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SUPERIOR COURT FOR THE STATE OF CALIFORNIA

COUNTY OF CONTRA COSTA

GOLDEN GATE WATER SKI CLUB, Petitioner and Plaintiff, v. COUNTY OF CONTRA COSTA, a political subdivision of the State of California; the CONTRA COSTA COUNTY BOARD OF SUPERVISORS; and DOES 1 through 50, inclusive, Respondents and Defendants.	Case No.: N-05-1769 Complaint filed: November 30, 2005 PETITIONER'S OPENING BRIEF Date: 5/12/06 Time: 8:30 a.m. Dept.: 22 The Hon. Joyce M. Cram

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INTRODUCTION

Petitioner Golden Gate Water Ski Club (Golden Gate or Club) seeks to set aside an order by the Contra Costa County Board of Supervisors (Board) to utterly demolish all 28 cabins and 28 docks on Golden Gate's property, an island located in the Sacramento-San Joaquin Delta. The Board's order would halt a use of the property that has existed—with the County's knowledge and acquiescence—for nearly 40 years by the oldest private water ski club in the United States. Despite the Board's claim that the lack of permits constitutes a "public nuisance," Golden Gate's docks and other structures, including its sanitary systems, have been approved and permitted by the U.S. Environmental Protection Agency; the U.S. Fish and Wildlife Service (formerly, the Bureau of Sport Fisheries and Wildlife); the State Lands Commission; the U.S. Coast Guard; and the U.S. Army Corps of Engineers (Administrative Record (AR) at pp. 230-231.)

The County's own Environmental Health Department stated, following inspections in 1972 and again in 1978, that it "found the entire operation to be clean, neat and well maintained. We observed no problems of public health significance." (AR at pp. 18 and 38.) The County Planning Department has likewise stated that Golden Gate is "well maintained" and that its uses are "desirable and should be permitted." (AR at p. 306.) As recently as 2003, the Community Development Department inspected the premises and found that "development of the site appeared to be orderly and well maintained, with most of the structures in fair to good shape." (AR at p. 82.)

In 1970, the County first notified Golden Gate, as well as various federal agencies, that permits were required, Golden Gate promptly submitted land use permit and rezoning applications in a good faith effort to obtain all necessary approvals for full compliance. It also submitted permit applications to the appropriate federal agencies.

While the federal agencies granted the permits, the County, by its own admission, inexplicably "shelved" the applications for *eight years*. County staff informed Golden Gate's attorney as early as 1974 that they "would not hassle" Golden Gate over the alleged violations. Finally, in 1979, the County urged Golden Gate to withdraw the applications, dropped any

enforcement against Golden Gate, and ceased all contact with the Club. The County did, however, continue to assess taxes against Golden Gate's property, both the land as well as the structures. The Club faithfully paid all of the tax assessments.

Now, more than 25 years later, the County wants Golden Gate to tear down *everything*, merely because there has been a change in the political winds. However, the County's delays and acquiescence for the last 35 years support a finding of laches and estoppel.

Moreover, the Board's findings in support of abatement are based upon an *erroneous* understanding of the law regarding nuisance and are unsupported by the evidence. The Board has attempted to define a "public nuisance" as *anything* that violates *any* County ordinance. However, a public nuisance under state law must (1) constitute a "nuisance" by creating an actual threat of injury to health and safety or obstruction of a public right, and (2) constitute a "public" nuisance by affecting a substantial portion of the community. The Board made no such findings, nor does its evidence support such findings, even if they had been made.

Golden Gate therefore seeks an order from this Court commanding the County to set aside its order that every structure and dock on the island be torn down at Golden Gate's expense, estimated by the County to be $485,000.00. (AR at p. 830.)

STATEMENT OF FACTS

Golden Gate is the oldest continually operating water ski club in the United States. Its purpose is to support and promote the sport of water skiing at all levels, from the beginning recreational skier to the international competitive skier. Golden Gate was organized in early 1948 and became incorporated as a nonprofit organization under the laws of the State of California in 1949. (AR at p. 94.) It was one of the first clubs to become affiliated with the American Water Ski Association and helped form the Bay Area Tournament Association. Through these associations, Golden Gate has sponsored numerous officially sanctioned water ski tournaments. Many of its past and present members have become regional, national and world champions.

In 1966, Golden Gate purchased the subject property, a five (5) acre island in the South San Joaquin Delta. (AR at p. 95.) The island, which is accessible only by water, was established

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for the primary purpose of accommodating Golden Gate's recreational activities in the waters of the Delta. (*Ibid.*) Through the years, the members have gradually developed the island, which now has facilities for picnicking, barbecuing, and overnight tent camping. A portion of the island has been developed with small cabins for the use of individual members.[1] All cabin construction is approved by the Club Steering Committee, which monitors for standard building practices and also conducts annual safety inspections of each cabin. (AR at pp. 56, 59.)

In August 1970, Golden Gate was informed by the County Planning Department that the use of the island was not consistent with the applicable zoning designation. (AR at p. 474.) The County Planning Department suggested that Golden Gate submit an application for a rezoning of the property to legalize the use. (*Ibid.*) Golden Gate complied with the County's request and submitted an application for rezoning and for a land use permit. (AR at pp. 475-478.) The applications requested that Golden Gate continue to use the island for ". . . day, overnight camping, mobile home and cabin facility. To be use[d] by members of our organization . . .." (AR at pp. 477-478.) Subsequently, Golden Gate was informed that the County could not approve the application. (AR at pp. 393-394.) However, the County Planning Department never denied the application. Instead, it "shelved" Golden Gate's application for eight years. (AR at p. 306.)

On June 17, 1974, Norman Halverson, a member of the County Planning Department staff, told the Club's attorney that the County would not "hassle" the Club over the various zoning and permitting issues. (AR at p. 294; see also AR at p. 754:18-25.) Having complied with the County's requests and being told they would not be bothered further, the Club continued to use the island as it had always done, and the County continued to allow them.

In 1979, out of fear that the application would become automatically approved under the recently enacted Permit Streamlining Act, the Planning Department prepared an internal memorandum recommending that the applications be immediately withdrawn to avoid its automatic approval date. (AR at p. 306.) The memorandum nonetheless commended the island as being "well-maintained." (*Ibid.*) It also indicated the department's position that "weekend

[1] Representative photographs of the structures are attached hereto as Exhibit "1."

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and seasonal recreation use of this land is desirable and should be permitted but that it must be controlled. In light of the time constraint staff recommends that both applications be withdrawn and that a committee be established to work with representatives of the Golden Gate Water Ski Club in addressing the aforementioned concerns." (*Ibid.*)

On February 28, 1979, Golden Gate received a letter from the County Planning Department recommending that the applications be withdrawn and suggesting the formation of a committee on Delta recreation. (AR at p. 307.) However, the letter made no reference to either the Permit Streamlining Act or the County's concerns that Golden Gate's land use application would become automatically approved. (*Ibid.*) On March 21, 1979, in reliance on the County's offer to include Golden Gate in a new committee, Golden Gate withdrew its applications and eagerly volunteered to sit on any committee. (AR at p. 308.)

In the meantime, Golden Gate's members had been informed that they could continue using the island as they had before. (AR at pp. 294, 754:18-25.) Golden Gate heeded the County's advice and continued using the island and paying taxes to the County. (AR at p. 752:15-19; see also AR at pp. 43-44.) Golden Gate relied on the County's representation that everything was "OK" and continued to utilize the island for recreational purposes. Golden Gate thus sought and obtained leases from the State Lands Commission to use the land for its docks and pilings. (AR at pp. 196-217.)

Moreover, as a part of its initial investigation, the County notified the U.S. Army Corps of Engineers (Corps) of the Club's existence and the alleged violations on the island, prompting the Corps to make its own investigation. (AR at p. 10.) As a result, Golden Gate applied to the Corps for permits for its docks, piling, houseboats, walkways, mooring, and the bulkhead encompassing the island. (AR at p. 17.) During its permitting process, the Corps notified the U.S. Environmental Protection Agency (EPA), U.S. Fish and Wildlife Service, and the County about the pending permits and solicited any input and objections. (AR at pp. 17, 32-37.)

Although the EPA was initially concerned about improper disposal of human, sanitary, and other wastes, it later withdrew its objections (AR at p. 20), after assurances from Golden Gate's representatives. (AR at p. 29.) Likewise, the U.S. Fish and Wildlife Service responded

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that it also did not object to the permit. (AR at pp. 27-28.)

More importantly, however, the County also submitted written comments to the Corps. The Corps' notice to the County specifically invited County input "on any violations of Contra Costa County regulations which may have occurred as a result of this work ...." (AR at p. 32.) In response, the County inspected the island and stated "We found the entire island clean, neat and well maintained." (AR at p. 38.) Although it reiterated its arrangement with the Club regarding some sewage disposal concerns, the County offered no objections to the Corps permit. (*Ibid.*)

During the next 24 years, the Club never heard from the County. (AR at p. 236.) Inexplicably, the County never formed the committee it had promised earlier. (*Ibid.*) Nor did it ever conduct follow-up investigations or enforcement proceedings, despite the fact that the County was well aware of Golden Gate's use of the island. (*Ibid.*)

During the intervening years, Golden Gate supported, and continues to support, a number of public and community service activities, including donation of time and equipment to the City of Berkeley's Learn to Ski Week (AR at p. 96); involvement in boating safety and Delta water use legislation (*Ibid*); water safety classes for children in Contra Costa County (*Ibid*); and involvement with the American Red Cross for 9-11, Junior Development for Northern California, and Breast Cancer Walk for Cure (*Ibid*).

As a result of their presence and location in this remote part of the Delta, the Club's members have assisted countless numbers of distressed boaters by providing gasoline, jump-starts, mechanical assistance and emergency towing. (AR at p. 97.) Sheriff Deputy Jim Lambert of the Contra Costa County Sheriff Marine Patrol has publicly stated that, in responding to emergency situations, he has "observed club members to be more than willing to help non-club boaters in need of immediate assistance of any type. ... The Club members on this island make our job much easier, and we appreciate their professionalism and dedication to boating, and to the sport of water skiing." (AR at p. 305.)

On February 23, 2005, the County Building Inspection Department issued a Notice and Order to Abate the island in its entirety. (AR at pp. 289-290.) The grounds for this order was

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that mere technical violations of the County's ordinances constituted a public nuisance. (*Ibid.*) The notice and order did not make any findings of endangerment to public health and safety. (*Ibid.*) Rather, it merely recited technical violations of the County ordinance code, mostly failure to obtain permits.

On March 23, 2005, Golden Gate exercised its administrative right to appeal by filing an appeal with the Board. (AR at pp. 292-322A.) On August 16, 2005, the Board held a public hearing and upheld the County's order to abate. (AR at pp. 836-837.) The Board simply adopted the same findings made by the Building Inspection Department and failed to make any findings at all that the Club's structures and uses of the island endanger public health and safety. (*Ibid.*)

ARGUMENT

I.

STANDARD OF REVIEW

The scope of the Court's review into the Board's order to abate is whether the Board acted in excess of its jurisdiction or whether there was any prejudicial abuse of discretion. (CCP 1094.5, subd. (b).) Abuse of discretion is present if the Board failed to proceed in the manner required by law, its decision is not supported by the findings, or its findings are not supported by the evidence. (*Ibid.*) Inquiries, which involve a question of law, are reviewed by the trial court de novo. (*Anserv Insurance Services, Inc. v. Kelso* (2000) 83 Cal.App.4th 197, 205 [de novo review to decide as question of law whether the agency acted without jurisdiction].) Where a fundamental vested right is involved, courts review the sufficiency of the evidence under the independent judgment test. (*Bixby v. Pierno* (1971) 4 Cal.3d 130, 144.)

In determining whether the right is fundamental the courts "do not alone weigh the economic aspect of it, but the effect of it in human terms and the importance of it to the individual in the life situation." (*Bixby v. Piern, supra* 4 Cal.3d at p. 144.) "Although no exact formula exists by which to make this determination ..., courts are less sensitive to the preservation of purely economic interests." (*E.W.A.P., Inc. v. City of Los Angeles* (1997) 56 Cal.App.4th 310, 325.) Moreover, "[a]dministrative decisions which result in restricting a

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property owner's return on his property, increasing the cost of doing business, or reducing profits are considered impacts on economic interests, rather than on fundamental vested rights." (*Id.*)

Golden Gate's right to use and enjoy its property in this case does not involve a mere economic interest or the profitability of a business. Golden Gate is a non-profit organization whose members purchased the island in 1966 for the express purpose of pursuing their active lifestyle and the pure enjoyment of water sports. This interest in their property affects a human element of their everyday lives, not the profitability of their pocketbooks. The Board's decision admits that the only access to the island is by boat, yet it orders the demolition of all of the docks—the members' only means of access to their property. Thus, the interest at stake here is a "fundamental" right.

Moreover, the Club's interest is a "vested" fundamental right. With respect to land, courts have essentially equated vesting with a present possessory interest in the land. (*Cadiz Land Co., Inc. v. Rail Cycle, L.P.* (2000) 83 Cal.App.4th 74, 112 [petitioner "did not have a present possessory, or vested right in the ... project"].) Here, however, Golden Gate *does* have a possessory interest in the island. Its fundamental right is therefore "vested."

Because the Board's order of abatement affects Golden Gate's fundamental vested right, the Court must use its independent judgment in reviewing the sufficiency of the evidence to support the Board's findings. Under this independent judgment standard of review, the Court must determine whether the weight of the evidence, in light of the whole record, supports the agency's findings. (CCP § 1094.5, subd. (c).) This standard is synonymous with the preponderance of the evidence test. (*Chamberlain v. Ventura County Civil Service Com.* (1977) 69 Cal.App.3d 362, 368 .)

Even if it is assumed that the independent judgment standard does not apply, Golden Gate is still entitled to the relief sought herein because the County failed to proceed in a manner required by law, and its findings lack requisite evidentiary support under the substantial evidence standard.

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II.

THE BOARD'S RELIANCE ON THE COUNTY'S LOCAL DEFINITION OF "PUBLIC NUISANCE" IS IN ERROR

In its August 16, 2005, order, the Board adopted the findings contained in the staff report and determined that Golden Gate's structures constituted a public nuisance. As the findings themselves reveal, the Board based its decision entirely on the County's own definition of a public nuisance, not the state statutory definition. (Minutes of Board's Decision, AR at p. 836, nos. 1 and 2 with Staff Report, AR at pp. 830-831, finding no. 4.) The County's definition broadly states, "[a]ny condition existing in violation of this code is a public nuisance, and may be abated in a civil action, summarily or otherwise by the county." (Contra Costa County Ordinance Code, § 14-6.204.)

The County's attempt to redefine a public nuisance is an act in excess of its jurisdiction and is contrary to law.

A. The County Has No Authority to Redefine a Public Nuisance

While the County may have power to *abate* public nuisances, it is without power to redefine what *constitutes* a public nuisance. The state has already defined a nuisance:

> Anything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance.

(Civil Code, § 3479.) Moreover, a *public* nuisance is defined as "one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal." (Civil Code, § 3480.)

The County therefore was required to make findings based on substantial evidence that Golden Gate's structures and uses on the island (1) constitute a nuisance in fact (i.e., are injurious to health, indecent or offensive to the senses, obstruct the free use of property, or unlawfully obstruct the free passage or use of public areas) and (2) create a nuisance of a public

nature (i.e., affects at the same time an entire community or neighborhood). However, the County's decision and order is noticeably devoid of any such findings. Rather, the County based its decision entirely on its invalid definition of a nuisance.

California county governments "are legal subdivisions of the State" (Cal. Const. art. XI, § 1) and "may exercise only those powers expressly or impliedly granted to [them] by the Constitution or statute." (*McCafferty v. Board of Supervisors* (1969) 3 Cal.App.3d 190, 192.) The California Constitution expressly provides that "[t]he Legislature shall provide for county powers ...." (Cal. Const. art. XI, § 1, subd. (b).) Counties, as mere political subdivisions of the state, were "created for the purpose of advancing the policy of the state at large, for purposes of political organization and civil administration...." (*Marin County v. Superior Court of Marin County* (1960) 53 Cal.2d 633, 638-639, internal quotation marks omitted.) Although California cities are municipal corporations rather than political subdivisions of the state, they likewise derive their powers from the state. (Cal. Const. art. XI, § 2 ["The Legislature shall ... provide for city powers"].)

With respect to carrying out nuisance abatements, the Legislature has granted both cities and counties the power to abate nuisances and to establish the procedures for nuisance abatements. Government Code section 38773 grants this power specifically to cities: "The legislative body [of a city] may provide for the summary abatement of any nuisance ...." Likewise, Government Code section 25845 grants this power specifically to counties: "The board of supervisors, by ordinance, may establish a procedure for the abatement of a nuisance."

In addition to this power to abate a nuisance and establish the relevant abatement procedures, the Legislature has given *cities alone* the express power to ***define*** nuisances within their jurisdictions. Government Code section 38771 states, "By ordinance the city legislative body may declare what constitutes a nuisance." By contrast, however, the Legislature has not seen fit to give a similar grant of authority to *counties*. Rather, counties must "advance the policy of the state at large" with respect to nuisances by carrying out nuisance abatements using the state's definition of a nuisance.

While the Legislature has not expressly forbidden counties from redefining a nuisance,

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basic rules of statutory and constitutional construction support the conclusion that counties do not have such power. First, the maxim *expressio unius est exclusio alterius* is applicable. Under this maxim, "the expression of one thing implies the exclusion of another." (See Black's Law Dict. (6th ed. 1990) p. 581, col. 1, attached hereto as Exhibit 2; *In re Pardue's Estate* (1937) 22 Cal.App.2d 178, 180-181.) In this case, the Legislature's express grant of power to cities to define a nuisance implies an exclusion of any similar grant of power to counties.

Second, Golden Gate anticipates that the County will argue that its power to define a nuisance is derived from California Constitution Article XI, section 7: "A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." (Cal. Const. art. XI, § 7.) However, because this provision applies to both counties and cities alike, Government Code section 38771 in its entirety (granting cities the power to define a nuisance) would be superfluous, as the California Supreme Court recognized in *City of Bakersfield v. Miller* (1966) 64 Cal.2d 93, 100. Why would the Legislature expressly grant cities the power to define a nuisance if cities already had the power under this constitutional provision? A basic rule of statutory construction is that "it is presumed that every word, phrase and provision used in a statute was intended to have some meaning and to perform some useful office, and a construction making some words surplusage is to be avoided." (*California School Employees Association v. Oroville Union High School District* (1990) 220 Cal.App.3d 289, 294.) If courts must avoid rendering individual words and phrases surplasage, a fortiori, they must avoid rendering surplasage an entire statutory section of the Government Code.

Finally, if there is any doubt whether the County possesses such power, the Court must deny it. "Any fair, reasonable doubt concerning the existence of the [County's] power is resolved by the courts against [it], and the power is denied." (*Tax Factors, Inc. v. Marin County* (1937) 20 Cal.App.2d 79, 88.) Here, Golden Gate has met that minimum threshold by at least raising a "fair, reasonable doubt" concerning the County's power to define a nuisance. Therefore, the Court should grant the petition because the Board's order to abate a nuisance based on its own definition of nuisance was in excess of its jurisdiction and not according to law.

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Such errors of law are reviewed de novo and the Board is not entitled to any deference.

B. Even If It Is Assumed, Arguendo, That the County Does Have Power to Redefine a Public Nuisance, Mere Designation of a Public Nuisance Does Not Make It So

Even assuming, arguendo, that the County has authority to redefine a nuisance, it cannot take something that is not a nuisance and, by mere declaration, transform it into a nuisance. (58 Am.Jur.2d Nuisances § 58 ["The legislature cannot, by mere declaration, make that a nuisance which is not so in fact"].) Even the *express* power of a city to define a nuisance is limited to traditional notions of nuisance. "The City's designation of a nuisance does not necessarily make it so [citation]...." (*Flahive v. City of Dana Point* (1999) 72 Cal.App.4th 241, 244, fn. 4.) In *Flahive*, the city ordinance in question, much like the ordinance at issue here, designated as a public nuisance "[a]ny violation of any Section of the Dana Point Municipal Code ...." (Dana Point Municipal Code, § 6.14.002.) The County's ordinance here is strikingly similar: "Any condition existing in violation of this code is a public nuisance ...." (Contra Costa County Ordinance Code, § 14-6.204.)

A categorical designation of a nuisance must constitute a subset of and fit within the definition of a nuisance. Otherwise, the County could destroy just about anything and everything simply by passing an ordinance regulating the particular condition, even if it did not constitute a nuisance. For example, suppose the County passes a building code ordinance requiring houses to be painted using a certain color palette. It would be absurd to think that the County could demolish every building of a different color simply because it constitutes a violation of its ordinance. Consider some actual examples currently contained in the County's ordinance code:

- "The minimum thickness of concrete floor slabs supported directly on the ground shall not be less than three and one-half inches." (Contra Costa County Ordinance Code, § 74-3.1900.4.4.)
- "[E]very new residential dwelling unit building shall be equipped with a lighted (illuminated) house number or address...." (Contra Costa County Ordinance Code, § 74-3.502.)
- "No permit shall be issued to a person to do or cause to be done any work regulated by this title except to the holder of a valid, unexpired and unrevoked [state contractor] license in good standing ...." (Contra Costa County Ordinance Code, § 72-6.018.)

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- "The thickness of wood shingles or shakes between wood nailing boards shall not be less than three-eighths inch (9.5 mm)." (Contra Costa County Ordinance Code, § 74-3.2310.4.)

If the County's definition of public nuisance is accepted, it would be entitled to demolish an entire building simply because the concrete floor slab happened to be three and three-eighths inches thick rather than the required minimum of three and one-half inches. Alternatively, it could raze a house built by a contractor whose state contractor's license was later determined to have been expired at the time the building permit was issued. Likewise, it could tear down a house because a builder failed to install an illuminated address sign, or a wall is too thin, and the list could go on and on.

The County's definition of nuisance also runs afoul of the takings clause, as Golden Gate will later argue in its inverse condemnation claim.[2] In *Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003, 1031, the U.S. Supreme Court stated, "a State, by *ipse dixit*, may not transform private property into public property without compensation. [Citation.] Instead, as it would be required to do ... ***in a common-law action for public nuisance***, [the State] must identify background principles of nuisance and property law that prohibit the uses [that the property owner intends] . . . ." (*Id.* at p. 1031, internal quotation marks omitted, emphasis added.) In short, government cannot avoid paying just compensation when it destroys private property simply by adopting a broad definition of a "public nuisance" that exceeds common-law notions of nuisance.

The Board's order and decision contain no findings that Golden Gate's structures and presence on the island are injurious to health, indecent, offensive to the senses, or obstruct the free use and enjoyment of other private or public property. In fact, in response to Golden Gate's argument to the Board that its facilities did not constitute a nuisance, the staff report, as adopted by the Board, boldly admits: "[A]ny condition existing in violation of the County Ordinance

[2] In addition to the takings issues discussed here, the Board admitted that "[t]his island is not accessible by road..." (AR at p. 330) and yet it ordered the destruction of *all* of the island's boat docks. The Board's order thus denies Golden Gate *all access* to its property. Such denial of all practicable access to property effectively ousts the property owner of his land constituting a *per se* taking by physical invasion under the Fifth Amendment.

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Code is a public nuisance and may be abated by the County. No proof beyond the existence of the illegal condition is required." (AR at p. 834.) Accordingly, the County offered no evidence beyond the existence of the ordinance violations. The Board's only finding with respect to the violations of the Building, Electrical, Plumbing, and Mechanical Codes is that Golden Gate did not have the requisite permits. (AR at pp. 830-831.)

Aside from these technical violations, the County has historically commended Golden Gate's facilities and uses, describing the facilities as "clean, neat, and well maintained" (AR at pp. 18, 38 and 82) and its uses as "desirable." (AR at p. 306.) Additionally, the County readily admits that it has known of the alleged violations since 1970. (AR at pp. 2 and 770:7-20.) If the existence of these facilities and uses are such a nuisance, why has the County waited more than 35 years to abate it?

With respect to the alleged illegal water supply and sewage systems, the Board's only finding is that Golden Gate did not have the approvals and permits from the County Health Officer. (AR at p. 830.) However, Mr. Stuart, the County's Director of Environmental Health, testified at the hearing that the County's water supply concerns could be solved fairly easily and that there were feasible alternatives for addressing the County's concerns about Golden Gate's sanitary system. (AR at p. 776:4-22.) Mr. Stuart further testified that he had ***no evidence*** that Golden Gate was causing pollution in the Delta. (AR at p. 777:6-11.) In contrast to the County's admission that it had no evidence of pollution, Golden Gate submitted the water test results from a commercial environmental testing laboratory demonstrating that the water around Golden Gate's island was not being polluted. (AR at pp. 784:16-786:10; 1108-1117.) Thus, the Board's only finding was that Golden Gate merely failed to obtain permits and approvals.

Finally, with respect to the alleged illegal land uses, the Board found that the number of structures exceeded the number allowed under the applicable zoning and that Golden Gate did not have the necessary permits and zoning approvals. (AR at p. 830.) However, the Board made no other finding that Golden Gate's use of the island was somehow injurious to public health and safety or obstructed a public right.

The Board failed to adopt any findings that the alleged violations affect "an entire

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community or neighborhood." (Civ. Code, § 3480.) Even if the alleged zoning violations constituted a nuisance, the Board will have difficulty explaining how Golden Gate's uses constitute a "public" nuisance, since, by the Board's own admission, the island "is not visible from any road in the County" (AR at p. 832) nor has any member of the community ever complained about Golden Gate's uses or structures on the island. (AR at p. 301.)[3] Thus, it is hard to imagine how the alleged violations affect the entire community or neighborhood.

In sum, the County's designation of Golden Gate as a nuisance does not necessarily transform it into one. As Abraham Lincoln is commonly reported to have said, "How many legs does a dog have if you call the tail a leg? Four. Calling a tail a leg doesn't make it a leg." Likewise, calling something a nuisance that is not a nuisance does not make it so. Rather, the County was required to follow the statutory definition of nuisance in Civil Code section 3479.

Thus, the Board was required by law to make specific findings, based on the weight of the evidence, that Golden Gate's uses and structures injured the public health and safety and affected an entire community or neighborhood. However, because the Board failed to make the required findings, much less base such findings on substantial evidence, its failure to proceed in the manner required by law and to base its decision on the evidence constitutes an abuse of discretion. Government Code section 25845 allows only for the abatement of a nuisance. Because the structures on the island do not constitute a public nuisance, the Board cannot abate the island and acted in excess of its authority by ordering the abatement. Therefore, the petition should be granted, and the Board's order should be set aside.

III.

THE BOARD ABUSED ITS DISCRETION BY ISSUING AN ORDER BROADER THAN NECESSARY TO ABATE THE NUISANCE

Even assuming that Golden Gate's violations constitute a nuisance, the Board's decision

[3] The only possible exception to this last assertion is a letter from the Baykeeper Organization, Deltakeeper Chapter, in support of the County's abatement efforts. (AR at pp. 626-627.) However, the letter is dated August 15, 2005, a day before the Board's hearing.

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was overbroad in that it ordered the demolition of *all* of Golden Gate's structures, rather than allowing Golden Gate to keep a number of structures consistent with the A-2 zoning. Where government seeks to abate or enjoin a nuisance, the order must be tailored to abate only the acts or conditions constituting the nuisance. (*Morton v. Superior Court of State, In and For San Mateo County* (1954) 124 Cal.App.2d 577, 586; *People v. Mason* (1981) 124 Cal.App.3d 348, 353-354.)

In *Morton*, defendant's quarry operations were being conducted in a manner that constituted a public nuisance, and the trial court issued an order absolutely enjoining the operation of the quarry. (*Morton v. Superior Court of State, In and For San Mateo County, supra,* 124 Cal.App.2d at pp. 578-579.) On appeal, the First District Court of Appeal noted that "[a]ll of these acts which create a nuisance ... can be corrected or stopped without preventing the quarry from operating" and held that the injunction "should have been limited to prohibiting the acts creating the nuisance...." (*Id.* at p. 586.)

Likewise, in *Mason*, the government sought injunctive relief against defendant restaurant and bar because the noise levels coming from the establishment during the night were disturbing nearby residents. The trial court entered judgment for the government and enjoined defendant from allowing the noise "to be audible anywhere in the neighborhood...." (*People v. Mason, supra,* 124 Cal.App.3d at p. 352.) The appellate court reversed, holding that the injunction was too broad because it restrained *all* audible noise from the neighborhood rather than restraining only those noise levels that disturbed the neighbors. The court stated, "We conclude that the injunction should have been worded so as to permit some noise to be audible, save and except that which unreasonably interferes with the residents' use and enjoyment of their property." (*Id.* at p. 354.) Thus, the abatement of a nuisance must be limited to the extent that the condition constitutes a nuisance.

Here, the County's A-2 zoning allows as a permitted use "[a] detached single-family dwelling on each parcel and the accessory structures and uses normally auxiliary to it." (Contra Costa County Ordinance Code, § 84-38.402, subd. (4), AR at p. 383.) The County further admits that "[a] dock is allowed in an A-2 zone as an accessory use to a single-family [dwelling]." (AR

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at p. 358.) However, the Board ordered the destruction of ***all*** the cabins and ***all*** the docks, despite its ordinance allowing at least one dwelling and an accessory dock. As in *Mason* and *Morton*, the Board should have limited its order to prohibiting the conditions creating the nuisance under the zoning ordinance by allowing Golden Gate, at a minimum, to keep one of the cabins and one of the docks consistent with the A-2 zone. Whereas the island is admittedly accessible only by boat (AR at p. 330), elimination of all the docks effectively denies Golden Gate all access to its own property.

Moreover, with a land use permit, the A-2 zoning further allows "[c]ommunity buildings, clubs, activities of a quasi-public, social, fraternal, or recreational character, such as golf, tennis or swimming clubs, or veterans' or fraternal organizations" (Contra Costa County Ordinance Code, § 84-38.404, subd. (10), AR at p. 383) as well as an additional single-family dwelling. (Contra Costa County Ordinance Code, § 84-38.404, subd. (11), AR at p. 383.) Given Golden Gate's 40-year existence on the property, the Board should have further allowed Golden Gate to keep a number of its structures, if not all of them, as they squarely fit within the "recreational club" use allowed by the A-2 zoning district. However, the Board refused to allow even one structure on the property and ordered the demolition of *all* the structures.

As a result, the Board's order was overbroad and contrary to law and must be set aside.

IV.

THE COUNTY'S 35-YEAR "INEXPLICABLE" DELAY IN ISSUING THE ABATEMENT ORDER IS AN EGREGIOUS EXAMPLE OF LACHES

Laches is a long-standing equitable defense which requires a showing of unreasonable delay, plus acquiescence ***or*** prejudice. (*People v. Department of Housing and Community Development* (1975) 45 Cal.App.3d 185, 195; *Conti v. Board of Civil Service Commissioners* (1969) 1 Cal.3d 351, 359.) Acquiescence without prejudice will support the second prong of the laches test. (*Northridge Hospital Foundation v. Pic 'N' Save No. 9, Inc.* (1986) 187 Cal.App.3d 1088, 1101.) Laches has historic origin in the equity courts, which insisted on "'conscience, good faith, and reasonable diligence.'" (*People v. Department of Housing and Community Development, supra*, 45 Cal. App.3d at p. 195.) The defense of laches involves a large measure

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of judicial discretion, shaped by the exigencies of the particular case. (*Id.*)

The California Supreme Court has further recognized that the equitable defense of laches may be applied against the government, consistent with the requirement that government should be held to a standard of "rectangular rectitude" in dealing with its citizens. (*Farrell v. County of Placer* (1944) 23 Cal.2d 624, 627-628.) In virtually every case in which the equitable defense of laches has been asserted by a private litigant, the governmental entity has contended that neither laches nor any other equitable principle may be invoked if it would operate to defeat the effective operation of a policy adopted to protect the public. (See, e.g., *San Diego County v. California Water and Telephone Co.* (1947) 30 Cal.2d 817, 826; see also *People v. Department of Housing and Community Development, supra*, 45 Cal. App. 3d at p. 196.) However, the California Supreme Court has emphasized that private litigants are not categorically precluded from asserting equitable defenses, including laches, against a governmental entity, even when the governmental action purportedly promotes a policy adopted for public protection. The California Supreme Court and the lower courts have consistently ***balanced*** the impact on the private litigant with the purported policy adopted for public protection. In the context of equitable estoppel, which will be discussed further in section IV, *infra*, the California Supreme Court has adopted the following balancing principle:

> The government may be bound by an equitable estoppel in the same manner as a private party when the elements requisite to such an estoppel against a private party are present and, in the considered view of a court of equity, the injustice which would result from a failure to uphold an estoppel is of sufficient dimension to justify any effect upon public interest or policy which would result from the raising of an estoppel.

(City of Long Beach v. Mansell (1970) 3 Cal.3d 462, 496-497; see also *Anderson v. City of La Mesa* (1981) 118 Cal. App.3d 657, 661 [rejecting a city's contention that, as a matter of law, it cannot be estopped to deny a building permit issued in violation of a zoning ordinance]; *Lentz v. McMahon* (1989) 49 Cal.3d 393, 399 [reiteration of the balancing approach]; *City and County of San Francisco v. Pacello* (1978) 85 Cal.App.3d 637 [eight-year delay by San Francisco Zoning Administrator caused a nuisance action to be barred by equitable doctrine of laches].)

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In *People v. Department of Housing and Community Development, supra,* the court of appeal applied this balancing principle to the equitable defense of laches. In that case, the court of appeal addressed the question of whether a $40,000 loss by a private citizen was a sufficient injustice to warrant the application of laches, despite countervailing public policy concerns about the government's failure to follow CEQA guidelines. The court of appeal held that, on balance, the injustice which would result to the property owner from a failure to uphold laches was of sufficient dimension to justify any effect upon the public interest resulting from the failure of HCD to comply with CEQA. In reaching this conclusion, the court of appeal held that the balancing test adopted by the California Supreme Court in *Mansell* applied equally to an equitable claim of laches: "The above [*Mansell*] formula is quite adaptable to claims of laches in counterpoise to the strong policy underlying environmental legislation." (*People v. Department of Housing and Community Development, supra*, 45 Cal.App.3d at p. 197.)

In sum, Golden Gate is not categorically precluded from asserting equitable defenses, including laches. Thus, even if it is assumed, arguendo, that the abatement order is the result of a policy adopted for public protection, this Court must nevertheless balance that policy against the injustice to Golden Gate if laches is denied.[4]

A. By Its Own Admission, the County Unreasonably and Inexplicably Delayed Acting on Golden Gate's Permit Application After It Had Languished for Eight Years

On June 7, 1971, Golden Gate submitted an application to the County for a "land use permit" for operation of the island as a water ski club, and on application for rezoning. The County failed to act on there application for eight years. (AR at pp. 4-5.)

In January 1979, almost eight years after submission of the land use permit and rezoning applications, the County Planning Department in an internal memorandum finally recommended that "both applications be withdrawn and that a committee be established to work with

[4] The County cannot avail itself of Civil Code section 3490 in this action. That section provides: "No lapse of time can legalize a public nuisance, amounting to an actual obstruction of public right." As is discussed more fully below, there is *no* evidence in the administrative record to support a conclusion that the structures on the island are "obstructing" a public right. On the contrary, the Board has admitted in its findings that the island cannot even be seen by the general public. (AR at p. 832.) Furthermore, the County made no findings in support of its abatement order that the structures on the island are "actually obstructing" a public right.

representatives of [Golden Gate] in addressing the aforementioned concerns." (AR at p. 306.) In this same memorandum, the County Planning Department recognized that "[d]ue to the confines of '884' [the Permit Streamlining Act] action must be taken on these pending applications by March 30, 1979 (a 90 day extension request was submitted)." (*Ibid.*)

Approximately one month later, on February 23, 1979, the County Planning Department suggested the creation of an "advisory committee" consisting of various representatives and interested organizations, for the ostensible purpose of studying recreational uses in the Delta region in general. (AR at p. 40.) In reasonable reliance on what was perceived at the time to be a good-faith gesture on the part of the County, Golden Gate unilaterally withdrew the land use permit and rezoning applications. (AR at p. 107.) Indeed, in correspondence to the County Planning Department dated March 21, 1979, Golden Gate expressly acknowledged that the decision to withdraw the applications "was based on your planning staff recommendation and, our ability to participate on the committee to be form[ed] for the study of concerns surrounding recreational uses in the delta." (AR at p. 107.) Golden Gate's correspondence was sent to the County Planning Department a mere nine days before the County, by its own admission, believed that the applications would be approved by operation of law as a result of the Permit Streamlining Act. Curiously, in the February 28, 1979, correspondence from the County Planning Department to Golden Gate, there was no acknowledgement that the County believed the permits would be approved as a matter of law on March 30, 1979. (AR at p. 307.) The County merely recommended that the rezoning and land use permits be "withdrawn before March 30, 1979." (*Ibid.*) In this same correspondence, the County Planning Department informed Golden Gate that it would "contact you before formation of the committee." (*Ibid.*)

Despite the County's representation that it would be forming a committee, and despite Golden Gate's reasonable reliance on this misrepresentation in deciding to unilaterally withdraw its land use permit and rezoning applications, the committee was never formed. Not only that, the record is devoid of *any* effort by the county to form a committee. The only inference that may be drawn is that the County purposely recommended withdrawal of the applications because

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it believed that the Permit Streamlining Act would grant the permit by operation of law.[5] As soon as the applications were withdrawn, the County ignored Golden Gate. "Rectangular rectitude" is indeed the standard by which the government's dealings with its citizens is to be measured, and in this respect, the County has fallen short.

By the County's own admission, its failure to form a committee is inexplicable. In its written response to Logan & Powell's (Golden Gate's prior counsel) September 16, 2003, correspondence regarding code compliance issues, the County acknowledged that it had

> initiated an earlier zoning investigation of the property in 1970. The matter was pursued for a decade, ***but inexplicably the investigation was discontinued.*** The last correspondence from the County proposed to form a 'committee' to address the County concerns with recreational uses in the Delta, including Golden Isle. However, ***staff can find no evidence that the committee was formed or that there were further discussions on code compliance with the Club members until 2003.***

(AR at p. 236, italics and bold added.)

The record therefore contains sufficient evidence to support a finding by this Court that both elements of laches—unreasonable delay and acquiescence—have been satisfied. As will be shown below, further inexplicable delays support a finding of laches.

B. After the County Convinced Golden Gate to Withdraw Its Permit and Rezoning Applications, It Unreasonably and Inexplicably Delayed Issuance of the Abatement Order for 26 Years, Thereby Acquiescing To Golden Gate's Use of the Island as a Water Ski Club

In addition to the unreasonable delays and acquiescence rendered by the County's handling of the land use permit and rezoning applications, laches is also established by the subsequent 24-year delay in issuing the abatement order. This 24-year delay is as unreasonable and inexplicable as the eight-year delay in acting upon Golden Gate's land use permit and rezoning applications. There can be no conclusion but that the County acquiesced to the use of the island by Golden Gate for a water ski club. This acquiescence is understandable in light of the fact that the County historically viewed Golden Gate's activities on the island as an overall positive contribution to the area. In its January 18, 1979, internal memorandum, for example, the County Planning Department concluded: "It is felt that weekend and seasonal

[5] At the time, there was no case authority that rezoning applications are not subject to the Permit Streamlining Act.

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recreation use of this land is desirable and should be permitted but that it must be controlled." (AR at p. 306.)

In 1972, the County's own health department found "the entire operation to be clean, neat and well maintained. We observed no problems of public health significance." (AR at p. 018.) The Health Department came to the same conclusion again in 1975. (AR at p. 38.) Even as recently as 2003, the Community Development Department inspected the property and found that the "development of the site appeared to be orderly, and well maintained, with most of the structures in fair to good shape." (AR at p. 82.) In addition, throughout the entire history of Golden Gate's use of the island, the County has assessed and been paid property taxes on each and every separate structure. (AR at p. 752:15-19; see also AR at pp. 43-44.) The County has also taken affirmative steps to inform Golden Gate of desired improvements, such as the installation of a sump pump to aid the County's mosquito abatement. (AR at p. 744:15-20.) Golden Gate has also received permits from a number of other agencies, as discussed more fully in the statement of facts.

Having complied with all of the County's wishes, including the County's desire that Golden Gate unilaterally withdraw its land use permit and rezoning applications, Golden Gate continued to use the island as it had always done: skiing, barbecuing, and paying taxes, not only on the property, but also all improvements for the next 26 years. The County's silence during this 26-year period falls under the classic definition of acquiescence: "to give an implied consent to a transaction, to the accrual of a right, or to any act, by one's mere silence, or without express consent or acknowledgment." (See Black's Law Dict. (6th ed. 1990) p. 24, col. 1, attached hereto as Exhibit 3.)

C. Even If It Is Assumed, Arguendo, That the County Has Not Acquiesced to the Use of the Island as a Water Ski Club, Golden Gate Has Been Substantially Prejudiced by the Unreasonable and Inexplicable Delays

Even if it is assumed, arguendo, that the County's unreasonable and inexplicable delay in issuing an abatement order does not rise to the level of "acquiescence," Golden Gate has been substantially prejudiced by the delay—thus satisfying the alternative second prong of the laches test.

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1. Golden Gate Has Been Prejudiced by the Unavailability of Key Witnesses

Prejudice is not limited to material losses and out-of-pocket expenses. In *City and County of San Francisco v. Pacello*, *supra*, 85 Cal.App.3d at 645, the First District Court of Appeal held that "prejudice is manifest" when delays cause important evidence to become unavailable. In that case, the City and County of San Francisco (City) sought to overturn the findings of the Board of Permit Appeals, and further sought abatement of the structure as an alleged public nuisance. However the City unreasonably delayed bringing suit for over eight years.

In light of this delay, the court of appeal concluded that laches barred the relief sought by the City and County of San Francisco, even though the purported ground for the abatement order was that the structure constituted a public nuisance. In reaching this conclusion, the court of appeal first cited the general principle of laches, and then proceeded to cite the California Supreme Court's decision in *Mansell*, *supra*, which set forth a balancing test when the purported ground for the abatement order is protection of the public interest. The court of appeal concluded that "on its face, the complaint shows an unexplained delay of eight and one-half years between a cease and desist order by the zoning administrator and the institution of the present action. The delay also appears in the stipulated facts in the file of the Board." (*City and County of San Francisco v. Pacello*, *supra*, 85 Cal.App.3d at 644.) Thus, the court of appeal concluded that the first prong of the laches test had been satisfied. Significantly, the court of appeal then concluded that *prejudice had been established solely on the basis of the unavailability of important evidence due to the delay: **where the delay caused important evidence before the Board to become unavailable, prejudice is manifest***. . . Such prejudice, plus the unexplained delay, constitutes laches. There is thus substantial evidence to support the trial court's finding thereof. (*Id.* at p. 645.)

In the present action, the County's delay in issuing an abatement order has prejudiced Golden Gate solely on the basis of the unavailability of key witnesses. For example, Gordon Turner, Golden Gate's attorney in the 1970s, had participated in meetings with Norman Halverson, on behalf of the County, regarding Golden Gate's permit and rezoning applications.

As a result, Mr. Turner relayed to members of Golden Gate that the County would not "hassle" the Club over the various zoning and permitting issues. (AR at p. 294; see also AR at p. 754:18-25.) Because of the unreasonable and inexplicable delays in pursuing the abatement order, Mr. Turner is no longer available as a witness. He passed away in 1997. Related thereto, one long-standing member of Golden Gate, Bob Abbadie, informed the County during the appeal hearing of the following: "At that time, I guess the County officials were more compassionate, as we were told go away, don't bother us and we won't bother you. And that's how we got to this date now. We've existed for 35 years there. (AR at p. 754:11-25.)

The delay in issuing the abatement order has also prejudiced Golden Gate in that the County's planning staff in the 1970s is not the planning staff in 2006. In addition, the County's zoning regulations have been changed to restrict the recreational uses of the island—restrictions that were not in place in the 1970s.

2. Changes in the Applicable Land Use Regulations During the County's Unreasonable Delay Have Caused Prejudice to Golden Gate

Recent changes in state law, as well as in the County's ordinances and General Plan, have made Golden Gate's compliance with the zoning requirements extremely difficult, if not impossible.

For example, in 1992, the Legislature enacted the Delta Protection Act, which the County says limits its ability to help bring Golden Gate into compliance. (AR at pp. 704:5-10, 772:6-12; AR at p. 342.) In 1990, the voters of the County adopted Measure C, establishing an Urban Limit Line. (AR at p. 774:12-17.) According to the County, this new Urban Limit Line prohibits the type of densities necessary to bring the Club in compliance. (AR at p. 415.)

Most significantly, the County has adopted and amended its General Plan in the intervening years. The current version of the General Plan was adopted in 1991. (AR at p. 774:1-6.) The County readily admits that it is more restrictive than the regulations applicable to the Golden Gate in the 1970s. (AR at p. 774:7-17.) It has also frequently cited conflicts with the current General Plan as a reason for refusing to help the Club come into compliance. (AR at pp. 273-274.) Additionally, the current Land Use Element of the General Plan provides that both the

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Forestry Recreation and Water Recreation Districts—which would have permitted Golden Gate's uses—are now presumed to be antiquated and will be deleted. (AR at p. 272.)

Had the County diligently pursued its enforcement action and investigation, rather than drop the matter for a quarter century, the County and Golden Gate could have worked out a solution for compliance. Because of these changes in the regulatory landscape, the County's delay has prejudiced Golden Gate. Thus, the doctrine of laches bars the County's abatement order.

3. Golden Gate Has Expended a Substantial Amount of Time and Money Improving the Island Over the Last 35 Years

In 1979, the County dropped its investigation and enforcement actions against Golden Gate only to reopen them again in 2003. During those years, the Club has made substantial expenditures of time and money working to improve the island. Golden Gate estimates that it has paid more than $100,000 to the County in property tax revenues since 1979. (AR at p. 752:15-19; see also AR at pp. 43-44.) The taxes were paid based on assessments against the structural improvements—of which the County is now complaining—as well as the land.

Shortly after the County dropped investigation in the 1970s, Golden Gate obtained permits from the Army Corps of Engineers to install bank protection around the island to protect the island from erosion. (AR at pp. 178-185.) The estimated costs of the work, including maintenance over the years, is approximately $100,000. (AR at p. 753:1-2.) During this time, the Club also entered into a 20-year lease with the State Lands Commission for its docks and pilings, costing the Club $110.00 per year, and adjusted at the discretion of the commission. (AR at p. 197.) In 2000, the Club renewed its lease for another 20-year term, this time at a cost of $700 per year. (AR at p. 188.)

In 1996, Golden Gate worked with the County Sheriffs' Marine Patrol, the U.S. Coast Guard, and the Army Corps of Engineers to install four speed limit buoys, limiting the speed limit to five miles per hour around the island. (AR at p. 228-231.) As the owner of these buoys, the Club is now legally obligated to maintain them under Part 66 of Title 33 of the Code of Federal Regulations. (AR at p. 229.) Golden Gate's duites and position have changed to its

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prejudice due to the County's unreasonable delay.

Finally, in reliance on the County's assurances that the Club could use the property as it always had, Golden Gate added structures to the island. Although the record is unclear when such structures were added, in 1970, there were 15 mobile homes (AR at p. 2), while today there are 28 cabins. (AR at p. 330.)

Taken in their totality, these circumstances demonstrate that the County's unreasonable delay has worked to the Club's prejudice in that the Club has relied on the County's knowledge and acquiescence, and made substantial expenditures to maintain and improve the island.

D. On Balance, the Injustice to Golden Gate If All Of The Structures And Docks Are to be Demolished at Their Considerable Expense Outweighs the Effect, If Any, On the Public Interest

As set forth more fully in section I, *supra*, the County has issued an abatement order with findings that the structures located on the island are public nuisances. However, there is no finding that these structures fall under the statutory definition of a "nuisance" (Civil Code, § 3479), or a "public nuisance" (Civil Code, § 3480). On the contrary, the County has concluded that these structures are "public nuisances" simply because they are purportedly in technical violation of several County ordinance codes. The County, however, does not have the power, jurisdiction, or authority to supercede the state statutory definitions of a "nuisance" and "public" nuisance. There is no finding that the structures are "injurious to health." There is no finding that the structures are "indecent or offensive to the senses, or an obstruction to the free use of property." There is no finding that the structures "unlawfully obstruct the free passage or use in the customary manner, of any navigable lake, river, bay, stream, canal or basin, or any public park, square, street, or highway." (Civil Code, § 3479.) There is also no finding that the structures constitute a "public" nuisance, which is defined as a nuisance affecting "an entire community or neighborhood . . .." (Civil Code, § 3480.)

If the structures are in fact "nuisances" as defined by Civil Code, § 3479 why did the County fail to issue an abatement order 35 years ago? The simple answer is that these structures are not nuisances, and pose no risk whatsoever to the general public, as evidenced by the absence

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of members of the public at the appeal hearing.

Furthermore, the County cannot simply contend that there is, on balance, greater harm to the general public than there is harm to Golden Gate simply because the County is seeking to enforce zoning requirements. If this were the case, then the balancing test established by *Mansell* and its progeny would be superfluous, resulting in the very categorical ban rejected by the California Supreme Court.

The absence of evidence that the island poses harm to the public, coupled with the injustice to Golden Gate if all of the structures are forced to be torn down, at its considerable expense, mandates the relief sought herein. Golden Gate has cleared every hurdle set up by the County over the last 35 years to ensure its ability to use the island as a water ski club. These efforts include the submission of land use permits and rezoning applications which languished with the County for over eight years; Golden Gates' unilateral withdrawal of these applications in reliance on the County's misrepresentation that it would form a committee; and the subsequent 24 years of uninterrupted use. During this time period, the Golden Gate expended substantial amounts of money in improving the facilities located on the island for the benefit of its members, and for the benefit of the community in general.

Even assuming, arguendo, that the County had adopted findings that Golden Gate's structures and uses create environmental health problems, there is no substantial evidence in the record to support such findings. The staff report makes the conclusory statement that the Club's lack of a "legal" (i.e., permitted) water supply or sewage system "pose[s] significant health risks to island residents and to the state's drinking water supply." (AR at p. 331.) However, a review of the record demonstrates the County's lack of substantial evidence for this conclusory statement.

Golden Gate submitted three years' worth of periodic water sampling conducted by FGL Environmental, an environmental analytical firm that is accredited by both the National Environmental Laboratory Accreditation Program and the California Department of Health Service's Environmental Laboratory Accreditation Program. (AR at pp. 110-112, 1108-1117.) These test results showed that the Club's activities and uses were not causing pollution to the

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surrounding waters. (AR at pp. 784:16-786:11; 753:20-754:4.) In addition to the testing by the private firm, the California Department of Water Resources has been conducting testing at and around the site for the last 20 years without any reports of pollution problems. (AR at pp. 101, 113-115.) Moreover, the Club submitted evidence that it had installed three commercial grade septic systems and 14 mini-septic systems for handling sewage disposal. (AR at pp. 101, 116-120.) By contrast, the County's Director of Environmental Health admitted at the hearing that the County had *no evidence* that the Club was polluting the Delta. (AR at p. 777:6-9.)

The County has also concluded that the residential dwelling units are "structures in a Special Flood Hazard Area without a floodplain permit," in violation of Contra Costa County Ordinance Code, § 82-28.802, even though many of the structures pre-date the ordinance, and cannot be considered new construction. (AR at p. 830.) As with the County's other conclusory assertions that ***any*** ordinance violation is automatically a nuisance, there are no findings that the absence of a floodplain permit constitutes a public nuisance within the state statutory definition. Furthermore, Rubin Hernandez, Planner II with the Community Development Department, participated in a site inspection of the island in 2003. Mr. Hernandez concluded, among other things, that "some of the structures were raised above the assumed floodplain elevation . . .." (AR at p. 82.) Mr. Hernandez did not specify exactly how many structures had been raised above the assumed floodplain elevation; therefore, there is no substantial evidence in the administrative record, which would support a finding that ***all*** of the structures must be removed.[6]

The County further contends in the "background information" in support of its floodplain permit finding, that absence of a permit "could jeopardize the County's participation in the National Flood Insurance Program, with the result that the federal government would not be required to provide assistance to the County in the event of a major flooding disaster." (AR at pp. 833-834.) In support of this "background information" finding, the County cites to a 2005 letter from Rich Lierly, a senior civil engineer and floodplain manager with the Contra Costa County Public Works Department. In this correspondence, Mr. Lierly suggests, ***without any specific supporting legal citation, statutory or otherwise***, that:

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> if the County does not take every legal means available to remedy these violations . . . [the Federal Emergency Management Agency] could find that the County is not meeting the minimum requirement of the [National Flood Insurance Program], and the County could be deemed non-participating, thereby jeopardizing the County's Floodplain Management Program and adversely affecting the County and all its residences.

(AR at p. 527.) Mr. Lierly does not cite to any specific federal statute or code of federal regulation, which could possibly support such a draconian, factually baseless conclusion.

Furthermore, in this same correspondence, Mr. Lierly recommends, based on his own field visit in 2005, that the "structures would have been required to be elevated in order to meet our minimum freeboard requirement of two feet above the BFE (10 feet mean see level.)" (AR at p. 527.) Mr. Lierly does not acknowledge the finding by Mr. Hernandez that some of the structures have already been properly elevated. Mr. Lierly also concluded that the structures can comply with floodplain requirements by merely being elevated, in contradiction to the Board's overbroad abatement order.[7] Indeed, Golden Gate had expressed to the County a willingness to perform any required remedial work to comply with floodplain requirements. (AR at p. 648.)

In sum, the harm to Golden Gate if the abatement order is enforced far outweighs any effect on the public interest.

V.

THE COUNTY IS ESTOPPED FROM ISSUING THE ABATEMENT ORDER

The equitable defense of estoppel is separate and distinct from the equitable defense of laches. (*City and County of San Francisco v. Pacello, supra*, 85 Cal.App.3d at p. 645.) The doctrine of equitable estoppel is "founded on concepts of equity and fair dealing." (*Strong v.*

[6] See section II, *supra*.

[7] In its January 18, 1979 internal memorandum, the County Planning Department had concluded that "it is unclear whether allowing this use in the flood hazard zone without requiring elevation of building floors to minimize flood damage will jeopardize the County's participation in the National Flood Insurance Act." (AR at p. 105.) The County has therefore been aware of this issue for almost 30 years and failed to take any action, yet now cries wolf. If the danger to the public is as real as the County suggests, it certainly would not have waited almost 30 years to take action. In fact, there is ***no*** risk of the County losing its flood insurance.

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County of Santa Cruz (1975) 15 Cal.3d 720, 725.) It provides that a person may not deny the existence of a state of facts if he intentionally led another to believe a particular circumstance to be true and to rely upon such belief to his detriment. (*Id.*) The elements of the doctrine are that (1) the party to be estopped must be appraised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party that is serving the estoppel has a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury. (*Id.* at p. 725.) Equitable estoppel may be asserted as a defense against acts of the government. (*City of Long Beach v. Mansell, supra,* 3 Cal.3d 462, 496. As with the equitable defense of laches, there is no categorical ban to the defense of equitable estoppel against the government, even if the estoppel may have an affect upon public interest or policy. (*Id.* at pp. 496-497.)[8]

In this case, the County made several representations in several different time periods, on which Golden Gate reasonably relied upon to its injury. These representations are sufficient to estop the County from issuing the abatement order at this late date. First, as set forth more fully in the preceding section, the County believed in an impending Permit Streamlining Act deadline in 1979, and thereby induced Golden Gate to unilaterally withdraw its land use permit and rezoning applications. The County did not inform Golden Gate of the effect of the Permit Streamlining Act. The County's letter to Golden Gate on this issue (AR at p. 40), as well as the County's own internal memorandum on this issue (AR at p. 306), establish the County's knowledge of the facts, and its intent that Golden Gate withdraw its applications. The County certainly intended that Golden Gate be left unaware of the impending deadline, as the Permit Streamlining Act was not referenced in its letter to Golden Gate. As a result of this letter, Golden Gate did in fact withdraw the applications to its prejudice. (See section IV C, *supra.*)

The County also informed Golden Gate, via its attorney Gordon Turner, that it would not "hassle" Golden Gate over the various zoning and permit issues. (AR at pp. 294; AR at p. 754:18-25.) Having complied with all of the County's requests, and being told that it would not

[8] Golden Gate hereby incorporates by reference its discussion of laches at section IV, *supra.* This discussion is equally applicable to a claim of estoppel against the government.

be bothered further, Golden Gate continued to use the island as it had always done. If the County had intended in the 1970s to prohibit the use of the island as a water ski club, it would have denied the applications for a permit and for rezoning at that time. As noted above, the government is held to a standard of "rectangular rectitude" when dealing with its citizens, and this case should be no exception. (See, e.g. *Kiefer v. Spencer* (1984) 153 Cal.App.3d 954, 963 [government estopped from enforcing arcade permit ordinance because owners had invested substantial money and had "followed the procedures outlined for them"].)

It should also be emphasized that this Court can grant Golden Gate the relief it requests on a theory of promissory estoppel, as well as equitable estoppel. Promissory estoppel and equitable estoppel are closely-related doctrines and arise from the same equitable origins. (*Hughes Electronics Corp. v. Citibank Delaware* (2004) 120 Cal.App.4th 251, 271, fn. 19.) The elements of promissory estoppel are (1) a promise, (2) reliance, (3) substantial detriment, and (4) damages measured by the extent of the obligation assumed and not performed. (*Toscano v. Greene Music* (2004) 124 Cal.App.4th 685, 692.) The County represented to Golden Gate that it would form a committee to discuss and address recreational uses in the Delta region, which never materialized. In reliance on this representation, Golden Gate unilaterally withdrew its land use permit and rezoning applications to its prejudice. Golden Gate is now faced with the prospect of hundreds of thousands of dollars in losses in its investment in the structures and docks of the island, as well as the loss of hundreds of thousands of dollars in being forced to bear the cost of demolition of these structures and docks.

Because the doctrine of estoppel is equitable in nature, this Court has broad judicial discretion to fashion an appropriate remedy in the interest of justice. (*Toscano v. Greene Music, supra,* 124 Cal.App.4th at p. 695.)

CONCLUSION

The California Supreme Court has imposed upon the County a standard of "rectangular rectitude" in dealing with Golden Gate and its members. The County's inexplicable delays and misrepresentations as described above have violated this standard. Golden Gate therefore respectfully requests that this Court command the County to set aside the abatement order.

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DATED: March 9, 2006.

Respectfully submitted,

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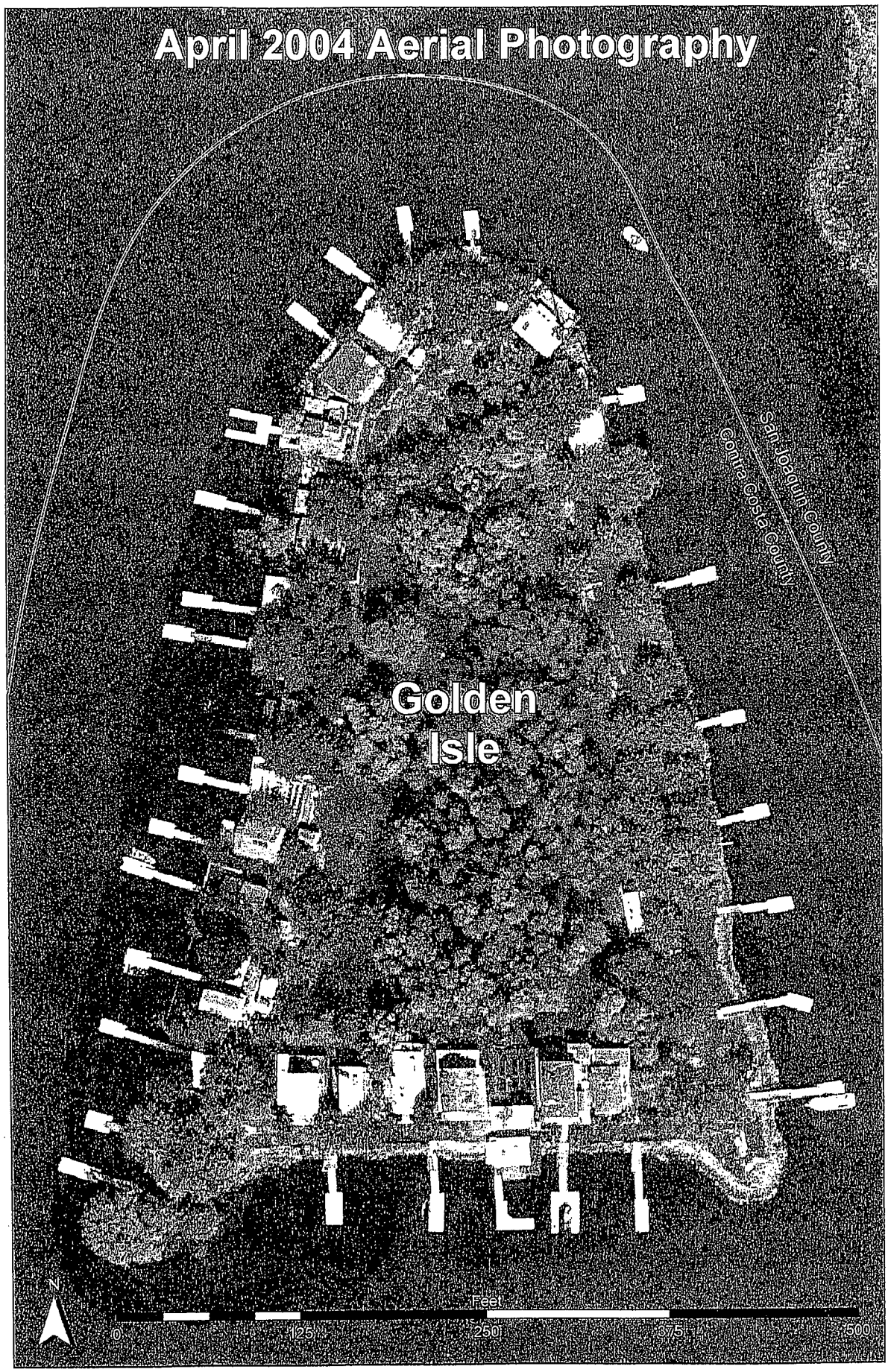
EXHIBIT 1


April 2004 Aerial Photography
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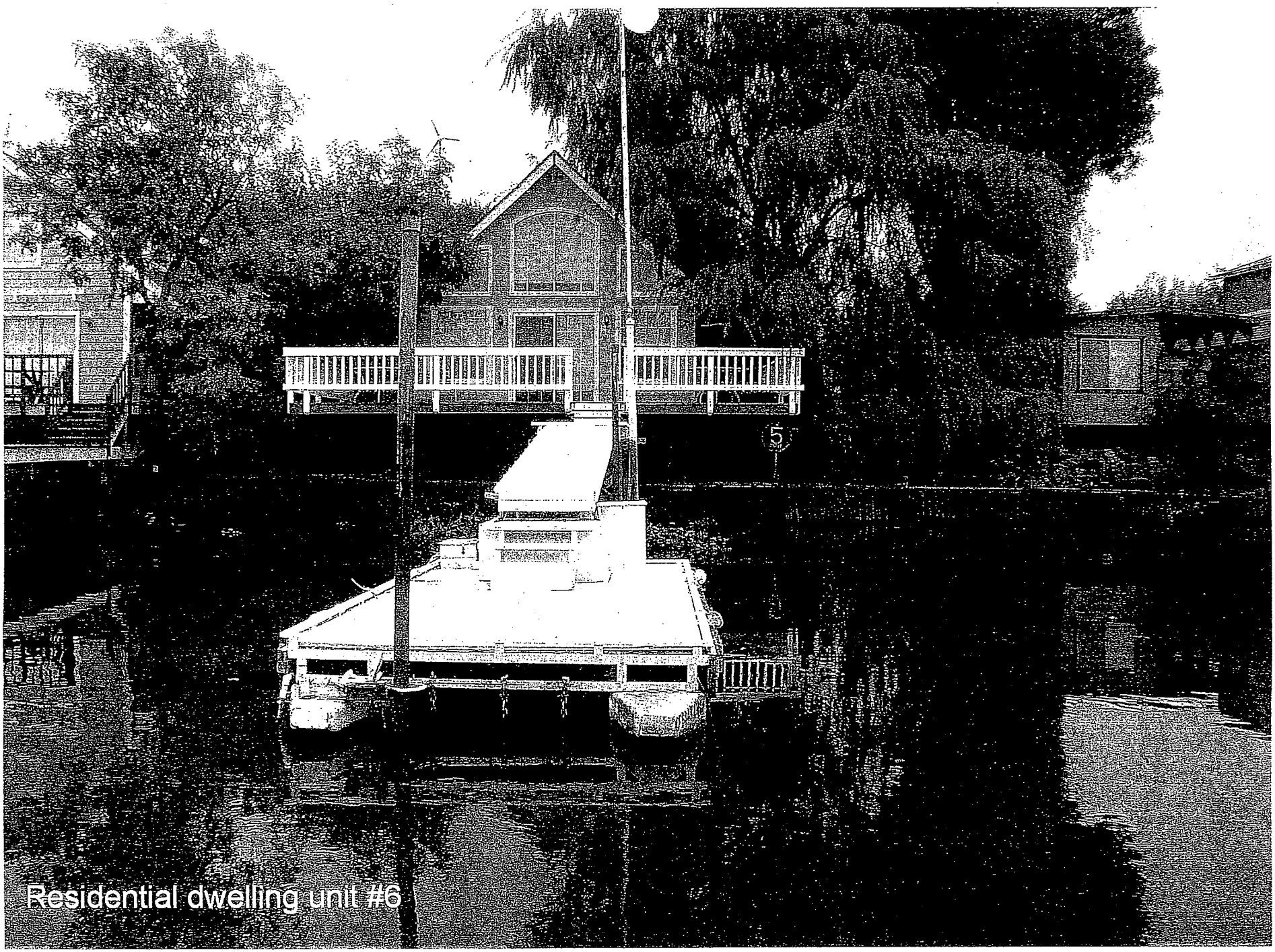
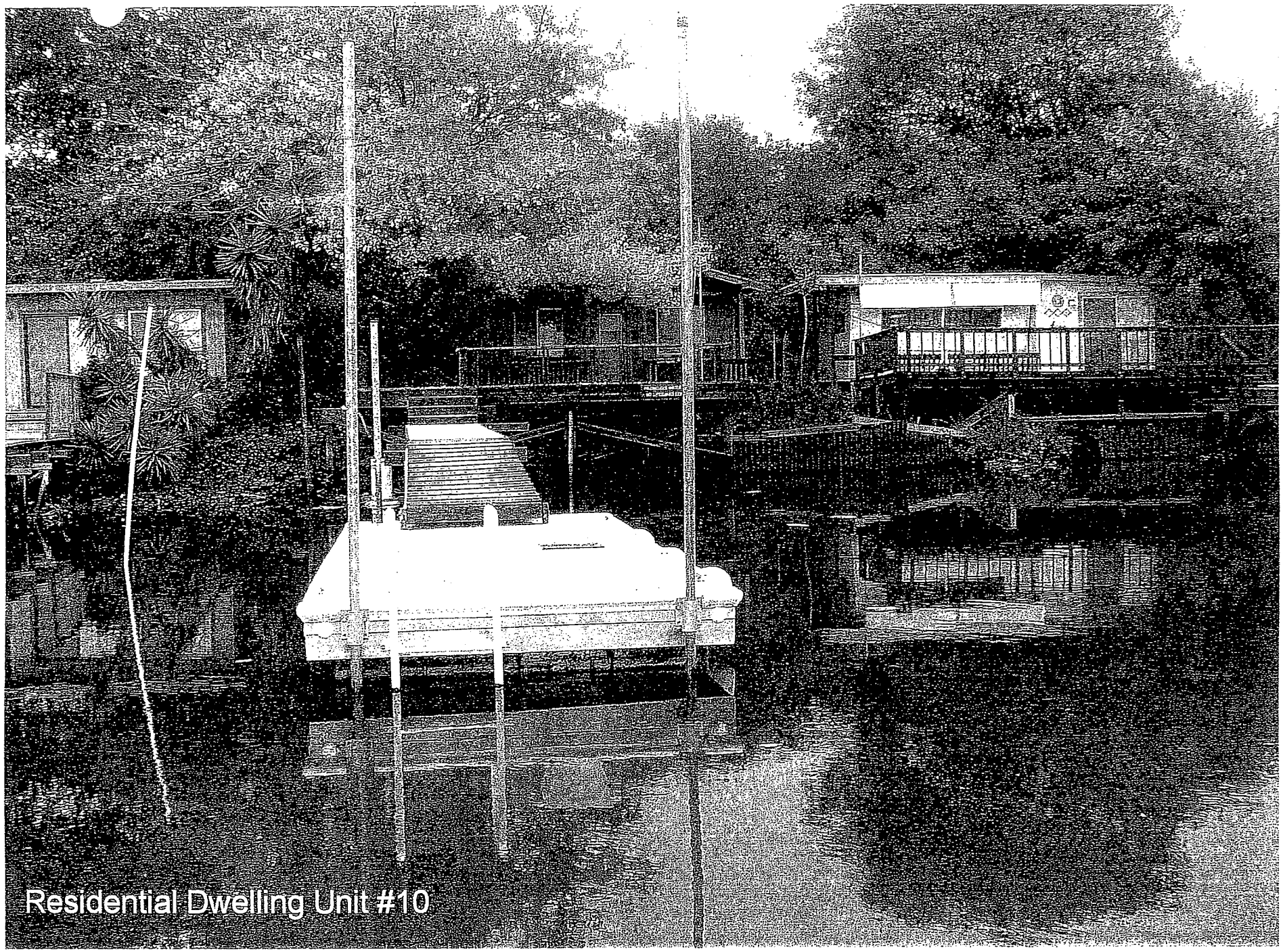


Residential dwelling unit #6

000544



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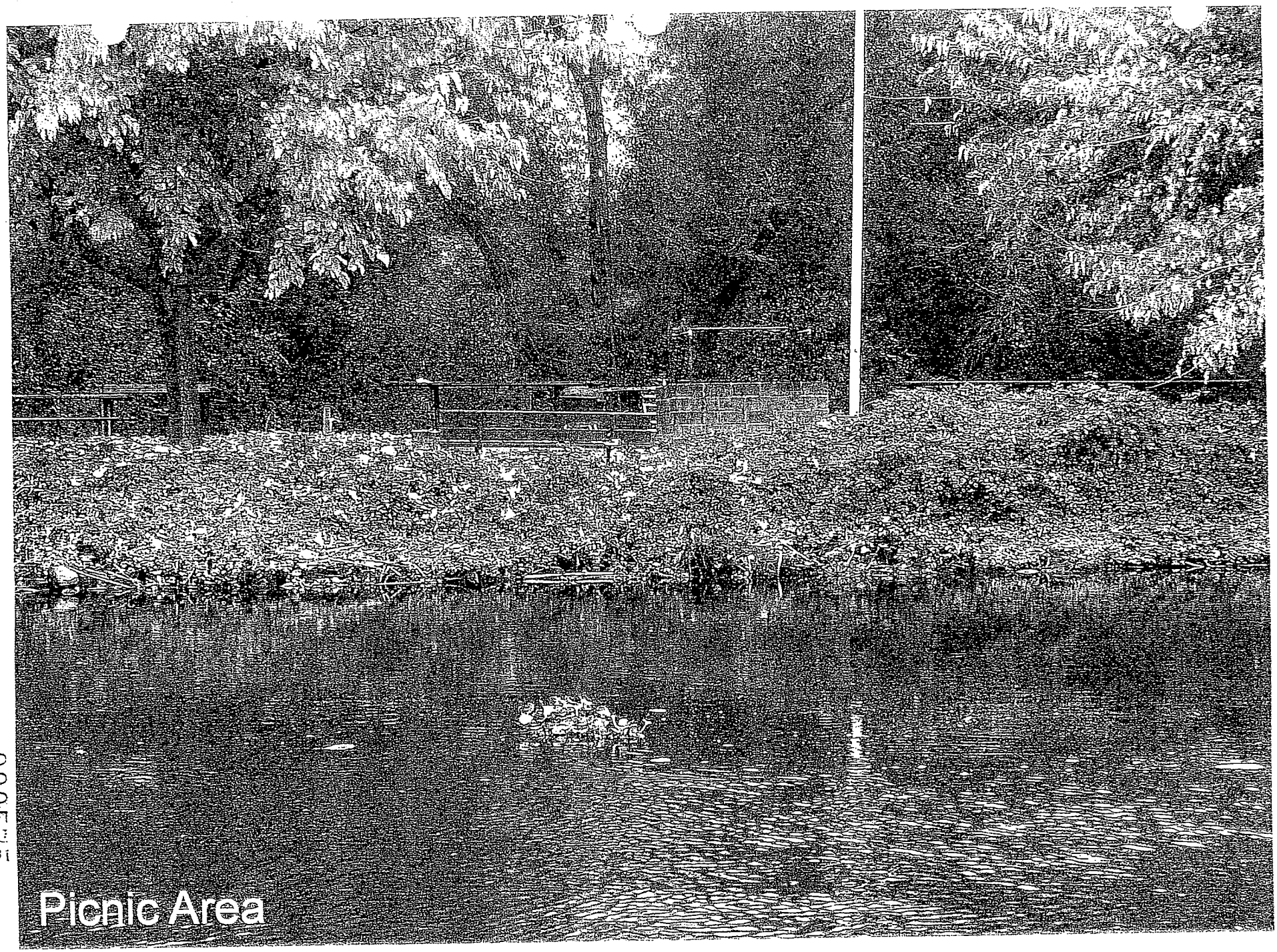
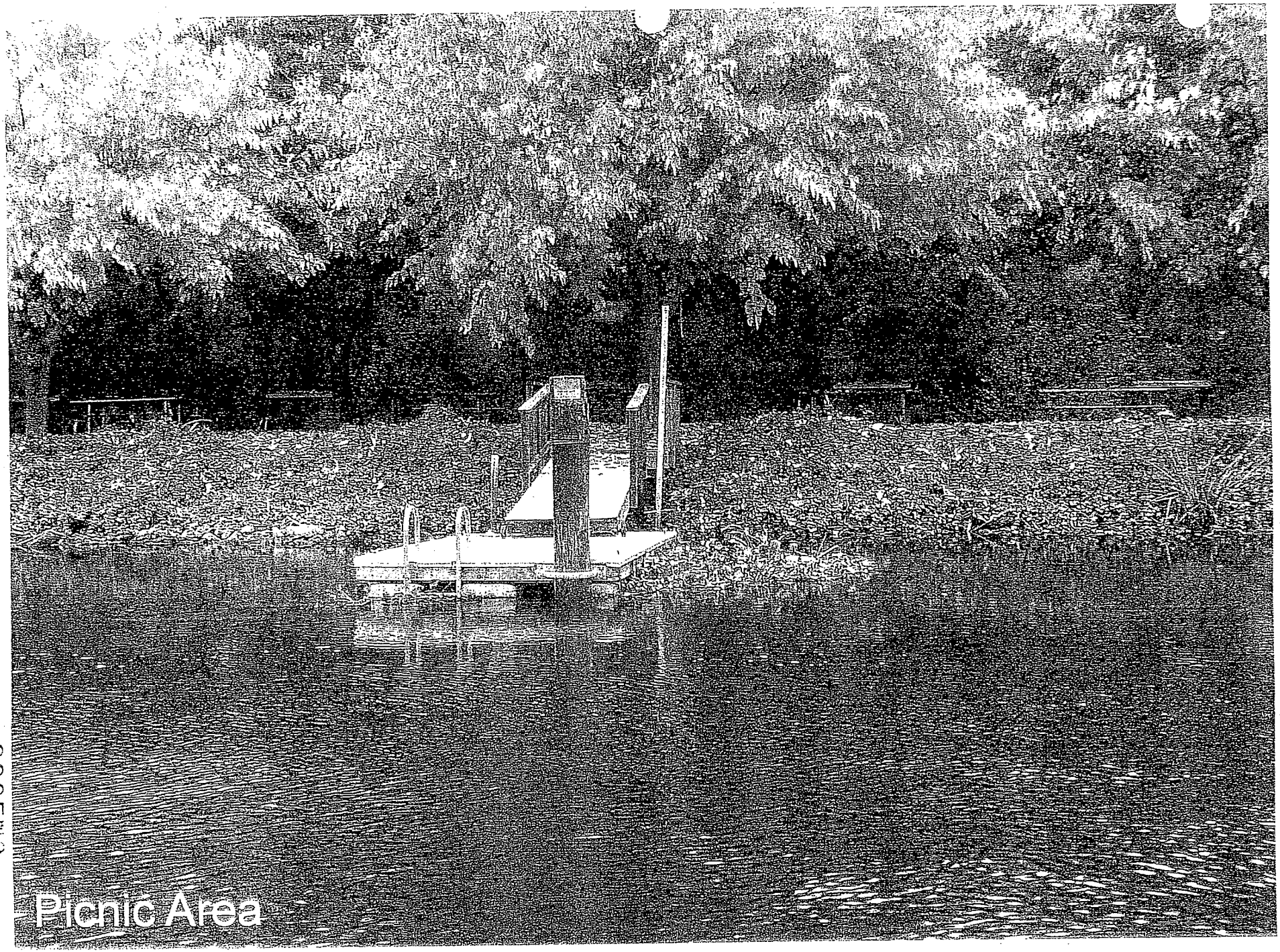
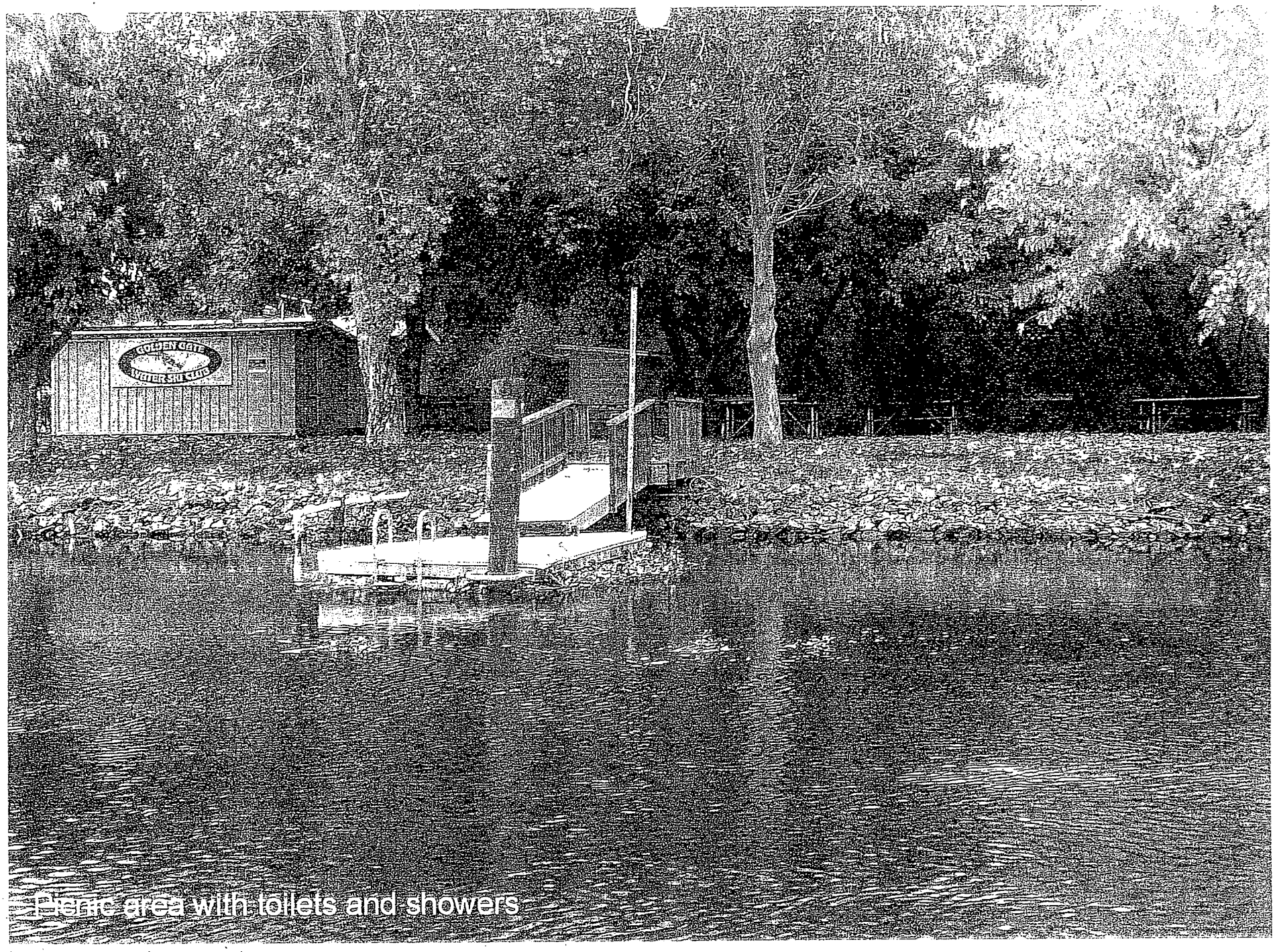
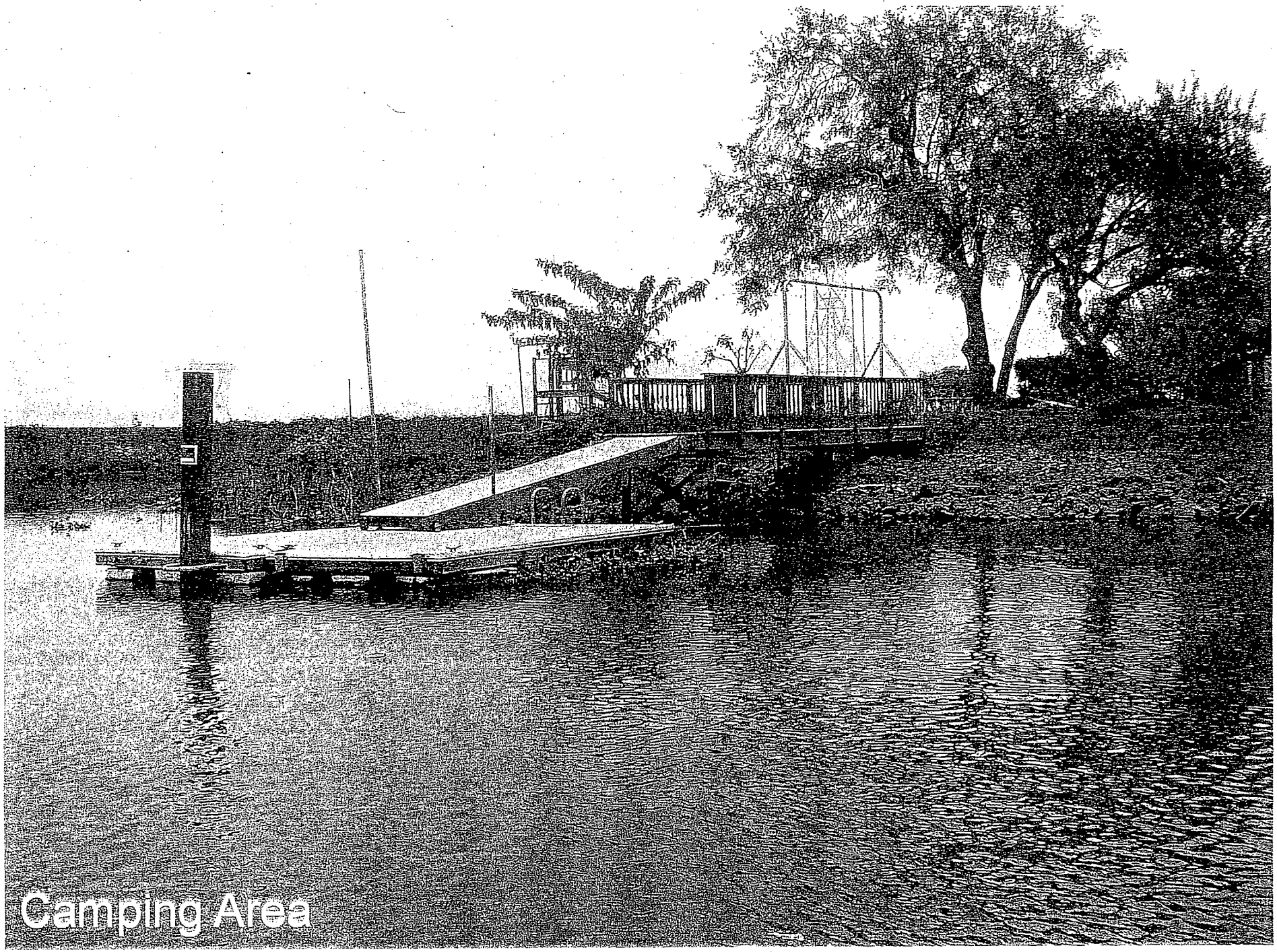


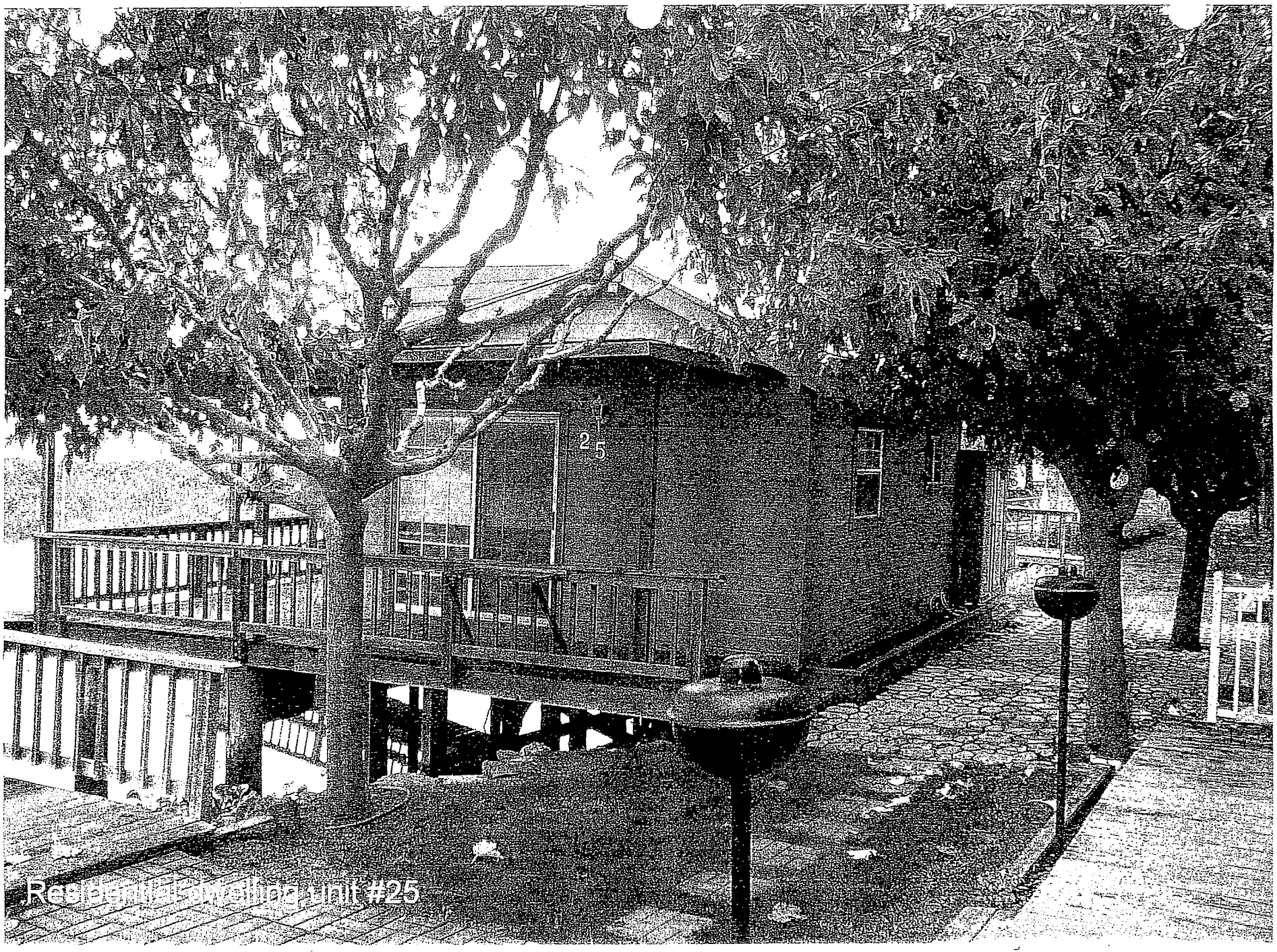


Picnic Area



Picnic area with toilets and showers





Residential Dwelling Unit #25

235000

Unit #25

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25, 27; Anderson v. Biesman & Carrick Co., 287 Ill.App. 507, 4 N.E.2d 639, 640, 641.

Express authority. Authority delegated to agent by words which expressly authorize him to do a delegable act. Authority which is directly granted to or conferred upon agent in express terms. That authority which principal intentionally confers upon his agent by manifestations to him. Epstein v. Corporacion Peruana de Vapores, D.C.N.Y., 325 F.Supp. 535, 537.

That which confers power to do a particular identical thing set forth and declared exactly, plainly, and directly with well-defined limits. An authority given in direct terms, definitely and explicitly, and not left to inference or implication, as distinguished from authority which is general, implied, or not directly stated or given.

Express color. In old English law, an evasive form of special pleading in a case where the defendant ought to plead the general issue. Abolished by the common-law procedure act, 1852, 15 & 16 Vict., c. 76, § 64.

Express common-law dedication. *See* Dedication.

Express company. A firm or corporation engaged in the business of transporting parcels or other movable property, in the capacity of common carriers, and especially undertaking the safe carriage and speedy delivery of small but valuable packages of goods and money.

Express conditions. *See* Condition.

Express contract. *See* Contract.

Express dissatisfaction. Where will declares that any one expressing dissatisfaction with its provisions should forfeit his interest, "dissatisfaction" is legally "expressed" when beneficiary contests or objects in legal proceeding to enforcement of any provision of will.

Expressed. Means stated or declared in direct terms; set forth in words; not left to inference or implication. Anderson v. Board of Ed. of School Dist. No. 91, 390 Ill. 412, 61 N.E.2d 562, 567. *See* Express.

Expressio eorum quæ tacite insunt nihil operatur /əksprésh(iy)ow iyórəm kwìy tǽsətiy insə̀nt náy(h)əl òpəréytər/. The expression or express mention of those things which are tacitly implied avails nothing. A man's own words are void, when the law speaks as much. Words used to express what the law will imply without them are mere words of abundance.

Expression, freedom of. One of the basic freedoms guaranteed by the First Amendment of U.S.Const. and by most state constitutions. Such is equivalent to freedom of speech, press, or assembly.

Expressio unius est exclusio alterius /əksprésh(iy)ow yənáyəs èst əksklúwz(h)(i)yow òltəráyəs/. A maxim of statutory interpretation meaning that the expression of one thing is the exclusion of another. Burgin v. Forbes, 293 Ky. 456, 169 S.W.2d 321, 325; Newblock v. Bowles, 170 Okl. 487, 40 P.2d 1097, 1100. Mention of one thing implies exclusion of another. When certain persons or things are specified in a law, contract, or will, an intention to exclude all others from its operation may be inferred. Under this maxim, if statute specifies one exception to a general rule or assumes to specify the effects of a certain provision, other exceptions or effects are excluded.

Expressio unius personæ est exclusio alterius /əksprésh(iy)ow yənáyəs pərsówniy èst əksklúwz(h)(i)yow òltəráyəs/. The mention of one person is the exclusion of another.

Expressly. In an express manner; in direct or unmistakable terms; explicitly; definitely; directly. St. Louis Union Trust Co. v. Hill, 336 Mo. 17, 76 S.W.2d 685, 689. The opposite of impliedly. Bolles v. Toledo Trust Co., 144 Ohio St. 195, 58 N.E.2d 381, 396.

Express malice. Express malice for purposes of first degree murder includes malice, formed design or intention to kill or to do great bodily harm, and sedate and deliberate mind of which that intention is the product. State v. Gardner, 7 Storey 588, 203 A.2d 77, 80. As used with respect to libel, means publication of defamatory material in bad faith, without belief in the truth of the matter published, or with reckless disregard of the truth or falsity of the matter. Barlow v. International Harvester Co., 95 Idaho 881, 522 P.2d 1102, 1113. *See also* Malice.

Express permission. Within statute respecting automobile owner's liability, includes prior knowledge of intended use and affirmative and active consent thereto.

Express private trust. *See* Trust.

Express repeal. Abrogation or annulment of previously existing law by enactment of subsequent statute declaring that former law shall be revoked or abrogated.

Express republication. Occurs with respect to will when testator repeats ceremonies essential to valid execution, with avowed intention of republishing will.

Express request. That which occurs when one person commands or asks another to do or give something, or answers affirmatively when asked whether another shall do a certain thing.

Express terms. Within provision that qualified acceptance, in "express terms," varies effect of draft, "express terms" means clear, unambiguous, definite, certain, and unequivocal terms.

Express trust. *See* Trust.

Expressum facit cessare tacitum /əksprésəm féysət səsériy tǽsətəm/. That which is expressed makes that which is implied to cease [that is, supersedes it, or controls its effect]. Thus, an implied covenant in a deed is in all cases controlled by an express covenant. Where a law sets down plainly its whole meaning the court is prevented from making it mean what the court pleases. Munro v. City of Albuquerque, 48 N.M. 306, 150 P.2d 733, 743.

Expressum servitium regat vel declaret tacitum /əksprésəm sərvish(iy)əm ríygət vèl dèkləréret tǽsətəm/. Let service expressed rule or declare what is silent.

Express warranty. *See* Warranty.

EXHIBIT 3

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the name of one of the two, and not of both. *See* Community property; Conquêts.

Acquiesce /ækwiyés/. To give an implied consent to a transaction, to the accrual of a right, or to any act, by one's mere silence, or without express assent or acknowledgment.

Acquiescence /ækwiyésəns/. Conduct recognizing the existence of a transaction, and intended, in some extent at least, to carry the transaction, or permit it to be carried, into effect. It is some act, not deliberately intended to ratify a former transaction known to be voidable, but recognizing the transaction as existing, and intended, in some extent at least, to carry it into effect, and to obtain or claim the benefits resulting from it, and thus differs from "confirmation," which implies a deliberate act, intended to renew and ratify a transaction known to be voidable. De Boe v. Prentice Packing & Storage Co., 172 Wash. 514, 20 P.2d 1107, 1110. Passive compliance or satisfaction; distinguished from avowed consent on the one hand, and, on the other, from opposition or open discontent. Paul v. Western Distributing Co., 142 Kan. 816, 52 P.2d 379, 387. Conduct from which assent may be reasonably inferred. Frank v. Wilson & Co., 24 Del.Ch. 237, 9 A.2d 82, 86. Equivalent to assent inferred from silence with knowledge or from encouragement and presupposes knowledge and assent. Imports tacit consent, concurrence, acceptance or assent. Natural Soda Products Co. v. City of Los Angeles, Cal. App., 132 P.2d 553, 563. A silent appearance of consent. Failure to make any objections. Submission to an act of which one had knowledge. Exists where a person knows or ought to know that he is entitled to enforce his right or to impeach a transaction, and neglects to do so for such a length of time as would imply that he intended to waive or abandon his right. Yench v. Stockmar, C.A. Colo., 483 F.2d 820, 834.

It is to be distinguished from avowed consent, on the one hand, and from open discontent or opposition, on the other.

Acquiescence and *laches* are cognate but not equivalent terms. The former is a submission to, or resting satisfied with, an existing state of things, while laches implies a neglect to do that which the party ought to do for his own benefit or protection. Hence laches may be evidence of acquiescence. Laches imports a merely passive assent, while acquiescence implies active assent. In re Wilbur's Estate, 334 Pa. 45, 5 A.2d 325, 331. "Acquiescence" relates to inaction during performance of an act while "laches" relates to delay after act is done.

See also Admission; Confession; Estoppel; Nonacquiescence; Ratification.

Administrative agencies. An administrative agency's policy of agreeing to be bound by judicial precedent which is contrary to the agency's interpretation of its organic statute. *Compare* Nonacquiescence.

Acquiescence, estoppel by. Acquiescence is a species of estoppel. An estoppel arises where party aware of his rights sees other party acting upon mistaken notion of his rights. Injury accruing from one's acquiescence in another's action to his prejudice creates "estoppel". Lebold v. Inland Steel Co., C.C.A.Ill., 125 F.2d 369, 375. Passive conduct on the part of one who has knowledge of the facts may be basis of estoppel. Winslow v. Burns, 47 N.M. 29, 132 P.2d 1048, 1050. It must appear that party to be estopped was bound in equity and good conscience to speak and that party claiming estoppel relied upon acquiescence and was misled thereby to change his position to his prejudice. Sherlock v. Greaves, 106 Mont. 206, 76 P.2d 87, 91. *See also* Estoppel.

Acquietandis plegiis /əkwàyətándəs pliyjiyəs/. A writ of justices, formerly lying for the surety against a creditor who refuses to acquit him after the debt has been satisfied.

Acquire. To gain by any means, usually by one's own exertions; to get as one's own; to obtain by search, endeavor, investment, practice, or purchase; receive or gain in whatever manner; come to have. In law of contracts and of descents, to become owner of property; to make property one's own. To gain ownership of. Commissioner of Insurance v. Broad Street Mut. Casualty Ins. Co., 312 Mass. 261, 44 N.E.2d 683, 684. The act of getting or obtaining something which may be already in existence, or may be brought into existence through means employed to acquire it. Ronnow v. City of Las Vegas, 57 Nev. 332, 65 P.2d 133, 140. Sometimes used in the sense of "procure." It does not necessarily mean that title has passed. Includes taking by devise. U. S. v. Merriam, 263 U.S. 179, 44 S.Ct. 69, 70, 68 L.Ed. 240. *See also* Accession; Acquisition; Purchase.

Acquired rights. Those which one does not naturally enjoy, but which are owing to his or her own procurement, as sovereignty, or the right of commanding, or the right of property.

Acquired surplus. Surplus arising from changes of the capital structure of one or more businesses; *e.g.* from the purchase of one business by another business.

Acquisition /ækwəzíshən/. The act of becoming the owner of certain property; the act by which one acquires or procures the property in anything. State ex rel. Fisher v. Sherman, 135 Ohio St. 458, 21 N.E.2d 467, 470. Used also of the thing acquired. Taking with, or against, consent. Scribner v. Wikstrom, 93 N.H. 17, 34 A.2d 658, 660. Term refers especially to a material possession obtained by any means. Jones v. State, 126 Tex.Cr.R. 469, 72 S.W.2d 260, 263.

See Accession; Acquire; Purchase; Tender offer.

Derivative acquisitions are those which are procured from others. Goods and chattels may change owners by act of law in the cases of forfeiture, succession, marriage, judgment, insolvency, and intestacy; or by act of the parties, as by gift or sale.

Original acquisition is that by which a man secures a property in a thing which is not at the time he acquires it, and in its then existing condition, the property of any other individual. It may result from occupancy; accession; intellectual labor—namely, for inventions, which are secured by patent rights; and for the authorship of

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SUPERIOR COURT FOR THE STATE OF CALIFORNIA

COUNTY OF CONTRA COSTA

GOLDEN GATE WATER SKI CLUB, Petitioner and Plaintiff, v. COUNTY OF CONTRA COSTA, a political subdivision of the State of California; the CONTRA COSTA COUNTY BOARD OF SUPERVISORS; and DOES 1 through 50, inclusive, Respondents and Defendants.	Case No.: N-05-1769 Complaint filed: November 30, 2005 REQUEST FOR JUDICIAL NOTICE (Evid. Code, § 452) Date: 5/12/06 Time: 8:30 a.m. Dept.: 22 The Hon. Joyce M. Cram

Petitioner Golden Gate Water Ski Club hereby requests that, pursuant to section 452 of the Evidence Code, this Court take judicial notice of the following documents:

1. Contra Costa County Ordinance Code, § 14-6.204, a copy of which is attached hereto as Exhibit 1.

2. Contra Costa County Ordinance Code, § 74-3.502, a copy of which is attached hereto as Exhibit 2.

3. Contra Costa County Ordinance Code, § 74-3.1900.4.4, a copy of which is attached hereto as Exhibit 3.

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4. Contra Costa County Ordinance Code, § 74-3.2310.4, a copy of which is attached hereto as Exhibit 4.

5. Contra Costa County Ordinance Code, § 72-6.018, a copy of which is attached hereto as Exhibit 5.

6. Dana Point Municipal Code, § 6.14.002, a copy of which is attached hereto as Exhibit 6.

All the above documents constitute regulations and legislative enactments issued by or under the authority of the United States or any public entity in the United States, as set forth in section 452(b) of the Evidence Code.

DATED: March 9, 2006.

Respectfully submitted,

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By _____
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Attorneys for Petitioner and Plaintiff

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EXHIBIT 1

Title 1 GENERAL PROVISIONS

Chapter 14-6 CIVIL ENFORCEMENT

14-6.204 Nuisances.

Any condition existing in violation of this code is a public nuisance, and may be abated in a civil action, summarily or otherwise by the county. (Ords. 88-88 § 2; 70-36 § 1: prior code § 1203).

EXHIBIT 2

Title 7 BUILDING REGULATIONS

Chapter 74-3 MODIFICATIONS

74-3.502 Premises identification.

CBC Section 502, premises identification, is amended to read:

"Approved numbers or addresses shall be provided for all new buildings in such a position as to be plainly visible and legible from the street or road fronting the property. In addition, every new residential dwelling unit building shall be equipped with a lighted (illuminated) house number or address plainly visible and legible from the street or road fronting the property. As appropriate, the planning agency or county building official may grant exceptions to the illumination requirements when satisfied that the application of its requirements would impose an unreasonable hardship and expense for the owner and/or applicant due to special circumstances applicable to the involved new building(s) because of location, topography, or surroundings. "

(Ords. 2002-31 § 3, 99-1 § 6: 90-100 § 6, 88-70 § 2).

EXHIBIT 3

Title 7 BUILDING REGULATIONS

Chapter 74-3 MODIFICATIONS

74-3.1900.4.4 Minimum slab thickness.

CBC Section 1900.4.4, minimum slab thickness, is amended to read:

"The minimum thickness of concrete floor slabs supported directly on the ground shall be not less than three and one-half inches. Slabs shall have six inches by six inches by ten gauge wire mesh or equal at this midheight. Earth under concrete slabs shall be of proper consistency and thickness to retard capillary action and shall be approved by the county building official. "

(Ords 99-17 § 9, 99-1 § 6, 90-100 § 6, 80-14 § 7, 74-30).

EXHIBIT 4

Title 7 BUILDING REGULATIONS

Chapter 74-3 MODIFICATIONS

74-3.2310.4 Shingles or shakes.

CBC Section 2310.4,shingles or shakes, is amended to read:

"Wood shingles or shakes and asbestos cement shingles may be used for exterior wall covering, provided the frame of the structure is covered with building paper as specified in CBC Section 1402.1. All shingles or shakes attached to sheathing other than wood sheathing shall be secured with approved corrosion-resistant fasteners or on furring strips attached to the studs. Wood shingles or shakes may be applied over fiberboard shingle backer and sheathing with annular grooved nails. The thickness of wood shingles or shakes between wood nailing boards shall not be less than three-eighths inch (9.5 mm). Wood shingles or shakes and asbestos shingles or siding may be nailed directly to approved fiberboard nailbase sheathing not less than one-half inch (13mm) nominal thickness with annular grooved nails. The weather exposure of wood shingle or shake siding used on exterior walls shall not exceed maximums set forth in Table 23-II-K. When untreated wood shingles or shakes are used for exterior wall covering, there shall be a minimum of ten feet from the exterior wall (including shingles or shakes) to the property line of all sides, except for any sides of exterior walls facing the street."

(Ords. 2002-31 § 3, 2002-31 § 3, 99-17 § 10, 99-1 § 6, 90-100 § 6, 87-55 § 9.)

EXHIBIT 5

Title 7 BUILDING REGULATIONS

Chapter 72-6 GENERAL PROVISIONS

72-6.018 State contractor license required.

No permit shall be issued to a person to do or cause to be done any work regulated by this title except to the holder of a valid, unexpired and unrevoked license in good standing, issued under Chapter 9, Division 3 of the Business and Professions Code of the state; but permits may be issued to persons and for work exempt from that statute. (Ords. 2002-31 § 2, 99-1 § 5: prior code § 7110: Ord. 1372).

EXHIBIT 6

Title 6 HEALTH AND SANITATION

Chapter 6.14 NUISANCES, GENERAL

6.14.002 Public Nuisances Designated.

It shall be unlawful and a misdemeanor subject to punishment in accordance with Section 1.01.200 of this Code, and it is hereby declared to be a public nuisance, from any person owning, leasing, occupying, or having charge of any residential, agricultural, commercial, industrial, business park, office, educational, religious, vacant, or other property within the City of Dana Point, to maintain such property in such a manner that any of the following conditions are found to exist thereon:

(a) Any violation of any Section of the Dana Point Municipal Code or any section of the City of Dana Point Ordinance No. 90-07 which adopted by reference portions of the Codified Ordinances of the County of Orange ("Orange County Code") and other noncodified Orange County Ordinances including, but not limited to the following:

(1) Division 2 through 14 of Title 3 of the Orange County Code relating to Public Morals, Safety and Welfare; including property maintenance and recreational vehicles on private property;

(2) Division 1 through 7 and 9 of Title 4 of the Orange County Code relating to Health, Sanitation, and Animal Regulation; including animal control regulations and licensing, noise control;

(3) With the exception of Article 2 of Division 3 therein, of Title 6 of the Orange County Code relating to Highways, Bridges, Rights-of-Way, and Vehicles; including oversized vehicles on streets, signs on parked cars, and encroachments over and on streets;

(b) Land, the topography or configuration of which, in any man-made state, whether as a result of grading operations, excavations, fill, or other alteration, interferes with the established drainage pattern over the property or from adjoining or other properties which does or may result in erosion, subsidence or surface water drainage programs of such magnitude as to be injurious to public health, safety and welfare or to neighboring properties;

(c) Buildings or structures which are partially destroyed, abandoned or permitted to remain in a state of partial construction for more than six (6) months, or during any period of extension, after the issuance of a building permit;

(d) The failure to secure and maintain from public access all doorways, windows and other openings into vacant or abandoned (not occupied or in use for any purpose, no maintenance applied to the structure or grounds) buildings or structures;

(e) Painted buildings that require repainting, and walls, retaining walls, fences or structures, or building, walls, fences or structures upon which the condition of the paint has become so deteriorated as to permit decay, excessive checking, cracking, peeling, chalking, dry rot, warping or termite infestation;

(f) Any building or structure, wall, fence, pavement, or walkway upon which any graffiti, including paint, ink, chalk, dye or other similar marking substances, is allowed to remain for more than twenty-four (24) hours;

(g) Broken windows;

(h) Overgrown, dead, decayed or hazardous vegetation which:

(1) May harbor rats, vermin or other disease carriers;

(2) Is maintained so as to cause an obstruction to the vision of motorists or a hazardous condition to pedestrians or vehicle traffic;

(3) Constitutes an unsightly appearance;

(4) Creates a danger or attractive nuisance to the public;

(i) Building exterior, roofs, landscaping, grounds, walls, retaining and crib walls, fences, driveways, parking lots, sidewalks or walkways which are maintained in such condition so as to become defective, unsightly or no longer viable;

(j) The accumulation of dirt, litter, feces, or debris in doorways, adjoining sidewalks, parking lots, landscaped or other areas;

(k) Except where construction is occurring under a valid permit, lumber, junk, trash, garbage, salvage materials, rubbish, hazardous waste, refuse, rubble, broken asphalt or concrete, containers, broken or neglected machinery, furniture, appliances, sinks, fixtures or equipment, scrap metals, machinery parts, or other such material stored or deposited on property such that they are visible from a public street, alley or neighboring property;

(l) Deteriorated parking lots, including those containing pot holes, or cracks;

(m) Abandoned, broken or neglected equipment and machinery, pools, ponds, excavations, abandoned wells, shafts, basements or other holes, abandoned refrigerators or other appliances, abandoned motor vehicles, any unsound structure, skateboard ramps, or accumulated lumber, trash, garbage, debris or vegetation which may reasonably attract children to such abandoned or neglected conditions;

(n) (1) Construction equipment, buses, tow trucks, dump trucks, flatbed trucks, grading equipment, tractors, tractor trailers, truck trailers, or any other commercial vehicle over twenty-five (25) feet long or eight (8) feet in height or ninety (90) inches wide, supplies, materials, or machinery of any type or description, parked or stored upon any street or property within a residential zone.

(2) Commercial vehicle, for the purposes of this section, shall be defined as any motorized or non-motorized vehicle used or maintained to transport property or goods for profit, or persons for hire or compensation. Any commercial vehicle, when used as the primary source of transportation by the person owning, leasing, occupying or having charge of any such vehicle, shall be excluded from the provisions of this Subsection;

(o) Construction debris storage bins stored in excess of fifteen (15) days on a public street or any front or sideyard setback area without the express approval of the Director of Community Development and/or the City Engineer;

(p) Refuse or trash placed so as to be visible from neighboring properties or streets, except for those times scheduled for collection, in accordance with Section 6.10.016;

(q) Any property with accumulations of grease, oil or other hazardous material on paved or unpaved surfaces, driveways, buildings, walls, or fences, or from which any such material flows or seeps on to any public street or other public or private property;

(r) Any front yard, parkway, or landscaped setback area which lacks turf, other planted material, decorative rock, bark or planted ground cover or covering, so as to cause excessive dust or allow the accumulation of debris;

(s) Any condition of vegetation overgrowth which encroaches into, over or upon any public right-of-way including, but not limited to, streets, alleys, or sidewalks, so as to constitute either a danger to the public safety or property or any impediment to public travel;

(t) Use of parked or stored recreational vehicles, as defined in Section 6-4-603(c) of the Codified Ordinances of the County of Orange as adopted by the City of Dana Point by Ordinance No. 90-07, as temporary or permanent living space;

(u) Animals, livestock, poultry or bees kept, bred or maintained for any purpose and in violation of any provision of the City Municipal Code;

(v) Any habitation which is overcrowded, as defined by the Uniform Housing Code, as adopted by reference by the City of Dana Point Ordinance No. 89-29, or as defined in Section 6.16.018(a) of the Dana Point Municipal Code or which lacks adequate ventilation, sanitation or plumbing facilities, or which constitutes a fire hazard; (Amended by Ord. No. 92-01, 1/28/92)

(w) (1) Except where construction is occurring under a valid permit, the dumping of any waste matter in or upon any public or private highway or road, including any portion of the right-of-way thereof, or in or upon any private property into or upon which the public is admitted by easement or license, or upon any private property without the consent of the owner, or in or upon any public park or any public property other than property designated or set aside for that purpose by the governing board or body having charge of that property.

(2) Except where construction is occurring under a valid permit, any placing, depositing or dumping, whether by natural or man-made causes, and whether intentionally or unintentionally, of any rocks, dirt or debris in or upon any private highway or road, including any portion of the

right-of-way thereof, or any private property, without the consent of the owner, or in or upon any public work or other public property, without the consent of the state or local agency having jurisdiction over the highway, road, or property.

(x) Any other condition declared by any State, County, or City statute, code or regulation to be a public nuisance.

(y) Trailers, campers, boats or motor vehicles present on vacant property or in front yards of developed lots other than driveways.

(z) Laundry, clothes or household linens viewable from the public right-of-way, unless such laundry, clothes or household linens are on a clothes line in the rear yard or side yard of a property or unless such clothes or household linens are being sold at a legally permitted garage sale.

(aa) Any violation of Title 8 or Title 9 of the City of Dana Point Municipal Code. (Amended by Ord. 93-09, 5/11/93; Ord. 94-15, 9/27/94)

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SUPERIOR COURT FOR THE STATE OF CALIFORNIA

COUNTY OF CONTRA COSTA

GOLDEN GATE WATER SKI CLUB, Petitioner and Plaintiff, v. COUNTY OF CONTRA COSTA, a political subdivision of the State of California; the CONTRA COSTA COUNTY BOARD OF SUPERVISORS; and DOES 1 through 50, inclusive, Respondents and Defendants.	Case No.: N-05-1769 Complaint Filed: November 30, 2005 DECLARATION OF SERVICE

I, Sharice Perkins, declare as follows:

I am a citizen of the United States, a resident of the State of California, employed in the County of Sacramento. I am over the age of 18 years and am not a party to the above-entitled action. My business address is 3800 Watt Avenue, Suite 101, Sacramento, California

On March 9, 2006, true copies of PETITIONER'S OPENING BRIEF, REQUEST FOR JUDICIAL NOTICE, and EXHIBITS thereto, were placed in an envelope and addressed as follows:

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THE ZUMBRUN LAW FIRM
A Professional Corporation
3800 Watt Avenue, Suite 101
Sacramento, CA 95821

Mr. Tom Geiger
Deputy County Counsel
County of Contra Costa
651 Pine Street, 9th Floor
Martinez, CA 94553-1229

Attorney for County of Contra Costa and Contra Costa County Board of Supervisors

Said envelope, with postage fully prepaid, was then sealed and mailed via overnight delivery service at Sacramento, California.

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct and that this declaration was executed this 9th day of March, 2006, at Sacramento, California.

Sharice Perkins
SHARICE PERKINS

THE ZUMBRUN LAW FIRM
A Professional Corporation
3800 Watt Avenue, Suite 101
Sacramento, CA 95821