APPLICATION ACCEPTED: September 4, 2009
DATE OF PUBLIC HEARING: December 1, 2009
TIME: 9:00 a.m.

County of Fairfax, Virginia

November 24, 2009

STAFF REPORT

SPECIAL PERMIT APPLICATION No. SP 2009-BR-090

BRADDOCK DISTRICT

APPLICANT:	Thien D. Vu
OWNERS:	Thien D. Vu & Loan M. Cao
ZONING:	R-C & W-S
LOCATION:	4409 Shirley Gate Road
SUBDIVISION:	Shirley Gate Park
ZONING ORDINANCE PROVISION:	8-914
TAX MAP:	56-4 ((6)) 5
LOT SIZE:	43,547 Sq. Feet
SP PROPOSAL:	Reduction to minimum yard requirements based on error in building location to permit accessory structures to remain 9.2 feet, 6.3 feet and 5.8 feet from side lot lines.

A copy of the BZA's Resolution setting forth this decision will be mailed within five (5) days after the decision becomes final.

The approval of this special permit does not interfere with, abrogate or annul any easement, covenants, or other agreements between parties, as they may apply to the property subject to this application.

Department of Planning and Zoning
Zoning Evaluation Division
12055 Government Center Parkway, Suite 801
Fairfax, Virginia 22035-5509
Phone 703-324-1290 FAX 703-324-3924
www.fairfaxcounty.gov/dpz/

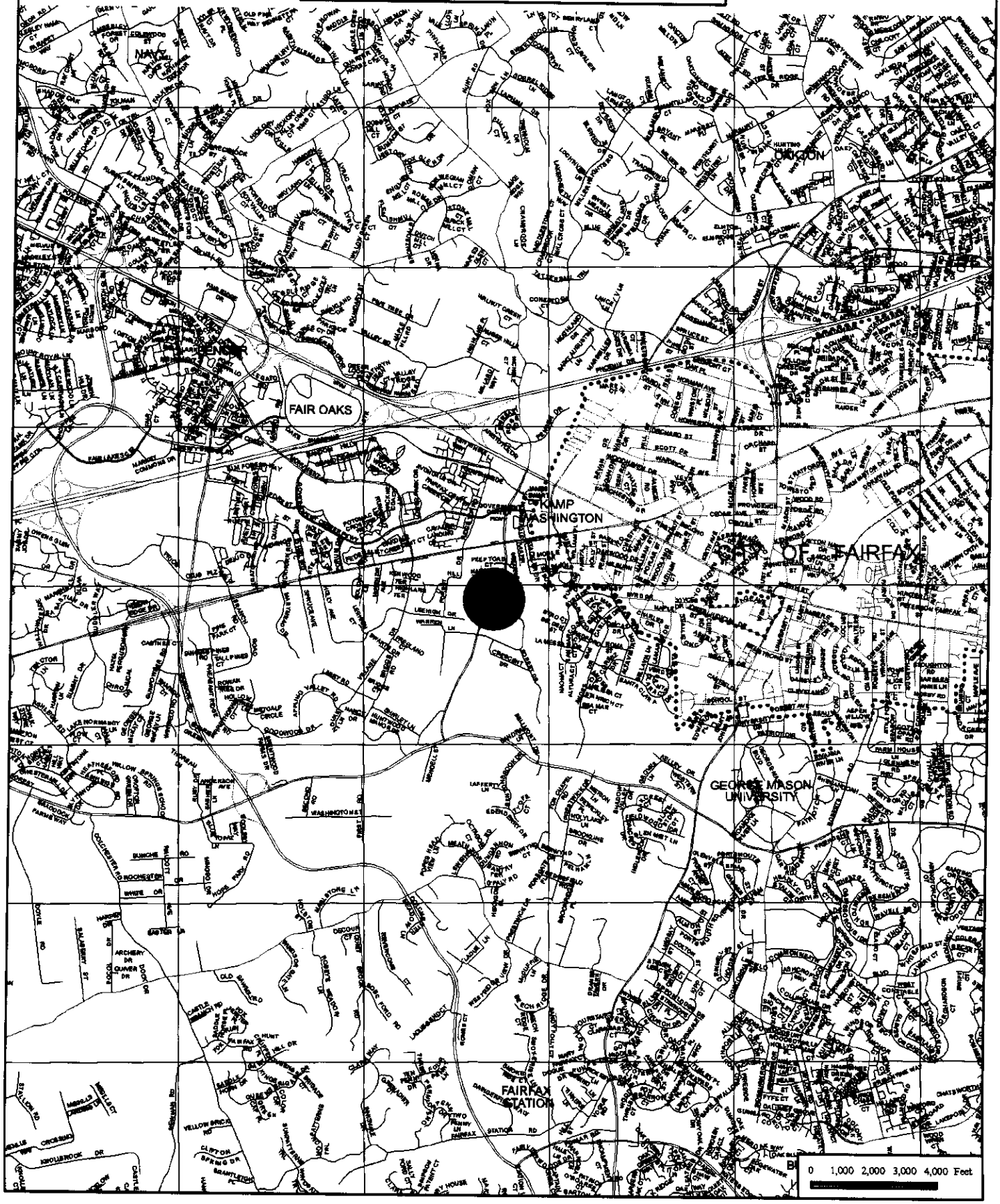
Excellence * Innovation * Stewardship
Integrity * Teamwork * Public Service

For additional information, call Zoning Evaluation Division, Department of Planning and Zoning at 324-1280, 12055 Government Center Parkway, Suite 801, Fairfax, Virginia 22035. **Board of Zoning Appeals' meetings are held in the Board Room, Ground Level, Government Center Building, 12000 Government Center Parkway, Fairfax, Virginia 22035-5505**.

Americans with Disabilities Act (ADA): Reasonable accommodation is available upon 7 days advance notice. For additional information on ADA call (703) 324-1334 or TTY 711 (Virginia Relay Center).

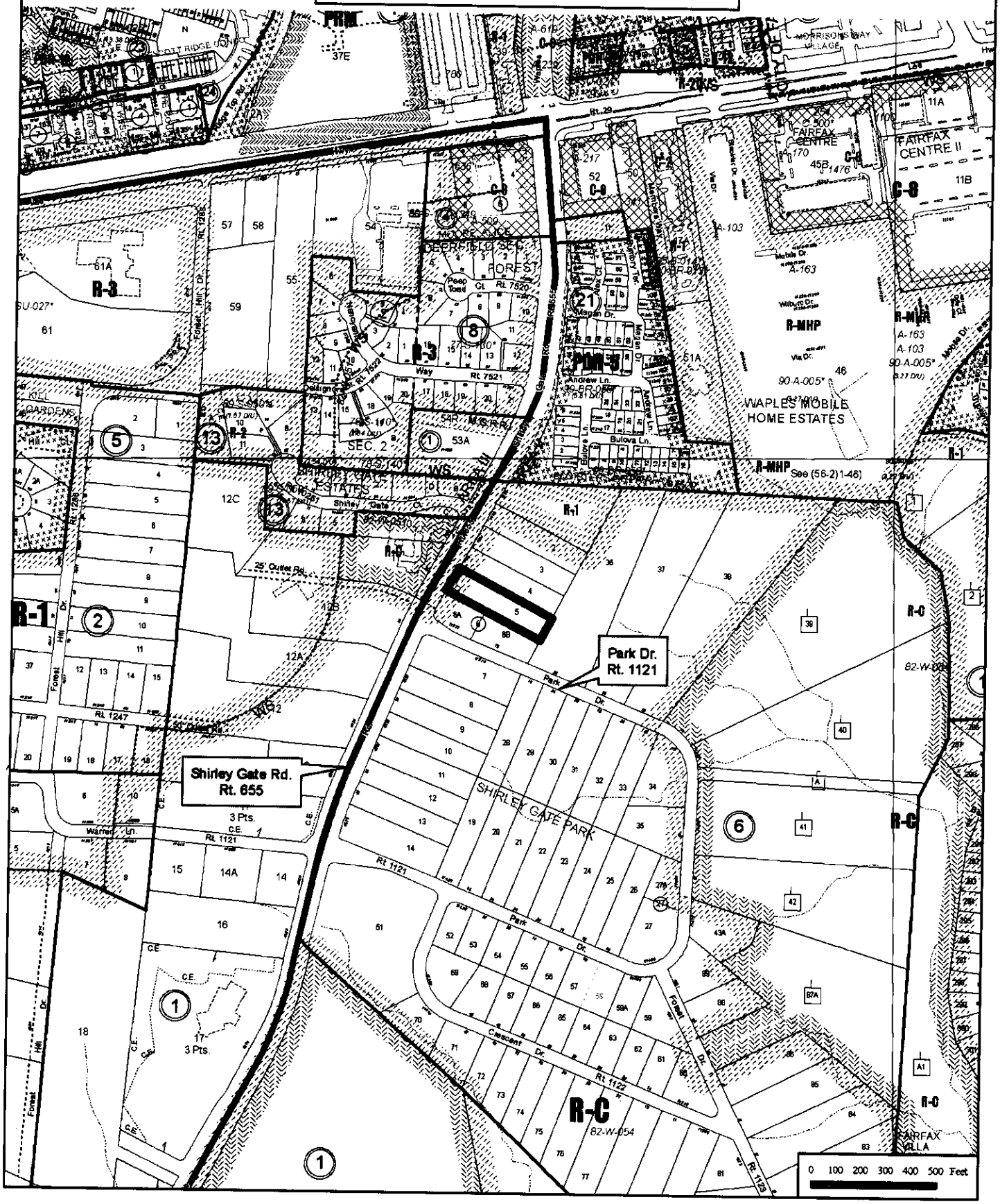
Special Permit
SP 2009-BR-090

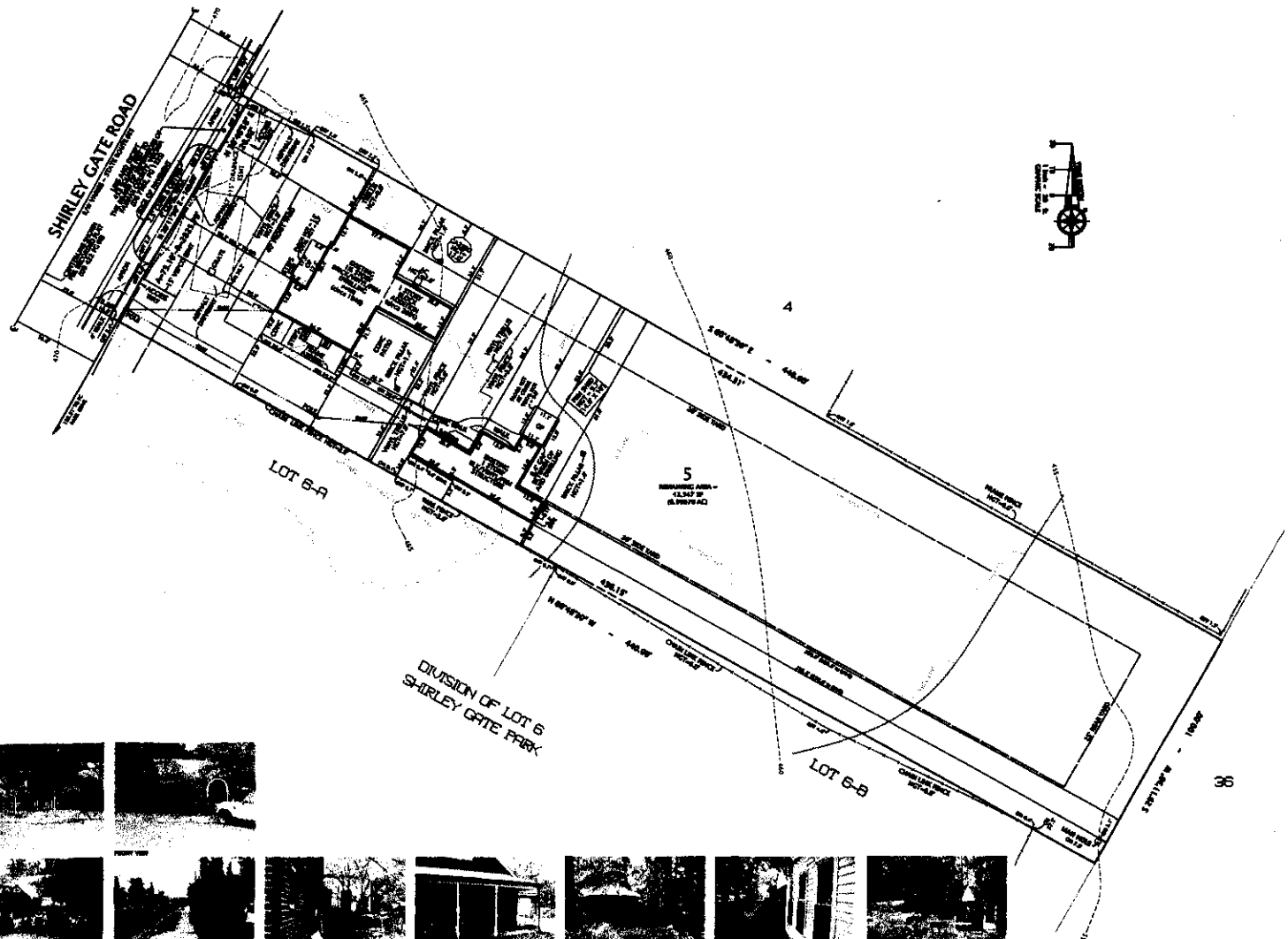
THIEN D. VU



Special Permit
SP 2009-BR-090

THIEN D. VU





NOTES

1. TAX MAP: 56-4-08-0005
2. ZONE: RC (RESIDENTIAL CONSERVATION 1 DU/AC)
3. LOT AREA: 0.99970 ACRE (43,547 SF)
4. REQUIRED YARDS:

FRONT:	=	40 FEET
SIDE:	=	20 FEET
REAR:	=	25 FEET

5. HEIGHTS:

DWELLING	=	17.0 FEET
ACCESSORY STRUCTURE	=	16.0 FEET
SHED	=	09.7 FEET
CP'S	=	AS NOTED
FENCES	=	AS NOTED
PILLARS/GAZEBO	=	AS NOTED

6. THIS PROPERTY IS NOT SERVED BY PUBLIC WATER. THIS PROPERTY IS SERVED BY PUBLIC SEWER. (FAIRFAX COUNTY REAL ESTATE ASSESSMENT LISTS SEWER AS NOT AVAILABLE)
7. THERE IS NO OBSERVABLE EVIDENCE OF GRAVE SITES OR BURIAL GROUNDS ON THIS PROPERTY.
8. ALL IMPROVEMENTS SHOWN ON THIS PLAT ARE EXISTING UNLESS DENOTED AS PROPOSED.
9. THE SURVEYOR IS NOT AWARE OF ANY UTILITY EASEMENTS 25 FEET IN WIDTH OR GREATER AFFECTING THIS PROPERTY.
10. TOPOGRAPHY DELINEATED HEREON WAS TAKEN FROM AVAILABLE RECORDS, IS SHOWN AT 5' INTERVALS, AND IS AERIAL.
11. THERE ARE NO FLOODPLAINS OR RESOURCE PROTECTION AREAS ON THIS PROPERTY.
12. #4408 GROSS FLOOR AREA:

BASEMENT FLOOR	=	1,907 SF
FIRST FLOOR	=	1,779 SF
SECOND FLOOR	=	793 SF
GROSS FLOOR AREA	=	3,889 SF

ACCESSORY STRUCTURE GROSS FLOOR AREA = 917 SF.
COMBINED GROSS FLOOR AREA = 4806 SF.
#4409 FLOOR AREA RATIO = GFA (3889) / LOT AREA (43547) = 0.09
COMB. FLOOR AREA RATIO = GFA (4806) / LOT AREA (43547) = 0.11

PLAT

SHOWING THE IMPROVEMENTS ON

LOT 5

SHIRLEY GATE PARK

LESS AND EXCEPT
453 SQUARE FEET TO THE
BOARD OF SUPERVISORS OF
FAIRFAX COUNTY, VIRGINIA
DB 7362, PG 1230

FAIRFAX COUNTY, VIRGINIA

BRADDOCK DISTRICT

SCALE: 1" = 20' JUNE 19, 2008
AUGUST 21, 2009 (LESS AND EXCEPT)

I HEREBY CERTIFY THAT THE POSITIONS OF ALL THE EXISTING IMPROVEMENTS HERE SHOWN COMPILED SUBSEQUENT TO A CURRENT FIELD SURVEY AND UNLESS OTHERWISE NOTED ARE ON VISIBLE IMPROVEMENTS AS OF THIS DATE.

THIS PLAT IS SUBJECT TO RESTRICTIONS OF RECORD.

A FULL SURVEY WAS NOT PERFORMED.

NO CORNERS SET/FOUND.

COMMONWEALTH OF VIRGINIA
06/19/2009
GEORGE M. O'QUINN
LICENSE NO.
George M. O'Quinn

CASE NAME

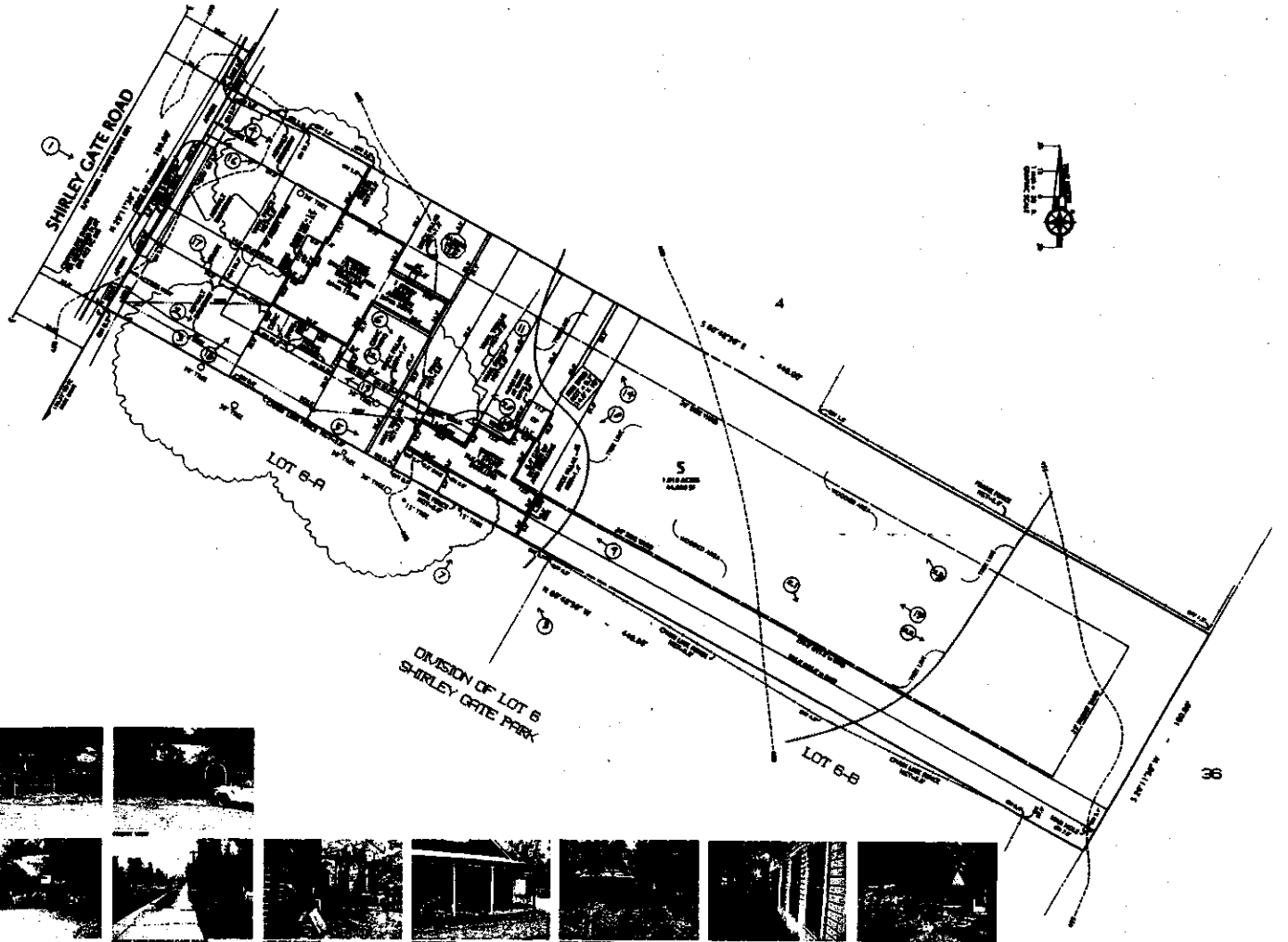
DOMINION Surveyors Group, LLC
10500-A1 PARK TOWN VILLAGE COURT
ALBEMARLE, VIRGINIA 22906
PHONE: 434-973-8215
FAX: 434-973-8216

#29-09

PHOTOGRAPHS OF THE APPLICATION PROPERTY AND ABUTTING PROPERTIES

June 22, 2009

RECEIVED
Department of Planning & Zoning
JUN 29 2009
Zoning Evaluation Division



NOTES

1. TAX MAP: 56-4-06-0005
2. ZONE: RC (RESIDENTIAL CONSERVATION 1 DU/AC)
3. LOT AREA: 1.040 ACRES (44,000 SF)
4. REQUIRED YARDS:

FRONT:	=	40 FEET
SIDE:	=	20 FEET
REAR:	=	25 FEET

5. HEIGHTS:

DWELLING	=	17.6 FEET
ACCESSORY STRUCTURE	=	16.9 FEET
SHED	=	68.7 FEET
GPS	=	AS NOTED
FENCES	=	AS NOTED
PILLARS/GAZEBO	=	AS NOTED

6. THIS PROPERTY IS NOT SERVED BY PUBLIC WATER. THIS PROPERTY IS SERVED BY PUBLIC SEWER, (FAIRFAX COUNTY REAL ESTATE ASSESSMENT LISTS SEWER AS NOT AVAILABLE)
7. THERE IS NO OBSERVABLE EVIDENCE OF CRAVE SITES OR BURIAL GROUNDS ON THIS PROPERTY.
8. ALL IMPROVEMENTS SHOWN ON THIS PLAT ARE EXISTING UNLESS DENOTED AS PROPOSED.
9. THE SURVEYOR IS NOT AWARE OF ANY UTILITY EASEMENTS 25 FEET IN WIDTH OR GREATER AFFECTING THIS PROPERTY.
10. TOPOGRAPHY DELINEATED HEREON WAS TAKEN FROM AVAILABLE RECORDS, IS SHOWN AT 5' INTERVALS, AND IS AERIAL.
11. THERE ARE NO FLOODPLAINS OR RESOURCE PROTECTION AREAS ON THIS PROPERTY.
12. #4480 GROSS FLOOR AREA:

BASEMENT FLOOR	=	1,407 SF
FIRST FLOOR	=	1,779 SF
SECOND FLOOR	=	293 SF
GROSS FLOOR AREA	=	3,588 SF

ACCESSORY STRUCTURE GROSS FLOOR AREA = 917 SF.
COMBINED GROSS FLOOR AREA = 4505 SF.
#4480 FLOOR AREA RATIO = GFA (3588) / LOT AREA (44000) = 0.09
COMB. FLOOR AREA RATIO = GFA (4505) / LOT AREA (44000) = 0.11

RECEIVED
Department of Planning & Zoning
JUN 19 2000
Zoning Evaluation Division

Locations & Orientation of Photographs

PLAT
SHOWING THE IMPROVEMENTS ON
LOT 5
SHIRLEY GATE PARK
FAIRFAX COUNTY, VIRGINIA
SPRINGFIELD DISTRICT
SCALE: 1" = 30' JUNE 19, 2000

06/13/2000
GEORGE M. SQUIER
LICENSED LAND SURVEYOR

CASE NAME:

DOMINION

#29-00

① Looking at front yard from across Shirley Gate Road

② Looking at southern side yard from the front yard

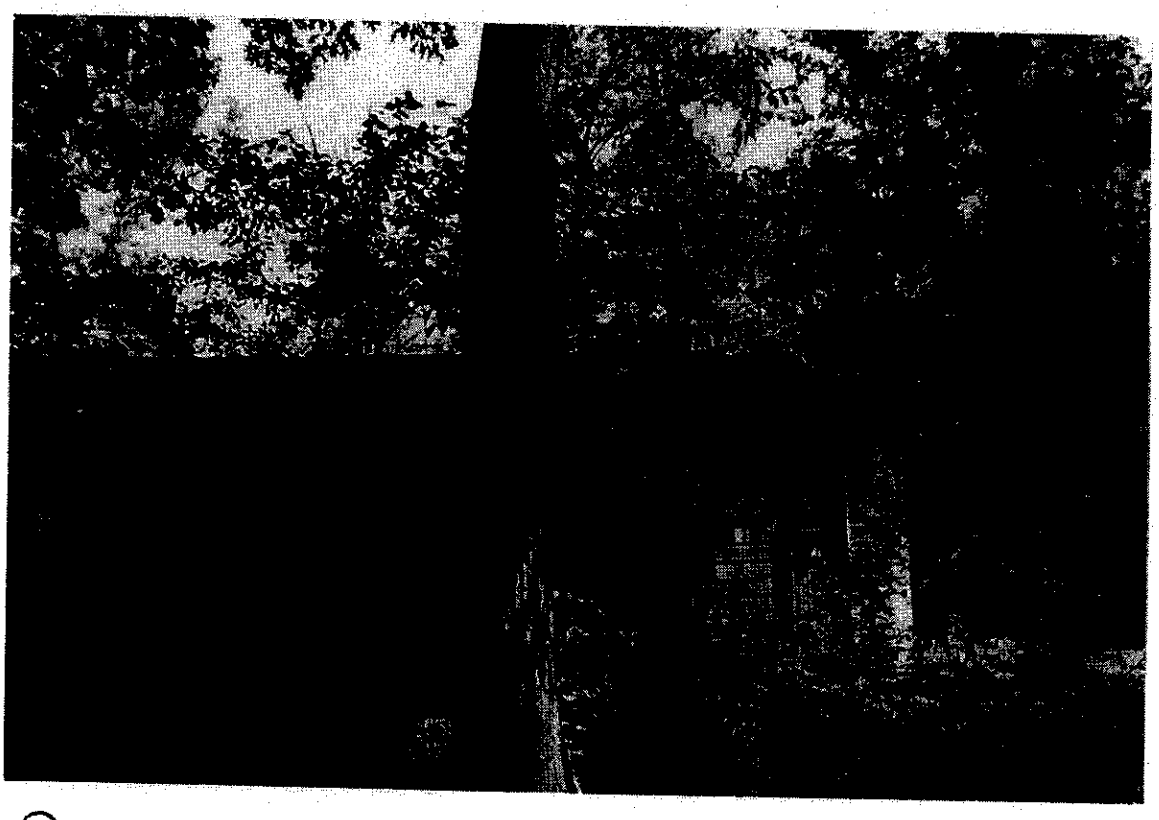
(3) Looking at southern side yard and part of existing house

(4) Looking from front yard toward northern side yard and part of existing house

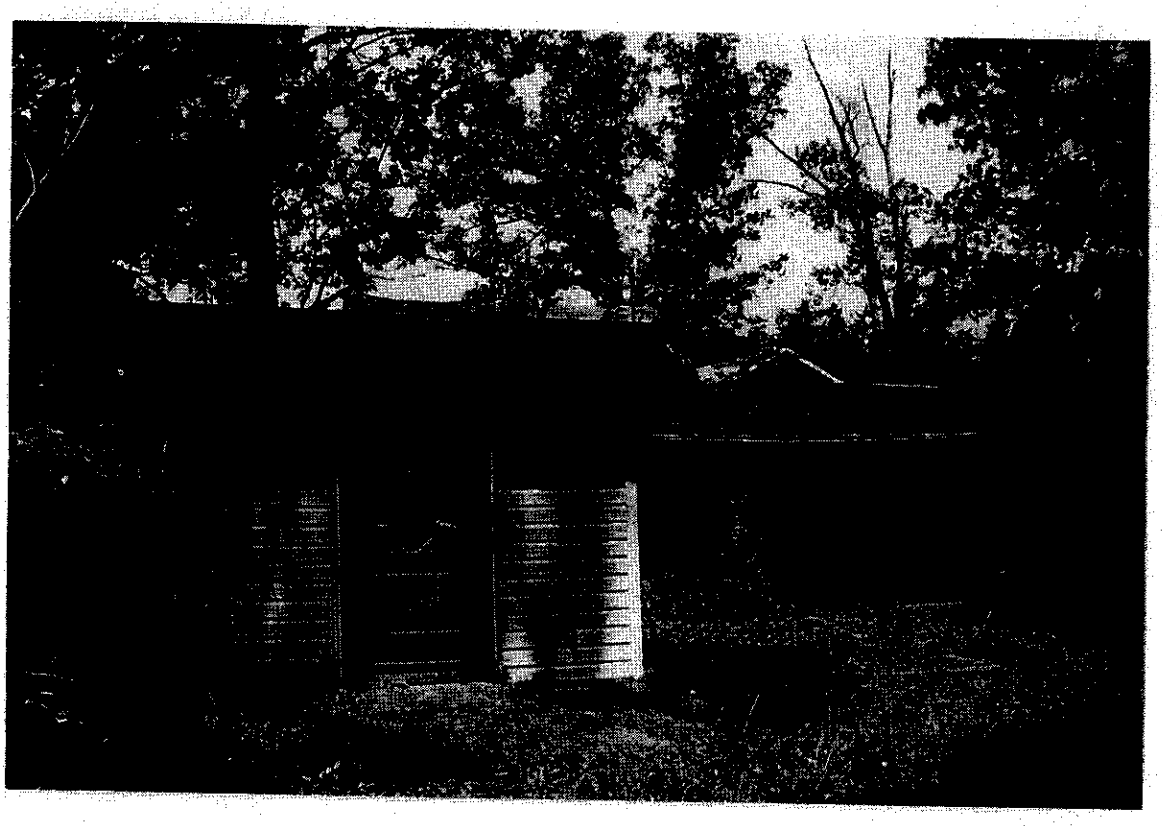
⑤ View of accessory structure and southern side yard

⑥ Looking at accessory structure from existing house

⑦ View of accessory structure from adjacent property



⑧ View of accessory structure from adjacent property

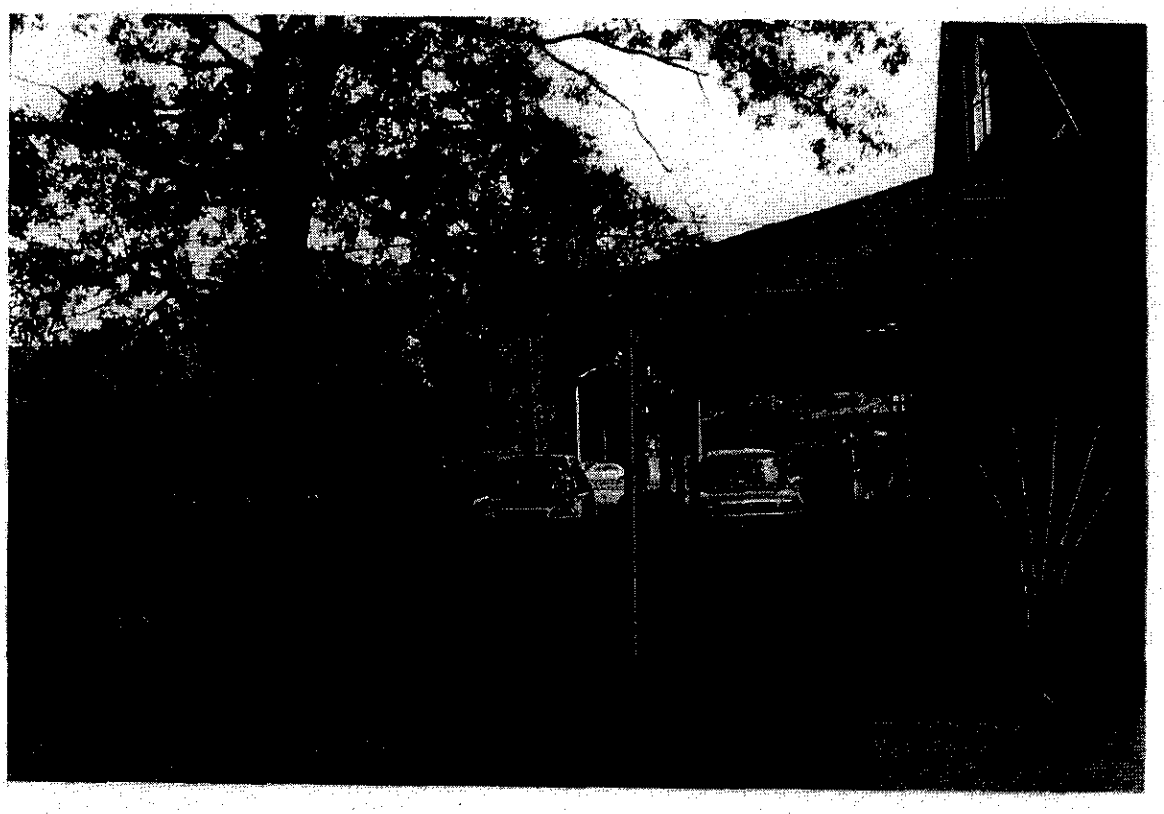


⑨ View of accessory structure

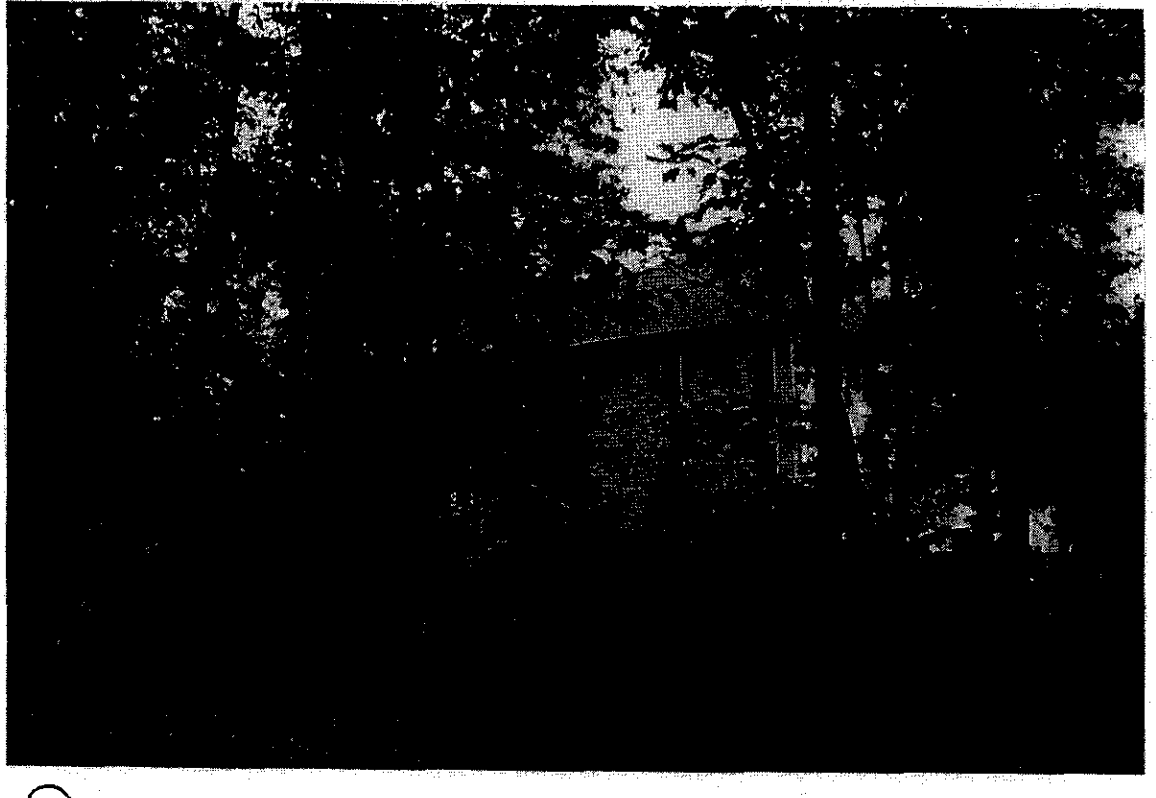
⑩ View of accessory structure from inside of property

(11) View of accessory structure from inside of property

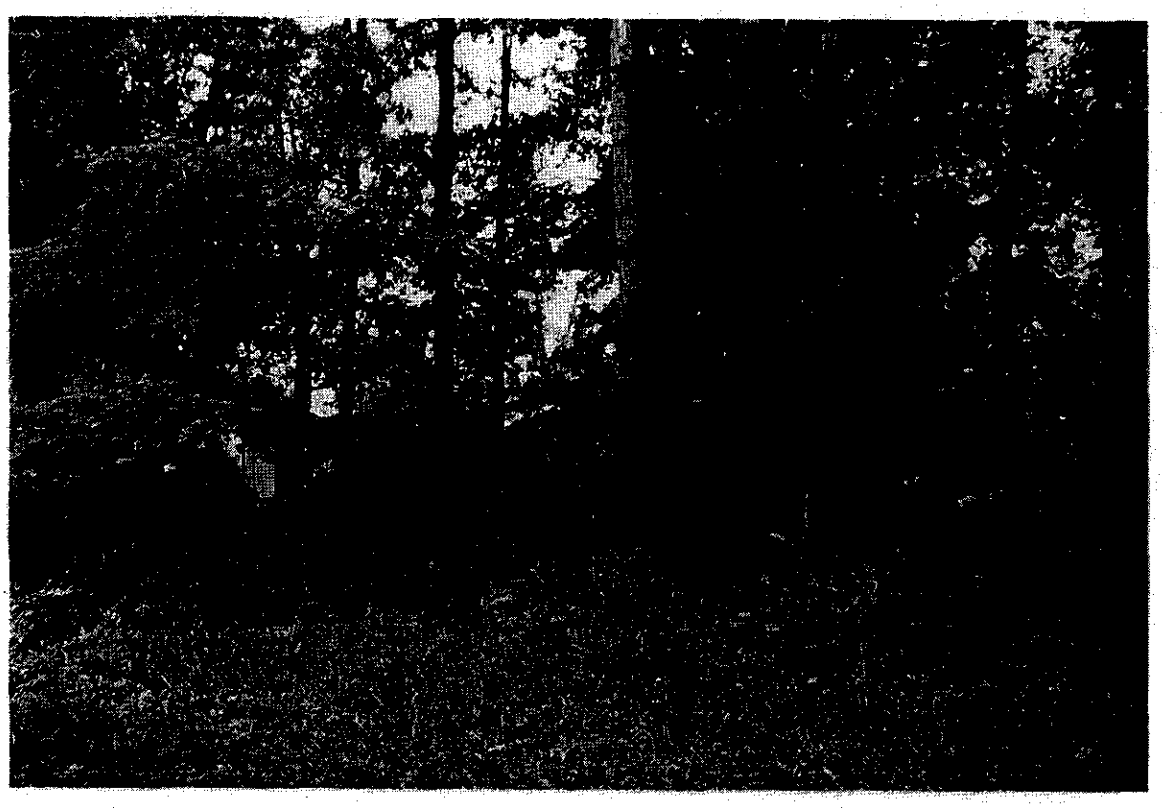
(12) View of accessory structure from inside of property



(13) Looking at southern side yard and toward Shirley Gate Road



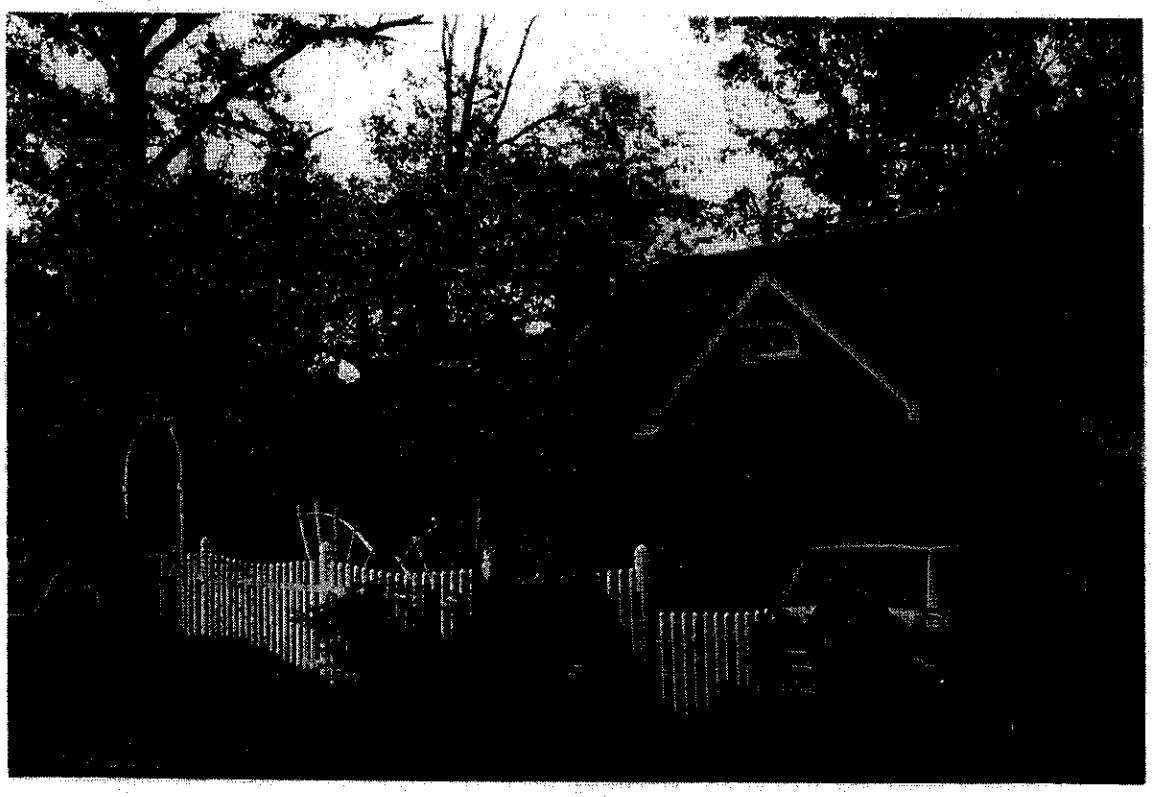
(14) Looking from rear yard at adjacent property located on north side of this property



(15) Looking toward the front of the property from rear yard

(16) Looking from front yard toward the adjacent property located on north side of this property

(17) Looking from front yard toward the adjacent property located on south side of this property



(18) Looking from southern side yard toward existing house and part of front yard

(19) View of existing shed

(20) View of rear portion of existing house

(21) Looking from rear yard toward adjacent property located on south side of this property

(22) Looking at eastern portion of rear yard from inside the property

(23) Looking from rear yard toward adjacent property located on north side of this property

(24) Looking at gazebo from rear corner of house

(25) Looking at trellis from front yard

DESCRIPTION OF THE APPLICATIONS

The applicant is requesting approval of three special permits for the subject property to permit reduction in minimum yard requirements based on errors in building locations for detached accessory structures. The first accessory structure is a one-story block and vinyl frame structure that is located 9.2 feet from the southern side lot line. The second structure is a detached gazebo that is located 6.3 feet from the northern side lot line. The last accessory structure is a detached trellis located 5.8 feet from the northern side lot line.

	Yard	Min. Yard Req.*	Structure Location	Amount of Error	Percent of Error
Special Permit 1 (Frame Struct.)	Southern Side	20 feet	9.2 feet	10.8 feet	54 %
Special Permit 2 (Gazebo)	Northern Side	20 feet	6.3 feet	13.7 feet	68.5 %
Special Permit 3 (Trellis)	Northern Side	20 feet	5.8 feet	14.2 feet	71 %

* Minimum yard requirement per Section 10-104

LOCATION AND CHARACTER

Character of the Area

	Zoning	Use
North	R-C & W-S	Single Family Detached Dwellings
South	R-C & W-S	Single Family Detached Dwellings
East	R-C & W-S	Single Family Detached Dwellings
West	R-C & W-S	Single Family Detached Dwellings & Land owned by the Board of Supervisors for a Fairfax County Probation House

Existing Site Description

The 43,547 square foot lot is developed with a one and a half-story with full basement, 2,325 square foot single family detached dwelling constructed in 1949. A second dwelling unit, referred to as a one-story block and vinyl frame structure, had been constructed on the subject property; but county records to not indicate when this took place. This one-story block and vinyl frame structure has since had the kitchen facilities removed so that it is no longer a second dwelling unit; however, the structure does not meet Zoning Ordinance location regulations and is one of the requests associated with this application.

The subject property has a slight change in topography, with the grade sloping downward from the front towards the rear. There is dense vegetation and wooded areas throughout the entire lot; including a densely wooded area directly in front of the one-story block and vinyl frame structure.

There is a 15-foot wide VEPCO easement located along the front lot line of the property as well as a 15-foot wide drainage easement that diagonally cuts through the front yard. An existing asphalt driveway covers a majority of the surface of the front yard that includes coverage of the easements. The applicant will be required to obtain a waiver for the existing driveway to remain within the easements. Provisions in the Zoning Ordinance that reference percentage of allowed coverage by driveways is only applicable to the R-1 through R-4 zoning districts; therefore, since this lot is within an R-C district, the percentage of front yard coverage does not apply.

ANALYSIS OF SPECIAL PERMIT APPLICATION

- **Title of SP Plat:** Plat Showing the Improvements on Lot 5, Shirley Gate Park
- **Prepared By:** George M. O'Quinn, Dominion Surveyors, Inc., dated June 19, 2009, revised through August 21, 2009
- **Building Permit Required for One-Story Brick and Vinyl Frame Structure:** Yes
- **Obtained:** No
- **Location Error Made By:** Previous Owners
- **Building Permit Required for Gazebo:** Yes, greater than 150 square feet in size
- **Obtained:** No
- **Location Error Made By:** Current Owners
- **Building Permit Required for Trellis:** No, less than 150 square feet in size
- **Location Error Made By:** Current Owners

BACKGROUND

The existing single-family detached dwelling was constructed in 1949 as a one and a half story with basement single-family dwelling based on real estate assessments. A Notice of Violation (NOV) was issued on November 25, 2008 for the subject property for excessive dwelling units with the second dwelling unit constructed without building permits and too close to the side lot line. This NOV identified the one-story block and vinyl frame structure in this special permit application as another dwelling unit on the property. The applicant states that they have removed the kitchen in the unit to comply with the regulations. A development condition has been included to address this issue. A copy of the NOV can be found in Appendix 4.

The Notice of Violation was appealed to the BZA and a public hearing was held on March 31, 2009, where the BZA took action to uphold the Zoning Administrator. The Zoning Administrator maintained that the structure did not qualify as a legal nonconforming use or fall under the Vested Rights provisions of §15.2307 of the State Code. The only way to bring the structure into compliance was to remove all kitchen facilities within the structure and obtain a special permit for error in building location for the structure's location. A copy of the Clerk's letter and appeal staff report outlining the history in more detail can be found in Appendix 5.

The gazebo and trellis were identified when the applicant submitted the special permit application for the location of the one-story brick and frame structure.

The Board of Zoning Appeals (BZA) has not heard any similar applications in the neighborhood.

ZONING ORDINANCE REQUIREMENTS (See Appendix 6)

- General Special Permit Standards (Sect. 8-006)
- Group 9 Standards (Sect. 8-903)
- Provisions for Approval of Reduction of the Minimum Yard Requirements Based on an Error in Building Location (Sect. 8-914)
- Location Regulations (Sect. 10-104)

CONCLUSION

If it is the intent of the BZA to approve this application, the BZA should condition its approval by requiring conformance with the conditions set forth in Appendix 1 of this report, Proposed Development Conditions.

The approval of this special permit does not interfere with, abrogate or annul any easement, covenants, or other agreements between parties, as they may apply to the property subject to this application.

APPENDICES

1. Proposed Development Conditions
2. Applicant's Affidavit
3. Applicant's Statement of Justification
4. Notice of Violation
5. Appeal Resolution and Staff Report
6. Zoning Ordinance Provisions

PROPOSED DEVELOPMENT CONDITIONS

SP 2009-BR-090

November 24, 2009

1. This special permit is approved for the location of existing detached accessory structures (one-story block and vinyl frame structure, gazebo and trellis) as shown on the plat prepared by George M. O'Quinn, Dominion Surveyors, Inc., dated June 19, 2009, revised through August 21, 2009, submitted with this application and is not transferable to other land.

2. Within 120 days of approval of this application, building permits and final inspections for the detached structures (one-story block and vinyl frame structure and gazebo) shall be obtained or the structures shall be removed or brought into compliance with Zoning Ordinance requirements.

3. Within 120 days of approval of this application, the kitchen shall be removed from the one story brick and vinyl frame building by:

    a. Removing, on a permanent basis, any ovens, microwave, ranges, sinks, cabinets, countertops, refrigerators, and freezers or combinations thereof; all other appliances and accoutrements used or intended for use for cooking or eating, and all plumbing, electrical, and gas connections and piping; and

    b. Utilities referenced above for the kitchen to be demolished are to be capped and sealed in the wall cavities.

    The Zoning Inspector shall be contacted to perform an inspection to determine conformance.

4. Within 6 months of approval of this special permit, the applicant shall apply for and gain approval and/or waiver for the existing driveway to remain within the easements or the driveway or portions thereof shall be removed from the easements.

This approval, contingent upon the above-noted conditions, shall not relieve the applicant from compliance with the provisions of any applicable ordinances, regulations or adopted standards.

Application No.(s): SP 2009-BR-010
(county-assigned application number(s), to be entered by County Staff)

SPECIAL PERMIT/VARIANCE AFFIDAVIT

DATE: July 14, 2009
(enter date affidavit is notarized)

I, Quy V. Do, do hereby state that I am an
(enter name of applicant or authorized agent)

(check one) [ ] applicant
[✓] applicant's authorized agent listed in Par. 1(a) below

10527

and that, to the best of my knowledge and belief, the following is true:

1(a). The following constitutes a listing of the names and addresses of all **APPLICANTS, TITLE OWNERS, CONTRACT PURCHASERS,** and **LESSEES** of the land described in the application,* and, if any of the foregoing is a **TRUSTEE,**** each **BENEFICIARY** of such trust, and all **ATTORNEYS** and **REAL ESTATE BROKERS,** and all **AGENTS** who have acted on behalf of any of the foregoing with respect to the application:

(NOTE: All relationships to the application listed above in **BOLD** print must be disclosed. Multiple relationships may be listed together, e.g., **Attorney/Agent, Contract Purchaser/Lessee, Applicant/Title Owner**, etc. For a multiparcel application, list the Tax Map Number(s) of the parcel(s) for each owner(s) in the Relationship column.)

NAME (enter first name, middle initial, and last name)	**ADDRESS** (enter number, street, city, state, and zip code)	**RELATIONSHIP(S)** (enter applicable relationships listed in **BOLD** above)
Thien D. Vu & Loan M. Cao	4409 Shirley Gate Road Fairfax, VA 22030	Title owners / Applicants
Quy V. Do Do Architects, LLC	5627 Rapid Run Court Burke, VA 22015	Architect / Agent " "

(check if applicable) [ ] There are more relationships to be listed and Par. 1(a) is continued on a "Special Permit/Variance Attachment to Par. 1(a)" form.

* In the case of a condominium, the title owner, contract purchaser, or lessee of 10% or more of the units in the condominium.

** List as follows: Name of trustee, Trustee for (name of trust, if applicable), for the benefit of: (state name of each beneficiary).

Application No.(s): SP 2009-BR-090

(county-assigned application number(s), to be entered by County Staff)

SPECIAL PERMIT/VARIANCE AFFIDAVIT

DATE: July 14, 2009 (enter date affidavit is notarized)

10524a

1(b). The following constitutes a listing*** of the **SHAREHOLDERS** of all corporations disclosed in this affidavit who own 10% or more of any class of stock issued by said corporation, and where such corporation has 10 or less shareholders, a listing of all of the shareholders:

(**NOTE**: Include **SOLE PROPRIETORSHIPS, LIMITED LIABILITY COMPANIES,** and **REAL ESTATE INVESTMENT TRUSTS** herein.)

CORPORATION INFORMATION

NAME & ADDRESS OF CORPORATION: (enter complete name, number, street, city, state, and zip code)
Do Architects, LLC
5627 Rapid Run Court
Burke, VA 22015

DESCRIPTION OF CORPORATION: (check one statement)

[✓] There are 10 or less shareholders, and all of the shareholders are listed below.

[ ] There are more than 10 shareholders, and all of the shareholders owning 10% or more of any class of stock issued by said corporation are listed below.

[ ] There are more than 10 shareholders, but no shareholder owns 10% or more of any class of stock issued by said corporation, and no shareholders are listed below

NAMES OF SHAREHOLDERS: (enter first name, middle initial, and last name)
Quy V. Do

(check if applicable) [ ] There is more corporation information and Par. 1(b) is continued on a "Special Permit/Variance Attachment 1(b)" form.

*** All listings which include partnerships, corporations, or trusts, to include the names of beneficiaries, must be broken down successively until (a) only individual persons are listed or (b) the listing for a corporation having more than 10 shareholders has no shareholder owning 10% or more of any class of stock. ***In the case of an APPLICANT, TITLE OWNER, CONTRACT PURCHASER, or LESSEE* of the land that is a partnership, corporation, or trust, such successive breakdown must include a listing and further breakdown of all of its partners, of its shareholders as required above, and of beneficiaries of any trusts. Such successive breakdown must also include breakdowns of any partnership, corporation, or trust owning 10% or more of the APPLICANT, TITLE OWNER, CONTRACT PURCHASER or LESSEE* of the land. Limited liability companies and real estate investment trusts and their equivalents are treated as corporations, with members being deemed the equivalent of shareholders; managing members shall also be listed.*** Use footnote numbers to designate partnerships or corporations, which have further listings on an attachment page, and reference the same footnote numbers on the attachment page.

Application No.(s): SP 2009-BR-090

(county-assigned application number(s), to be entered by County Staff)

SPECIAL PERMIT/VARIANCE AFFIDAVIT

DATE: July 14, 2009

(enter date affidavit is notarized)

105217a

1(c). The following constitutes a listing*** of all of the **PARTNERS, both GENERAL and LIMITED**, in any partnership disclosed in this affidavit:

PARTNERSHIP INFORMATION

PARTNERSHIP NAME & ADDRESS: (enter complete name, number, street, city, state, and zip code)
N/A

(check if applicable) [ ] The above-listed partnership has no limited partners.

NAMES AND TITLE OF THE PARTNERS (enter first name, middle initial, last name, and title, e.g. **General Partner, Limited Partner, or General and Limited Partner)**
N/A

(check if applicable) [ ] There is more partnership information and Par. 1(c) is continued on a "Special Permit/Variance Attachment to Par. 1(c)" form.

*** All listings which include partnerships, corporations, or trusts, to include the names of beneficiaries, must be broken down successively until: (a) only individual persons are listed or (b) the listing for a corporation having more than 10 shareholders has no shareholder owning 10% or more of any class of stock. ***In the case of an APPLICANT, TITLE OWNER, CONTRACT PURCHASER, or LESSEE* of the land that is a partnership, corporation, or trust, such successive breakdown must include a listing and further breakdown of all of its partners, of its shareholders as required above, and of beneficiaries of any trusts. Such successive breakdown must also include breakdowns of any partnership, corporation, or trust owning 10% or more of the APPLICANT, TITLE OWNER, CONTRACT PURCHASER, or LESSEE* of the land. Limited liability companies and real estate investment trusts and their equivalents are treated as corporations, with members being deemed the equivalent of shareholders; managing members shall also be listed.*** Use footnote numbers to designate partnerships or corporations, which have further listings on an attachment page, and reference the same footnote numbers on the attachment page.

Application No.(s): SP 2009-BR-090

(county-assigned application number(s), to be entered by County Staff)

SPECIAL PERMIT/VARIANCE AFFIDAVIT

DATE: July 14, 2009

(enter date affidavit is notarized)

10521a

1(d). One of the following boxes **must** be checked:

[ ] In addition to the names listed in Paragraphs 1(a), 1(b), and 1(c) above, the following is a listing of any and all other individuals who own in the aggregate (directly and as a shareholder, partner, and beneficiary of a trust) 10% or more of the **APPLICANT, TITLE OWNER, CONTRACT PURCHASER,** or **LESSEE*** of the land:

[✓] Other than the names listed in Paragraphs 1(a), 1(b), and 1(c) above, no individual owns in the aggregate (directly and as a shareholder, partner, and beneficiary of a trust) 10% or more of the **APPLICANT, TITLE OWNER, CONTRACT PURCHASER,** or **LESSEE*** of the land.

2. That no member of the Fairfax County Board of Zoning Appeals, Planning Commission, or any member of his or her immediate household owns or has any financial interest in the subject land either individually, by ownership of stock in a corporation owning such land, or through an interest in a partnership owning such land.

EXCEPT AS FOLLOWS: (**NOTE**: If answer is none, enter "NONE" on the line below.)

NONE

(check if applicable) [ ] There are more interests to be listed and Par. 2 is continued on a "Special Permit/Variance Attachment to Par. 2" form.

Application No.(s): SP 2009-BR-090

(county-assigned application number(s), to be entered by County Staff)

SPECIAL PERMIT/VARIANCE AFFIDAVIT

DATE: July 14, 2009
(enter date affidavit is notarized)

105217a

3. That within the twelve-month period prior to the public hearing of this application, no member of the Fairfax County Board of Zoning Appeals, Planning Commission, or any member of his or her immediate household, either directly or by way of partnership in which any of them is a partner, employee, agent, or attorney, or through a partner of any of them, or through a corporation in which any of them is an officer, director, employee, agent, or attorney or holds 10% or more of the outstanding bonds or shares of stock of a particular class, has, or has had any business or financial relationship, other than any ordinary depositor or customer relationship with or by a retail establishment, public utility, or bank, including any gift or donation having a value of more than $100, singularly or in the aggregate, with any of those listed in Par. 1 above.

EXCEPT AS FOLLOWS: (NOTE: If answer is none, enter "NONE" on line below.)

NONE

(NOTE: Business or financial relationships of the type described in this paragraph that arise after the filing of this application and before each public hearing must be disclosed prior to the public hearings. See Par. 4 below.)

(check if applicable) [ ] There are more disclosures to be listed and Par. 3 is continued on a "Special Permit/Variance Attachment to Par. 3" form.

4. **That the information contained in this affidavit is complete, that all partnerships, corporations, and trusts owning 10% or more of the APPLICANT, TITLE OWNER, CONTRACT PURCHASER, or LESSEE* of the land have been listed and broken down, and that prior to each and every public hearing on this matter, I will reexamine this affidavit and provide any changed or supplemental information, including business or financial relationships of the type described in Paragraph 3 above, that arise on or after the date of this application.**

WITNESS the following signature:

(check one) [ ] Applicant [✓] Applicant's Authorized Agent

Quy V. Do, Agent
(type or print first name, middle initial, last name, and title of signee)

Subscribed and sworn to before me this 14th day of July 2009, in the State/Comm. of VIRGINIA, County/City of FAIRFAX

Notary Public

My commission expires: JAN 31, 2012

BRANDY H. CARNEY
NOTARY PUBLIC
COMMONWEALTH OF VIRGINIA
MY COMMISSION EXPIRES JAN. 31, 2012
COMMISSION # 7196083

STATEMENT OF JUSTIFICATION

Re: Application for Special Permit for Reduction of Side Yard Requirement
Based on Error in Building Location
Tax Map 056-4/06/0005
4409 Shirley Gate Road, Fairfax, VA 22030

Our property was developed with a one and a half – story single family, 2,325 sq. ft. detached dwelling unit with basement constructed in 1949. An accessory structure is now located about 9' from the southern side lot line of the property and was built by the previous owners, Frank and Marjorie Jenkins. The side yard required by zoning regulations for our property is 20 feet. We did not realize that this construction may have been done in violation of the zoning code until Fairfax County notified us of this violation in 2008 and requested that we take certain measures to fix it.

County records show that on February 25, 1986 a Notice of Violation was issued to Frank and Marjorie Jenkins for maintaining two separate dwelling units on the lot and on March 4, 1986 another Notice of Violation was issued to them for three commercial vehicles and a storage yard on the property. The records do not show how the violation regarding the second dwelling unit was resolved, but it appears that the other violations were resolved on April 2, 1986 when the commercial vehicles and storage were removed from the property.

We purchased this property in 1988 with the understanding that it was free and clear of any errors or violations. Therefore we truly believe that we should not be penalized unfairly for any violation that was performed by the previous owners. Therefore we are applying for a reduction of the minimum side yard from 20 feet to 9.2 feet based on an error in building location in order to permit the existing accessory structure to remain where it is now located. We confirm that this structure shall not contain a second dwelling unit or a second kitchen.

In addition to the above structure, we also apply for reductions of the minimum side yard from 20 feet to 6.3 feet and 5.8 feet respectively based on errors in building location for an existing gazebo and an existing trellis in order to permit them to remain where they are now located in the northern side yard. We installed them around 1995 without building permits or

contracts because we mistakenly thought they were prefabricated and decorative items that did not need to be permitted. We also were not aware of side yard requirements for these two items.

It is submitted that this application meets the standards of Paragraph 2 of Section 8-914 as follows:

1/ The errors exceed 10 percent of the measurements involved.

2/ The noncompliance regarding the accessory structure was done in good faith and through no fault of the property owner in that the property owner purchased the property in the current condition.

3/ Reductions for structures that have been in place for such a long time will not impair the purpose and intent of the Ordinance. It is believed that the accessory structure was constructed prior to the adoption of the Residential Conservation (R-C) District being imposed. The previous Zoning Ordinance in 1960, when it is believed that the accessory structure was constructed, did not have a height limitation for accessory structures and if the structure was of a masonry material could be up to 5 feet from the side lot line provided it was a certain distance from the main dwelling. It appears that this structure meets those requirements.

4/ Reductions will not be detrimental to the use and enjoyment of other property in the immediate vicinity.

5/ Reductions to permit the structures to remain will not create an unsafe condition with respect to both property and the public streets.

6/ To force compliance would cause unreasonable hardship upon the owner since the structures would have to be removed, which would be a considerable cost since the materials that might have been used in the construction are not known.

7/ The reductions will not result in an increase in density or floor area ratio from that permitted by the applicable zoning district regulations.

The following special permit justification questions do not apply to this request since this is a single family home:

- Types of operation(s).
- Hours of operation.
- Estimated number of patrons / clients / patients / pupils / etc.
- Proposed number of employees / attendants / teachers / etc.
- Estimated traffic impact of the proposed use, including the maximum expected trip generation and the distribution of such trips by mode and time of day.
- A listing, if known, of all hazardous waste as set forth in Title 40, Code of Federal Regulations Parts 114.4 and 355; all hazardous waste as set forth in Virginia Department of Environmental Quality Hazardous Waste Management Regulations; and/or petroleum products as defined in Title 40, Code of Federal Regulations Part 280; to be generated, utilized, stored, treated, and/or disposed of on site and the size and contents of any existing or proposed storage tanks or containers.

Thank you for your consideration of this request.

APPENDIX 4

CEST Return Copy

ST1

County of Fairfax, Virginia

To protect and enrich the quality of life for the people, neighborhoods and diverse communities of Fairfax County.

FAIRFAX COUNTY
RECEIVED
DEC 1 8 2008
DIVISION OF
ZONING ADMINISTRATION

NOTICE OF VIOLATION

DATE OF ISSUANCE: November 25, 2008

SHERIFF'S LETTER

CASE #: 200800803

LEGAL NOTICE ISSUED TO:
PROPERTY OWNER(S): Thien Duy Vu
Loan M. Cao
4409 Shirley Gate Rd.
Fairfax, VA 22030

LOCATION OF VIOLATION:
4409 Shirley Gate Rd.
Fairfax, VA 22030-5519
Tax Map #: 056-4 ((06)) 0005
Zoning District: R-C

Dear Thien Duy Vu and Loan M. Cao:

An inspection of the above referenced property on July 18, 2008 revealed the following violations of the Fairfax County Zoning Ordinance.

§ 2-501 Excessive Dwelling Units:

The inspection revealed that there are two (2) complete, separate and independent dwellings located on the above-referenced property. A dwelling is defined in Part 3 of Article 20 of the Fairfax County Zoning Ordinance, as:

> One (1) or more rooms in a residential building or residential portion of a building, which are arranged, designed, used, or intended for use as a complete, independent living facility, which includes permanent provisions for living, sleeping, eating, cooking and sanitation. Occupancy shall be in accordance with the provisions of Sect. 2-502.

Therefore, the presence of more than one dwelling unit on the above-referenced property is a violation of Sect. 2-501 of the Zoning Ordinance, which states, in part:

> There shall be not more than one (1) dwelling unit on any one (1) lot, nor shall a dwelling unit be located on the same lot with any other principal building....

You are hereby directed to clear this violation within fifteen (15) days of the date of this notice. Compliance can be achieved as follows:

- Ceasing immediately, and on a permanent basis, the occupancy of the unlawful detached accessory dwelling unit on the property, and

- Obtain a building permit approved by the Zoning Administrator to permanently and completely remove the unlawful kitchen located in the accessory dwelling. This shall include; all ovens, microwave, ranges, sinks, cabinets, countertops, refrigerators, and freezers or combinations thereof; all other appliances, accoutrements used or intended for use for cooking or eating, and all plumbing, electrical, and gas connections and piping; and

- Utilities referenced above for the kitchen to be demolished are to be capped and sealed in the wall cavities; and

- Ceasing immediately, and on a permanent basis, the use of all but one (1) dwelling unit, on the property.

---

§ 18-601 Building Permit
§ 18-603 Compliance with Other Codes:
§ 10-104 (12D) Accessory Dwelling Unit Location
§ 2-302 (6) Accessory Use must comply with Article 10:

This inspection found the existence of an accessory dwelling unit within an accessory structure on the property. This structure measures approximately ten (10) feet in height and measures approximately twenty-seven (27) feet by fifty-five (55) feet and located approximately nine (9) feet from the right side lot line.

A review of Fairfax County Land Development records failed to provide evidence of a Building Permit approved by the Zoning Administrator, for the construction of the structure/dwelling described above. Therefore, the construction of this structure, absent approval of the Zoning Administrator, is a violation of Sect. 18-601 of the Zoning Ordinance, which specifies:

> The erection of all buildings and all structures, as well as additions, deletions and modifications thereto, shall be subject to the provisions of Chapter 61 of The Code, Buildings. No building or structure which is required to have a Building Permit pursuant to Chapter 61 of The Code shall be erected until a Building Permit Application has been approved by the Zoning Administrator.

In addition, you are advised a Building Permit can not be issued for the detached accessory dwelling unit, as the property is not in compliance with Par. 1 of Sect. 18-603 of the Zoning Ordinance which states:

> No Building Permit shall be issued for the erection of any building or structure on a lot or addition or modification to a building or structure that is in violation of any of the provisions of Chapter 101, Chapter 116 or Chapter 118 of The Code, this Ordinance, all other applicable laws and ordinances, any proffered conditions, or any development conditions of any approved rezoning, special permit, special exception or variance. Appeals of decisions made pursuant to Chapter 118 of The Code which are appealable shall be processed in accordance with Article 8 of Chapter 118.

Accessory structures are permitted in the R-C District, subject to the limitations detailed in Par. 12D of Sect. 10-104 of the Zoning Ordinance, which states:

> No accessory structure or use which exceeds seven (7) feet in height shall be located in any minimum required side yard.

The minimum required side yard distance, in the R-C District is twenty (20) feet as detailed in Par. 2A (2) of Sect. 3-C07 of the Zoning Ordinance. Because this structure exceeds seven feet in height, it is in violation of Par. 6 of Sect. 2-302 of the Zoning Ordinance which states:

> No accessory structure or use, as defined in Article 20, shall hereafter be built, moved, remodeled, established, altered or enlarged unless such accessory structure or use complies with provisions of Par. 1 of Article 10.

You are hereby directed to clear this violation within fifteen (15) days of receipt of this Notice. Compliance can be accomplished by:

- Obtain a building permit approved by the Zoning Administrator and remove the second dwelling structure from the property, or

- Obtain a building permit approved by the Zoning Administrator to reduce the height of the structure to a maximum of eight and one-half (81/2) feet when measured from the lowest point of grade, or

- Obtain a building permit approved by the Zoning Administrator to relocate the structure on the lot in compliance with the provisions for an accessory storage structure, as detailed in Par. 10E of Sect. 10-104 of the Zoning Ordinance.

A follow-up inspection will be made at the expiration of this time. Failure to comply with the Notice shall result in the initiation of appropriate legal action to gain compliance with the Zoning Ordinance.

You may have the right to appeal this Notice of Zoning Violation within thirty (30) days of the date of this letter in accordance with Sec. 15.2-2311 of the Code of Virginia. This decision shall be final and unappealable if it is not appealed within such thirty (30) days. Should you choose to appeal, the appeal must be filed with the Zoning Administrator and the Board of Zoning Appeals (BZA) in accordance with Part 3 of Article 18 of the Fairfax County Zoning Ordinance. Those provisions require the submission of an application form, a written statement setting forth the decision being appealed, the date of decision, the grounds for the appeal, how the appellant is an aggrieved party and any other information that you may wish to submit and a $375.00 filing fee. Once an appeal application is accepted, it will be scheduled for public hearing and decision before the BZA.

Should you have any questions or need additional information, please do not hesitate to contact me at (703) 246-3609

Sincerely,

Jason B. Gibbs, Property Maintenance and
Senior Zoning Inspector

County of Fairfax, Virginia

To protect and enrich the quality of life for the people, neighborhoods and diverse communities of Fairfax County

April 7, 2009

FAIRFAX COUNTY
RECEIVED
APR 10 2009
DIVISION OF
ZONING ADMINISTRATION

Thien Vu
4409 Shirley Gate Road
Fairfax VA 22030

Shirley Gate Park, Lot 5

Re: Appeal Application A 2008-BR-071
Thien Vu

Dear Mr. Vu:

At its March 31, 2009 meeting, the Board of Zoning Appeals took action to **UPHOLD** the determination of the Zoning Administrator for the above-referenced appeal application.

If you have questions, please contact Charles Fitzhugh, Staff Coordinator, at 703-324-1314.

Sincerely,

Suzanne Frazier

Suzanne Frazier, Deputy Clerk
Board of Zoning Appeals

cc: John C. Cook, Supervisor
Braddock District

Mavis Stanfield, Deputy Zoning Administrator for Appeals
Zoning Administration Division

Charles Fitzhugh, Staff Coordinator
Zoning Administration Division

Diane Johnson-Quinn, Deputy Zoning Administrator
Zoning Permit Review Branch

Leo Conrad, Property Maintenance/Senior Zoning Inspector
Code Enforcement Strike Team

Shirley Gate Park Subdiv DJQ

FAIRFAX COUNTY

BOARD OF ZONING APPEALS

PUBLIC HEARING DATE: March 31, 2009
TIME: 9:30 a.m.

V I R G I N I A

March 24, 2009

STAFF REPORT

APPEAL APPLICATION A 2008-BR-071

BRADDOCK DISTRICT

FAIRFAX COUNTY
RECEIVED
MAR 26 2009
DIVISION OF
ZONING ADMINISTRATION

APPELLANT:	Thien Duy Vu
LOCATION:	4409 Shirley Gate Road
TAX MAP REF:	56-4 ((6)) 5
ZONING DISTRICTS:	R-C
SITE AREA:	43,547 square feet
NATURE OF APPEAL:	Appeal of a determination that the appellant is maintaining a second dwelling unit located in an accessory structure which exceeds seven feet in height, was erected without a valid building permit and does not meet minimum side yard requirements, all on property in the R-C District in violation of Zoning Ordinance provisions.

CPF

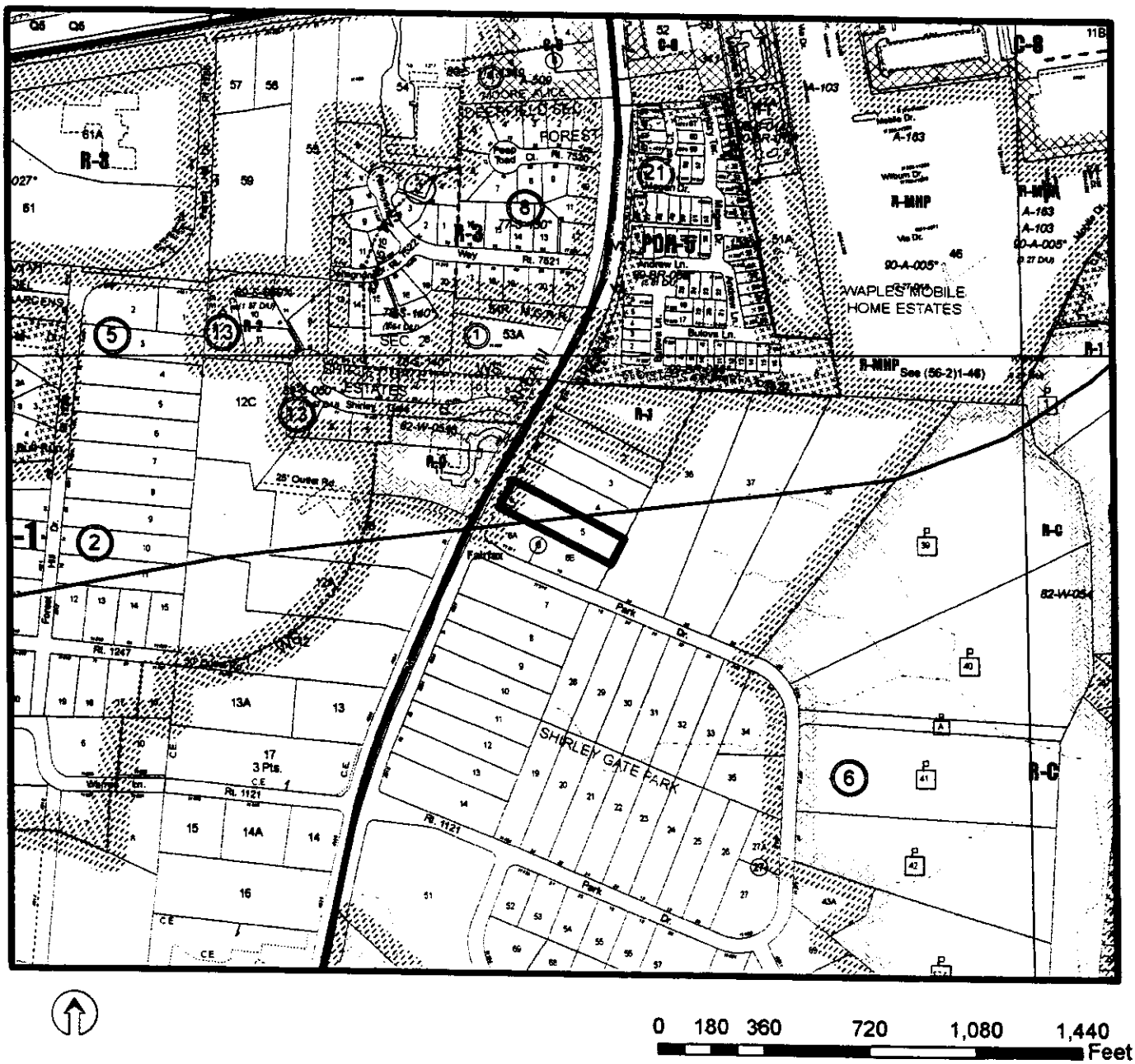
For information, contact the Zoning Administration Division, Department of Planning and Zoning, 12055 Government Center Parkway, Suite 807, Fairfax, Virginia 22035-5505, 703-324-1314.

American with Disabilities Act (ADA): For special accommodations, call 703-324-1334 (TTY 711 Virginia Relay Center) seven days in advance of the meeting to make the necessary arrangements.

APPEAL APPLICATION

A 2008-BR-071

THIEN VU, A 2008-BR-071 Appl. under sect(s). 18-301 of the Zoning Ordinance. Appeal of a determination that appellant is maintaining a second dwelling unit located in an accessory structure which exceeds seven feet in height, was erected without a valid Building Permit and does not meet minimum side yard requirements, all on property in the R-C District in violation of Zoning Ordinance provisions. Located at 4409 Shirley Gate Rd. on approx. 1.0 ac. of land zoned R-C. Braddock District. Tax Map 56-4 ((6)) 5.



DESCRIPTION OF APPEAL

Appellant:	Thien Duy Vu
Issue:	Appeal of a determination that the appellant is maintaining a second dwelling unit located in an accessory structure which exceeds seven feet in height, was erected without a valid building permit and does not meet minimum side yard requirements, all on property in the R-C District in violation of Zoning Ordinance provisions.
Property Description:	The property that is the subject of this appeal is located at 4409 Shirley Gate Road (Rte. 655), in the Shirley Gate Park Subdivision, south of Lee Highway (Rte. 29), and north of Braddock Road (Rte. 620). The property is zoned R-C, Residential Conservation District, and contains a lot area of 43,547 square feet. The property is developed with a one and a half-story, 2,325 square foot single family detached dwelling unit with a basement constructed in 1949. A second dwelling unit is currently located in the rear yard area within a detached structure that is ten feet in height and is located approximately nine feet from the side property line of the subject property. County records do not contain information indicating when the second dwelling unit was constructed. A copy of the zoning map sheet showing the subject property is provided on the previous page.
Appellant's Position:	The appellant's application and basis for appeal are set forth in Attachment 1.

ZONING ORDINANCE PROVISIONS

The provisions of the Zoning Ordinance that are pertinent to this appeal are listed below. The complete text of these provisions is provided as Attachment 2.

- Paragraphs 5, 6 of Sect. 2-302, Permitted Uses
- Sect. 2-501, Limitation on the Number of Dwelling Units on a Lot

- Par. 6D of Sect. 3-C03, Special Permit Uses
- Par. 2A and 2B of Sect. 3-C07, Bulk Regulations
- Sect. 8-914, Provisions for Approval of Reduction to the Minimum Yard requirements Based on Error in Building Location
- Lead-in Paragraph and Paragraphs 1 through 5 of Sect. 8-918, Additional Standards for Accessory Dwelling Units
- Par. 11, and 21 of Sect. 10-102, Permitted Accessory Uses
- Par. 2, 3, 4 of Sect. 10-103, Use Limitations
- Par. 10, and 12D, 12E of Sect. 10-104, Location Regulations
- Sect 18-601 Permit Required for Erection of Buildings and Structures
- Par. 1 of Sect 18-603 Limitations on Approval of Building Permits
- Definitions of ACCESSORY USE; DWELLING, DWELLING SINGLE FAMILY; DWELLING UNIT and DWELLING UNIT, ACCESSORY; NONCONFORMING BUILDING OR USE as set forth in Article 20 of the Zoning Ordinance.

BACKGROUND

- Department of Tax Administration records show that the principal single family dwelling unit on the subject property is a one story brick structure with a basement originally constructed in 1949, and that the above grade living area of the single family dwelling totals 2,325 sq. ft. with a 288 square foot carport, 112 square foot screened porch, and a small miscellaneous building with no square footage noted.

- Building Permit records on file for the subject property include a permit for a single family dwelling approved in September, 1948; a permit and location plat for a storage shed approved in August, 1957; a permit and location plat for a screened porch from June, 1971; a sunroom addition approved in October, 2002 and renewal of the permit for a sunroom addition (as the original permit had expired) approved in June, 2004. A copy of the permits and location plats are included as Attachment 3.

- County records reflect that on November 1, 1985 a Notice of Violation (NOV) was issued to Frank and Marjorie Jenkins for the operation of a roofing business and the parking of commercial vehicles, to include a dump truck, on the subject property. It is not clear how the violation was resolved, but it is assumed that the business and vehicles were removed and the case was closed.

- County records reflect that on February 25, 1986 a NOV was issued to Frank and Marjorie Jenkins for maintaining two separate dwelling units on the lot and on March 4, 1986 a NOV was issued to Frank and Marjorie Jenkins for three commercial vehicles and a storage yard on the subject property. The records do not reflect how the violation with respect to the second dwelling unit was resolved, but it appears that the other violations were resolved on April 2, 1986 when the commercial vehicles and storage was removed from the property.

- The subject property was conveyed to the appellant Thien Duy Vu and Loc Hong Tran and recorded in Deed Book 6993, Page 0705 on April 6, 1988. The subject property was later conveyed to the appellant Thien Duy Vu and his wife, Loan M. Cao and recorded in Deed Book 10616, Page 0791 on October 21, 1998. A copy of the deeds is included as Attachment 4.

- On June 22, 2000 a complaint was received in ZEB (Case File # 2000-1100) regarding paving in the front yard of the subject property and that there was always 10 cars or more on the subject property, and for multiple occupancy. The case was later resolved and closed on August 29, 2000.

- On March 1, 2001 a complaint was received in ZEB (Case File #2001-0302) which alleged that junk cars and miscellaneous engine parts and other debris were being stored on the subject property. The zoning case was later resolved and closed on June 1, 2001when an inspection on May 31, 2001 demonstrated that the inoperative vehicles and all outdoor storage on the property had been removed from the premises.

- On June 23, 2008, Fire and Rescue Services responded to an emergency call regarding 4409 Shirley Gate Road. It appears that the call was regarding a possible fire in the main dwelling unit. While checking for the origin of the smoke, the emergency services team members observed several interior doors with three to four eye bolts on each door and jamb, and several pad locks on the floor by each of the doors. According to the inspection report, the doors were set up in a fashion that could only be locked from the outside of the rooms. Emergency services personnel also noted that the windows in the basement had been taped shut with duct tape and carpet tack strips, which were placed in a fashion that someone inside attempting to open the windows would be injured. They observed that there appeared to be someone living in the detached structure located in the rear yard area which had the same locking mechanisms on the doors. Emergency Services personnel were told that these locked doors were in place because they had been robbed several times, even though an alarm system was in use and these measures appeared to keep people locked inside rather than to keep people out of the residence.

- On June 29, 2008 a record of what was found on the subject property as a result of the June 23, 2009 emergency call was forwarded by Fire and Rescue Services to the Code Enforcement Strike Team.

- On July 8, 2008, the Strike Team made an attempt to inspect the property for allegations of multiple occupancy but was unable to access the premises. The Strike Team members

left a door hanger asking for a return call from the property owner.

- On July 18, 2008 a Strike Team inspection was conducted by appointment with the appellants. The appellant's wife, Loan M. Cao met the Strike Team on the subject property and stated that she and her husband, appellant Thien Duy Vu, lived in the main dwelling unit and that the second dwelling unit was utilized by two of her relatives. The Strike Team was given permission to inspect the main dwelling unit (basement and main level) while they were waiting for the tenants of the second dwelling unit to return home. The Strike Team observed what appeared to be significant hoarding of items in the basement that blocked access to the basement exterior door. Areas of mold and asbestos were also observed, which the Inspectors felt could potentially pose a health hazard. When the appellant, Thien Vu, arrived, he allowed an inspection of the upper level of the main dwelling unit, where aisle space for egress was restricted in many of the rooms. Strike Team Inspector Jim Watson decided not to placard or issue a field notice regarding any of the unsafe bedrooms, since it was apparent that nobody was living in these rooms and these rooms were being used for storage. When the tenants of the second dwelling unit arrived, both the owner and tenant gave permission for the Strike Team inspectors to access the second dwelling unit which was found to be complete with a living room, bedroom, bathroom, kitchen, and hobby room or studio. The Inspector's report noted that the second dwelling unit measured approximately 10' in height and was located approximately 9' from the side property line. A copy of the photographs taken of the second dwelling unit are included as Attachment 5. A copy of the zoning inspection drawing of the interior of the second dwelling unit is included as Attachment 7.

- On November 25, 2008 Strike Team Zoning Inspector Jason Gibbs issued a NOV by Sheriffs letter to appellants Thien Duy Vu and Loan M. Cao. The NOV stated that previous inspections found two complete, separate, and independent dwelling units on the property, and that no accessory structure or use which exceeds seven (7) feet in height shall be located in any minimum required side yard. The NOV also asks that the property owners cease immediately, and on a permanent basis, the occupancy of the unlawful detached accessory dwelling unit on the property as well as obtain a building permit to permanently and completely remove the unlawful kitchen and all plumbing, electrical, and gas connection or piping for the kitchen use located in the accessory dwelling unit. A copy of the NOV is included as a part of Attachment 1.

- On January 1, 2009 Strike Team Zoning Inspector Jason Gibbs issued a second NOV which was sent by Sheriff's Letter to the appellants Thien Duy Vu and Loan M. Cao for operating a business in a residential district. The letter states that the property owners are allowing a manufacturing business (compact disks and digital video disks) in a residential district in violation of Par. 5, Sect. 2-302 of the Zoning Ordinance. To date there has been no appeal filed relating to the January 1, 2009 NOV. A copy of the NOV is included as Attachment 6.

- The referenced appeal was received on December 22, 2008, accepted on January 5, 2009, and scheduled for public hearing before the BZA on March 31, 2009.

ZONING ADMINISTRATOR'S POSITION

This is an appeal of the determination that the appellant is maintaining two dwelling units on a single lot in the R-C District. Besides the 2,325 square foot main dwelling unit, constructed in 1949, the appellants are maintaining a second dwelling unit, and according to the Zoning Inspector who inspected the property with the Strike Team, the second dwelling unit is located in a detached accessory structure which is approximately 1,000 square feet in area, is located in the rear and side yard areas, is ten (10) in height and approximately nine (9) feet from the side property line. Staff maintains that the use of an accessory structure as a residence was never legally established and that the appellants enjoy no nonconforming rights to utilize the structure for a second dwelling unit on the subject property.

A dwelling unit is defined in Article 20 of the Zoning Ordinance as one or more rooms in a residential building "which are arranged, designed, used or intended for use as a complete, independent living facility which includes provisions for living, sleeping, eating, cooking and sanitation." Based on this definition and the photographs taken of the second dwelling unit during the July 18, 2008 inspection on the subject property, it is clear that the main dwelling permitted in 1949 is the principal dwelling unit and that there is a separate and independent second living facility on the subject property. In addition to the standard kitchen located on the first level of the main dwelling unit, a full kitchen exists in the second dwelling unit. (Photographs taken during the July 18, 2008 inspection are included as Attachment 5).

The two (2) complete, separate, and independent dwelling units located on the subject property are violations of Sect. 2-501 of the Zoning Ordinance, which states that there shall be not more than one (1) dwelling unit on any one (1) lot, nor shall a dwelling unit be located on the same lot with any other principal building. Section 2-501 allows one dwelling unit per lot unless approval is obtained through the BZA process for additional uses or dwelling units with the approval of a special permit or special exception. The provisions of Sect. 2-501 prohibit the location of more than one dwelling unit on any one lot, with few exceptions, none of which apply to the appellant. In addition, the appellant is in violation of Par. 5 of Sect. 2-302 of the Zoning Ordinance which states that "no use shall be allowed in any district which is not permitted by the regulations for the district."

Inspections revealed that the accessory dwelling unit was approximately ten (10) feet in height, measured approximately twenty-seven (27) feet by fifty-five (55) feet and was located approximately nine (9) feet from the side lot line. Records reflect that there is no evidence of a building permit for the construction of the accessory dwelling unit structure and that the construction of this dwelling unit is a violation of Sect. 18-601 of the Zoning Ordinance, which specifies:

> The erection of all buildings and all structures, as well as additions, deletions and modifications thereto, shall be subject to the provisions of Chapter 61 of The Code, Buildings. No building or structure which is required to have a Building Permit pursuant to Chapter 61 of The Code shall be erected until a Building Permit application has been approved by the Zoning Administrator.

In addition, the appellants were advised that a building permit could not be issued for the detached accessory structure as the property is not in compliance with Par. 1 or Sect. 18-603 and that accessory structures are permitted in the R-C District, subject to the limitations detailed in Par. 12D

of Sect. 10-104. This provision states that no accessory structure or use which exceeds seven feet in height shall be located in the minimum required side yard, which is twenty feet in the R-C District. Because the structure exceeded seven feet in height, it is in violation of Par. 6 of Sect. 2-302 which states that no accessory structure or use, as defined in Article 20, shall hereafter be built, moved, remodeled, established, altered or enlarged unless such accessory structure or use complies with the provisions of Par. 1, Article 10.

The appellant's response, on letterhead for C. Broughton Shedlick and Associates, Attorneys at Law, and signed by the appellant, Thien Vu, references the NOV dated November 25, 2008 and states that the appellant feels that he is an aggrieved party since he is the owner of the property at 4409 Shirley Gate Road in Fairfax, Virginia. The appellant states that it would cost a great deal of money to comply with the notice of violation and that when he purchased the property in 1988, the guest house (second dwelling unit) was already on the property and set up for occupancy and that he was told by the previous owner that the guest house was present when the property was originally purchased in 1949. A copy of the appellant's response is included as a part of Attachment 1. By making these statements, the appellant appears to be saying that the second dwelling unit is considered to be a legal nonconforming use on the subject property. A legal nonconforming use is defined as a building or use which lawfully existed on the effective date or this or prior Ordinances and which has continued, without an interruption for a period greater than two years, since the use was established. In accordance with the provisions of Article 15 of the Zoning Ordinance, the use of the second dwelling unit cannot be considered legally nonconforming because such use was never legally established on the property.

Building permit and property records for the subject property include a permit for a single family dwelling approved in September, 1948; an approved permit and location plat for a 300 square foot storage shed approved in August, 1957; a permit and location plat for a screened porch addition in June, 1971; and a sunroom addition from October, 2002 and renewal of the permit for a sunroom addition (original permit had expired) approved in June, 2004. It appears that the 300 square foot storage shed approved in 1957 (Permit #20060) was built in about the same place that the current second dwelling is located, and was to be of cinderblock construction with frame siding and asphalt roof shingles. The storage shed is not listed on DTA records. A location plat attached to the permit show the proposed storage shed with a ten (10') foot side setback, a distance of 280' from the rear property line and a separation of 55' feet between the main dwelling and the storage shed. The 1957 permit application indicates that the property was zoned agricultural (a zoning history confirms this designation) and it clearly states in two different places that the use of the structure would be as storage for the residence and as a storage unit or shed. There are no building permits or prior zoning approvals on file for a second dwelling unit or an accessory dwelling unit on the subject property. A copy of the building permits and location plats on record is included as Attachment 3.

DTA records show that the above grade living area of the main dwelling unit totals 2,325 sq. ft. and that the property has been assessed only as a single family dwelling with a 288 square foot carport and a 112 square foot screened porch. A small miscellaneous metal building with no square footage noted is shown in the DTA records, but DTA staff have stated that the metal building is not a part of the tax assessments for the subject property. DTA staff was unable to locate any applicable tax assessment records for a second dwelling unit on the property at any time from the 1940's to the present. The appellant maintains that the prior owner had told him

that the second dwelling unit has been on the property since 1949. In reviewing Fairfax County's Geographic Information Systems (GIS) records from 1954, it appears that, in addition to the principal dwelling unit, a small structure existed on the lot, as shown on the aerial included in Attachment 11. In a later aerial taken in 1960 another structure appears, which although considerably smaller than what exists in that location today, was located on the lot in a different location and orientation than the structure shown in 1954, which may be consistent with the building permit approved in 1957. The aerial from 1968 shows the same accessory structure, but it is much larger; however, it does not yet appear to be as large as it is today. In fact, it appears an addition to the building to the southeast was added sometime between 1997 and 2007.

A review of the 1941 and 1954 Zoning Ordinances indicates that applicable provisions did not permit more than one dwelling unit on an Agricultural District lot. Therefore, even if the dwelling unit had been constructed in 1949, it still would not have been legally established and would not be deemed a legal nonconforming use. In 1954, the only residential zoning district which allowed more than one dwelling unit on a lot was the Urban Residence District, which allowed semi-detached dwellings (defined as one of two one family dwellings having a vertical common party wall) subject to special approval of the Board of County Supervisors and the prior submission of a report and recommendation to the Board by the County Planning Commission.

The only legitimate/legal way to establish a second dwelling unit on the subject property, which is currently less than one acre in size, is through the approval of a special permit for an accessory dwelling unit. Par. 2 of Sect. 8-918 of the Zoning Ordinance provides that on lots containing less than two acres, the accessory dwelling unit must be located within the structure of a single family detached dwelling unit, the gross floor area of the accessory dwelling unit shall not exceed 35% of the total gross floor area of the principal dwelling unit and the accessory dwelling unit cannot contain more than two bedrooms. Only on lots two (2) acres or greater in area, may an accessory dwelling unit be located within the structure of a single family dwelling unit or within a freestanding accessory structure. Since the subject property is less than one acre in size, an accessory dwelling unit cannot be established in a freestanding accessory structure.

Staff maintains that the appellant has only one option available to him, to remove the second dwelling unit including all kitchen facilities and utility connections which serves to establish more than one dwelling unit. The second dwelling unit appears to be approximately 1,000 square feet in size, and appears to meet the provisions regarding an accessory use in reference to overall size and area in comparison to the principal dwelling unit in Article 20 of the Zoning Ordinance. If the appellant wishes to utilize the current structure as a storage shed or other permitted accessory use allowed in the R-C District, the appellants would need to apply for a Group 9 Special Permit for an error in building location as provided for in Sect. 8-914 of the Zoning Ordinance based on how the actual accessory structure is situated on the lot in reference to the side property lines. The November 25, 2008 NOV states that the structure being utilized as a second dwelling unit is located nine feet from the side property boundary where a twenty foot side setback is required in the R-C District. If this is correct, in order to legitimize the location of the accessory structure on the site, the appellant must demonstrate that the proposed use of the structure meets the definition of an accessory use, receive approval of a special permit for error in building location for the existing structure and get building permits approved, or else these features must be removed or altered to meet the current side setback requirements of twenty feet for an accessory structure in the R-C District.

In conclusion, the appellant does not deny that two dwelling units exist on the subject property. The only structure ever approved in the location of the second dwelling unit is a 300 square foot detached storage shed that may have been constructed via building permit in 1957. There was no provision under the 1941 or the 1954 Zoning Ordinances which would allow a second independent dwelling unit on the subject property. Additionally, in a recent Virginia Supreme Court decision (BOS, et. al. vs BZA et. al. Record No. 051269 Circuit Court Case No. CL-2004-022-4071) which dealt with a similar issue, the Court found that even though an apartment had been established in a detached garage 54 years before, the homeowners enjoyed no nonconforming rights to continue the garage apartment use because the use was never legally established. (A copy of the Virginia Supreme Court ruling is included as Attachment 8). No matter how long the second dwelling unit has been in use on the subject property, the use of the accessory structure for a residence was never legally established under any Zoning Ordinance and, as a result, the appellants enjoy no nonconforming or "grandfathered" rights to use the structure for a second dwelling unit on the subject property or to maintain the structure absent approval of a special permit for a reduction in minimum yard requirements. It has been clearly demonstrated through zoning inspections that the appellant is maintaining two separate, independent dwelling units in violation of Zoning Ordinance provisions. Therefore, staff recommends that the BZA uphold the Zoning Administrator's determination as set forth in the NOV dated November 25, 2008.

ATTACHMENTS:

1. Appellant's Application and Basis for Appeal
2. Applicable Zoning Ordinance Provisions
3. Building Permits and House Location Plats
4. Deed Book 10616, Page 0791
5. Photographs Taken During the July 18, 2008 Strike Team Inspection
6. Copy of January 1, 2009 Notice of Violation for Business in a Residential District
7. Zoning Inspector's drawing of second dwelling unit interior
8. Virginia Supreme Court Decision
9. Aerial Views of the Subject Property (Fairfax County GIS) from 1954 and 1968.
10. Pictometry Aerial Photos of the Subject Property dated March 22, 2007
11. GIS Aerial photography from 1954, 1960, 1968, 1982, 1997 and 2007

Attachment 1

Please type or
Print in Black Ink

COMMONWEALTH OF VIRGINIA
COUNTY OF FAIRFAX
APPLICATION FOR APPEAL

APPLICATION NO. A2008-BR-071
(Assigned by Staff)

NAME OF APPELLANT: THIEN VU

NATURE OF THE APPEAL: I RECEIVED A NOTICE OF VIOLATION ON NOVEMBER 26 2008 CASE # 200800803. I AM APPEALING THE § 21-501 EXCESSIVE DWELLING UNIT VIOLATION AND THE OTHER VIOLATIONS. THE 2ND DWELLING UNIT WAS ON PROPERTY WHEN PURCHASED

DATE OF ORDER, REQUIREMENT, DECISION, DETERMINATION OR NOTICE OF VIOLATION WHICH IS SUBJECT TO THE APPEAL NOVEMBER 25 2008

HOW IS THE APPELLANT AN AGGRIEVED PERSON? OWNER OF THE AFFECTED PROPERTY

IF APPEAL RELATES TO A SPECIFIC PROPERTY, PROVIDE THE FOLLOWING INFORMATION:

POSTAL ADDRESS OF PROPERTY: 4409 SHIRLEY GATE ROAD FAIRFAX

TAX MAP DESCRIPTION: # 056-4 (06) 0005

The undersigned has or has not (circle one) the authority to allow and does or does not (circle one) authorize Fairfax County staff representatives on official business to enter on the subject property as necessary to process the application.

THIEN VU 4409 SHIRLEY GATE ROAD FAIRFAX VA 22030
Type or Print Name of Appellant or Agent

Thien D. Vu
Signature of Appellant or Agent

Address

703 532 1551 THOMAS CAMPBELL
Telephone No. **Home** **Work**

Please provide name and phone number of contact person if different from above.

DO NOT WRITE IN THIS SPACE

Subdivision Name: Shirley Gate Park Lt. 5
Total Area (Acres/Square Feet): .9997 Acres
Present Zoning: R-C
Supervisor District: Braddock
Date application received: 12/22/08 **Application Fee Paid: $** 375.00
Date application accepted: 1/5/09

1/96

C. Broughton Shedlick and Associates
Attorneys at Law
6408-R Seven Corners Place
Falls Church, Virginia 22044
Office: (703) 532-1551
Fax: (703) 532-1554

C. Broughton Shedlick (VA & MD)
Thomas E. Campbell (VA & DC)
Donovan Thomas (MD)*

*of Counsel

December 16, 2008

Written Statement
Filed with Application for Appeal

My name is Thien Vu. Attached to this statement is a copy of the Notice of Violation I received on November 26, 2008. The Notice is dated November 25, 2008. I am an aggrieved party as I am the owner of the premises at 4409 Shirley Gate Road, Fairfax, VA 22030. It would cost me a great deal of money to comply with the Notice of Violation.

My reason for appeal is that when I purchased the property in 1988, the guest house (accessory dwelling unit) was already on my property and set up for occupancy. I was told by the owner that the guest house was present when the property was originally purchased in 1949.

Thien Vu

Attachments: Notice of Violation Fairfax County Property Search map of lot with Structures.

County of Fairfax, Virginia

ST-1

To protect and enrich the quality of life for the people, neighborhoods and diverse communities of Fairfax County.

NOTICE OF VIOLATION

DATE OF ISSUANCE: November 25, 2008

SHERIFF'S LETTER

CASE #: 200800803

LEGAL NOTICE ISSUED TO:
PROPERTY OWNER(S): Thien Duy Vu
Loan M. Cao
4409 Shirley Gate Rd.
Fairfax, VA 22030

LOCATION OF VIOLATION:
4409 Shirley Gate Rd.
Fairfax, VA 22030-5519
Tax Map #: 056-4 ((06)) 0005
Zoning District: R-C

Dear Thien Duy Vu and Loan M. Cao:

An inspection of the above referenced property on July 18, 2008 revealed the following violations of the Fairfax County Zoning Ordinance.

§ 2-501 Excessive Dwelling Units:

The inspection revealed that there are two (2) complete, separate and independent dwellings located on the above-referenced property. A dwelling is defined in Part 3 of Article 20 of the Fairfax County Zoning Ordinance, as:

> One (1) or more rooms in a residential building or residential portion of a building, which are arranged, designed, used, or intended for use as a complete, independent living facility, which includes permanent provisions for living, sleeping, eating, cooking and sanitation. Occupancy shall be in accordance with the provisions of Sect. 2-502.

Code Enforcement Strike Team
10700 Page Avenue
Fairfax, Virginia 22030
Fax: 703-246-3614

Therefore, the presence of more than one dwelling unit on the above-referenced property is a violation of Sect. 2-501 of the Zoning Ordinance, which states, in part:

> There shall be not more than one (1) dwelling unit on any one (1) lot, nor shall a dwelling unit be located on the same lot with any other principal building....

You are hereby directed to clear this violation within fifteen (15) days of the date of this notice. Compliance can be achieved as follows:

- Ceasing immediately, and on a permanent basis, the occupancy of the unlawful detached accessory dwelling unit on the property, and
- Obtain a building permit approved by the Zoning Administrator to permanently and completely remove the unlawful kitchen located in the accessory dwelling. This shall include; all ovens, microwave, ranges, sinks, cabinets, countertops, refrigerators, and freezers or combinations thereof; all other appliances, accoutrements used or intended for use for cooking or eating, and all plumbing, electrical, and gas connections and piping; and
- Utilities referenced above for the kitchen to be demolished are to be capped and sealed in the wall cavities; and
- Ceasing immediately, and on a permanent basis, the use of all but one (1) dwelling unit, on the property.

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§ 18-601 Building Permit
§ 18-603 Compliance with Other Codes:
§ 10-104 (12D) Accessory Dwelling Unit Location
§ 2-302 (6) Accessory Use must comply with Article 10:

This inspection found the existence of an accessory dwelling unit within an accessory structure on the property. This structure measures approximately ten (10) feet in height and measures approximately twenty-seven (27) feet by fifty-five (55) feet and located approximately nine (9) feet from the right side lot line. correct

A review of Fairfax County Land Development records failed to provide evidence of a Building Permit approved by the Zoning Administrator, for the construction of the structure/dwelling described above. Therefore, the construction of this structure, absent approval of the Zoning Administrator, is a violation of Sect. 18-601 of the Zoning Ordinance, which specifies:

Built in 1949

> The erection of all buildings and all structures, as well as additions, deletions and modifications thereto, shall be subject to the provisions of Chapter 61 of The Code, Buildings. No building or structure which is required to have a Building Permit pursuant to Chapter 61 of The Code shall be erected until a Building Permit Application has been approved by the Zoning Administrator.

In addition, you are advised a Building Permit can not be issued for the detached accessory dwelling unit, as the property is not in compliance with Par. 1 of Sect. 18-603 of the Zoning Ordinance which states:

> No Building Permit shall be issued for the erection of any building or structure on a lot or addition or modification to a building or structure that is in violation of any of the provisions of Chapter 101, Chapter 116 or Chapter 118 of The Code, this Ordinance, all other applicable laws and ordinances, any proffered conditions, or any development conditions of any approved rezoning, special permit, special exception or variance. Appeals of decisions made pursuant to Chapter 118 of The Code which are appealable shall be processed in accordance with Article 8 of Chapter 118.

Accessory structures are permitted in the R-C District, subject to the limitations detailed in Par. 12D of Sect. 10-104 of the Zoning Ordinance, which states:

> No accessory structure or use which exceeds seven (7) feet in height shall be located in any minimum required side yard.

The minimum required side yard distance, in the R-C District is twenty (20) feet as detailed in Par. 2A (2) of Sect. 3-C07 of the Zoning Ordinance. Because this structure exceeds seven feet in height, it is in violation of Par. 6 of Sect. 2-302 of the Zoning Ordinance which states:

> No accessory structure or use, as defined in Article 20, shall hereafter be built, moved, remodeled, established, altered or enlarged unless such accessory structure or use complies with provisions of Par. 1 of Article 10.

You are hereby directed to clear this violation within fifteen (15) days of receipt of this Notice. Compliance can be accomplished by:

- Obtain a building permit approved by the Zoning Administrator and remove the second dwelling structure from the property, or

- Obtain a building permit approved by the Zoning Administrator to reduce the height of the structure to a maximum of eight and one-half (81/2) feet when measured from the lowest point of grade, or

- Obtain a building permit approved by the Zoning Administrator to relocate the structure on the lot in compliance with the provisions for an accessory storage structure, as detailed in Par. 10E of Sect. 10-104 of the Zoning Ordinance.

A follow-up inspection will be made at the expiration of this time. Failure to comply with the Notice shall result in the initiation of appropriate legal action to gain compliance with the Zoning Ordinance.

You may have the right to appeal this Notice of Zoning Violation within thirty (30) days of the date of this letter in accordance with Sec. 15.2-2311 of the Code of Virginia. This decision shall be final and unappealable if it is not appealed within such thirty (30) days. Should you choose to appeal, the appeal must be filed with the Zoning Administrator and the Board of Zoning Appeals (BZA) in accordance with Part 3 of Article 18 of the Fairfax County Zoning Ordinance. Those provisions require the submission of an application form, a written statement setting forth the decision being appealed, the date of decision, the grounds for the appeal, how the appellant is an aggrieved party and any other information that you may wish to submit and a $375.00 filing fee. Once an appeal application is accepted, it will be scheduled for public hearing and decision before the BZA.

Should you have any questions or need additional information, please do not hesitate to contact me at (703) 246-3609

Sincerely,

Jason B. Gibbs, Property Maintenance and
Senior Zoning Inspector

ZONING ORDINANCE PROVISIONS

2-302 Interpretation of District Regulations, Permitted Uses

5. No use shall be allowed in any district which is not permitted by the regulations for the district.

6. No accessory structure or use, as defined in Article 20, shall hereafter be built, moved, remodeled, established, altered or enlarged unless such accessory structure or use complies with the provisions of Part 1 of Article 10.

2-501 Limitation on the Number of Dwelling Units on a Lot

There shall be not more than one (1) dwelling unit on any one (1) lot, nor shall a dwelling unit be located on the same lot with any other principal building. This provision shall not be deemed, however, to preclude multiple family dwelling units as permitted by the provisions of this Ordinance; an accessory use or accessory service use as may be permitted by the provisions of Article 10; an accessory dwelling unit as may be approved by the BZA in accordance with the provisions of Part 9 of Article 8; single family attached dwellings in a rental development; or a condominium development as provided for in Sect. 409 above; or antennas and/or related unmanned equipment structures for a mobile and land based telecommunications facility mounted on a utility distribution pole, utility transmission pole or light/camera standard in accordance with the provisions of Sect. 514 below.

In addition, in all districts, the Board or BZA, in conjunction with the approval of a special exception or special permit use, may allow dwelling units for a proprietor, owner and/or employee and his/her family whose business or employment is directly related to the special exception or special permit use. Such dwelling units may either be located within the same structure as the special exception or special permit use or in separate detached structures on the same lot. If located in separate detached structures, such dwelling units shall meet the applicable bulk regulations for a principal structure set forth in the specific district in which located, and any locational requirements set forth as additional standards for a special exception or special permit use shall not be applicable to detached structures occupied by dwelling units.

3-CO3 Special Permit Uses

6. Group 9 - Uses Requiring Special Regulation, limited to:

   A. Home professional offices

   B. Veterinary hospitals

   C. Modification to minimum yard requirements

   D. Accessory dwelling units

3-C07 Bulk Regulations

2. Minimum yard requirements

   A. Single family dwellings

      (1) Front yard: 40 feet

      (2) Side yard: 20 feet

      (3) Rear yard: 25 feet

   B. All other structures

      (1) Front yard: Controlled by a 50° angle of bulk plane, but not less than 40 feet

      (2) Side yard: Controlled by a 45° angle of bulk plane, but not less than 20 feet

      (3) Rear yard: Controlled by a 45° angle of bulk plane, but not less than 25 feet

8-914 Provisions for Approval of Reduction to the Minimum Yard Requirements Based on Error in Building Location

The BZA may approve a special permit to allow a reduction to the minimum yard requirements for any building existing or partially constructed which does not comply with such requirements applicable at the time such building was erected, but only in accordance with the following provisions:

1. Notwithstanding Par. 2 of Sect. 011 above, all applications shall be accompanied by ten (10) copies of a plat and such plat shall be presented on a sheet having a maximum size of 24" x 36", and one 8 ½" x 11" reduction of the plat. Such plat shall be drawn to a designated scale of not less than one inch equals fifty feet (1" = 50'), unless a smaller scale is required to accommodate the development. Such plat shall be certified by a professional engineer, land surveyor, architect, or landscape architect licensed by the State of Virginia and such plat shall contain the following information:

   A. Boundaries of entire property, with bearings and distances of the perimeter property lines and of each zoning district.

   B. Total area of the property and of each zoning district in square feet or acres.

   C. Scale and north arrow, with north, to the extent feasible, oriented to the top of the plat and on all supporting graphics.

   D. Location of all existing structures, with dimensions, including height of any structure and penthouse, and if known, the construction date(s) of all existing structures.

   E. All required minimum yards to include front, side and rear, and a graphic depiction of the angle of bulk plane, if applicable, and the distances from all existing structures to lot lines.

   F. Means of ingress and egress to the property from a public street(s).

   G. For nonresidential uses, the location of parking spaces, indicating minimum distance from the nearest property line(s).

   H. If applicable, the location of well and/or septic field.

   I. For nonresidential uses, a statement setting forth the maximum gross floor area and FAR for all uses.

J. Location of all existing utility easements having a width of twenty-five (25) feet or more, and all major underground utility easements regardless of width.

K. Seal and signature of professional person certifying the plat.

In addition, the application shall contain a statement of justification explaining how the error in building location occurred and any supportive material such as aerial photographs, Building Permit applications, County assessments records, a copy of the contract to build the structure which is in error, or a statement from a previous owner indicating how the error in building location occurred.

2. The BZA determines that:

   A. The error exceeds ten (10) percent of the measurement involved, and

   B. The noncompliance was done in good faith, or through no fault of the property owner, or was the result of an error in the relocation of the building subsequent to the issuance of a Building Permit, if such was required, and

   C. Such reduction will not impair the purpose and intent of this Ordinance, and

   D. It will not be detrimental to the use and enjoyment of other property in the immediate vicinity, and

   E. It will not create an unsafe condition with respect to both other property and public streets, and

   F. To force compliance with the minimum yard requirements would cause unreasonable hardship upon the owner.

   G. The reduction will not result in an increase in density or floor area ratio from that permitted by the applicable zoning district regulations.

3. In granting such a reduction under the provisions of this Section, the BZA shall allow only a reduction necessary to provide reasonable relief and may, as deemed advisable, prescribe such conditions, to include landscaping and screening measures, to assure compliance with the intent of this Ordinance.

4. Upon the granting of a reduction for a particular building in accordance with the provisions of this Section, the same shall be deemed to be a lawful building.

5. The BZA shall have no power to waive or modify the standards necessary for approval as specified in this Section.

8-918 Additional Standards for Accessory Dwelling Units

As established by the Fairfax County Board of Supervisors' Policy on Accessory Dwelling Units (Appendix 5), the BZA may approve a special permit for the establishment of an accessory dwelling unit with a single family detached dwelling unit but only in accordance with the following conditions:

1. Accessory dwelling units shall only be permitted in association with a single family detached dwelling unit and there shall be no more than one accessory dwelling unit per single family detached dwelling unit.

2. Except on lots two (2) acres or larger, an accessory dwelling unit shall be located within the structure of a single family detached dwelling unit. Any added external entrances for the accessory dwelling unit shall be located on the side or rear of the structure.

   On lots two (2) acres or greater in area, an accessory dwelling unit may be located within the structure of a single family detached dwelling unit or within a freestanding accessory structure.

3. The gross floor area of the accessory dwelling unit shall not exceed thirty-five (35) percent of the total gross floor area of the principal dwelling unit. When the accessory dwelling unit is located in a freestanding accessory structure, the gross floor area of the accessory dwelling unit shall not exceed thirty-five (35) percent of the gross floor area of the accessory freestanding structure and the principal dwelling unit.

4. The accessory dwelling unit shall contain not more than two (2) bedrooms.

5. The occupancy of the accessory dwelling unit and the principal dwelling unit shall be in accordance with the following:

   A. One of the dwelling units shall be owner occupied.

B. One of the dwelling units shall be occupied by a person or persons who qualify as elderly and/or disabled as specified below:

(1) Any person fifty-five (55) years of age or over and/or
(2) Any person permanently and totally disabled. If the application is made in reference to a person because of permanent and total disability, the application shall be accompanied by a certification by the Social Security Administration, the Veterans Administration or the Railroad Retirement Board. If such person is not eligible for certification by any of these agencies, there shall be submitted a written declaration signed by two (2) medical doctors licensed to practice medicine, to the effect that such person is permanently and totally disabled. The written statement of at least one of the doctors shall be based upon a physical examination of the person by the doctor. One of the doctors may submit a written statement based upon medical information contained in the records of the Civil Service Commission which is relevant to the standards for determining permanent and total disability.

For purposes of this Section, a person shall be considered permanently and totally disabled if such person is certified as required by this Section as unable to engage in any substantial gainful activity by reasons of any medically determinable physical or mental impairment or deformity which can be expected to result in death or can be expected to last for the duration of the person's life.

C. The accessory dwelling unit may be occupied by not more than two (2) persons not necessarily related by blood or marriage. The principal single family dwelling unit may be occupied by not more than one (1) of the following:

(1) One (1) family, which consists of one (1) person or two (2) or more persons related by blood or marriage and with any number of natural children, foster children, step children or adopted children.

(2) A group of not more than four (4) persons not necessarily related by blood or marriage.

10-102 Permitted Accessory Uses

11. Guest house or rooms for guests in an accessory structure, but only in the R-A through R-E Districts, and provided such house is without kitchen facilities and is used for the occasional housing of guests of the occupants of the principal structure, and not as rental units or for permanent occupancy as housekeeping units.

21. Servants quarters, but only in the R-A through R-4 Districts on a lot of two (2) acres or more. Servants quarters located in a structure detached from the principal dwelling shall comply with the applicable zoning district bulk regulations for single family dwellings.

10-103 Use Limitations

2. All accessory uses and structures shall comply with the use limitations applicable in the zoning district in which located.

3. All uses and structures accessory to single family detached dwellings, to include those extensions permitted by Sect. 2-412, shall cover no more than thirty (30) percent of the area of the minimum required rear yard.

4. All accessory uses and structures shall comply with the maximum height regulations applicable in the zoning district in which they are located, except as may be qualified by Sect. 2-506. For the purposes of determining height, unless otherwise specified in Sect. 10-104 below, the height of an accessory structure shall be measured from the highest point of the structure to the lowest point of finished ground level adjacent to the structure.

10-104 Location Regulations

10. The following regulations shall apply to the location of freestanding accessory storage structures:

    A. For purposes of determining height, the height of an accessory storage structure shall be measured in accordance with Par. 4 of Sect. 10-103 above.

B. An accessory storage structure shall not be located (a) in any minimum required front yard on any lot or (b) in any front yard on any lot containing 36,000 square feet or less.

C. An accessory storage structure which does not exceed eight and one-half (8 ½) feet in height may be located in any part of any side yard or rear yard, except as qualified in Sect. 2-505.

D. An accessory storage structure which exceeds eight and one-half (8 ½) feet in height shall not be located in any part of any minimum required side yard.

E. An accessory storage structure which exceeds eight and one-half (8 ½) feet in height shall not be located closer than a distance equal to its height to the rear lot line or located closer than a distance equal to the minimum required side yard to the side lot line.

F. On a corner lot, the rear lot line of which adjoins a side lot line of a lot to the rear, an accessory storage structure which exceeds eight and one-half (8 ½) feet in height shall not be located:

(1) Nearer to any part of the rear lot line that adjoins the side yard on the lot to the rear than a distance equal to the minimum required side yard on such lot to the rear, or

(2) Nearer to the side street line than a distance equal to the minimum required front yard on the lot to the rear.

12. D. No accessory structure or use which exceeds seven (7) feet in height shall be located in any minimum required side yard.

E. No accessory structure or use which exceeds seven (7) feet in height shall be located closer than a distance equal to its height to the rear lot line or located closer than a distance equal to the minimum required side yard to the side lot line.

18-601 Permit Required for Erection of Buildings and Structures

The erection of all buildings and all structures, as well as additions, deletions and modifications thereto, shall be subject to the provisions of Chapter 61 of The Code, Buildings. No building or structure which is

required to have a Building Permit pursuant to Chapter 61 of The Code shall be erected until a Building Permit application has been approved by the Zoning Administrator.

18-603 Limitations on Approval of Building Permits

1. No Building Permit shall be issued for the erection of any building or structure on a lot or addition or modification to a building or structure that is in violation of any of the provisions of Chapter 101, Chapter 116 or Chapter 118 of The Code, this Ordinance, all other applicable laws and ordinances, any proffered conditions, or any development conditions of any approved rezoning, special permit, special exception or variance. Appeals of decisions made pursuant to Chapter 118 of The Code which are appealable shall be processed in accordance with Article 8 of Chapter 118.

DEFINITIONS

ACCESSORY USE: Accessory uses as permitted by this Ordinance are subject to the provisions of Part 1 of Article 10. An accessory use is a use or building which:

1. Is clearly subordinate to, customarily found in association with, and serves a principal use; and

2. Is subordinate in purpose, area or extent to the principal use served; and

3. Contributes to the comfort, convenience or necessity of the occupants, business enterprise or industrial operation within the principal use served; and

4. Is located on the same lot as the principal use, except any building that is customarily incidental to any agricultural use shall be deemed to be an accessory use, whether or not it is situated on the same lot with the principal building.

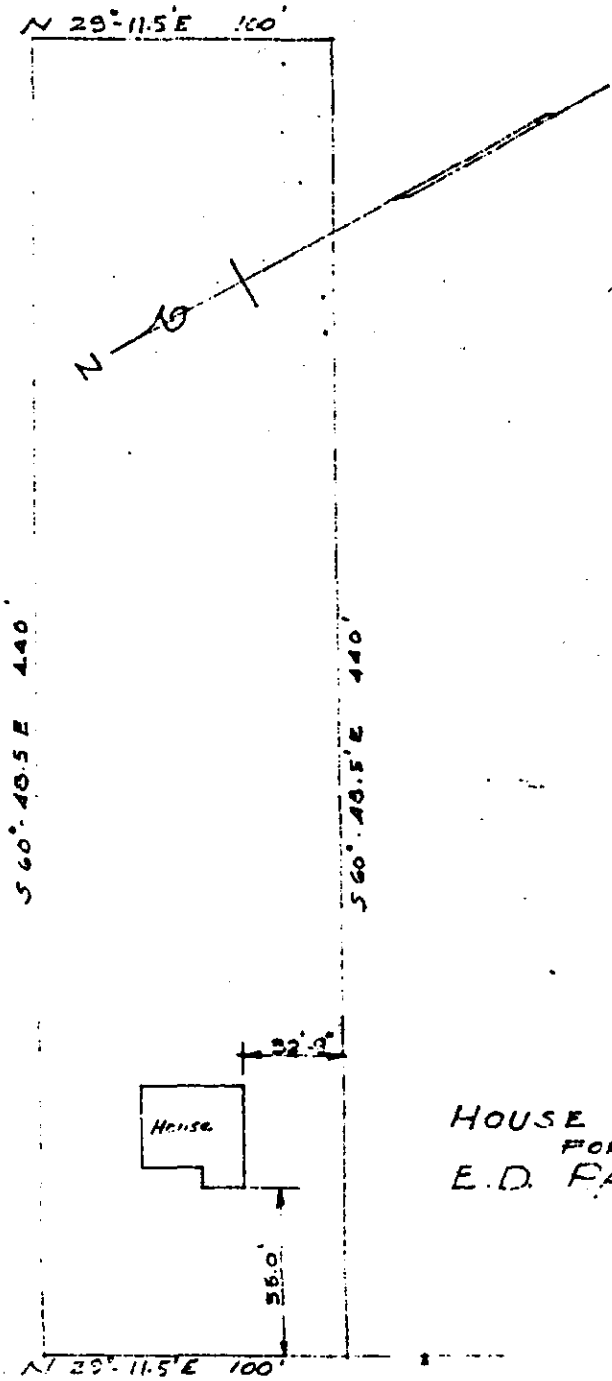
DWELLING: A building or portion thereof, but not a MOBILE HOME, designed or used for residential occupancy. The term 'dwelling' shall not be construed to mean a motel, rooming house, hospital, or other accommodation used for more or less transient occupancy.

DWELLING, SINGLE FAMILY: A residential building containing only one (1) DWELLING UNIT.

DWELLING UNIT: One (1) or more rooms in a residential building or residential portion of a building which are arranged, designed, used, or intended for use as a complete, independent living facility which includes permanent provisions for living, sleeping, eating, cooking and sanitation. Occupancy shall be in accordance with the provisions of Sect. 2-502.

DWELLING UNIT ACCESSORY: A secondary dwelling unit established in conjunction with and clearly subordinate to a single family detached dwelling unit. Accessory dwelling units may be permitted by the provisions of Part 9 of Article 8.

NONCONFORMING BUILDING OR USE: A building or use, lawfully existing on the effective date of this Ordinance or prior ordinances, which does not conform with the regulations of the zoning district in which it is located, except as may be qualified by Sect. 15-101 of this Ordinance.



HOUSE LOCATI
FOR
E.D. PAINTER

Attachment 3

County of Fairfax, Virginia

OFFICE OF THE ZONING ADMINISTRATOR

Magisterial

APPLICATION FOR ZONING APPROVAL

Building Permit

District Providence c/o W.C. Puckett No. 712

Name of Owner Edwin D. Painter Address Rt. 1 Fairfax, Va.

Name of Builder Ira W. Henry Address Front Royal, Va.

Subdivision Shirley Gate Park Lot No. 5 Block Section

Use of Building dwelling - 34.5 x 28.5'

No. of Families or Housekeeping Units one Plans Cost 11000 ±

Size of Lot: Width 100 ft. Depth 440 ft. Area 1.01 acres ~~sq. ft.~~

Height of building, at front center to highest point of roof 20 ft.

Set back from side line of street 55' (85' from ℄) Width of street 45 ft. (right of way)

Name (No.) of street Shirley Gate Rd. (#655) Paving of street

Side yard 33.1 ft. Side yard ft. Rear yard ft.

Are water and/or sewer available well & septic tank. Zone Agricultural

Plat property to scale, showing ALL buildings and ALL distances to property lines, if plat is required, and attach hereto. Permission is hereby granted to pour or establish footings and foundation walls not to exceed height of first floor joists, within the buildable area indicated on plot plan attached hereto. Before zoning approval of building permit shall be issued, it is required that a plat showing the exact location of the walls in relation to the property and street lines shall be submitted to the Zoning Administrator. Provided the plat is made and certified as being correct by a certified surveyor zoning permit shall be issued. Provided the plat is not made by a surveyor and all lot corners are in place on the ground and plainly marked by a high stake so as to be easily found, a field check will be made by this office before zoning approval shall be issued.

I, the undersigned, hereby certify that I have read the foregoing grant of permission and understand and agree that I will furnish the above required plat before zoning approval of building permit shall be issued. I further certify that I have the authority to make the foregoing application, that the information given is correct, and that the use and construction, if permit is issued, will conform to the County Health regulations, the Building and Zoning Ordinances, and private deed restrictions, if any, which may be imposed on the property.

(x) Edwin D. Painter

Applicant for Permit

FAIRFAX 78-W-13

9-7-'48, 19

ZONING APPROVAL

In compliance with the Zoning Ordinance, effective as of this date, and by authority vested in me as Zoning Administrator, by the Board of Supervisors, I hereby approve the above described use and building construction as indicated by sketch on the back of this form or plat attached hereto, as being in conformance with the said Zoning Ordinance.

Approved by:

Zoning Administrator

Inspector Farley 6-7-71 [illegible] BT

MAP REFERENCE			
Plat Number	Subd. Dvn.	Blk. or Sec.	Parcel or lot
56 4	6		5

COUNTY OF FAIRFAX, VIRGINIA
OFFICE OF THE BUILDING INSPECTOR
Application for Building Permit and Certificate of Occupancy

APPLICATION NO. H 4795
DATE _____ 19__ PERMIT NO. P 25322

To: BUILD ☐ ALTER OR REPAIR ☐ ADD TO ☐ DEMOLISH ☐ MOVE ☐

JOB LOCATION
Street: 4409 Shirley Gate Rd.
Lot No.: 5 Block: Section:
Subdivision: Shirley Gate Park

OWNER
Corp. Name:
Name (Reg. Agent): Edwin D. Painter
Address: 4409 Shirley Gate Rd
City: Fairfax Co. Va. 273-6172 Telephone Number

ARCHITECT ENGINEER
Name:
Address:
City: State Reg. No.

CONTRACTOR
Name:
Address: Owner
City:
County Reg. #: State Reg. #:

DESCRIPTION
For: Add Screen Porch

No. of Bldgs.: Est. Const. Cost $ 750.00
No. of Units: No. of Stories:
No. of Kitchens: Penthouse:
No. of Baths: Ht. of Bldg.: ft.
No. of Rooms: Bldg. Area: sq. ft.
(Exclude Kit. & Bath)
Basement ☐ Slab ☐ Crawl ☐ Soil: Solid ☐ Fill ☐

Ftg: Concrete ☐ Pile ☐ Caisson ☐
Ext. Walls: Wood ☐ Metal ☐ Brick ☐
Int. Walls: Plast ☐ Drywall ☐ Panel ☐
Roof: Flat ☐ Pitch ☐ Shed ☐
Roofing: Built-up ☐ Shingle ☐ Roll ☐

Heat: Oil ☐ Gas ☐ Electric ☐
Equipment: Boiler ☐ Furnace ☐ Heat Pump ☐ Air Cond. ☐

Sewage: Public ☐ Community ☐ Septic Tank ☒ None ☐
Water: Public ☐ Individual Well ☒ None ☐
Remarks:

I hereby certify that I have the authority to make this application, that the information given is correct, and that the use and construction shall conform to the County Health Regulations, the Building and Zoning Ordinances, and private deed restrictions, if any, which are imposed on the property.

Phone No. Date Edwin D. Painter
Signature of Owner or Auth. Agent

APPLICANT: DO NOT WRITE BELOW THIS LINE

PLAN APPROVAL
Use Group of Building: 1-3 Area of Bldg. ____ @ ____ per Sq. Ft. $
Type of Construction: 4-B ____ @ ____ $
Fire District: ____ @ ____ $
Date Checked: 6/1 1971 By: [illegible] TOTAL FEE $ 5.00
Approved by Building Inspector: Jack P. Burdi

ROOTING

	OFFICE	FLOOR	DATE	APPROVED BY		OFFICE	FLOOR	DATE	APPROVED
✓	Land Office	4th	6/1/71	[illegible]		Fire Marshall	B Level		
✓	Zoning Administrator	6th	6-1-71	[illegible]	✓	Design Review	7th	6-1-71	[illegible]
	Sanitation	8th			✓	Housing & Licenses	9th		
✓	Health Dept.	Annex	6-7-71	[illegible]					

CERTIFICATION
I hereby certify to the following statements:
1. All materials used for work performed under this permit will be paid directly to the supplier by the property owner.
2. All compensation will be on an hourly basis and paid by the property owner directly to the person(s) performing work under this permit.

Date _____ 19__ _____ By _____
Property Owner Authorized Agent

Supervisor of Assessments
Property is listed in name of: Edwin D. Painter
Magisterial District: [illegible] Deed Book Reference: 577-140
Supervisor: [illegible]

Subdivision: Shirley Gate Park Lot No.: 5 Block: Section: Zone: RE 1
Address: 4409 Shirley Gate Rd
Owner Alteration: [illegible] No. Families: [illegible]

56-4 (6) 5 : P-75322

Shirley Gate Park

6-7-71 - CR

FARLEY

Department of County Development
Fairfax County, Virginia
Application Number H-4795

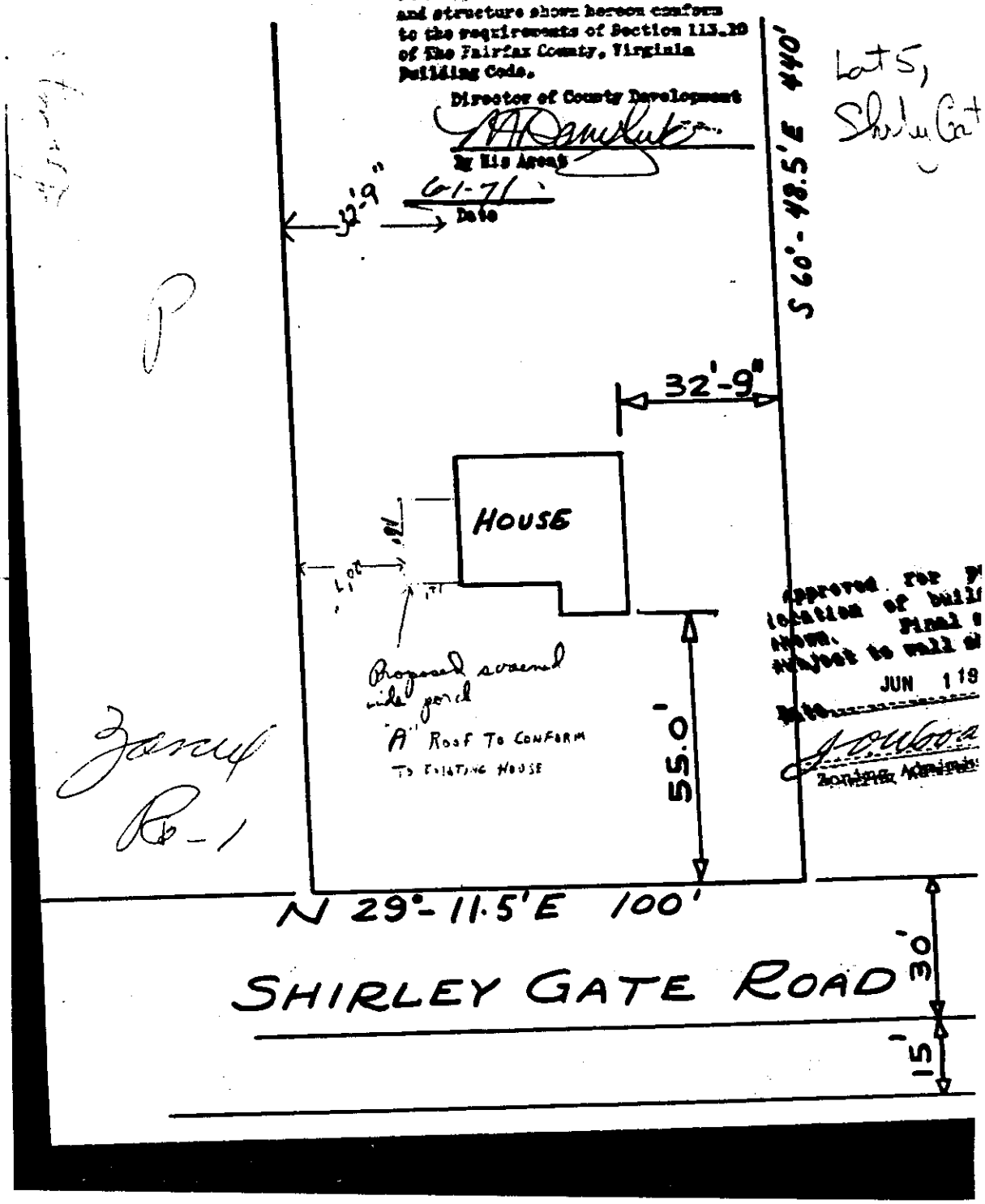
I hereby certify that this plot plan and structure shown hereon conform to the requirements of Section 113.10 of The Fairfax County, Virginia Building Code.

Director of County Development

By His Agent

6-1-71
Date

Lot 5, Shirley Gate



Approved for P... location of buil... shown. Final ... subject to wall ...

JUN 1 19...

Date

Zoning Administ...

Zoning Rt-1

COUNTY OF FAIRFAX, VIRGINIA

OFFICE OF BUILDING INSPECTOR

Building Permit No. 21660

34D

APPLICATION FOR PERMIT TO ALTER, REPAIR OR ADD TO EXISTING BUILDING

OK 10/17/57 WJZ

Fairfax, Va., Aug. 5, 1957

TO THE BUILDING INSPECTOR:

The undersigned applies for a permit to Build Storage Unit (1)

1. Description of Building 1
2. Location: Lot No. Ethan Block Section 5 Subdivision Unity Chapel
3. Name of Owner Edwin D. Painter Phone Br. 8-8769
   Address R.F.D. #1 - Box 185 - Fairfax, Va.
4. Name of Designer Jeff Phone
   Address
5. Name of Contractor Jeff Phone
   Address Br. 695 - 3/10 mile off 211

I hereby certify that the property described above is listed in the name of: Edwin D. + Lucille B. Painter

Mag. Dist. Providence Deed Book Reference 597-140

John W. Thompson
Supervisor of Assessments

for RES

6. Zoning: Use of building Storage No. of families or housekeeping units None
   No. kitchens None; Size of lot: Width 100 ft., Depth 440 ft., Area ; Height of building (to highest point of roof) 11 ft. ft. Setback from property line: Front 145 ft., Rear 280 ft., Side 10
   Zone Agriculture
7. Check system to be used: (a) Sewage Disposal by: Public Sewer, Community System, Septic Tank, Pit privy (b) Water Supply: Public system, Individual well
8. Give Details: Building to be cinder block + frame siding, asphalt roofing shingles. Bldgs will be 15'x28'. 1 bldg 8x16 conc ftg. 8" cin. blk to plate hgt 2x8 plate bolted w/1/2" x 6'-6" 2x6 rafters @ 24" o.c. 4" conc slab 1" sheathing Asphalt shingles

RES.

9. Use of Building after Alterations: Storage of marina equipment, anchors, etc.
10. Estimated Cost of Improvement 800.00

2x6-24"o.c.

I hereby certify that I have the authority to make this application, that the information given is correct, and that the use and construction shall conform to the County Health Regulations, the Building and Zoning Ordinances, and private deed restriction, if any, which are imposed on the property.

Edwin D. Painter
Signature of owner or authorized agent

R.F.D. #1 - Fairfax, Va.
Address

Fire-proof Non-fireproof X

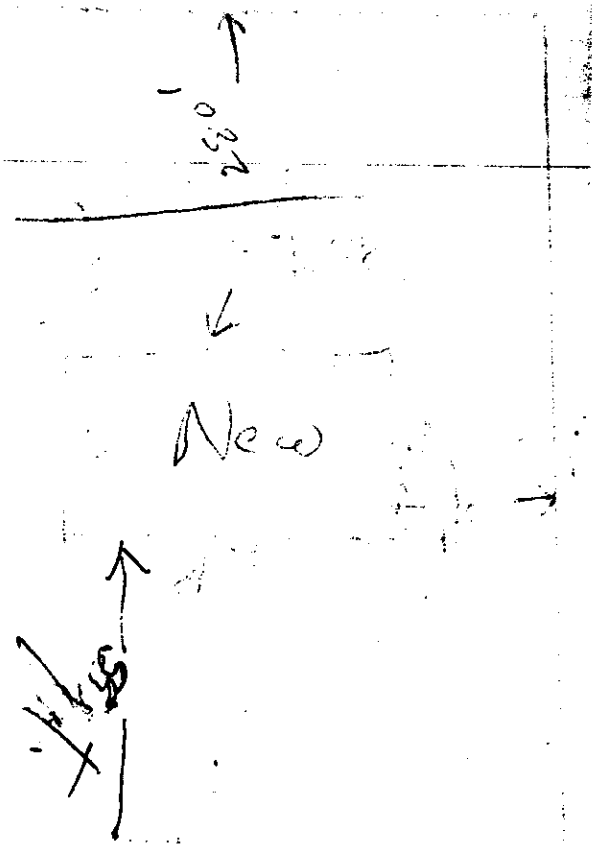
Total sq. ft. Fee $4.00

Approved by Building Inspector

8/5/57 Date Harvey L. Essig (CW)

Telephone No. Br. 8-8769 Date 8/5/57

[illegible] for proposed
[illegible] of building as
[illegible] approval
[illegible] to mail check.
Date AUG 5 [illegible]
[illegible]
Zoning Administrator



Ex. Dw

04177B0540

BUILDING PERMIT APPLICATION

PERMIT # ~~W-02-04274~~

FAIRFAX COUNTY OFFICE OF BUILDING CODE SERVICES
PERMIT APPLICATION CENTER
12055 Government Center Parkway, 2nd Floor, Fairfax, Virginia 22035-5504
Telephone: 703-222-0801
Web site: www.fairfaxcounty.gov/dpwes

FOR INSPECTIONS CALL 703-222-0455 (see back for more information)

FILL IN ALL APPROPRIATE INFORMATION IN THIS COLUMN
(PLEASE PRINT OR TYPE)

JOB LOCATION
ADDRESS 4409 SHIRLEY GATE RD Fairfax VA 22030
LOT # 5 BUILDING
FLOOR SUITE
SUBDIVISION Swinton Gate Rc
TENANT'S NAME

OWNER INFORMATION OWNER ☑ TENANT ☐
NAME THIEND VU & LOAN M CAO
ADDRESS 4409 SHIRLEY GATE RD
CITY FAIRFAX STATE VA ZIP 22030
TELEPHONE (703) 591-2412

CONTRACTOR INFORMATION SAME AS OWNER ☐
CONTRACTORS MUST PROVIDE THE FOLLOWING:
COMPANY NAME
ADDRESS
CITY STATE ZIP
TELEPHONE
STATE CONTRACTORS LICENSE #
COUNTY BPOL #

APPLICANT LOAN MY CAO

DESCRIPTION OF WORK
SUNROOM ADDITION
CANCEL PT 02192B0670
EXPIRED Issue new one.

HOUSE TYPE Y
ESTIMATED COST OF CONSTRUCTION 30,000
BLDG AREA (SQ FT OF FOOTPRINT)
USE GROUP OF BUILDING
TYPE OF CONSTRUCTION
SEWER SERVICE PUBLIC ☐ SEPTIC ☐ OTHER ☐
WATER SERVICE PUBLIC ☐ WELL ☐ OTHER ☐
OTHER PLEASE SPECIFY

DESIGNATED MECHANICS' LIEN AGENT
(Residential Construction Only)
NAME
ADDRESS
NONE DESIGNATED ☐ PHONE

CHARACTERISTICS FOR NEW SFD, TH, APT & CONDOS

# KITCHENS		EXTER. WALLS	
# BATHS		INTER. WALLS	
# HALF BATHS		ROOF MATERIAL	
# BEDROOMS		FLOOR MATERIAL	
# OF ROOMS		FIN. BASEMENT	%
# STORIES		HEATING FUEL	
BUILDING HEIGHT		HEATING SYSTEM	
BUILDING AREA		# FIREPLACES	
BASEMENT			

DO NOT WRITE IN GRAY SPACES - COUNTY USE ONLY
PLAN # W-02-04274
TAX MAP #

ROUTING	DATE	APPROVED BY
LICENSING		
ZONING		
SITE PERMITS		
HEALTH DEPT.		
BUILDING REVIEW		
SANITATION		
FIRE MARSHAL		
ASBESTOS		
PROFFERS		

FEE $
FILING FEE $
AMOUNT DUE $ 56.00

BUILDING PLAN REVIEW
REVIEWER # OF HOURS
REVISION FEES $
FIRE MARSHAL FEES $
FIXTURE UNITS PLAN LOC. J ☐ R ☐

APPROVED FOR ISSUANCE OF BUILDING PERMIT
(LOG OUT)
BY DATE 6-25-04

ZONING REVIEW
USE
ZONING DISTRICT HISTORICAL DISTRICT
ZONING CASE #
GROSS FLOOR AREA OF TENANT SPACE

YARDS:
FRONT
FRONT
L SIDE
R SIDE
REAR

GARAGE 1 ☐ 2 ☐ 3 ☐
OPTIONS YES ☐ NO ☐
REMARKS

GRADING AND DRAINAGE REVIEW
SOILS # A ☐ B ☐ C ☐
AREA TO BE DISTURBED (TOTAL SQ FT THIS PERMIT)
IMPERVIOUS AREA (TOTAL SQ FT THIS PERMIT)
PLAN # APPR. DATE

STAMPS
(See reverse side of application)

REMARKS
Sunroom addition building permit has expired. Like to renew it 02192B0670

Any and all information and/or stamps on the reverse side of this form are a part of this application and must be complied with. I hereby certify that I have authority of the owner to make this application, that the information is complete and correct, and that the construction and/or use will conform to the building code, the zoning ordinance and other applicable laws and regulations which relate to the property.

Signature of Owner or Agent — Date 6/25/04

LOAN MY CAO
Printed Name and Title
(Notarization of signature is required if owner is listed as the contractor and is not present at time of application)

NOTARIZATION (if required)
State (or territory or district) of
County (or city) of , to wit
, a
Notary Public in the State and County aforesaid, do certify that
whose name is signed to this application, appeared before me in the State and County aforesaid and executed this affidavit.
Given under my hand this day of , 20 .
commission expires the day of , 20 .
(Notary Signature)

BUILDING PERMIT APPLICATION

FAIRFAX COUNTY OFFICE OF BUILDING CODE SERVICES
PERMIT APPLICATION CENTER
12055 Government Center Parkway, 2nd Floor, Fairfax, Virginia 22035-5504
Telephone: 703-222-0801
Web site: http://www.co.fairfax.va.us/dpwes

PERMIT # 02192B0670

FOR INSPECTIONS CALL 703-222-0455 (see back for more information)

FILL IN ALL APPROPRIATE INFORMATION IN THIS COLUMN
(PLEASE PRINT OR TYPE)

JOB LOCATION
ADDRESS 4409 SHIRLEY GATE Rd
LOT # 5 BUILDING
FLOOR SUITE
SUBDIVISION Fairfax Gate Park
TENANT'S NAME

OWNER INFORMATION OWNER ☒ TENANT ☐
NAME THIEN VU & LOAN CAO
ADDRESS 4409 SHIRLEY GATE Rd
CITY FAIRFAX STATE VA ZIP 22030
TELEPHONE 703 591 2413

CONTRACTOR INFORMATION SAME AS OWNER ☒
CONTRACTORS MUST PROVIDE THE FOLLOWING:
COMPANY NAME
ADDRESS
CITY STATE ZIP
TELEPHONE
STATE CONTRACTORS LICENSE #
COUNTY BPOL #

APPLICANT Thien D Vu

DESCRIPTION OF WORK
SUN ROOM ADDITION
12' X 25'

HOUSE TYPE TH
ESTIMATED COST OF CONSTRUCTION
BLDG AREA (SQ FT OF FOOTPRINT) 2,888
USE GROUP OF BUILDING R-1 / U
TYPE OF CONSTRUCTION
SEWER SERVICE PUBLIC ☒ SEPTIC ☒ OTHER ☐
WATER SERVICE PUBLIC ☐ WELL ☒ OTHER ☐
OTHER PLEASE SPECIFY
DESIGNATED MECHANICS LIEN AGENT
(Residential Construction Only)
NAME
ADDRESS
NONE DESIGNATED ☐ PHONE

CHARACTERISTICS FOR NEW SFD, TH, APT & CONDOS

# KITCHENS		EXTER. WALLS	
# BATHS		INTER. WALLS	
# HALF BATHS		ROOF MATERIAL	
# BEDROOMS		FLOOR MATERIAL	
# OF ROOMS		FIN. BASEMENT	%
# STORIES		HEATING FUEL	
BUILDING HEIGHT		HEATING SYSTEM	
BUILDING AREA		# FIREPLACES	
BASEMENT			

DO NOT WRITE IN THIS SPACE - COUNTY USE ONLY
PLAN # W-02-04274
TAX MAP # 056-4-706 / 00005

ROUTING	DATE	APPROVED BY
LICENSING		
(1) ZONING	7-11-02	
(2) SITE PERMITS	7.11.02	MS
(3) HEALTH DEPT.	7/11/02	AT
(4) BUILDING REVIEW	10-7-02	TH
SANITATION		
FIRE MARSHAL		
ASBESTOS		
PROFFERS		

FEE $
FILING FEE - $ 40
AMOUNT DUE = $ 40

BUILDING PLAN REVIEW
REVIEWER # OF HOURS
REVISION FEES $
FIRE MARSHAL FEES $
FIXTURE UNITS PLAN LOC: J ☐ R ☐

APPROVED FOR ISSUANCE OF BUILDING PERMIT
(LOG OUT)
BY DATE 10/7/02

ZONING REVIEW ZONING CLASS R-C
USE SFD
ZONING CASE #
GROSS FLOOR AREA OF TENANT SPACE

YARDS:	
FRONT	N/C
FRONT	
L SIDE	33'
R SIDE	56'
REAR	25'

GARAGE 1 ☐ 2 ☐ 3 ☐
OPTIONS YES ☐ NO ☐
REMARKS BLD Sun RM 12'X25'

GRADING AND DRAINAGE REVIEW
SOILS # 57 A ☒ B ☐ C ☐
HISTORICAL DISTRICT
AREA TO BE DISTURBED (TOTAL SQ FT) 1,152
ADD'L IMPERVIOUS AREA (ADDED SQ FT) 312
PLAN # APPR. DATE

STAMPS Sp Rec, 11 00, 2 00
EXIST
SOIL/BEDROCK MAY CONTAIN ASBESTOS MINERALS. THE APPLICANT/OWNER/CONTRACTOR MUST ENSURE COMPLIANCE WITH THE REGULATIONS OF THE HEALTH DEPARTMENT. CONTACT THE AIR POLLUTION CONTROL DIVISION OF THE HEALTH DEPARTMENT
(See reverse side of application)

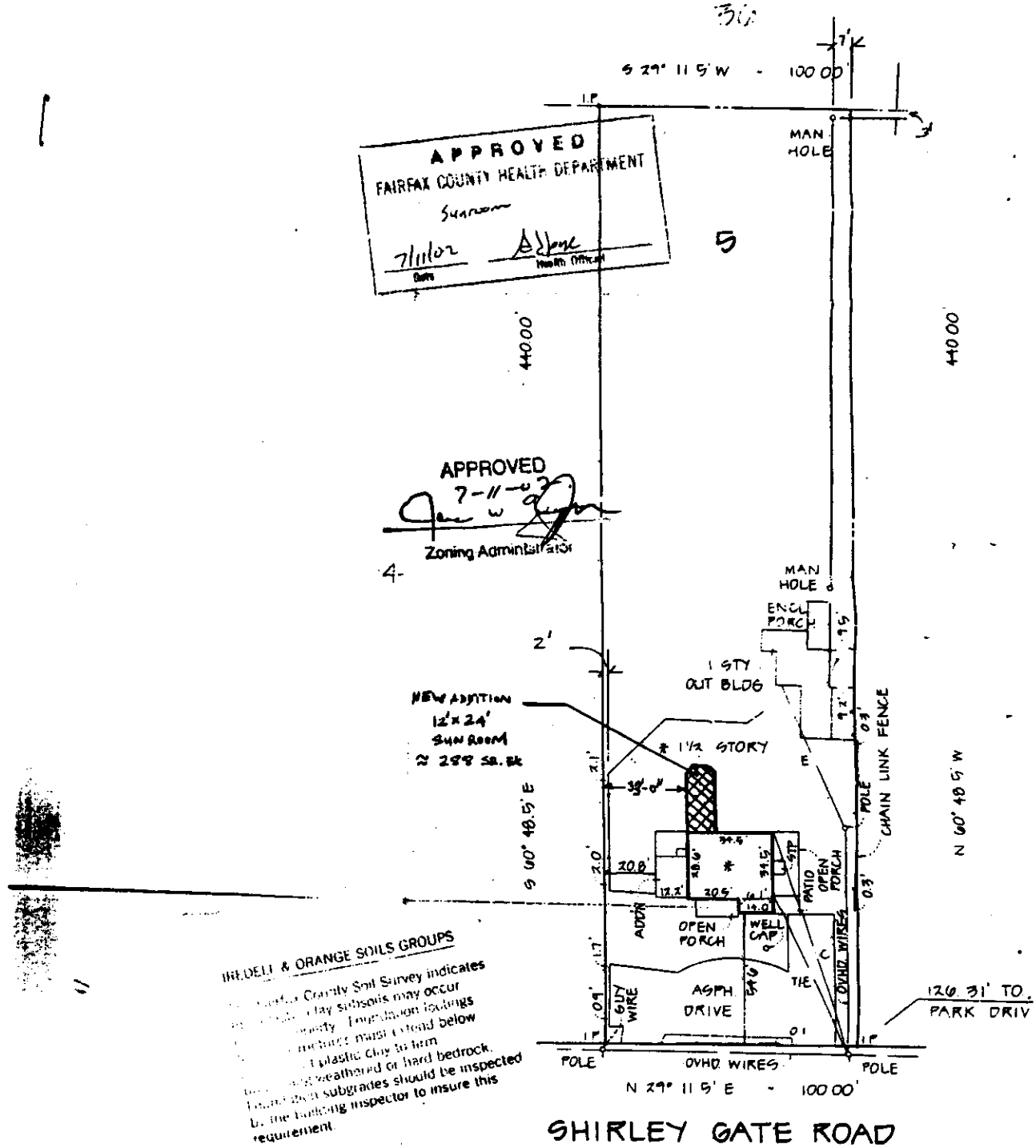
REMARKS

Any and all information and/or stamps on the reverse side of this form are a part of this application and must be complied with. I hereby certify that I have authority of the owner to make this application, that the information is complete and correct, and that the construction and/or use will conform to the building code, the zoning ordinance and other applicable laws and regulations which relate to the property.

Signature of Owner or Agent Date

THIEN D VU Mechanical Engineer

NOTARIZATION (If required)
State (or territory or district) of
County (or city) of , to wit:
I,
a Notary Public in the State and County aforesaid, do certify that
whose name is signed to this application, appeared before me in the State and County aforesaid and executed this affidavit.
Given under my hand this day of , 20
My commission expires the day of



MILDELL & ORANGE SOILS GROUPS

Fairfax County Soil Survey indicates ... clay subsoils may occur ... Inspection footings ... mechanics must extend below ... plastic clay to firm ... weathered or hard bedrock. ... subgrades should be inspected by the building inspector to insure this requirement.

FOOTINGS AND PIERS MUST BE PLACED ON COMPETENT MATERIAL.

DAMP PROOFING/WATERPROOFING REQUIRED IN ACCORDANCE WITH CABO AND BOCA CODES.

TOTAL EARTH DISTURBANCE ON THIS LOT SHALL NOT EXCEED 2500 S.F.

EXCAVATED MATERIAL SHALL BE REMOVED FROM SITE

DPWES
Office of Building ... Services
Approved for Sunroom Addition
By DBS
Date 7-11-02

NOTE: FENCES ARE FRAME

... COMPLIANCE W ... THE ... CONTACT THE ... OF THE HEALTH DEPARTMENT

88 043064 APR -6 · 9:30

This DEED, made and entered into this 31st day of March, 1988 by and between Frank R. Jenkins and H. Marjorie Jenkins, husband and wife, parties of the first part and Thien Duy Vu and Loc Hong Tran, Tenants in Common, parties of the second part,

WITNESSETH that for and in consideration of ten dollars and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged by the parties of the first part, the said parties of the first part do hereby GRANT, BARGAIN, SELL and CONVEY unto the parties of the second part, as tenants in common, in fee simple with GENERAL WARRANTY and ENGLISH COVENANTS OF TITLE but subject to encumbrances of record as stated below, all of that lot or parcel of land, with all improvements thereon, situate in Fairfax County, Virginia, and more particularly described as follows:

All of Lot Five (5), of the Subdivision known as Shirley Gate Park, as the same is duly dedicated, platted and recorded in Deed Book 442, at Page 68, among the land records of Fairfax County, Virginia.

AND BEING the same property acquired by the parties of the first part by Deed recorded in Deed Book 5741 at Page 1180, among the said land records,

Consideration: $196,000.00

Grantee(s) Address:
4409 Shirley Gate Rd.
Fairfax, Va. 22030

Return to:
J. Roger Cornellier
Box 166

BK6993 0705

TO HAVE AND TO HOLD UNTO THE GRANTEES in fee simple as tenants in common.

This conveyance is made subject to restrictions, rights of way, easements, agreements and covenants contained in the instruments that form the chain of title to the said property.

WITNESS the following signatures and seals:

Frank R. Jenkins (Seal)

H. Marjorie Jenkins (Seal)

COMMONWEALTH OF VIRGINIA)
COUNTY OF FAIRFAX)

The foregoing instrument was acknowledged before me this 31st day of March, 1988, by Frank R. Jenkins and by H. Marjorie Jenkins.

Notary Public

My commission expires: Feb 28, 1992

RECORDED W/CERTIFICATE ANNEXED
APR -6 1988
FAIRFAX COUNTY, VA.
TESTE:
CLERK

98-206251 98 OCT 21 P 3 27

4409 Shirley Gate Park

This Deed, Made this 16th day of October, 1998, by and between THIEN DUY VU and Loan M Cao, His Wife, Grantor, and THIEN DUY VU and LOAN M. CAO, HUSBAND AND WIFE Grantees

W I T N E S S E T H

That for and in consideration of the sum of TEN AND NO/100'S ($10 00) Dollars, cash in hand paid and other good and valuable consideration, receipt of which is hereby acknowledged, the Grantor does hereby grant in fee simple, with GENERAL WARRANTY of title, unto the Grantees, as tenants by the entirety with common law right of survivorship all that certain lot or parcel of land together with improvements thereon, situate, lying and being in Fairfax County, State of Virginia, and more particularly described as follows

LOT FIVE (5), OF THE SUBDIVISION OF SHIRLEY GATE PARK, AS THE SAME IS DULY DEDICATED, PLATTED AND RECORDED IN DEED BOOK 442 AT PAGE 68, AMONG THE LAND RECORDS OF FAIRFAX COUNTY, VIRGINIA.

LESS AND EXCEPT THAT PORTION OF SAID LOT CONTAINING 453 SQ FT. ACQUIRED BY THE FAIRFAX COUNTY BOARD OF SUPERVISORS BY CERTIFICATE RECORDED IN DEED BOOK 7382 AT PAGE 1235, AS CONFIRMED BY ORDER RECORDED IN DEED BOOK 7732 AT PAGE 1508, AMONG THE AFORESAID LAND RECORDS.

AND Being the same property acquired by THIEN DUY VU, UNMARRIED, AS SOLE OWNER, BY DEED FROM THIEN DUY VU, UNMARRIED AND LOC HONG TRAN, UNMARRIED, DATED 10/1/92, RECORDED 10/7/92 IN DEED BOOK 8288 AT PAGE 1324.

This conveyance is made expressly subject to the easements, conditions, restrictions, and rights of way of record contained in the deeds forming the chain of title to said property.

The said Grantor covenants that she has the right to convey the said land to the said Grantees; that she has done no act to encumber the same, that the said Grantees shall have quiet possession of the said land, free from all encumbrances except as

BK10616 0791

0118 154

Tax Map #
056-4-06-0-0005

RETURN TO NATL SETTLEMENT
5033 B Backlick Road
Annandale VA 22003
NSS # 98396

mentioned herein, and that she, the said Grantor, will execute such further assurances of the land as may be requisite

WITNESS the following signature and seal

_____ (SEAL)

_____ (SEAL)

STATE OF VIRGINIA
COUNTY OF Fairfax, to wit

I, the undersigned Notary Public in and for the State and County aforesaid, do hereby certify that , whose name is signed to the foregoing Deed, dated October 16, 1998, has acknowledged the same before me in my State and County aforesaid.

Given under my hand and seal this 16th day of October, 1998

My Commission Expires

_____
NOTARY PUBLIC

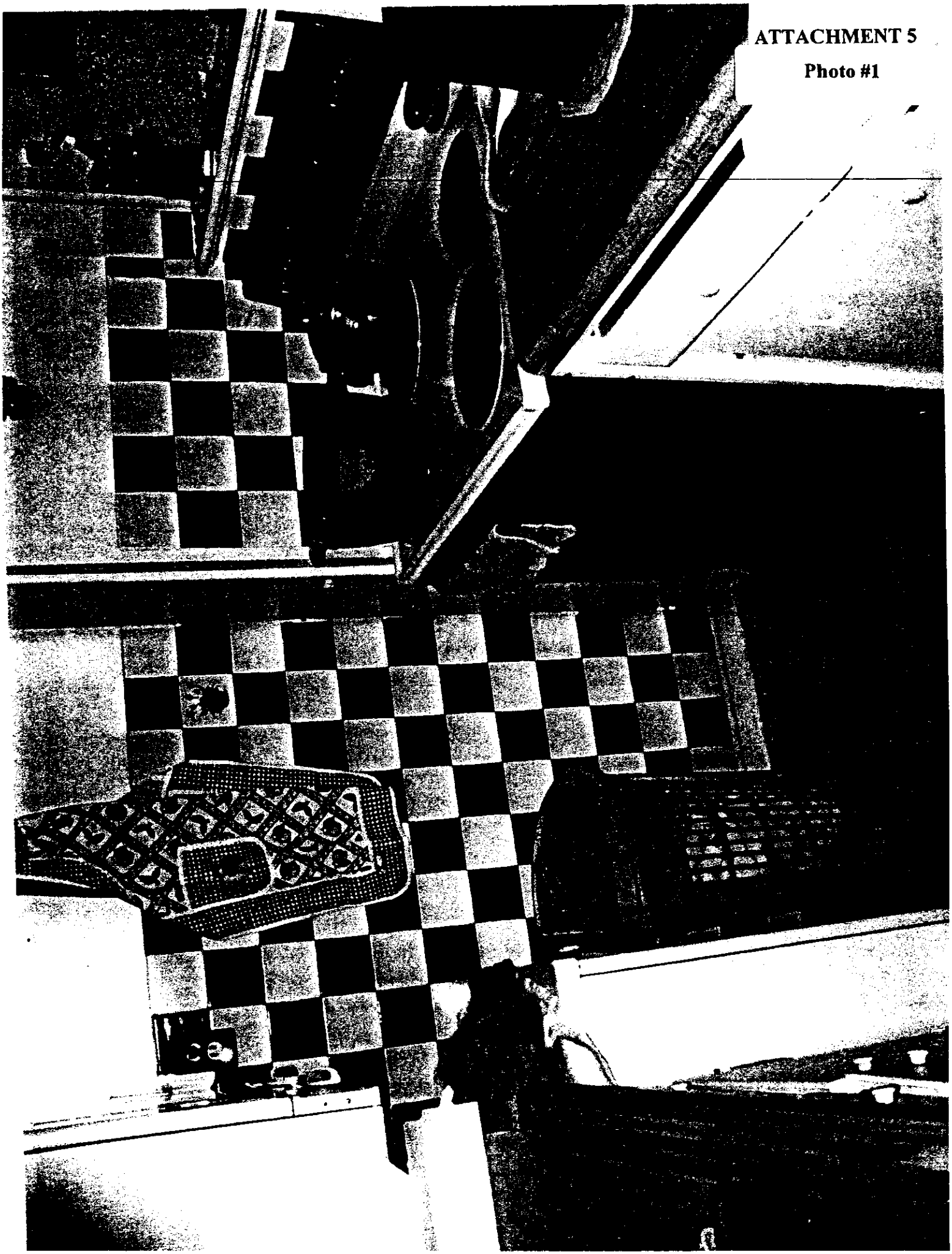
Consideration 00
Tax Map No
Grantees Address 4409 SHIRLEY GATE RD
FAIRFAX, VA 22030

Return to National Settlement Services
5033-B Backlick Road
Annandale, VA 22003
NSS #983913MF

OCT 21 98
RECORDED FAIRFAX CO VA
TESTE: J
CLERK

ATTACHMENT 5

Photo #1



ATTACHMENT 5

Photo #1

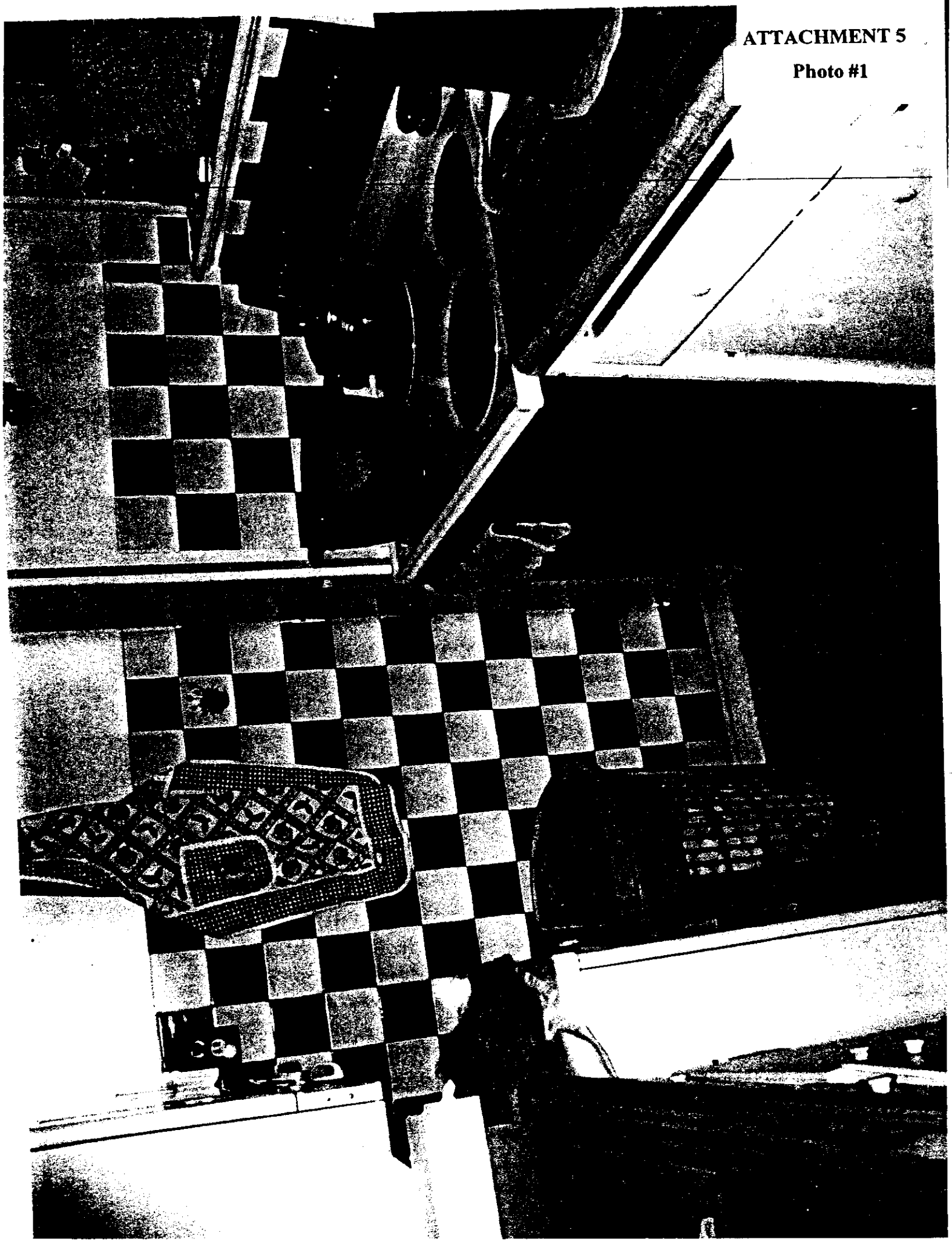


Photo #2

Photo #2

Photo # 3

Photo # 4

07/18/2008

Photo #5

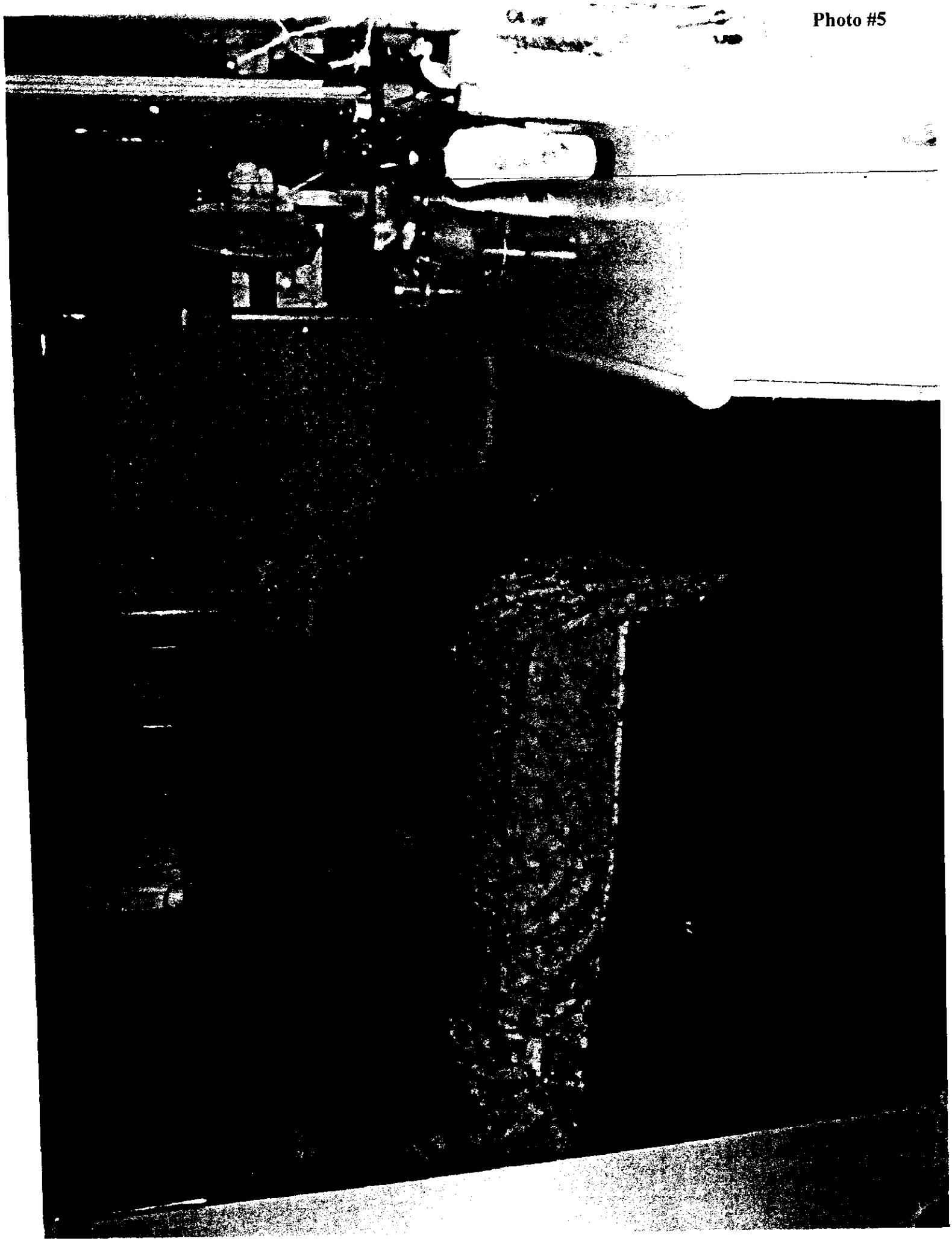


Photo #6

Photo # 7

CEST Return Copy

County of Fairfax, Virginia

To protect and enrich the quality of life for the people, neighborhoods and diverse communities of Fairfax County.

FAIRFAX COUNTY
RECEIVED
JAN 2 2 2009
DIVISION OF
ZONING ADMINISTRATION

NOTICE OF VIOLATION

DATE OF ISSUANCE: January 1, 2009

SHERIFF'S LETTER

CASE #: 200800803

LEGAL NOTICE
ISSUED TO:
PROPERTY OWNER(S): Thien Duy Vu
Loan M Cao
4409 Shirley Gate Road
Fairfax, VA 22030

LOCATION OF VIOLATION:
4409 Shirley Gate Road
Fairfax, VA 22030-5519
Tax Map #: 0564 06 0005
Zoning District: R-C

Dear Thien D. Vu and Loan M. Cao:

Information gathered by this office has revealed the following violations of the Fairfax County Zoning Ordinance.

§ 2-302 (5) Business in Residential District:

You are allowing a business to operate from the above referenced property. This business entails the manufacturing of compact disks (cds) / digital video disks (dvds) from the property with various titles such as CD5 Tinh Khuc Thien Cao My, and Han Em & Toi. The business that you are operating is most similar to:

> Establishments for printing of any size, production, processing, assembly, manufacturing, compounding, preparation, cleaning, servicing, testing, or repair of materials, goods or products and associated retail sales; however, bulk storage of flammable materials for resale, and those particular heavy industrial uses set forth in Par. 13 of Sect. 9-501 shall not be permitted.

This type of business is not permitted use in the R-C District. Therefore, you are in violation Par. 5 of the Sect. 2-302 of the Zoning Ordinance that states:

Code Enforcement Strike Team
10700 Page Avenue
Fairfax, Virginia 22030
Fax: 703-246-3614

> No use shall be allowed in any district which is not permitted by regulations for the district.

You are hereby directed to clear this violation within fifteen (15) days of the date of this Notice. Compliance can be accomplished by the following:

- Removal of all related supplies, materials, and equipment associated with this business from the residence.

A follow-up inspection will be made at the expiration of this time period. Failure to comply with the Notice shall result in the initiation of appropriate legal action to gain compliance with the Zoning Ordinance.

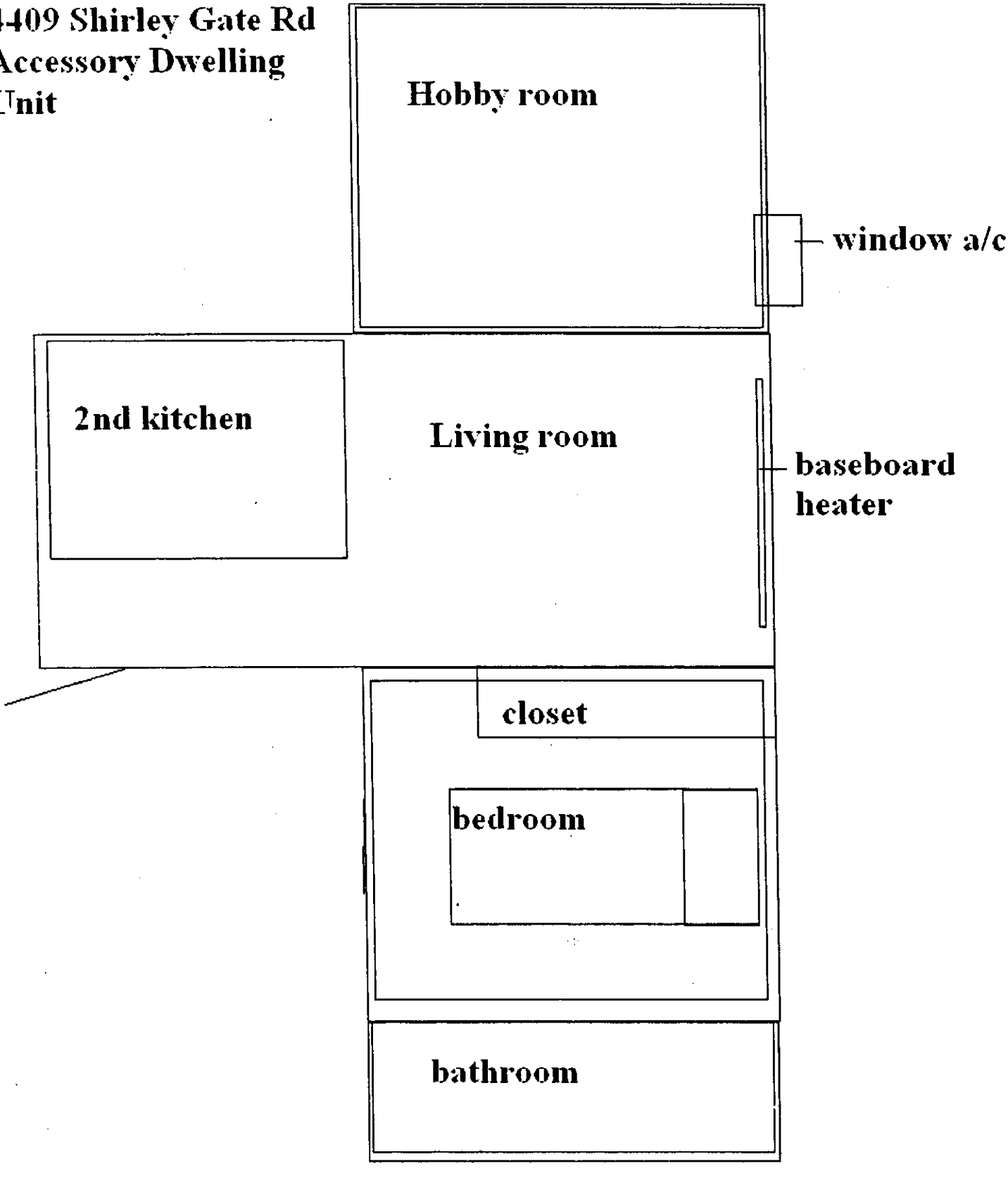
You may have the right to appeal this Notice of Zoning Violation within thirty (30) days of the date of this letter in accordance with Sec. 15.2-2311 of the Code of Virginia. This decision shall be final and unappealable if it is not appealed within such thirty (30) days. Should you choose to appeal, the appeal must be filed with the Zoning Administrator and the Board of Zoning Appeals (BZA) in accordance with Part 3 of Article 18 of the Fairfax County Zoning Ordinance. Those provisions require the submission of an application form, a written statement setting forth the decision being appealed, the date of decision, the grounds for the appeal, how the appellant is an aggrieved party and any other information that you may wish to submit and a $375.00 filing fee. Once an appeal application is accepted, it will be scheduled for public hearing and decision before the BZA.

Should you have any questions or need additional information, please do not hesitate to contact me at (703)246-2503.

Sincerely,

Jason B. Gibbs, Property Maintenance and
Senior Zoning Inspector

4409 Shirley Gate Rd Accessory Dwelling Unit



Present: All the Justices

BOARD OF SUPERVISORS OF FAIRFAX COUNTY, ET AL.

v. Record No. 051269 OPINION BY JUSTICE CYNTHIA D. KINSER
March 3, 2006

BOARD OF ZONING APPEALS OF FAIRFAX COUNTY, ET AL.

FROM THE CIRCUIT COURT OF FAIRFAX COUNTY
Randy I. Bellows, Judge

The primary issue in this appeal concerns the timeliness of a petition for a writ of certiorari filed by the Fairfax County Board of Supervisors (the Supervisors) and the Fairfax County Zoning Administrator (the Zoning Administrator) (collectively the County), seeking review of a final decision of the Fairfax County Board of Zoning Appeals (the BZA). Because the 30-day filing requirement set forth in Code § 15.2-2314 is not an aspect of the circuit court's subject matter jurisdiction to hear the appeal, the County's failure to timely file its petition for a writ of certiorari cannot be raised for the first time before this Court.

This appeal also involves the interpretation of a 1941 zoning ordinance and whether a garage apartment built over 50 years ago presently qualifies as a lawful nonconforming use. Because the relevant zoning ordinance permitted only

one principal dwelling on a single lot, we will reverse the judgment of the circuit court.

I. RELEVANT FACTS AND PROCEEDINGS

Donald J. and Jaki S. McCarthy (the McCarthys) own approximately 1.475 acres of real estate located in Fairfax County. The property is currently situated in a residential zoning district known as R-1, meaning that there cannot be more than one dwelling unit on any one lot nor can "a dwelling unit be located on the same lot with any other principal building." Fairfax County Zoning Ordinance (Zoning Ordinance) § 2.501. The property is developed with a single-family dwelling, built in 1945, and a two-story detached garage that contains an apartment on the second floor. The garage apartment was constructed in 1950.

On February 5, 2004, a zoning inspector informed the McCarthys that the existence of the garage apartment violated Zoning Ordinance § 2.501.[1] The McCarthys appealed the violation notice to the BZA. They claimed that the garage apartment was a qualified nonconforming use on the

[1] The zoning inspector advised the McCarthys of other violations of the Zoning Ordinance, but those alleged violations are not before us in this appeal.

basis that it was lawfully established under the 1941 Fairfax County Zoning Ordinance (1941 Ordinance).

In 1941, the subject property was zoned as agricultural. In the "Agricultural District," permitted uses included any use that was allowed in the "Rural Residence District." 1941 Ordinance § III(A)(2). Permitted uses in the Rural Residence District included a "[s]ingle family detached dwelling" and a "[p]rivate garage which shall not be used to house more than two vehicles in excess of those used by the residents of the premises on which the garage is located." Id. at §§ IV(A)(1), IV(A)(7). The term "single-family dwelling" was defined as "[a] dwelling constructed to accommodate only one family, and containing only one housekeeping unit." Id. at § I(6). The 1941 Ordinance defined the term "garage" as "[a] building used for the housing or storing of motor driven vehicles" and listed it as an example of an "accessory building" in the definition provided for that term. Id. at §§ I(1), I(9). No structure in the agricultural district could be erected "on a lot or building site containing an area of less than one-half . . . acre." Id. at § III(C)(1).

At a public hearing before the BZA held on May 25, 2004, the McCarthys argued that there was nothing in the 1941 Ordinance prohibiting "a property from having two dwelling units." They presented testimony from the daughter of the original owner of the subject property. She stated that the "apartment was built with the specific intended use as a dwelling. . . . The apartment was built in accordance with the Zoning Ordinance in effect at that time. It has been continually operated as a rental apartment ever since."

After hearing the evidence, the BZA agreed with the McCarthys and voted to overturn the decision of the Zoning Administrator. One member of the BZA noted that the language in the 1941 Ordinance was ambiguous. Another member stated, "it sounds to me like, as long you [sic] ha[d] enough room, a half-acre per structure, you could still do a structure on something other than a lot." Since the 1941 Ordinance specifically said "one or more," the member reasoned that the second dwelling would have been allowed. The perceived ambiguity in the 1941 Ordinance, coupled with the fact that the garage apartment had been continually used since it was built, led the BZA to find in favor of the McCarthys.

In a letter to the McCarthys, the BZA confirmed its May 25, 2004 action but advised the McCarthys that the date of the BZA's final decision was June 2, 2004. On July 1, 2004, the County petitioned the circuit court, pursuant to Code § 15.2-2314, for a writ of certiorari to review the BZA's decision. The circuit court granted the writ and ordered the BZA "to make a verified return of its record." The circuit court subsequently heard the appeal and affirmed the decision of the BZA. The court concluded that the BZA had not "applied erroneous principles of law [or] that its decision was plainly wrong."

The County appealed from the circuit court's judgment to this Court. In the opening brief, the County admits that, under the Court's decision in West Lewinsville Heights Ass'n v. Board of Supervisors, 270 Va. 259, 618 S.E.2d 311 (2005), its petition for a writ of certiorari seeking review of the BZA's final decision was not timely filed. The County, however, argues the timeliness of the petition for a writ of certiorari cannot be raised for the first time before this Court. The BZA did not participate in the proceedings before the circuit court, nor did the McCarthys question the timeliness of the petition in the circuit court. The BZA, however, entered an appearance in this Court to address the issue of timely filing.

II. ANALYSIS

We will first address the issue concerning the timeliness of the County's petition for a writ of certiorari and whether that issue can be raised for the first time in this Court. We will then consider the merits of the County's assignments of error challenging the decision of the circuit court finding that the McCarthys' garage apartment is a lawful nonconforming use.

1. Timeliness

The provisions of Code § 15.2-2314 govern appeals from a final decision of a board of zoning appeals to a circuit court. In pertinent part, the statute states:

> Any person or persons jointly or severally aggrieved by any decision of the board of zoning appeals, or any aggrieved . . . department, board or bureau of the locality, may file with the clerk of the circuit court for the county or city a petition specifying the grounds on which aggrieved within 30 days after the final decision of the board.

Code § 15.2-2314. Thus, under the terms set forth by the General Assembly, the County had 30 days from the BZA's final decision to file a petition for a writ of certiorari.

Even though the County admits that it did not file its petition within that 30 days, the question that remains is whether the timeliness of the petition for a writ of certiorari can be questioned for the first time before this

Court. Stated differently, is the failure to file the petition within the required 30-day period a defect in the circuit court's subject matter jurisdiction and therefore a claim not capable of being waived? See Farley v. Landsidle, 257 Va. 365, 371, 514 S.E.2d 153, 156 (1999) ("[t]he lack of subject matter jurisdiction may be raised at any time during a proceeding," including on appeal).

We have not previously determined the nature of the 30-day period specified in Code § 15.2-2314 for filing a petition for a writ of certiorari to review the final decision of a board of zoning appeals. The County, however, asserts that we decided this issue in Board of Supervisors of Fairfax County v. Board of Zoning Appeals of Fairfax County, 225 Va. 235, 302 S.E.2d 19 (1983). We do not agree.

There, the question was "whether the successful applicant before the board of zoning appeals must be made a party to the certiorari proceeding within the thirty-day period prescribed by" former Code § 15.1-497 (now Code § 15.2-2314). Id. at 237, 302 S.E.2d at 20. We concluded that, because the statute required

> only that an aggrieved person file a petition for certiorari within the prescribed thirty-day period and that the petition specify the grounds

> upon which the petitioner is aggrieved. . . . no action other than the filing of a proper petition within the prescribed period [was] necessary to complete the institution of the proceeding.

Id. at 238, 302 S.E.2d at 21. Until the board of zoning appeals made a return on the writ of certiorari, "the only necessary parties [were] the aggrieved person and the board." Id. Unlike the present case, the aggrieved party in Board of Supervisors had timely filed the petition for a writ of certiorari in the circuit court.

In order to decide whether the County's failure to timely file the petition for a writ of certiorari can be raised for the first time before this Court, we must revisit the term "jurisdiction." "Jurisdiction . . . is the power to adjudicate a case upon the merits and dispose of it as justice may require." Shelton v. Sydnor, 126 Va. 625, 629, 102 S.E. 83, 85 (1920). In order for a court to have the power to adjudicate a particular case upon the merits, i.e., to have "active jurisdiction," Farant Inv. Corp. v. Francis, 138 Va. 417, 427-28, 122 S.E. 141, 144 (1924), several elements are needed. See also Morrison v. Bestler, 239 Va. 166, 169, 387 S.E.2d 753, 755 (1990). Those elements are

> subject matter jurisdiction,[2] which is the authority granted through constitution or statute to adjudicate a class of cases or controversies; territorial jurisdiction, that is, authority over persons, things, or occurrences located in a defined geographic area; notice jurisdiction, or effective notice to a party or if the proceeding is in rem seizure of a res; and "the other conditions of fact must exist which are demanded by the unwritten or statute law as the prerequisites of the authority of the court to proceed to judgment or decree."

Id. (quoting Farant Inv. Corp., 138 Va. at 427-28, 122 S.E. at 144) (footnote added). All these elements "are necessary to enable a court to proceed to a valid judgment." Morrison, 239 Va. at 169, 387 S.E.2d at 755. There is, however, a fundamental distinction between the element of subject matter jurisdiction and the "other 'jurisdictional' elements." Id.

> Jurisdiction of the subject matter can only be acquired by virtue of the Constitution or of some statute. Neither the consent of the parties, nor waiver, nor acquiescence can confer it. Nor can the right to object for a want of it be lost by acquiescence, neglect, estoppel or in any other manner. . . . and the want of such jurisdiction of the trial court will be noticed by this court ex mero motu.

Humphreys v. Commonwealth, 186 Va. 765, 772-73, 43 S.E.2d

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[2] Subject matter jurisdiction is sometimes referred to as "potential jurisdiction", i.e. "'the power granted by the sovereignty creating the court to hear and determine controversies of a given character.'" Farant Inv. Corp., 138 Va. at 427, 122 S.E. at 144 (citation omitted).

890, 894 (1947) (citation omitted); accord Morrison, 239 Va. at 169, 387 S.E.2d at 755. Furthermore, the lack of subject matter jurisdiction can be initially raised at any point during the proceedings, including on appeal. Morrison, 239 Va. at 170, 387 S.E.2d at 756.

In Code § 17.1-513, the General Assembly granted circuit courts appellate jurisdiction over appeals from the judgments and proceedings of inferior tribunals in such civil and criminal cases as the General Assembly may provide. The General Assembly granted authority to circuit courts specifically to review any final decision of a board of zoning appeals in Code § 15.2-2314. Together, those two statutes confer upon circuit courts subject matter jurisdiction over the class of cases consisting of appeals from the final decisions of boards of zoning appeals.

The provisions of Code § 15.2-2314, however, demand another "condition[] of fact [to] exist . . . as the pre-requisites of the authority of the court to proceed to judgment or decree." Farant Inv. Corp., 138 Va. at 427-28, 122 S.E. at 144. The aggrieved person must file in the circuit court a petition for a writ of certiorari "specifying the grounds on which aggrieved within 30 days after the final decision of the board." Code § 15.2-2314. The 30-day filing requirement set by the General Assembly

does not define the class of cases, i.e. the subject matter jurisdiction, over which the circuit court has authority to adjudicate. Instead, as noted above, that class of cases is established in Code §§ 17.1-513 and 15.2-2314 as appeals from final decisions of boards of zoning appeals. In other words, the 30-day filing requirement is not an aspect of subject matter jurisdiction, but rather is a statutory prerequisite for a circuit court to proceed to adjudicate an appeal from a final decision of a board of zoning appeals.[3] See Morrison, 239 Va. at 169, 387 S.E.2d at 755; Parent Inv. Corp., 138 Va. at 427-28, 122 S.E. at 144.

We made a similar distinction in Nelson v. Warden of Keen Mountain Corr. Ctr., 262 Va. 276, 552 S.E.2d 73 (2001). There, we distinguished between subject matter jurisdiction granted by constitution or statute and the statutory requirements that enable a court to exercise its subject matter jurisdiction. Id. at 282, 552 S.E.2d at 76. We concluded that a statutory requirement of notice to

[3] The 30-day filing requirement could also be viewed as "notice jurisdiction, or effective notice to a party." Morrison, 239 Va. at 169, 387 S.E.2d at 755. The purpose of a time limitation for filing an appeal "is not to penalize the appellant but to protect the appellee. If the required papers are not [timely] filed . . . the appellee is entitled to assume that the litigation is ended, and to act on that assumption." Avery v. Brunswick County Sch. Bd., 192 Va. 329, 333, 64 S.E.2d 767, 770 (1951).

parents was not jurisdictional but procedural in nature and could be waived by a failure to raise a timely objection to the lack of notice. Id. at 285, 552 S.E.2d at 78.

Likewise, in Morrison we concluded that a 90-day waiting period for filing a medical malpractice action was a mandatory procedural requirement and did not involve subject matter jurisdiction. 239 Va. at 173, 387 S.E.2d at 757-58. The failure to comply with the requirement, therefore, did "not divest the [circuit] court of [its] subject matter jurisdiction." Id. at 173, 387 S.E.2d at 758. In reaching that decision, we pointed out that the General Assembly had, by statute, granted subject matter jurisdiction to circuit courts to decide cases and controversies involving torts and that medical malpractice actions are tort claims. Id. at 172, 387 S.E.2d at 757; cf. Sabre Constr. Corp. v. County of Fairfax, 256 Va. 68, 72, 501 S.E.2d 144, 147 (1998) (ten-day requirement for filing appeal from decision of public body to award a contract was "a special limitation" on the "substantive right to file an action against a county" or a "condition precedent to maintaining the claim"); Commonwealth v. Brunson, 248 Va. 347, 353, 448 S.E.2d 393, 397 (1994) (failure to file an information for forfeiture within 90 days of the date when the Commonwealth seized property

deprived the trial court of jurisdiction to consider the information).[4]

In many cases where time limitations for filing appeals were at issue, we referred to those filing requirements as "jurisdictional." For example, to perfect an appeal from a circuit court to this Court, Rule 5:9 states that "[n]o appeal shall be allowed unless, within 30 days after the entry of final judgment or other appealable order or decree, counsel for the appellant files with the clerk of the trial court a notice of appeal." Rule 5:9(a) A timely-filed notice of appeal is necessary to confer jurisdiction upon this Court to hear the appeal. See Super Fresh Food Mkts. v. Ruffin, 263 Va. 555, 563, 561 S.E.2d 734, 739 (2002) (since notice of appeal was filed after the

[4] We did not decide in Sabre or Brunson whether the filing requirement at issue in each case was an aspect of subject matter jurisdiction and thus capable of being raised at any time, nor did we need to do so. In both instances, the issue had been timely raised in the trial court. Sabre, 256 Va. at 70, 510 S.E.2d at 146; Brunson, 248 Va. at 349, 448 S.E.2d at 395. However, in Cunningham v. Smith, 205 Va. 205, 135 S.E.2d 770 (1964), we allowed a defendant, in a collateral attack on his conviction, to claim that his conviction was void because the orders of conviction did not show the concurrence of the Commonwealth's Attorney in waiving a trial by jury as required by the Constitution of Virginia. Id. at 206, 135 S.E.2d at 771. We concluded that compliance with the mandatory provision of the Constitution of Virginia was essential to the trial court's jurisdiction to try the defendant without a jury and that, without compliance,

30-day time period, the "Court lack[ed] jurisdiction to consider [it]"); School Bd. of the City of Lynchburg v. Caudill Rowlett Scott, Inc., 237 Va. 550, 556, 379 S.E.2d 319, 323 (1989) (this Court lacked "jurisdiction to entertain the appeal on its merits because no notice of appeal was filed with the clerk of the trial court within 30 days after entry of the final order"); cf. Hurst v. Ballard, 230 Va. 365, 367, 337 S.E.2d 284, 285 (1985) (failure to pay writ tax within prescribed time limit divests circuit court of jurisdiction because this Court has consistently "held that the failure to comply with rules governing appeals precludes 'the exercise of the jurisdiction of the circuit court over the proceedings'" (citation omitted)).

Similarly, in the Administrative Process Act, the General Assembly provided a procedure for court review of certain actions taken by administrative agencies. Code § 2.2-4026. To obtain such a review, Rule 2A:2 requires that "[a]ny party appealing from a regulation or case decision shall file, within 30 days . . . of the final order in the case decision, with the agency secretary a notice of appeal." The timely filing of that notice of appeal is

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jurisdiction was not obtained. Id. at 208, 135 S.E.2d at 773.

jurisdictional. See State Water Control Bd. v. Crutchfield, 266 Va. 416, 423, 578 S.E.2d 762, 766 (2003) ("[b]ecause the petitioners' notice of appeal and original petition for appeal were timely filed within the 30-day time periods specified . . . the circuit court had jurisdiction"); Virginia Retirement Sys. v. Avery, 262 Va. 538, 542, 551 S.E.2d 612, 614 (2001) ("the circuit court had jurisdiction over the appeal because [appellee] had perfected it by filing her notice of appeal and her petition for appeal within the times specified"); Occoquan Land Dev. Corp. v. Cooper, 239 Va. 363, 368, 389 S.E.2d 464, 467 (1990) (finding that "the county failed to perfect its appeal in a timely manner, . . . the trial court was without jurisdiction to hear the case"); see also Sours v. Virginia Bd. for Architects, Prof'l Eng'rs, Land Surveyors and Landscape Architects, 30 Va. App. 313, 318, 516 S.E.2d 712, 715 (1999) ("the timely filing of a petition for appeal of an agency decision is jurisdictional"); cf. Bendele v. Virginia Dep't of Med. Assistance Servs., 29 Va App. 395, 400, 512 S.E.2d 827, 829-30 (1999) ("because the appellant concedes that she did not comply with Rule 2A:4, the circuit court did not have jurisdiction to hear this administrative appeal"). In all these cases, we did not, however, state that the time requirements for the appellat

filings at issue were an aspect of subject matter jurisdiction. That question was not before us because, in each case, any concern about compliance with the respective time period for filing the appeal had been timely raised, and we therefore did not need to decide whether the issue had been or could have been waived.

Like the statutory provisions in Morrison and Nelson, the 30-day filing requirement in Code § 15.2-2314 does not involve the subject matter jurisdiction of a circuit court to adjudicate the matter in controversy. As such, the filing requirement is an "other 'jurisdictional' element[] subject to waiver if not properly raised. Morrison, 239 Va. at 169, 387 S.E.2d at 755. Thus, we hold that the County's failure to file the petition for a writ of certiorari under Code § 15.2-2314 within 30 days of the final decision of the BZA did not divest the circuit court of its subject matter jurisdiction. The issue of timely filing is therefore waived since it was not raised in the circuit court. See Rule 5:25. We turn now to the merits of the assignments of error presented by the County.

2. Nonconforming Use

The sole remaining issue is whether the garage apartment was a lawful nonconforming use. We have defined such a use as "'a lawful use existing on the effective dat

of the zoning restriction and continuing since that time is non-conformance to the ordinance.'" C. & C., Inc. v. Semple, 207 Va. 438, 439 n.1, 150 S.E.2d 536, 537 n.1 (1966) (citation omitted); see also Code § 15.2-2307. When a locality challenges a use as illegal, the locality "has the initial burden of producing evidence to show the uses permitted in the zoning district in which the land is located and that the use of the land is not a permitted use." Masterson v. Board of Zoning Appeals, 233 Va. 37, 47, 353 S.E.2d 727, 734 (1987). The burden then shifts to the landowner to establish that the use is a lawful nonconforming use. Id. The landowner "has both the burden of initially producing evidence tending to prove a lawful nonconforming use and the burden of persuading the fact-finder." Knowlton v. Browning-Ferris Indus. of Virginia, Inc., 220 Va. 571, 574, 260 S.E.2d 232, 235 (1979).

The final decision of a board of zoning appeals with regard to "an order, requirement, decision or determination of a zoning administrator . . . in the administration or enforcement of any ordinance . . . [is] presumed to be correct" on appeal to a circuit court. Code § 15.2-2314; accord Lamar Co., LLC v. Board of Zoning Appeals, 270 Va. 540, 545, 620 S.E.2d 753, 755-56 (2005). "The appealing party may rebut that presumption by proving by a

preponderance of the evidence . . . that the board of zoning appeals erred in its decision." Code § 15.2-2314.

The "preponderance of the evidence" standard, however, pertains only to questions about the sufficiency of the record to prove a particular fact. Lamar, 270 Va. at 546, 620 S.E.2d at 756. When, as in the case before us, the issue is a question of law, i.e., the interpretation of the 1941 Ordinance, the appealing party must show that the board either applied "'erroneous principles of law'" or that its decision was "'plainly wrong and in violation of the purpose and intent of the zoning ordinance.'" Id. at 545, 620 S.E.2d at 756 (quoting City of Suffolk v. Board of Zoning Appeals, 266 Va. 137, 142, 580 S.E.2d 796, 798 (2003)). On appeal to this Court, a circuit court's determination affirming the final decision of a board of zoning appeals is accorded the same presumption of correctness. Patton v. City of Galax, 269 Va. 219, 229, 609 S.E.2d 41, 46 (2005).

The 1941 Ordinance was a permissive zoning ordinance. County of Fairfax v. Parker, 186 Va. 675, 688, 44 S.E.2d 915 (1947). Under such an ordinance "'only those uses which are specifically named are permitted, and so the burden is on the property owner to show that the use he proposes is one that is included or permitted.'" Id. at 684, 44 S.E.2d

at 13 (citation omitted). Thus, in order to prevail, the McCarthys had to show that the 1941 Ordinance permitted, in the Agricultural District, multiple single-family dwellings on a lot. In order to determine if the garage apartment was permitted on the subject property under the 1941 Ordinance, the definition of the term "lot" must be examined:

> A piece or parcel of land abutting on a street whose area, in addition to the parts thereof occupied or which may hereafter be occupied by a building and buildings accessory thereto, is sufficient to furnish the yards, and minimum area required for compliance with this ordinance. The word lot shall include building site.

1941 Ordinance § I(13).

We agree with the County's argument that, under the definition of the term "lot" in the 1941 Ordinance, only one principal dwelling was permitted on a single lot. The critical portion of the definition is the clause "in addition to the parts thereof occupied or which may . . . be occupied by a building and buildings accessory thereto." (Emphasis added.) This clause limited the number of principal buildings permitted on a single lot to one building but permitted more than one accessory building. Thus, a lot consisted of a piece of land abutting on a street whose area, in addition to the area occupied by a

building and accessory buildings, met the yards and minimum area requirements of the 1941 Ordinance. Although the term "building site" is not defined in the 1941 Ordinance, the definition of the term "lot" specifically included a building site. The McCarthys overlook this portion of the definition in their argument that the term "building site" is separate and distinct from the term "lot."

We agree with the McCarthys' argument that the use of the word "parts" in the definition meant that lots could have different parts or areas occupied by buildings. That conclusion, however, does not change the clear language of the 1941 Ordinance permitting only one principal building on a lot. The word "parts" merely referenced the fact that, if a lot had a principal building and one or more accessory buildings, "parts," as opposed to a "part," of the lot would be occupied by buildings.

This interpretation of the 1941 Ordinance is consistent with the interpretation given to it by officials charged with its enforcement. At the BZA hearing, it was pointed out that such officials had "consistently allowed one dwelling unit per lot or building site under the Ordinance since [19]41." Furthermore, a member of the BZA who had worked in Fairfax County under the 1941 Ordinance stated, "I know of no circumstance at all where legally two

structures, residential, two units, residential units, were permitted on one lot." "A consistent administrative construction of an ordinance by the officials charges with its enforcement is entitled to great weight." Masterson, 233 Va. at 44, 353 S.E.2d at 733; accord Board of Supervisors v. Robertson, 266 Va. 525, 538, 587 S.E.2d 570, 578 (2003).

Finally, we point out that the only evidence offered by the McCarthys to show that the garage apartment is a lawful nonconforming use was the testimony of the original landowner's daughter. But, she merely opined that the garage apartment was built in accordance with the 1941 Ordinance. Neither she nor the McCarthys presented any facts or documents to substantiate that opinion. That evidence alone was not sufficient to carry the McCarthys' burden of persuading the fact-finder that the garage apartment was permitted under the 1941 Ordinance and is now a lawful nonconforming use. See Knowlton, 220 Va. at 574, 260 S.E.2d at 235.

Thus, we conclude that the BZA's final decision was "plainly wrong and in violation of the purpose and intent of the zoning ordinance." Masterson, 233 Va. at 44, 353 S.E.2d at 733; Alleghany Enterprises, Inc. v. Board of Zoning Appeals of the City of Covington, 217 Va. 64, 67,

225 S.E.2d 383, 385 (1976). We will therefore reverse the judgment of the circuit court.

III. CONCLUSION

For these reasons, we hold the 30-day period for filing a petition for a writ of certiorari seeking review of a final decision of a board of zoning appeals is a statutory prerequisite or "condition[] of fact" that enables a circuit court to exercise its authority to review the final decision of a board of zoning appeals. Farant Inv. Corp., 138 Va. 427-28, 122 S.E. at 144; see also Nelson, 262 Va. at 284-85, 552 S.E.2d at 77. The filing requirement is not an aspect of the circuit court's subject matter jurisdiction. Thus, the failure to file the petition within the required 30 days is waived if not timely raised during the proceedings. Since the County's failure to timely file its petition for a writ of certiorari was first raised in this Court, the issue is waived and we will not address it.[5]

Furthermore, since the 1941 Ordinance permitted only one principal dwelling on a lot, the County has overcome the presumption of correctness afforded the BZA's final decision. The BZA's decision that the garage apartment is

a lawful nonconforming use was "plainly wrong and in violation of the purpose and intent of the zoning ordinance." Masterson, 233 Va. at 44, 353 S.E.2d at 733.

In reaching this conclusion, we are mindful of the BZA's expressed concern about displacing the garage apartment after approximately 54 years of use. Equitable concerns, however, cannot be a basis for the BZA's decision in this case. See Foster v. Geller, 248 Va. 563, 570, 449 S.E.2d 802, 807 (1994) (legislative bodies "have authorized the use of equitable considerations only when the issue is whether to grant a special use permit").

For these reasons, we will reverse the judgment of the circuit court and enter final judgment in favor of the County.

Reversed and final judgment.

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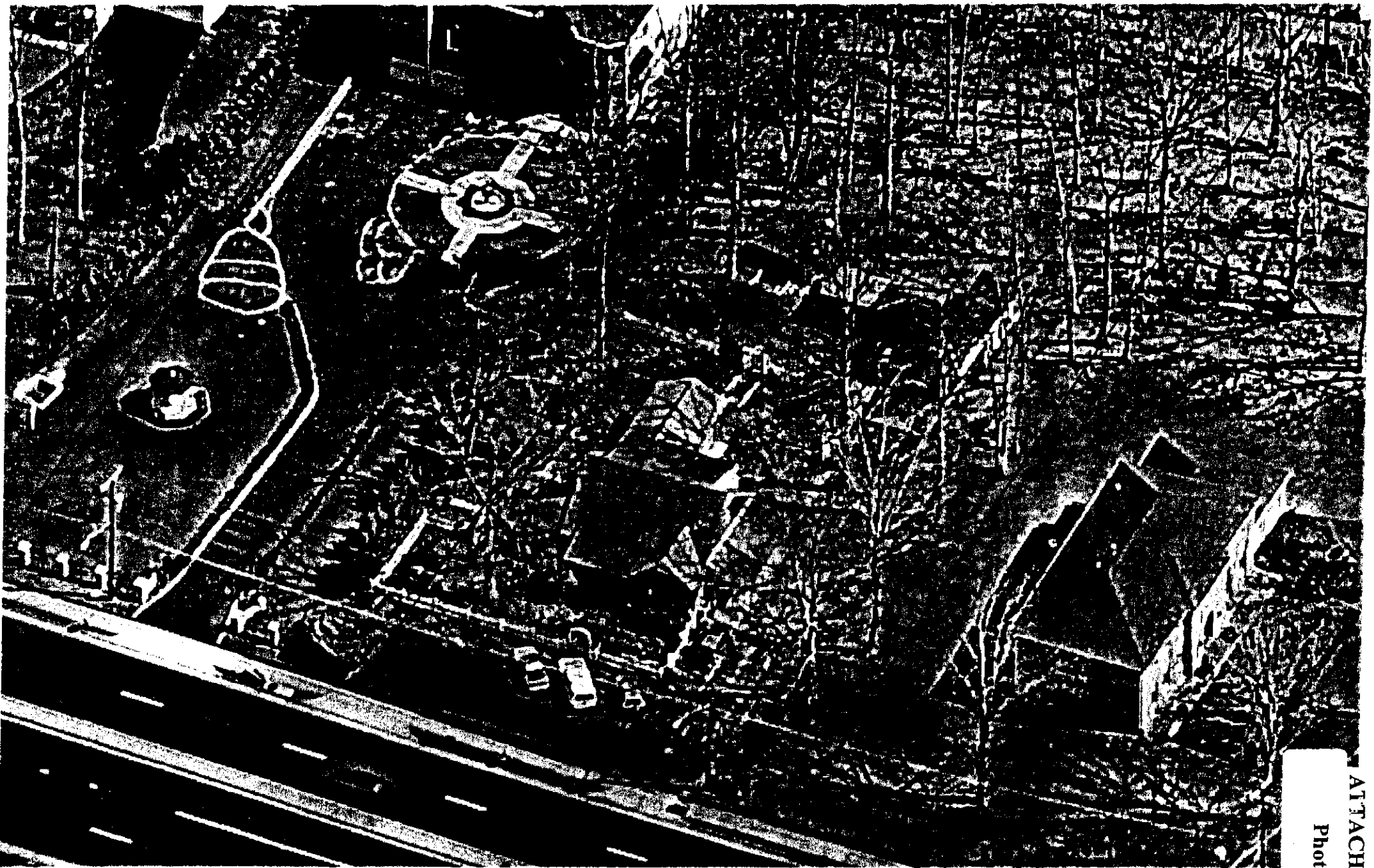
[3] In light of our decision, it is not necessary to address the County's argument that our decision in West Lewinsville should be applied only prospectively.



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ATTACHMENT 9
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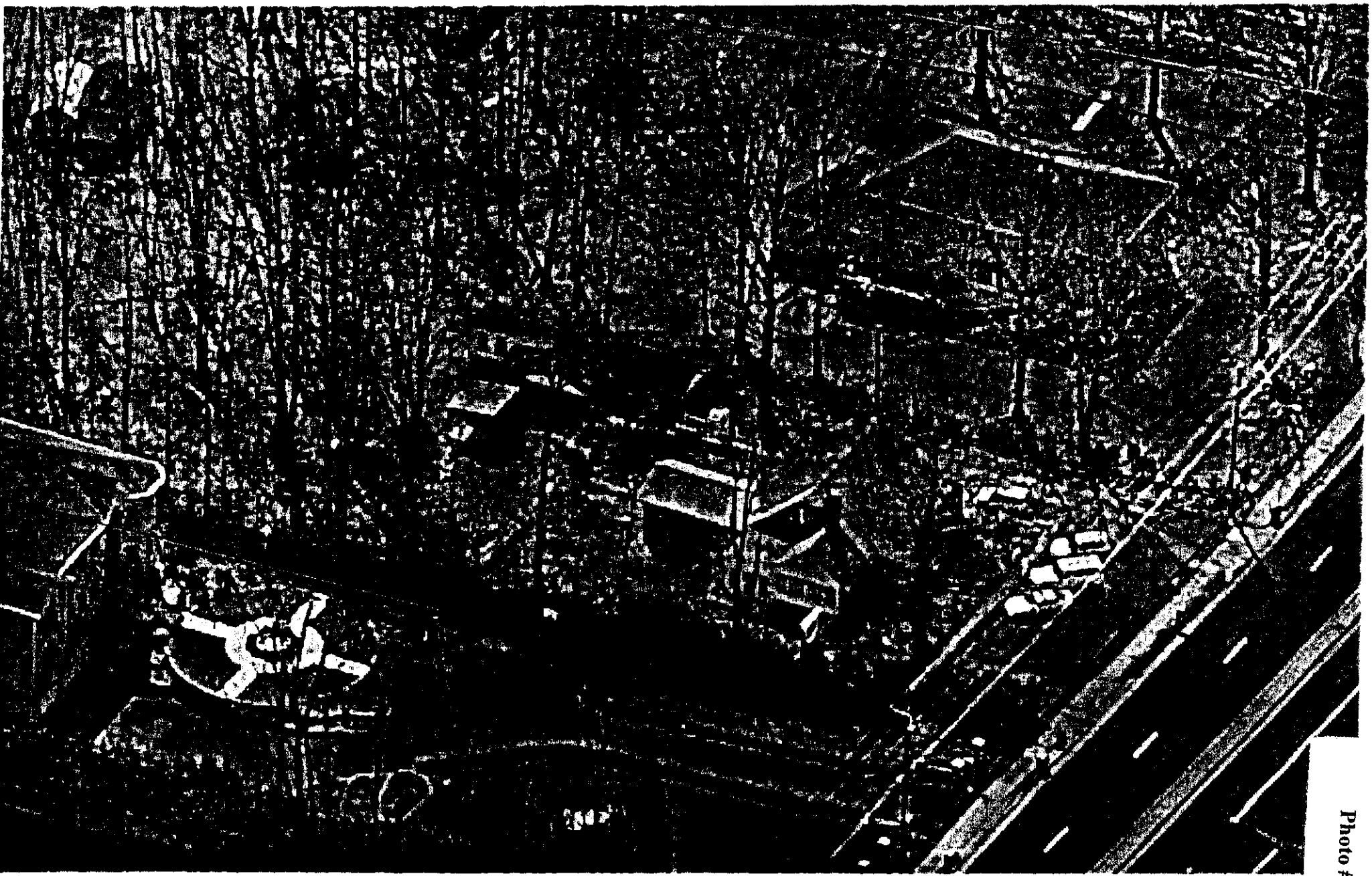

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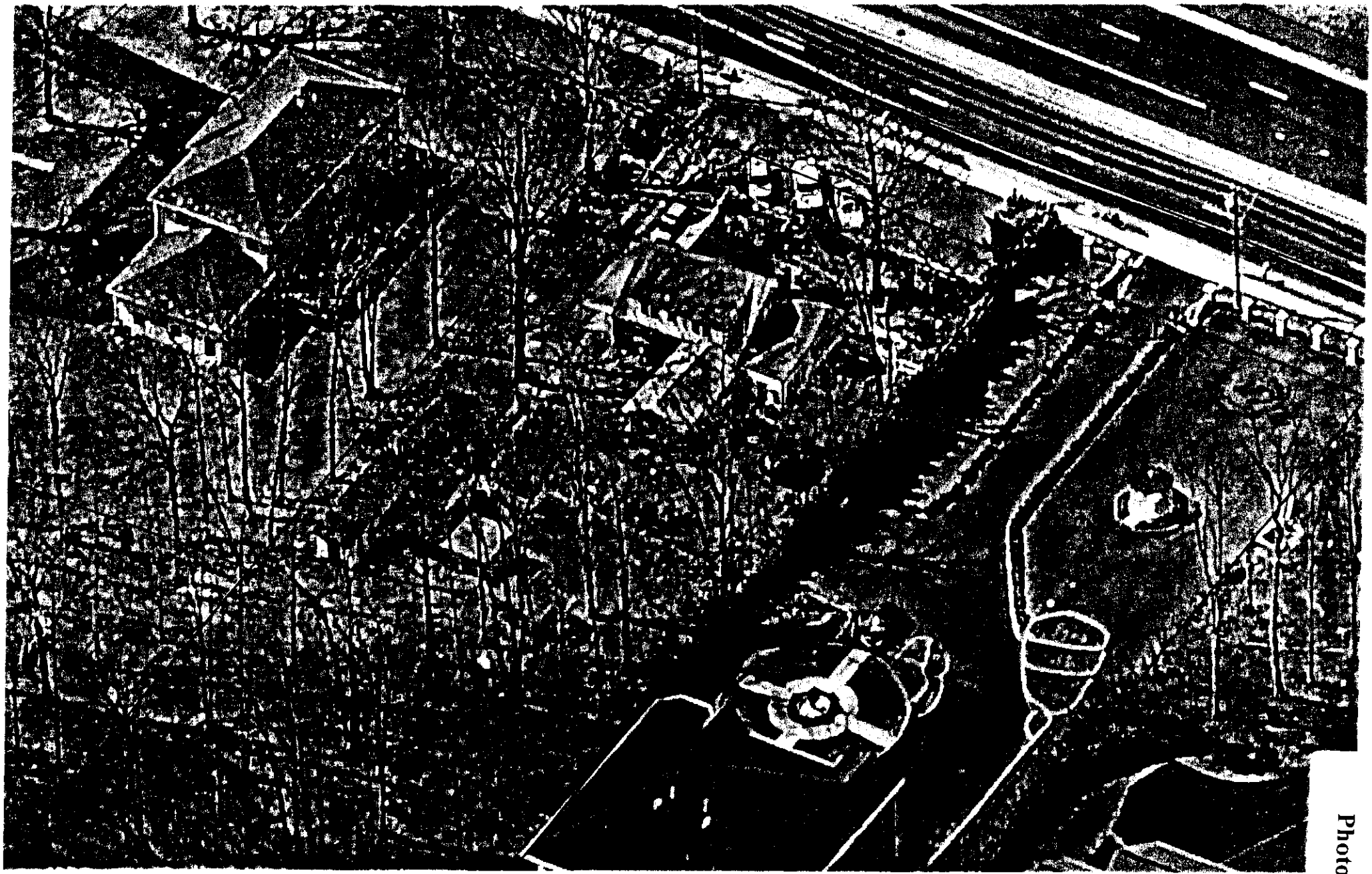

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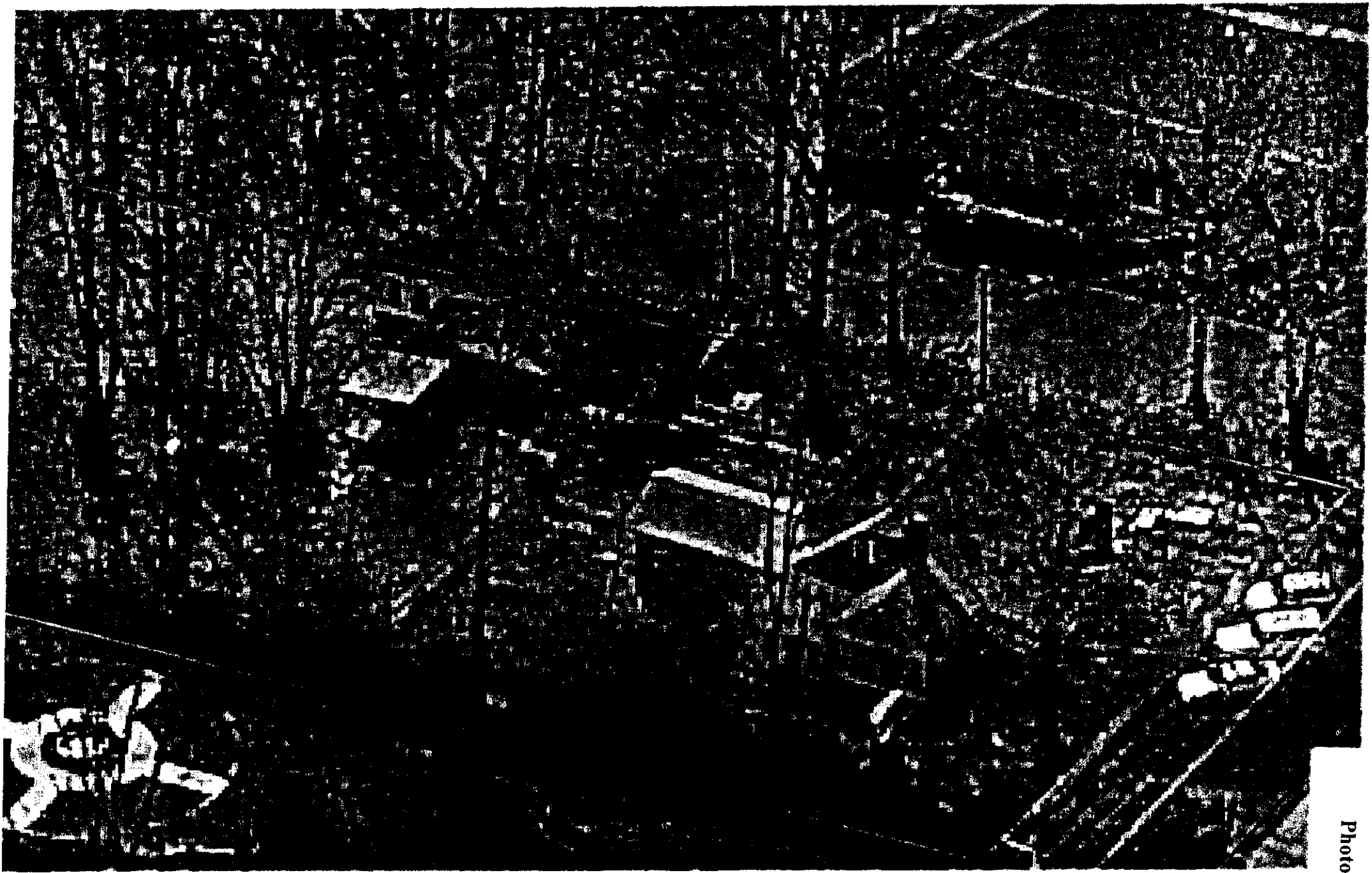

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Photo #5

Creation Date: Mar 22, 2007 12:44

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4409 SHIRLEY GATE RD

Photo #1

DATE OF AERIAL PHOTOGRAPHY: 2007

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Source: Fairfax County GIS & Mapping Services, March 2009

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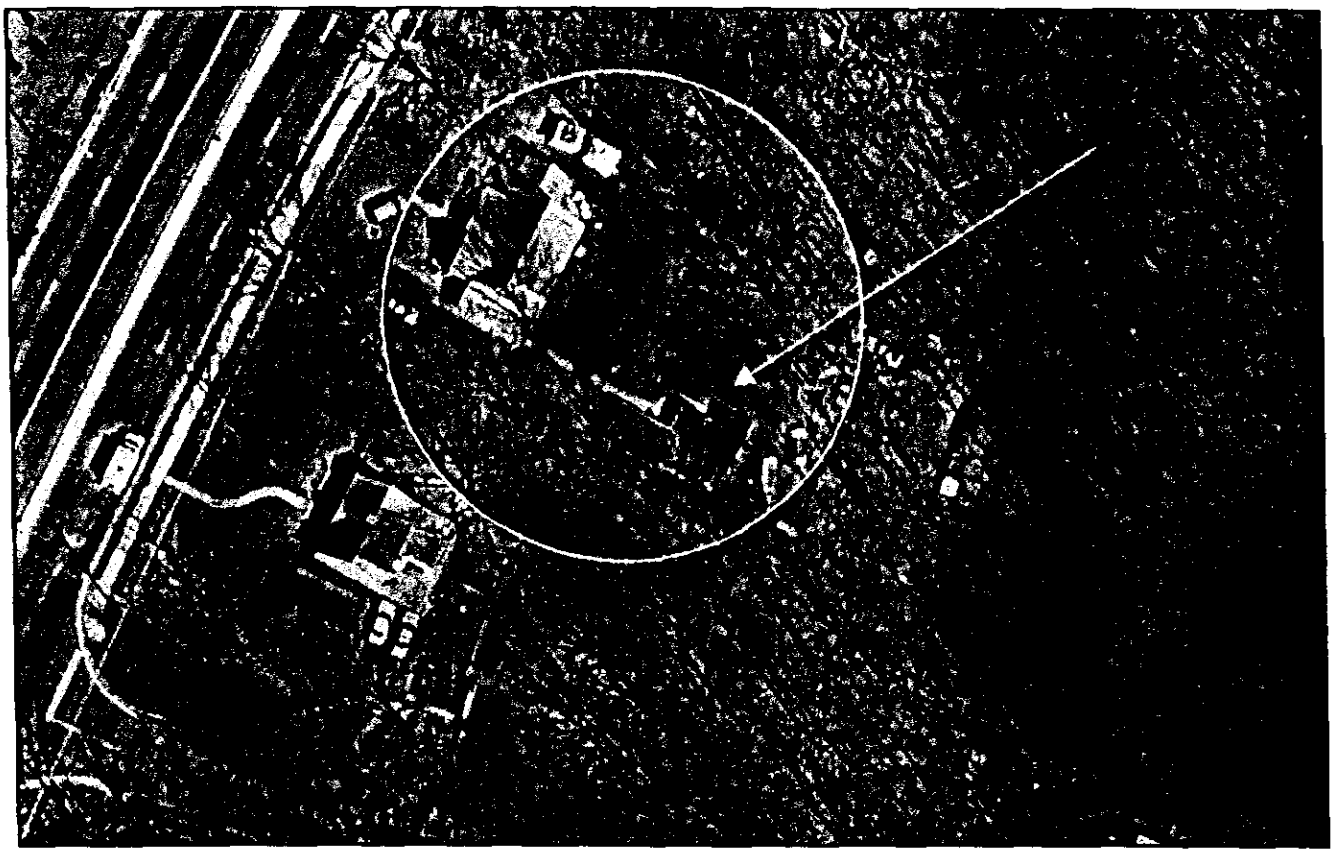
4409 SHIRLEY GATE RD



DATE OF AERIAL PHOTOGRAPHY: 1997

Source: Fairfax County GIS & Mapping Services, March 2009

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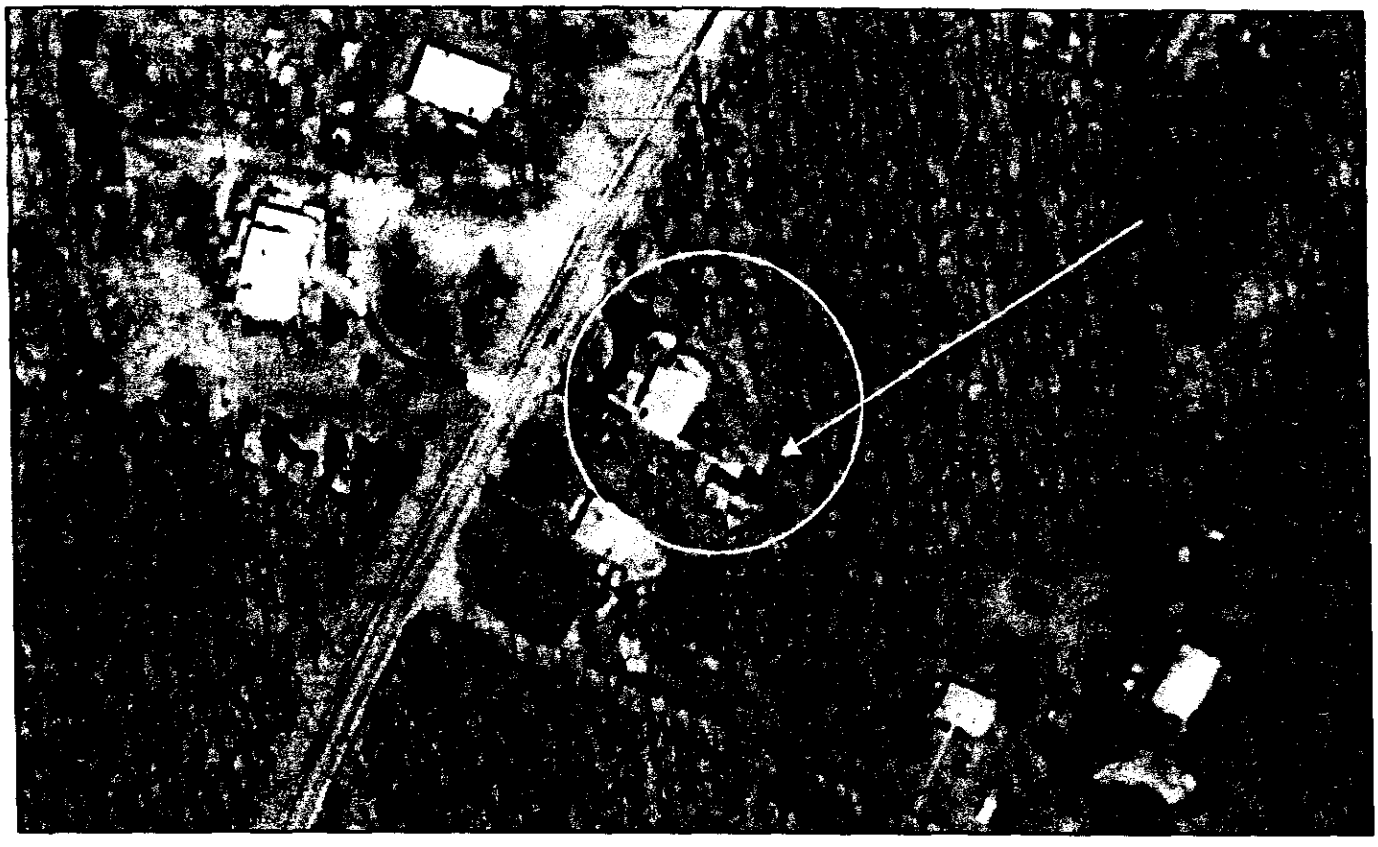

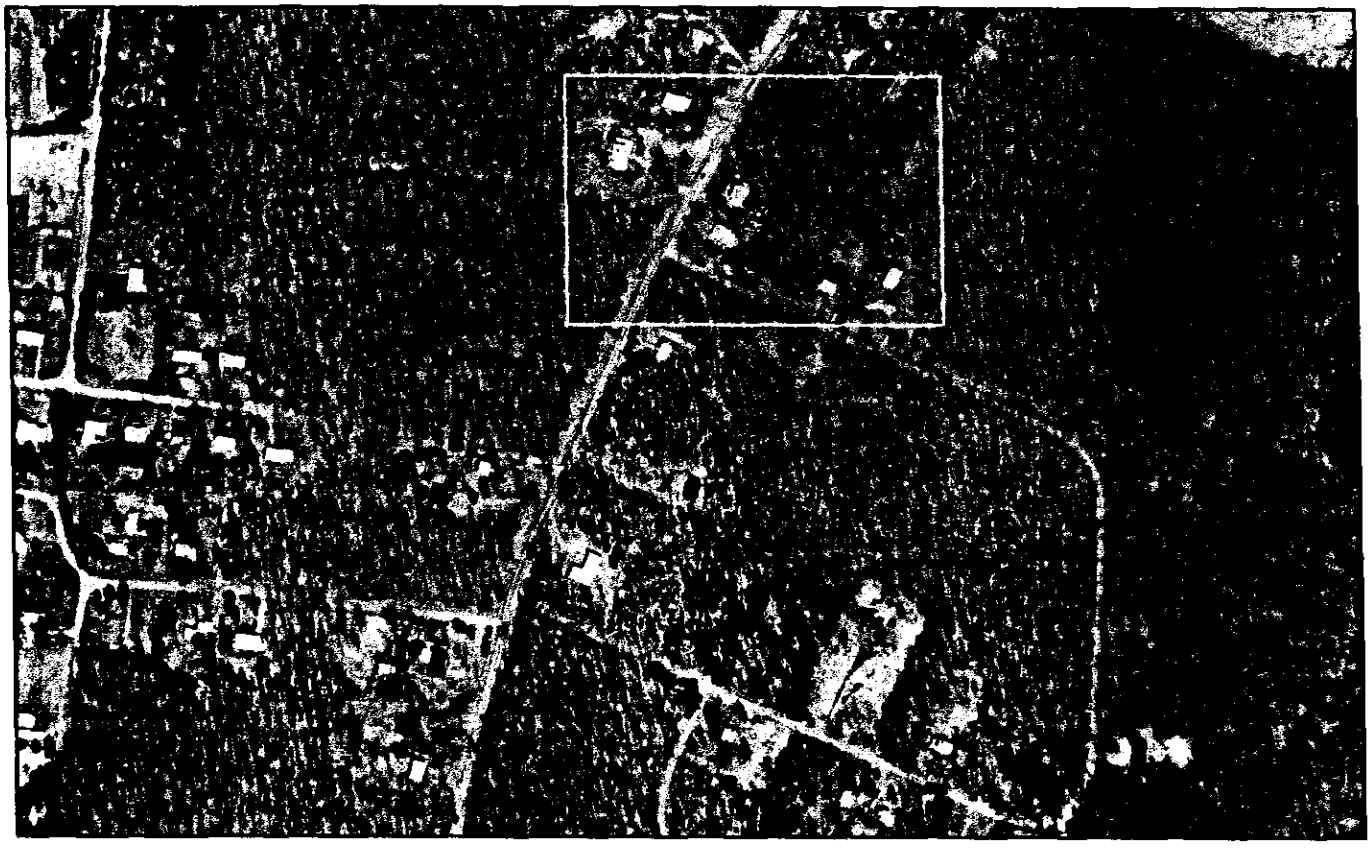

DATE OF AERIAL PHOTOGRAPHY: 1982

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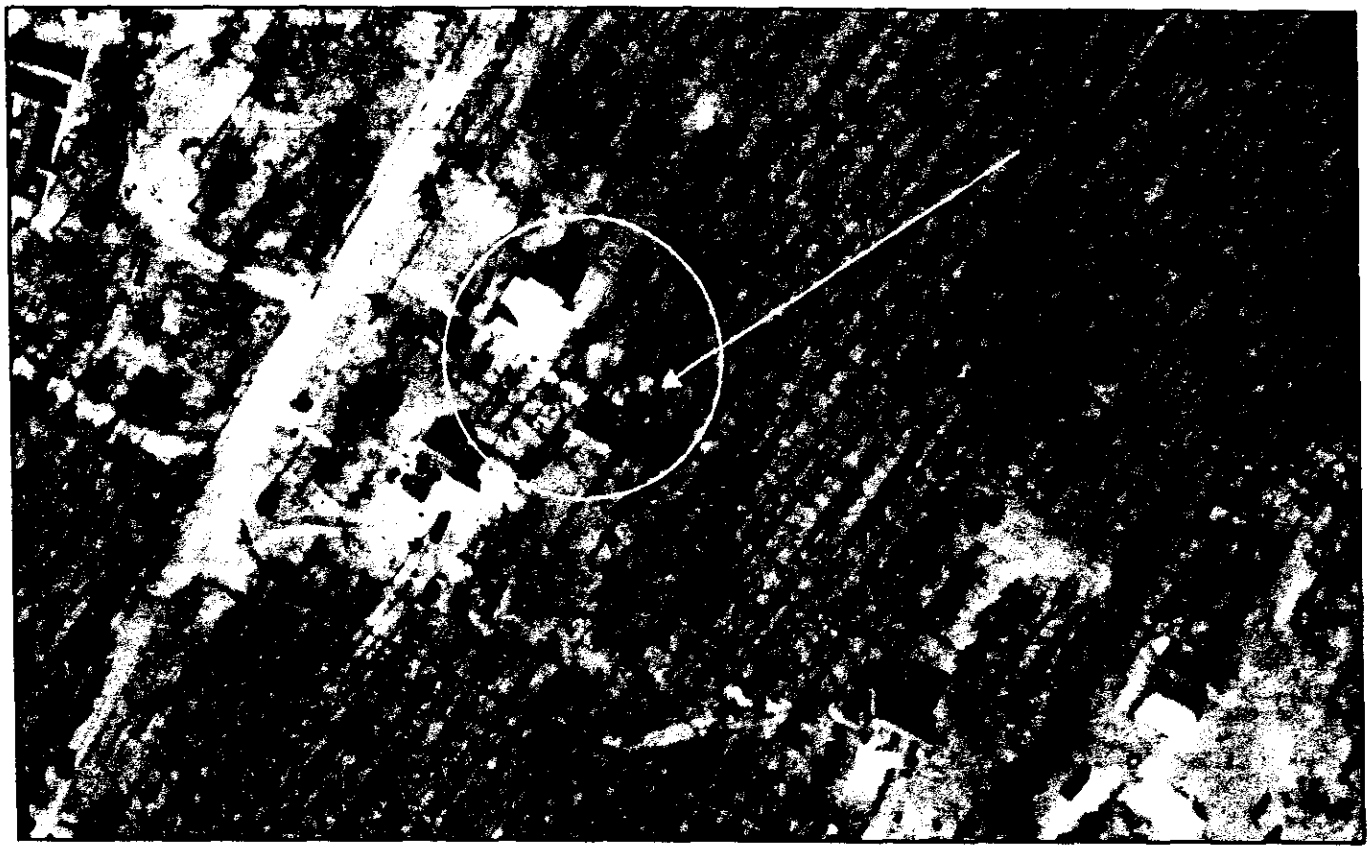

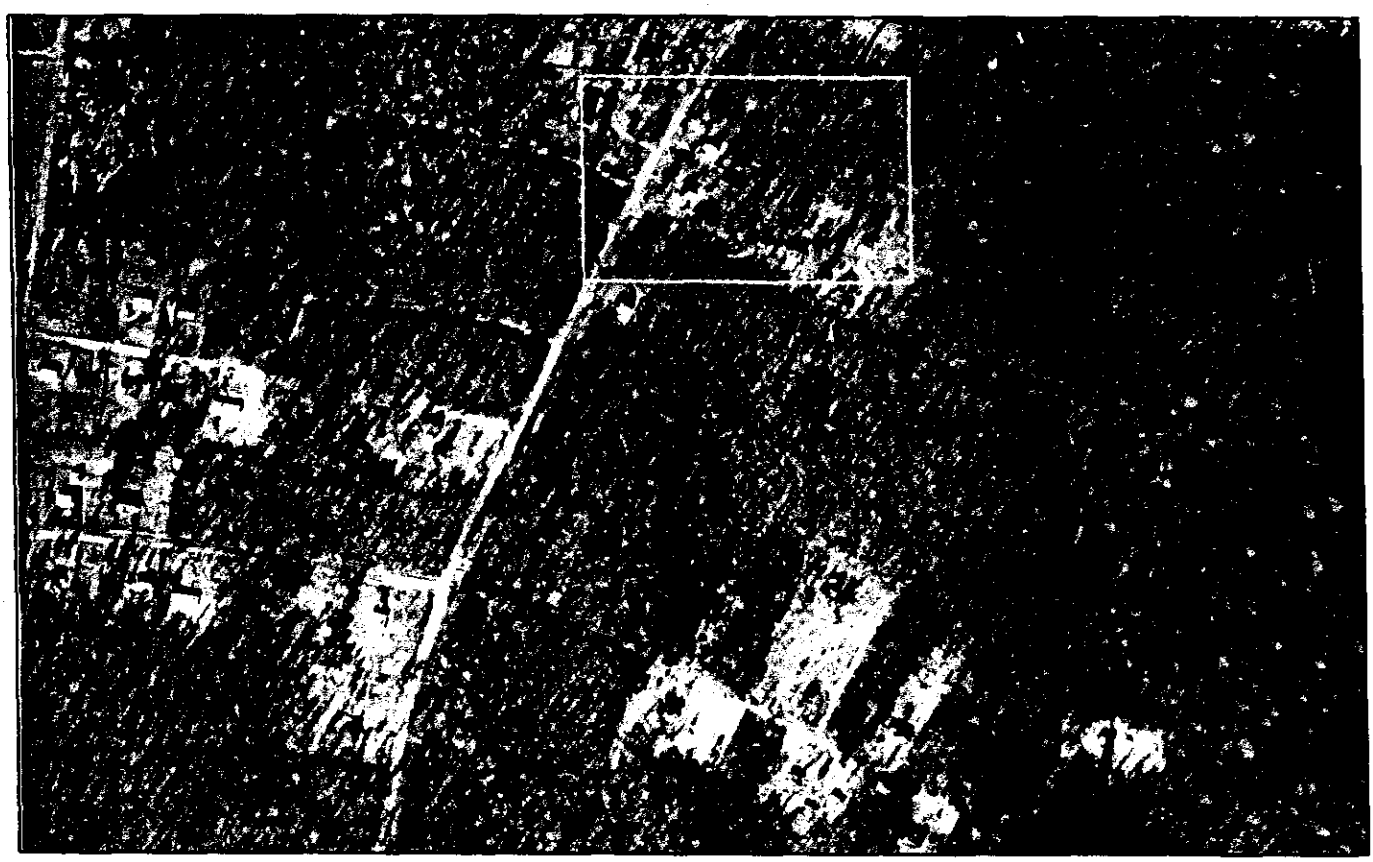

DATE OF AERIAL PHOTOGRAPHY: 1968

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Source: Fairfax County GIS & Mapping Services, March 2009

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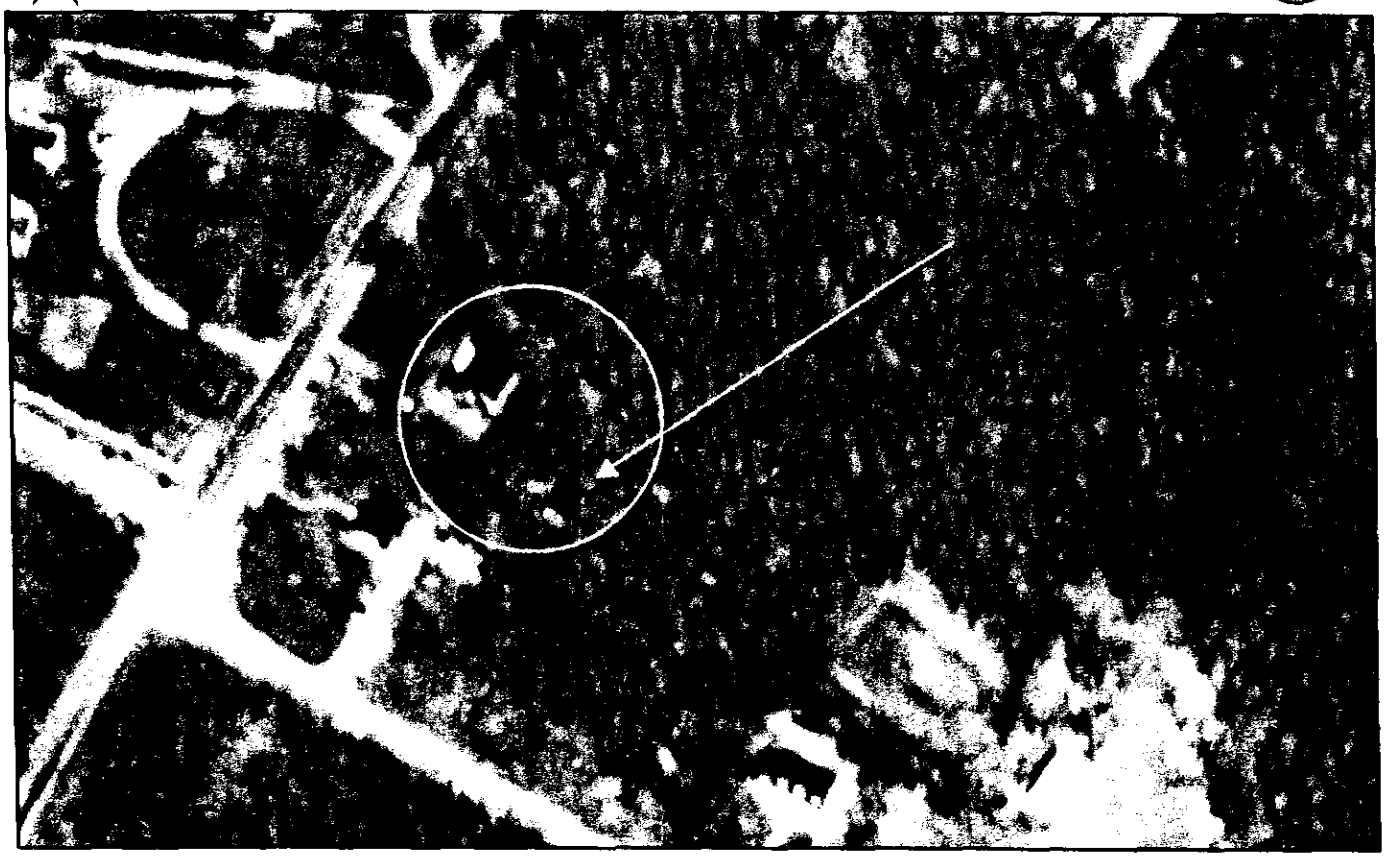

DATE OF AERIAL PHOTOGRAPHY: 1960

Note: The 1960 backyard structure is located south of the 1954 structure and it is positioned in a different orientation. The 1960 location is consistent with the structure's 2007 location.

Source: Fairfax County GIS & Mapping Services, March 2009

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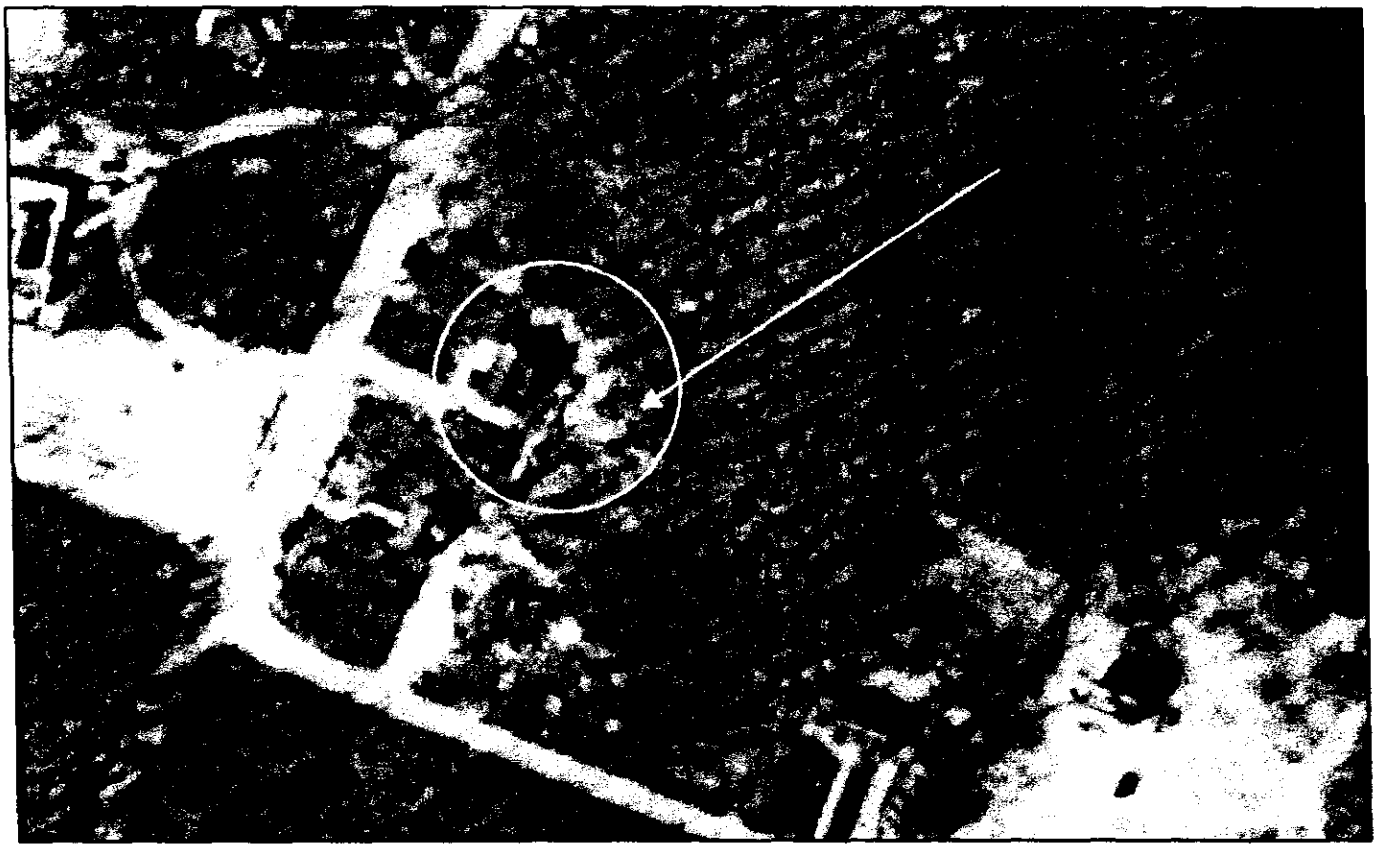

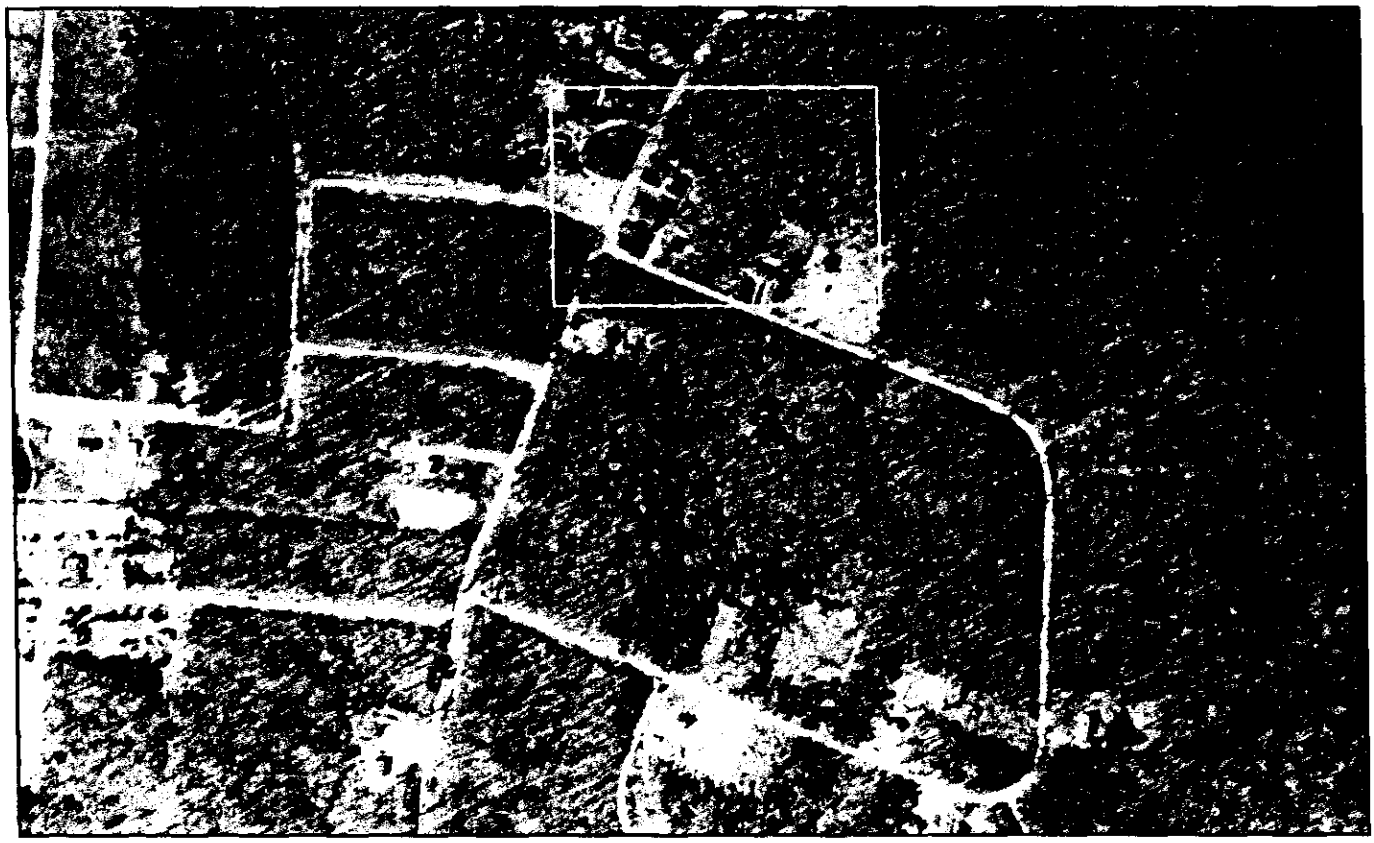

DATE OF AERIAL PHOTOGRAPHY: 1954

Source: Fairfax County GIS & Mapping Services, March 2009

8-006 General Standards

In addition to the specific standards set forth hereinafter with regard to particular special permit uses, all special permit uses shall satisfy the following general standards:

1. The proposed use at the specified location shall be in harmony with the adopted comprehensive plan.

2. The proposed use shall be in harmony with the general purpose and intent of the applicable zoning district regulations.

3. The proposed use shall be such that it will be harmonious with and will not adversely affect the use or development of neighboring properties in accordance with the applicable zoning district regulations and the adopted comprehensive plan. The location, size and height of buildings, structures, walls and fences, and the nature and extent of screening, buffering and landscaping shall be such that the use will not hinder or discourage the appropriate development and use of adjacent or nearby land and/or buildings or impair the value thereof.

4. The proposed use shall be such that pedestrian and vehicular traffic associated with such use will not be hazardous or conflict with the existing and anticipated traffic in the neighborhood.

5. In addition to the standards which may be set forth in this Article for a particular group or use, the BZA shall require landscaping and screening in accordance with the provisions of Article 13.

6. Open space shall be provided in an amount equivalent to that specified for the zoning district in which the proposed use is located.

7. Adequate utility, drainage, parking, loading and other necessary facilities to serve the proposed use shall be provided. Parking and loading requirements shall be in accordance with the provisions of Article 11.

8. Signs shall be regulated by the provisions of Article 12; however, the BZA, under the authority presented in Sect. 007 below, may impose more strict requirements for a given use than those set forth in this Ordinance.

8-903 Standards for all Group 9 Uses

In addition to the general standards set forth in Sect. 006 above, all Group 9 special permit uses shall satisfy the following standards:

1. All uses shall comply with the lot size and bulk regulations of the zoning district in which located, except as may be qualified below.

2. All uses shall comply with the performance standards specified for the zoning district in which located.

3. Before establishment, all uses, including modifications or alterations to existing uses, shall be subject to the provisions of Article 17, Site Plans, or other appropriate submission as determined by the Director.

8-914 Provisions for Approval of Reduction to the Minimum Yard Requirements Based on Error in Building Location

The BZA may approve a special permit to allow a reduction to the minimum yard requirements for any building existing or partially constructed which does not comply with such requirements applicable at the time such building was erected, but only in accordance with the following provisions:

1. Notwithstanding Par. 2 of Sect. 011 above, all applications shall be accompanied by ten (10) copies of a plat and such plat shall be presented on a sheet having a maximum size of 24" x 36", and one 8 ½" x 11" reduction of the plat. Such plat shall be drawn to a designated scale of not less than one inch equals fifty feet (1" = 50'), unless a smaller scale is required to accommodate the development. Such plat shall be certified by a professional engineer, land surveyor, architect, or landscape architect licensed by the State of Virginia and such plat shall contain the following information:

   A. Boundaries of entire property, with bearings and distances of the perimeter property lines and of each zoning district.

   B. Total area of the property and of each zoning district in square feet or acres.

   C. Scale and north arrow, with north, to the extent feasible, oriented to the top of the plat and on all supporting graphics.

   D. Location of all existing structures, with dimensions, including height of any structure and penthouse, and if known, the construction date(s) of all existing structures.

   E. All required minimum yards to include front, side and rear, and a graphic depiction of the angle of bulk plane, if applicable, and the distances from all existing structures to lot lines.

   F. Means of ingress and egress to the property from a public street(s).

   G. For nonresidential uses, the location of parking spaces, indicating minimum distance from the nearest property line(s).

   H. If applicable, the location of well and/or septic field.

   I. For nonresidential uses, a statement setting forth the maximum gross floor area and FAR for all uses.

J. Location of all existing utility easements having a width of twenty-five (25) feet or more, and all major underground utility easements regardless of width.

K. Seal and signature of professional person certifying the plat.

In addition, the application shall contain a statement of justification explaining how the error in building location occurred and any supportive material such as aerial photographs, Building Permit applications, County assessments records, a copy of the contract to build the structure which is in error, or a statement from a previous owner indicating how the error in building location occurred.

2. The BZA determines that:

   A. The error exceeds ten (10) percent of the measurement involved, and

   B. The noncompliance was done in good faith, or through no fault of the property owner, or was the result of an error in the relocation of the building subsequent to the issuance of a Building Permit, if such was required, and

   C. Such reduction will not impair the purpose and intent of this Ordinance, and

   D. It will not be detrimental to the use and enjoyment of other property in the immediate vicinity, and

   E. It will not create an unsafe condition with respect to both other property and public streets, and

   F. To force compliance with the minimum yard requirements would cause unreasonable hardship upon the owner.

   G. The reduction will not result in an increase in density or floor area ratio from that permitted by the applicable zoning district regulations.

3. In granting such a reduction under the provisions of this Section, the BZA shall allow only a reduction necessary to provide reasonable relief and may, as deemed advisable, prescribe such conditions, to include landscaping and screening measures, to assure compliance with the intent of this Ordinance.

4. Upon the granting of a reduction for a particular building in accordance with the provisions of this Section, the same shall be deemed to be a lawful building.

5. The BZA shall have no power to waive or modify the standards necessary for approval as specified in this Section.

10-104 Location Regulations

1. If an accessory-type building is attached to a principal building by any wall or roof construction, it shall be deemed to be a part of the principal building and shall comply in all respects with the requirements of this Ordinance applicable to a principal building, except as qualified in Sect. 2-412.

2. The required minimum yards referenced in this Section shall refer to the minimum yards in the applicable zoning district for the principal building(s) with which the accessory-type building is associated.

3. Except as may be qualified by Sect. 2-505, a fence or wall may be located as follows. Such regulations shall not be deemed to negate the screening requirements of Article 13.

   A. In any yard on any lot containing not less than two (2) acres located in the R-A through R-1 Districts, a fence or wall not exceeding seven (7) feet in height is permitted.

   B. In any front yard on any lot, a fence or wall not exceeding four (4) feet in height is permitted. However, in that portion of a front yard on a residential corner lot that abuts a major thoroughfare, a solid wood or masonry fence or wall not exceeding eight (8) feet in height, located flush to the ground, may be permitted, provided that:

      (1) the driveway entrance to the lot is from a street other than the major thoroughfare and the principal entrance of the dwelling faces a street other than the major thoroughfare, and

      (2) the lot is not contiguous to a lot which has its only driveway entrance from the major thoroughfare or service drive adjacent to the major thoroughfare.

      The fence shall not extend into the front yard between the dwelling and the street other than the major thoroughfare and shall also be subject to the provisions of Sect. 2-505.

      In addition, an increase in fence height in the front yard up to six (6) feet may be permitted with the approval of a special permit by the BZA in accordance with Part 9 of Article 8.

   C. In any side or rear yard on any lot, a fence or wall not exceeding seven (7) feet in height is permitted. However, a solid wood or masonry fence or wall not exceeding eight (8) feet in height, located flush to the ground, is permitted:

      (1) In any side or rear yard of a reverse frontage lot; or

      (2) For that portion of a side or rear yard of a residential lot where the side or rear lot line is within 150 feet of a major thoroughfare and abuts common or dedicated open space, where

such open space is located between the lot line and the major thoroughfare.

D. In any yard of an industrial use permitted by the provisions of this Ordinance, a fence or wall not exceeding eight (8) feet in height is permitted.

E. Notwithstanding the above provisions, a fence or wall which is an integral part of any accessory use, such as a tennis court or swimming pool, shall be subject to the location regulations of Par. 12 below. However, a modification to the location regulations may be permitted with approval of a special permit by the BZA in accordance with Part 9 of Article 8, or by the Board of Supervisors in conjunction with the approval of a rezoning or a special exception in accordance with Part 6 of Article 9 for containment structures associated with outdoor recreation/sports facility playing fields/courts and golf courses that are not constructed in association with a privately used playing field/court on a lot containing a single family dwelling.

F. In addition, for noise barriers which reduce adverse impacts of highway noise on properties located adjacent to major thoroughfares, or which reduce noise impacts of commercial and industrial uses on adjacent properties, an increase in height and/or modification to the corresponding location regulations set forth above may be permitted with approval of a special permit by the Board of Zoning Appeals in accordance with Part 9 of Article 8, or by the Board of Supervisors in conjunction with the approval of a proffered rezoning or a special exception in accordance with the following:

(1) A noise impact study shall be submitted with the application. The study shall demonstrate the need for such a barrier and the level of mitigation to be achieved, and shall include the height of the barrier, the proposed location of the barrier on the property, the acoustical design and structural features of the barrier, the type of building materials to be used in construction of the barrier and the proposed measures to mitigate any visual impacts of the barrier on adjacent property, to include the location and design of the barrier, use of berming and landscaping.

(2) The Board shall determine that the proposed height and location of the noise barrier are necessary in order to achieve mitigation of the noise and that the noise barrier will not adversely impact the use or development of surrounding properties.

(3) Before establishment, the noise barrier shall be subject to the provisions of Article 17, Site Plans or other appropriate submission as determined by the Director.

G. Notwithstanding the above, a fence or wall which is to be provided in conjunction with a public use may be of such height and location as approved by the Board.

H. In addition, the Board may approve in conjunction with a proffered rezoning or a special exception for another use, or the BZA in conjunction with a special permit for another use, an increase in fence and/or wall height and/or modification to the corresponding location regulations set forth above, and/or an increase in gate and/or gate post height and/or modification to the corresponding location regulations set forth in Par. 4 of Sect. 10-104 below in accordance with the following:

(1) In order to show the visual impact of the fence, wall, gate and/or gate post on nearby properties, the height, location, color and materials of the proposed fence, wall, gate and/or gate post and any associated berming or landscaping shall be submitted with the application.

(2) The Board/BZA shall determine that the proposed fence, wall, gate and/or gate post is in character with the existing development on the site, is harmonious with the surrounding development, and will not adversely impact the use and/or enjoyment of any nearby property. The Board/BZA may impose such conditions as it deems necessary to satisfy this criteria.

I. Notwithstanding the above, the Zoning Administrator shall have the authority to approve up to a five (5) percent increase in fence and/or wall height for an existing fence and/or wall in any yard which does not comply with the requirements set forth above. This provision shall not be applicable to such fences and/or walls that are subject to height increases pursuant to Sect. 8-923. Such an increase may be approved by the Zoning Administrator in accordance with all of the following:

(1) The sight distance requirements of Sect. 2-505 shall be met.

(2) The increase in fence and/or wall height is due to variations in topography on the site or of the fence materials.

(3) Any existing noncompliance was done in good faith and through no fault of the property owner.

(4) Such fence and/or wall height increase shall not be detrimental to the use and enjoyment of the other properties in the immediate vicinity.

(5) All such requests shall be accompanied by illustrations supporting the need for the height increase and identifying the location(s) for which the relief is sought.

J. Notwithstanding the above provisions, posts, not wider than six (6) inches by six (6) inches, finials, post caps, lighting fixtures, or similar decorative features as determined by the Zoning Administrator, may exceed the maximum height of any fence and/or wall by not more than nine (9) inches provided such features are spaced an average distance of not less than six (6) feet apart and a minimum distance of not less than three (3) feet apart. In addition, all other applicable provisions of this Ordinance shall be met, including the outdoor lighting provisions of Part 9 of Article 14.

4. Trellises, gates and gate posts may be located within any required minimum front yard as follows:

   A. Two (2) trellises, not to exceed eight (8) feet in height nor four (4) feet in width.

   B. Four (4) gate posts without limit as to height or width.

   C. Two (2) gates not to exceed eight (8) feet in height.

   D. Gates and gate posts exceeding four (4) feet in height shall not exceed in maximum width fifteen (15) percent of the lot width.

5. Ground-supported antenna structures for the operation of personal or amateur radio facilities under Parts 95 and 97 of the Federal Communications Commission regulations may be permitted in any R district as follows:

   A. Structures seventy-five (75) feet or less in height shall not be located closer to any lot line than a distance equal to one-fifth (1/5) of their height.

   B. Structures greater than seventy-five (75) feet in height shall not be located closer to any lot line than a distance equal to their height.

6. Off-street parking and loading spaces shall be located in accordance with the provisions of Article 11.

7. Signs shall be located in accordance with the provisions of Article 12.

8. Wayside stands shall be located in accordance with the provisions of Par. 28 of Sect. 102 above.

9. The following regulations shall apply to the location of structures for the housing of animals:

   A. Barns and other structures used in connection with agriculture, to include structures for the keeping, confining or sheltering of any poultry or livestock, except horses and ponies, shall be located no closer than 100 feet to any lot line. Additional provisions governing the location of hog pens are set forth in Chapter 41.1 of The Code.

B. Barns and other structures used for the confining or sheltering of livestock and domestic fowl, as permitted by the provisions of Sect. 2-512, shall be located no closer than fifty (50) feet to any lot line; provided, however, that any such structure used for the confining or sheltering of horses and ponies as permitted by Sect. 2-512 or in connection with agriculture shall be located no closer than forty (40) feet to any front or side lot line nor closer than twenty (20) feet to a rear lot line.

C. Cages, lofts, hives, pens and other structures which are seven (7) feet or less in height and which are used for the keeping of homing, racing, or exhibition (fancy) pigeons or honeybees shall be located no closer than three (3) feet to any lot line. Any such structure which exceeds seven (7) feet in height shall be located in accordance with the provisions set forth in Par. 12 below.

D. Doghouses, runs, pens, rabbit hutches, cages and other similar structures for the housing of dogs and other commonly accepted pets shall be located in accordance with the provisions set forth in Par. 12 below, except in no instance shall a structure, run or pen for three (3) or more dogs be located closer than twenty-five (25) feet to any lot line.

The BZA may approve a modification to the location regulations set forth in this Paragraph in accordance with the provisions of Part 9 of Article 8.

10. The following regulations shall apply to the location of freestanding accessory storage structures:

A. For purposes of determining height, the height of an accessory storage structure shall be measured in accordance with Par. 4 of Sect. 10-103 above.

B. An accessory storage structure shall not be located (a) in any minimum required front yard on any lot or (b) in any front yard on any lot containing 36,000 square feet or less.

C. An accessory storage structure which does not exceed eight and one-half (8 ½) feet in height may be located in any part of any side yard or rear yard, except as qualified in Sect. 2-505.

D. An accessory storage structure which exceeds eight and one-half (8 ½) feet in height shall not be located in any part of any minimum required side yard.

E. An accessory storage structure which exceeds eight and one-half (8 ½) feet in height shall not be located closer than a distance equal to its height to the rear lot line or located closer than a distance equal to the minimum required side yard to the side lot line.

F. On a corner lot, the rear lot line of which adjoins a side lot line of a lot to the rear, an accessory storage structure which exceeds eight and one-half (8 ½) feet in height shall not be located:

(1) Nearer to any part of the rear lot line that adjoins the side yard on the lot to the rear than a distance equal to the minimum required side yard on such lot to the rear, or

(2) Nearer to the side street line than a distance equal to the minimum required front yard on the lot to the rear.

11. Solid waste and recycling storage containers may be located in any yard, provided that any container located in a minimum front yard shall be located no closer than fifteen (15) feet to a front lot line and shall be screened from view from the abutting street by either plantings or solid fencing. Notwithstanding the provisions of Par. 3 above, the maximum height of such solid fencing shall not exceed one (1) foot above the solid waste and recycling storage containers. In addition, no containers shall be located in any required parking space, driveway, parking aisle, open space or landscaped area.

12. The following regulations shall apply to the location of all freestanding structures or uses except those specifically set forth in other paragraphs of this Section:

A. For purposes of determining height, the height of an accessory structure shall be measured in accordance with Par. 4 of Sect. 10-103 above.

B. An accessory structure or use, which does not exceed seven (7) feet in height, may be located in any part of any side or rear yard, except as qualified in Sect. 2-505.

C. No accessory structure or use, except a statue, basketball standard or flagpole, shall be located (a) in any minimum required front yard on any lot or (b) in any front yard on any lot containing 36,000 square feet or less. When located in a front yard, basketball standards shall not be located closer than fifteen (15) feet to a front lot line and twelve (12) feet to a side lot line, and shall not be used between the hours of 8:00 PM and 8:00 AM.

D. No accessory structure or use which exceeds seven (7) feet in height shall be located in any minimum required side yard.

E. No accessory structure or use which exceeds seven (7) feet in height shall be located closer than a distance equal to its height to the rear lot line or located closer than a distance equal to the minimum required side yard to the side lot line.

F. On a corner lot, the rear lot line of which adjoins a side lot line of a lot to the rear, no accessory structure or use which exceeds seven (7) feet in height shall be located:

(1) Nearer to any part of the rear lot line that adjoins the side yard on the lot to the rear than a distance equal to the minimum required side yard on such lot to the rear, or

(2) Nearer to the side street line than a distance equal to the minimum required front yard on the lot to the rear.

13. Except as may be qualified by Sect. 2-505, conventional television antennas and satellite dish antennas designed to receive television or video programming with a diameter or diagonal measurement of 39 inches (one meter) or less shall be permitted in any yard on any lot.

14. Except for lighting fixtures mounted on poles that are associated with outdoor recreation/sports facilities playing fields/courts and as noted below, the mounting height of lighting fixtures on light poles shall not exceed a maximum height of forty (40) feet as measured from the ground level or the surface on which the light pole is mounted to the bottom of the lighting fixture. Light poles mounted on the top of parking decks or parking structures shall not exceed a maximum height of twenty (20) feet as measured from the top of the pole to the surface on which the pole is mounted. Light poles shall be located in accordance with the following:

A. On lots developed with single family dwellings:

(1) Light poles that are no greater than seven (7) feet in height may be located in any yard;

(2) Light poles that exceed seven (7) feet in height shall be subject to the location regulations of Paragraphs 12C, 12D, 12E and 12F above.

B. On all other lots:

(1) Light poles that do not exceed seven (7) feet in height may be located in any yard;

(2) Light poles greater than seven (7) feet in height shall be subject to the minimum yard requirements, with the exception of angle of bulk plane, of the zoning district in which located.

The above locational provisions shall not be applicable to parking lot light poles, which may be located in any yard. All light poles, to include parking lot light poles, shall be subject to the provisions of Part 9 of Article 14.

15. Temporary portable storage containers shall be located in accordance with the provisions of Sect. 102 above.