, DC 20016
202-528-2918

C

5013 Beet Road NW
2003 Tinleytown Historic Resources Survey





This is a picture of 5013 Belt Rd., NW, taken in approximately March 2004. The grassy area to the left of the hedge and marked with the line is not part of the property. The property to the left of the hedge, therefore, does not belong to the Developer.

D



E

Photos by: Neil Letren

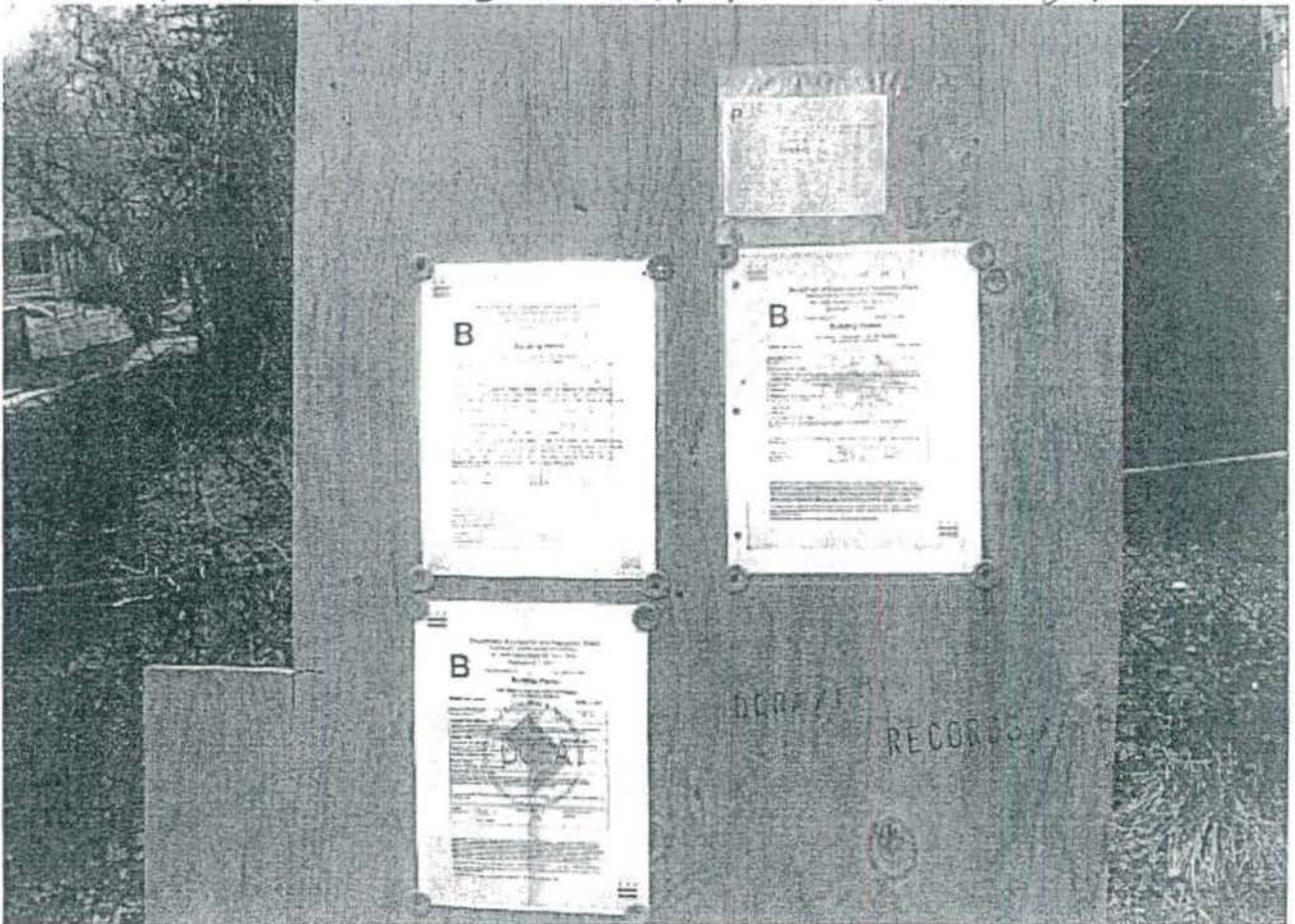
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No Raze Permit No Permit For New SFD

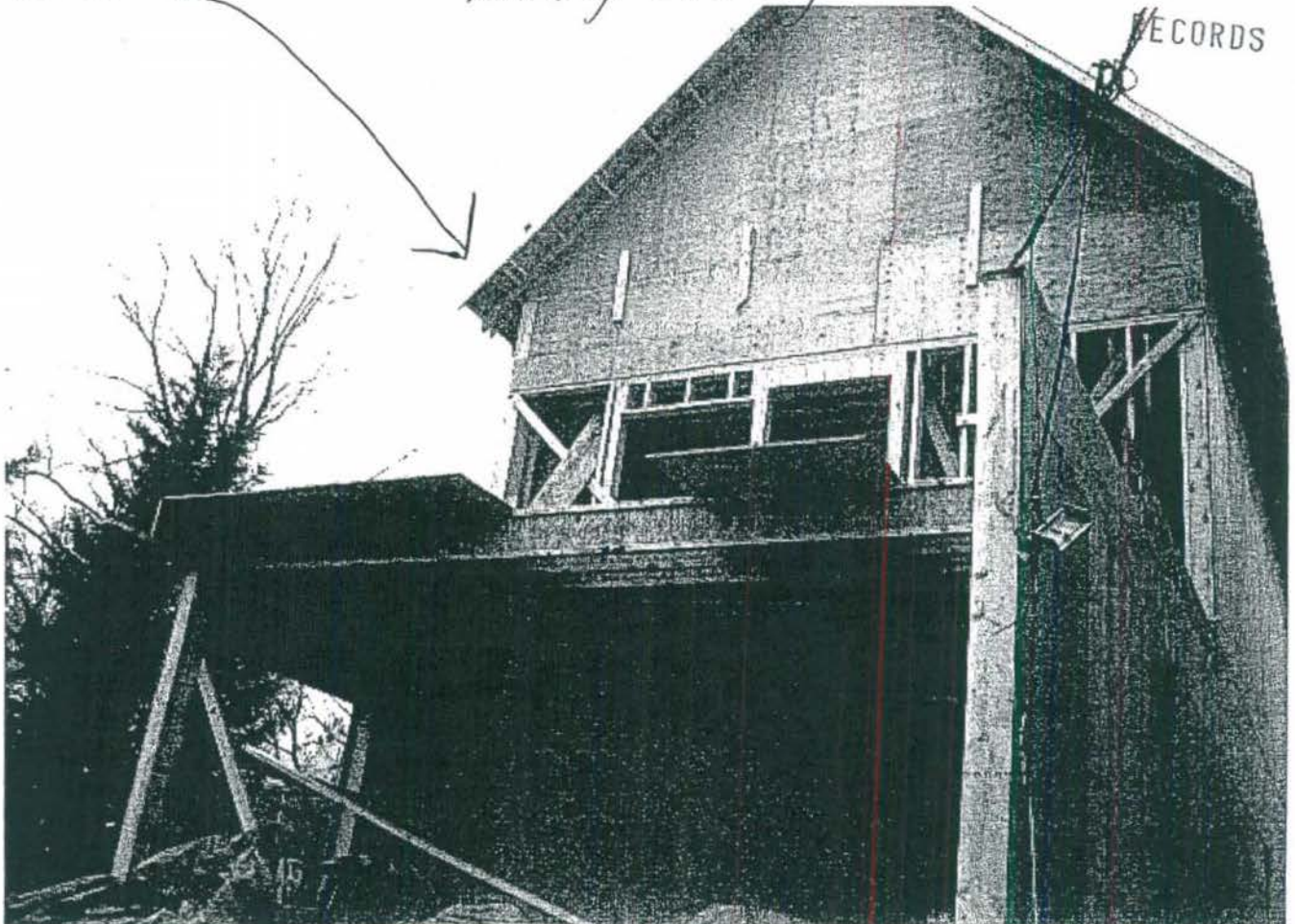


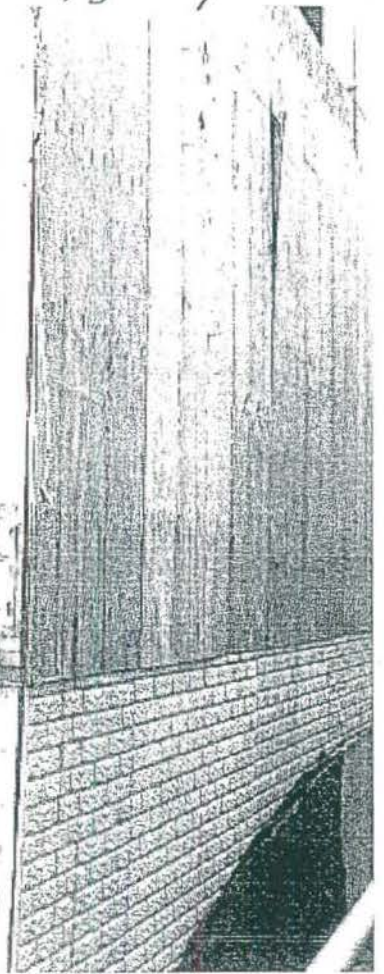


All New

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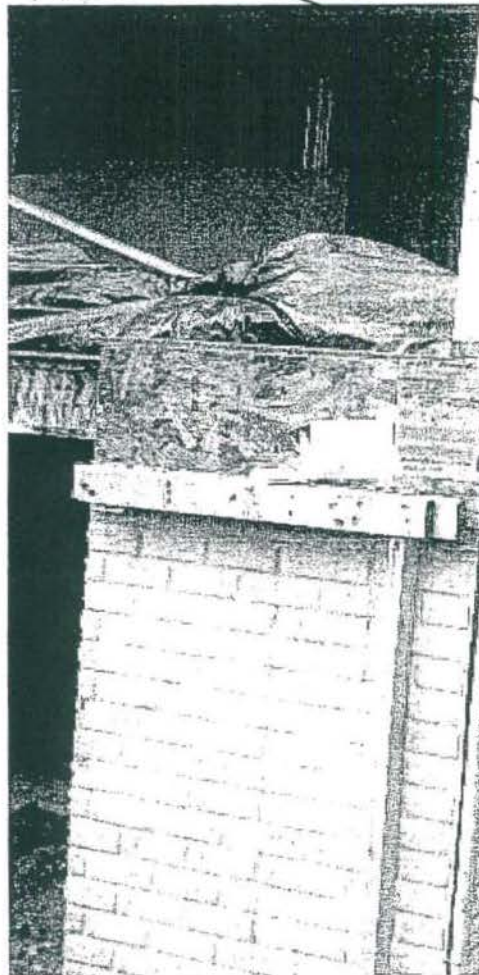
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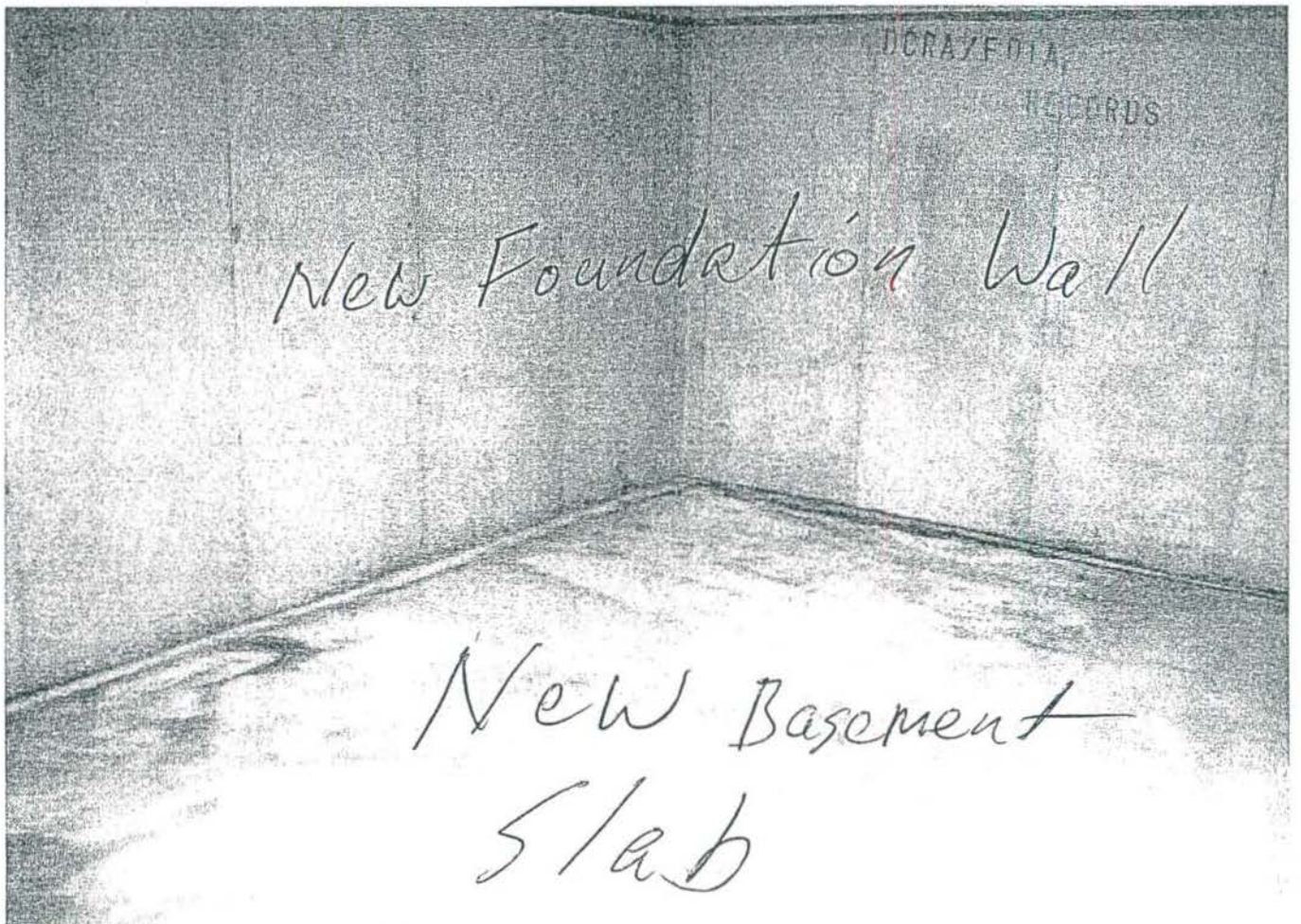
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Nothing Existing



Right Side

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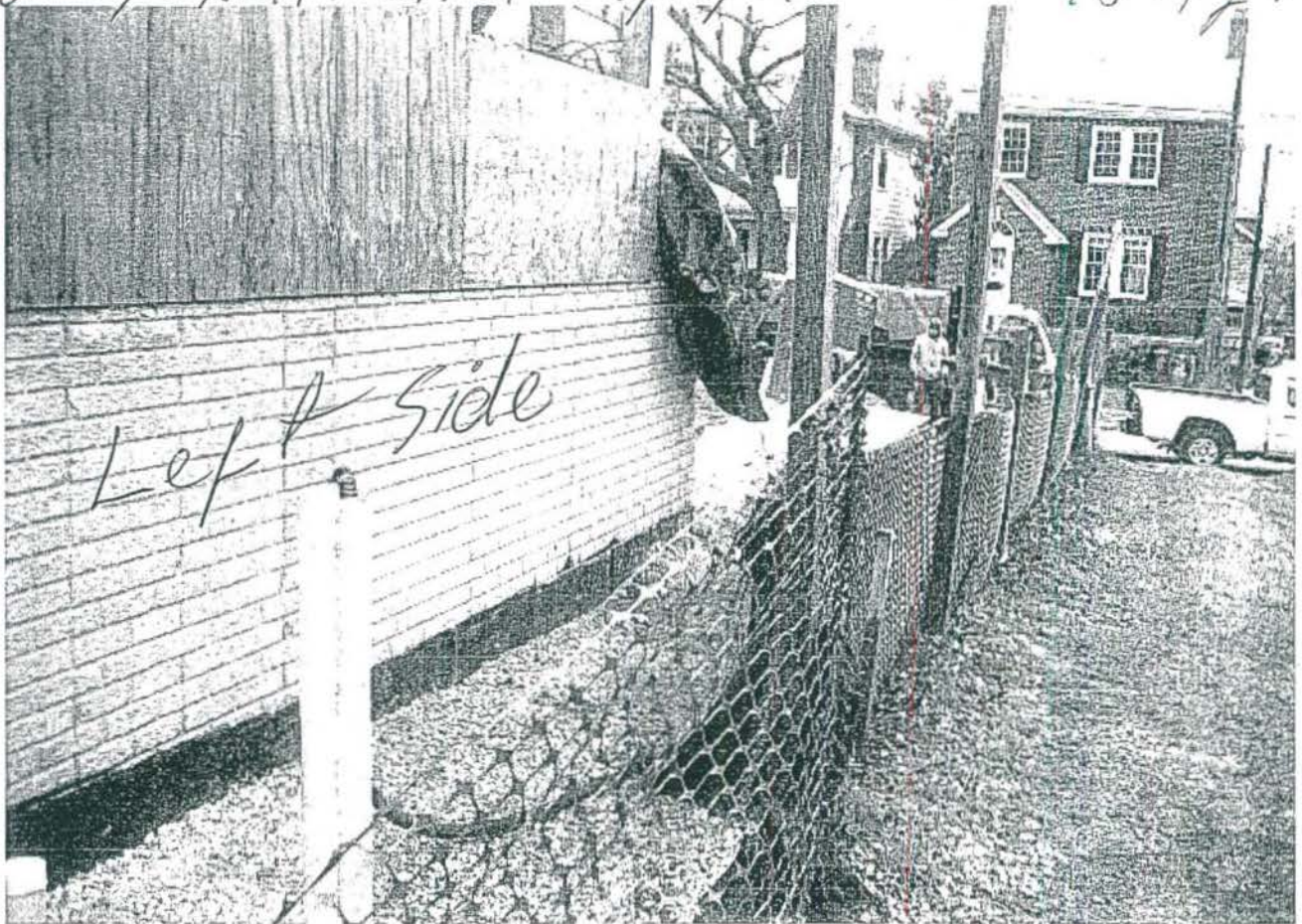
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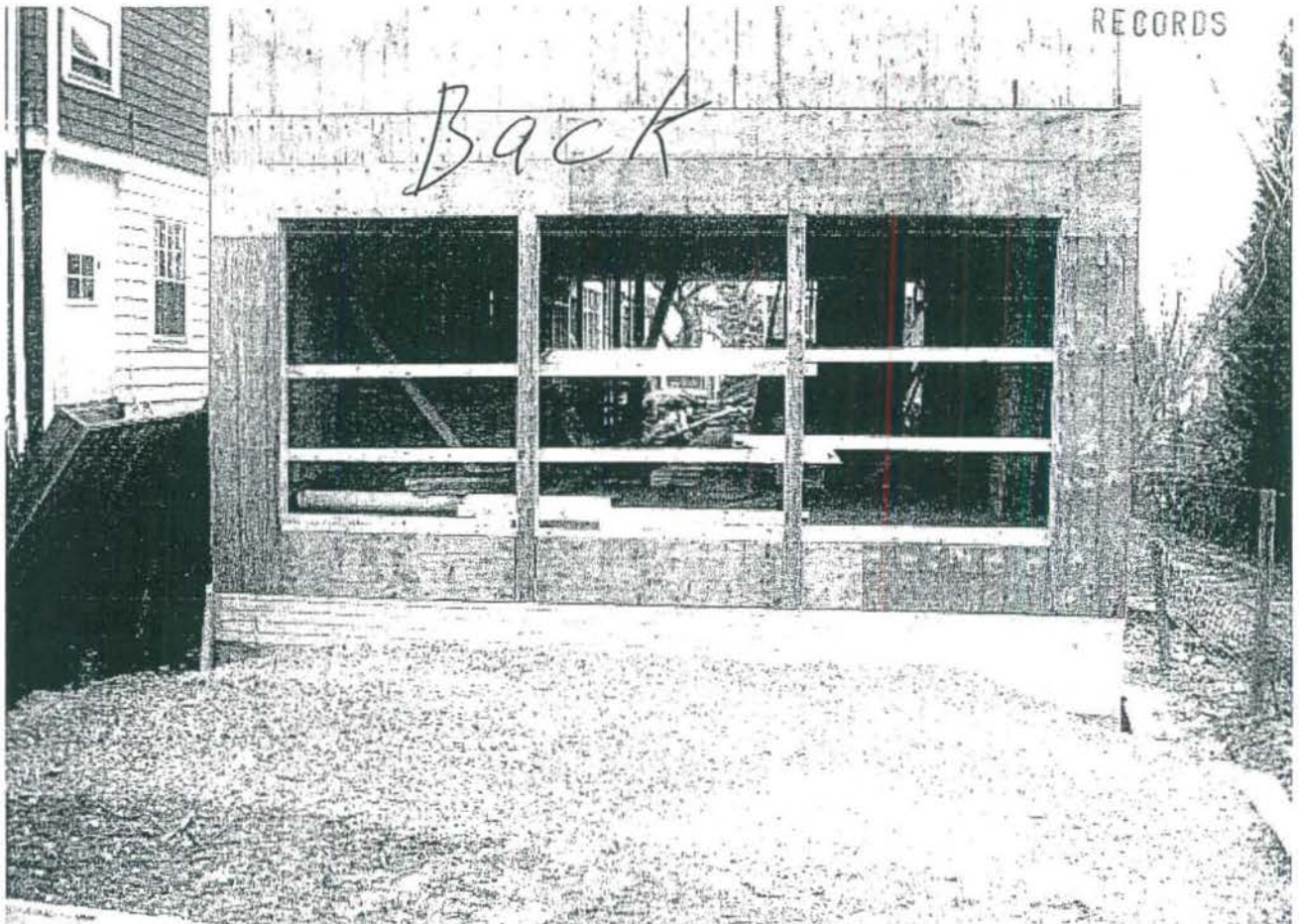
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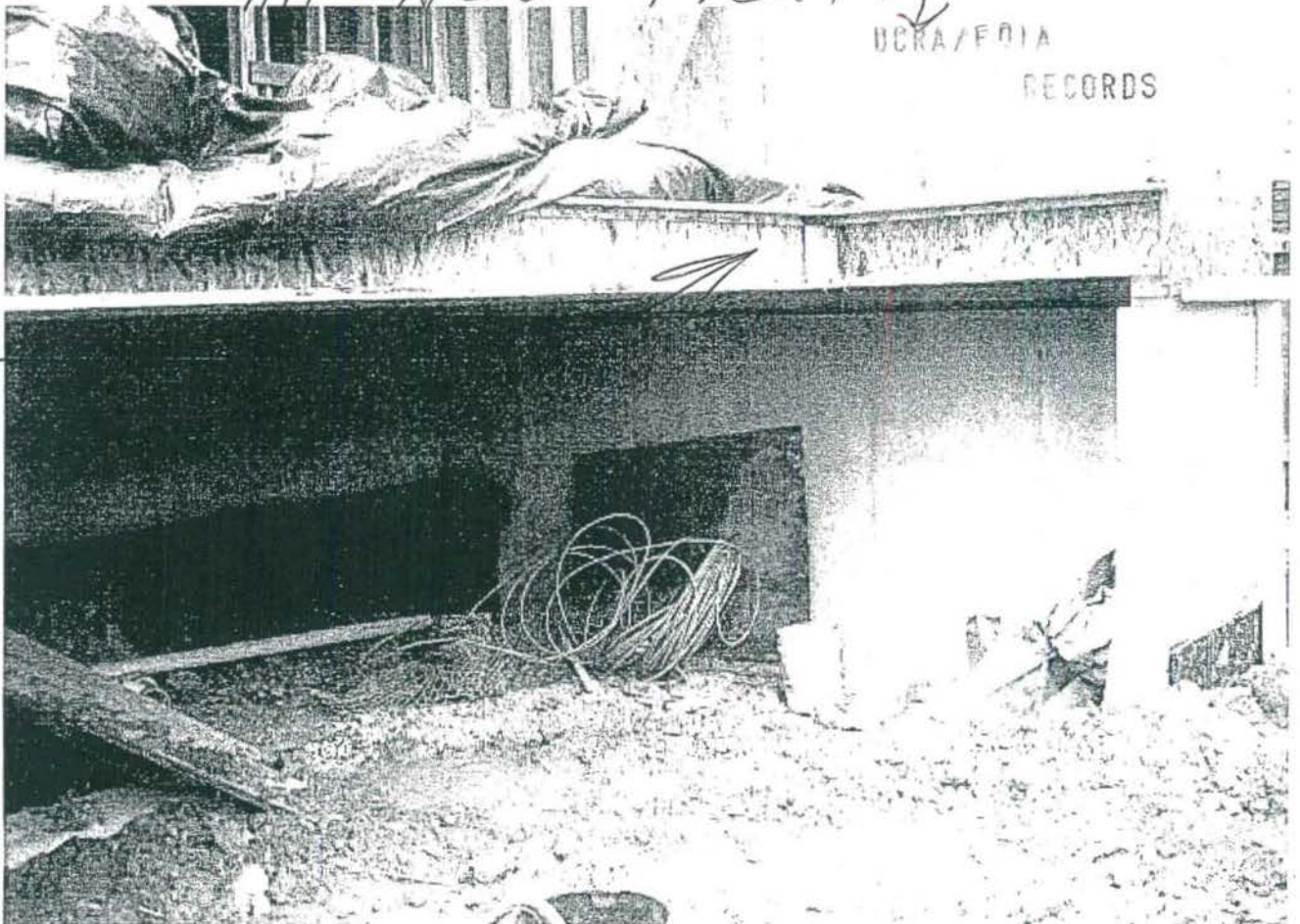
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All New Front

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Left Side



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Left Side
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photos By: Neil Letren

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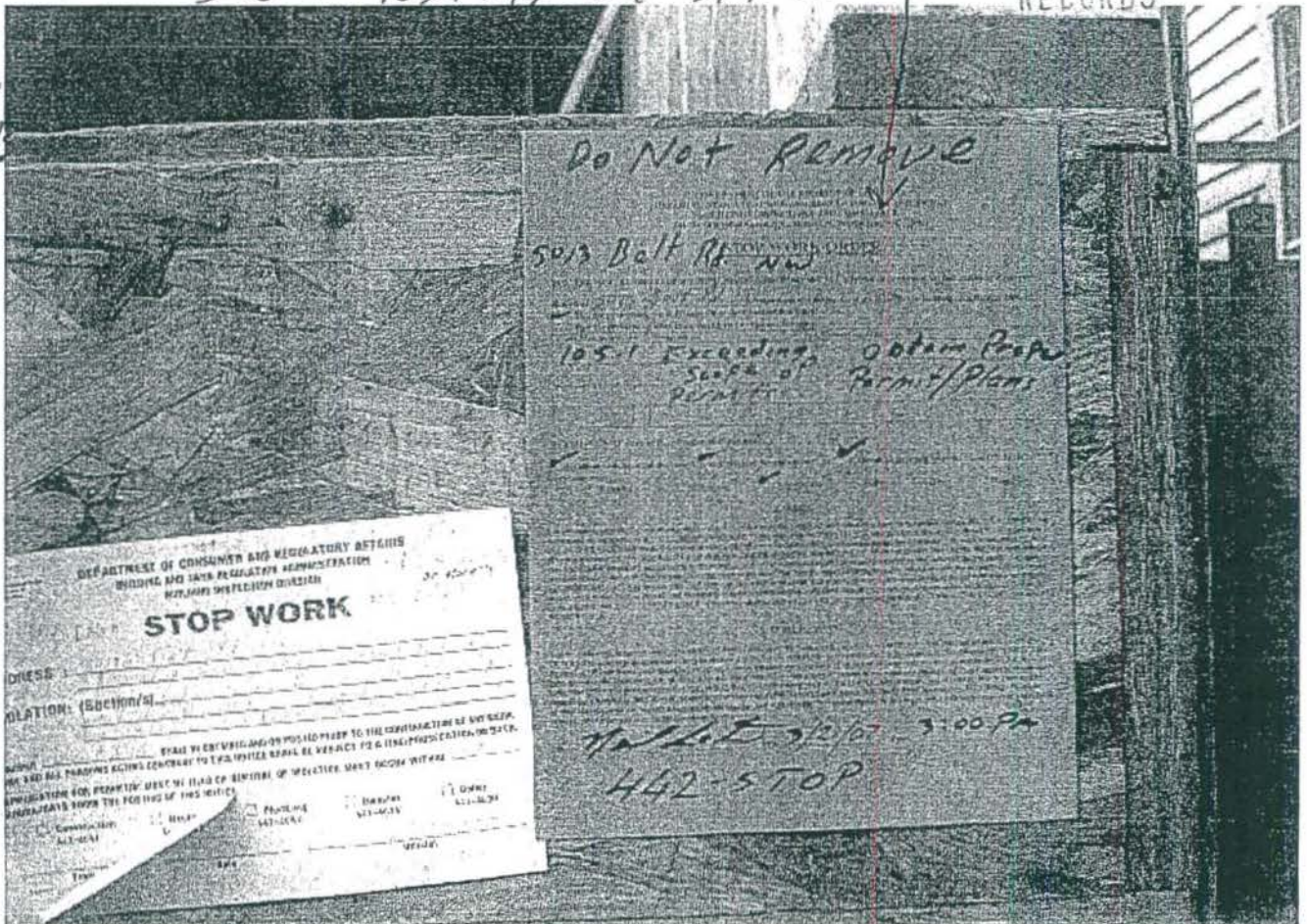
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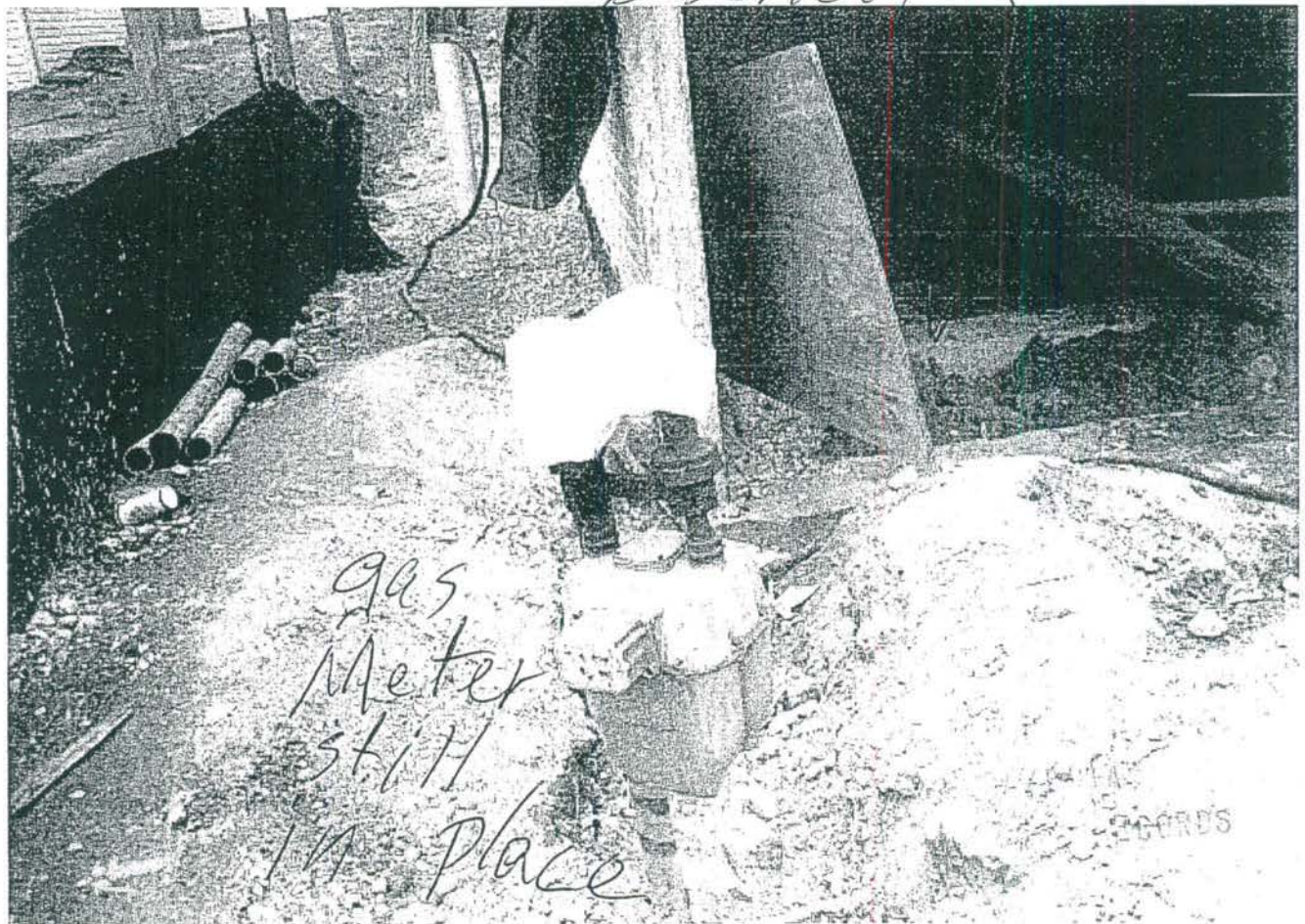
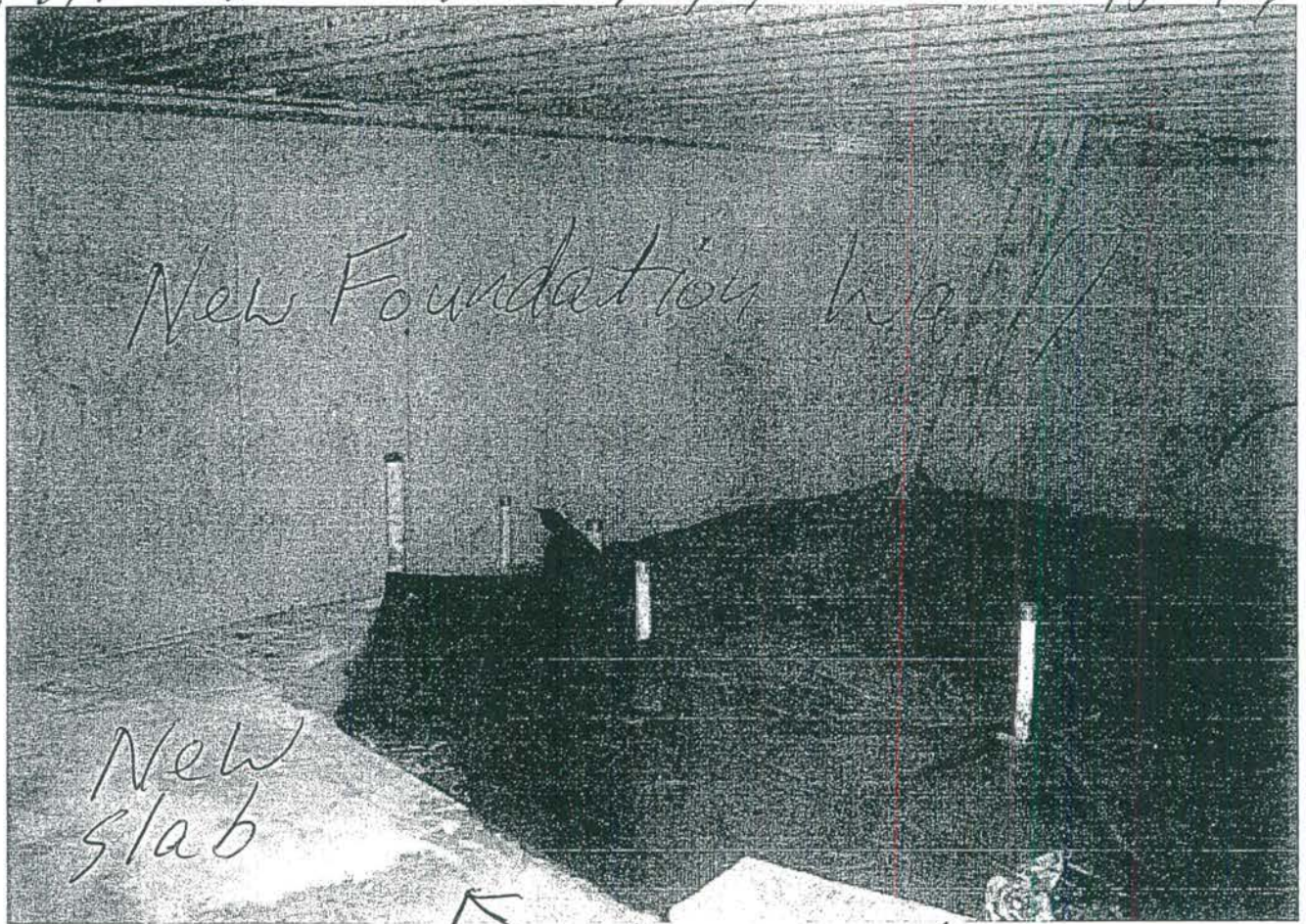
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Neighbour's House

RECORDS





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