

CITY OF MADISON
CITY ATTORNEY'S OFFICE
Room 401, CCB
266-4511

MEMORANDUM

TO: Common Council; Board of Public Works

FROM: Doran Viste, Assistant City Attorney

DATE: October 22, 2012

RE: 714 S. Few Street: Vacation of a portion of the S. Few St. right-of-way

This memo addresses the resolution seeking to vacate a portion of the S. Few St. right-of-way adjacent to the property located at 714 S. Few St. where the street dead ends into the Lake Monona shoreline (Legistar File ID # 28060). After reviewing the City's records, the property owner's records, and discussing the matter internally with the City Engineer and the area Alder (Marsha Rummel), it is the City Attorney's Office's recommendation that this resolution be adopted for the reasons set forth in this memo.

History of the Parcel

Few St. was platted in 1839 as part of the Original Plat of Madison. The 66 foot wide platted street runs northwest/southeast from Lake Mendota to Lake Monona.¹ The S. Few St. right-of-way was opened as a public highway no later than the 1910s, and has remained opened as a public highway ever since. As constructed, S. Few St. from Rutledge Street to Lake Monona is 28 feet wide from curb to curb, centered within the 66 foot right-of-way, with a 5 foot wide sidewalk immediately adjacent to the curb on the southwestern side. It is believed that the current right-of-way configuration has been in place for well over 70 years.

In 1853 the properties along the Lake Monona shore line area at S. Few Street were replatted by Farwell's Replat. Pursuant to the Replat, Lots 9 and 10 of Block 179 of the Original Plat now lay immediately adjacent to the southwestern side of S. Few St. at the Lake Monona terminus.² More specifically, the property that currently has the address of 714 S. Few St.³ (the "Parcel") is a parcel 33 feet wide that runs immediately adjacent to the S. Few St. right-of-way at the road's terminus at Lake Monona.⁴ The Parcel, and those around it, were developed sometime in the 1910s.⁵ A survey of the Parcel (see Attachment 1, the "Grenlie Survey") shows that the northeast side of the house only lies

¹ Since it was platted, some segments of Few Street have been vacated by the City.

² Farwell's Replat did not change the location, boundary or layout of Block 179, except as to relocating the shoreline of Lake Monona so that it ran through this block.

³ This parcel formerly had the address of 1150 Florence Ct. The parcel was readdressed to 714 S. Few St. in the 1960s.

⁴ The Parcel's actual legal description is the Northeast 33 feet of the southeast 42 feet of Lot 9 and the northeast 33 feet of Lot 10, of Block 179 of the Original Plat of Madison.

⁵ Assessor's Office records show that the house at 714 S. Few St. was built in 1916.

about 2-2.5 feet from the southwest side of the S. Few St. right-of-way. Indeed, as constructed, almost the entire side yard of the Parcel, along with the driveway apron, lies in the right-of-way.

In 1926, the Parcel's owner applied for a building permit and certificate of occupancy for a boathouse. While it is unknown when this boathouse was actually constructed, a review of the Sanborn maps, historical insurance maps showing buildings in the City, reveals that at least by August 1942 a boathouse had been built on the shore of Lake Monona at the end of, and within, S. Few St. adjacent to the Parcel. This boathouse still stands today. Although it has been refurbished by its current owner, its approximate 360 ft² footprint (depicted on the Grenlie Survey as Area A1 and referred to hereafter as the "Boathouse Area") has existed in the same condition for well over 70 years. In looking at the Grenlie Survey, it appears that efforts were made to fit the boathouse's footprint within the enclosed area formed if the S. Few St. sidewalk is extended from its terminus at the drive apron for the Parcel to the lake shore, as if the assumption at the time of construction was that the Parcel's property line extended to the sidewalk.

In addition to the boathouse, at some unknown point, the Parcel's property owners constructed a concrete retaining wall immediately adjacent to the southeast driveway apron for the Parcel. This wall runs 12 feet from the house to the sidewalk. Moreover, at some point the Parcel's property owners installed a fence running from the boathouse to the driveway retaining wall, effectively cutting off an approximate 240 ft² portion of the S. Few St. right-of-way (depicted on the Grenlie Survey as Area A2 and shown in the photographs attached hereto as Attachment 2, and referred to hereafter as the "Yard Area"). There is every indication that for many years the Parcel's property owners have used the Yard Area as an extension of their own property, again apparently under the mistaken assumption that the sidewalk marked the Parcel's boundary. To date, no efforts have been made by the City, or any other party except for the Parcel's owners, to utilize the Yard Area portion of the S. Few St. right-of-way.

In reviewing the records of the City Assessor, it appears that at least no later than 1961 the Assessor included the boathouse improvement in a determination of the Parcel's value.⁶ Hence, records show that the Parcel's property owners have paid property taxes on the boathouse for over 50 years.

During the 2011 reconstruction of S. Few St., the City discovered that the boathouse and fence at the Parcel were both in the S. Few St. right-of-way and issued the Parcel's owner a notice of encroachments. In response to this notice, the Property owner appealed the order to remove the encroachments by making an adverse possession claim over the Boathouse and Yard Areas (see Legistar File ID # 25493). Following this claim, City staff have thoroughly reviewed the City's and the Parcel's owner's records regarding the Parcel and the S. Few St. right-of-way. There are no records of the City ever taking any action to permit or cause the Parcel's property owners to remove the

⁶ While the boathouse improvement was accounted for by the Assessors as an improvement on the Parcel, neither the additional 12 feet of shoreline, nor the Boathouse and Yard Areas were included in determining the Parcel's size or assessed value.

boathouse or the fence, and no efforts have ever been made by the City to utilize the Boathouse or Yard Areas of the right-of-way. Indeed, the Parcel's current owner has indicated that there was an occasion when a City vehicle accidentally knocked over the encroaching decorative fence and the City paid him to replace the broken fence, actions which certainly do not indicate a belief that the fence was an unlawful encroachment.

Adverse Possession Claims

As noted above, the Parcel's owner has made claims that he has established adverse possession over the Boathouse and Yard Areas. Adverse possession is an ancient legal doctrine in which a property owner may lose title to property if another possesses the property for a statutory period and the possession is exclusive, uninterrupted, continuous, and hostile, with open and notorious actual occupancy of the disputed property. Prior to 1931, adverse possession against governmental entities in Wisconsin was not permitted. However, in 1931 the laws were changed to allow adverse possession against governmental entities if the person possessing the property could establish 40 years of uninterrupted adverse possession. The laws regarding adverse possession against governmental entities have changed over the intervening years, but because the courts have found that changes in the adverse possession laws are prospective in their application, if a land owner can show that they and their predecessors in title have adversely possessed City right-of-way for at least 40 consecutive years, and this possession started no later than March 28, 1944, then they will have met the statutory requirements and will have established title to that portion of the City's right-of-way.

With this framework in mind, it is clear that the Parcel's owner, through his predecessors in title, has established adverse possession over the Boathouse Area. The boathouse has been present in this portion of the right-of-way since at least 1942, and the City has made no efforts, at any point in time, to have the boathouse removed. In fact, the City has even taxed the Parcel's owners for the value of the improvement. Given the nature of the boathouse (a permanent building), its mere uninterrupted presence from 1942 to today meets all the elements of adverse possession. As a result, it is the City Attorney's Office's opinion that the City has already lost title to the Boathouse Area of the S. Few St. right-of-way, although the Parcel's owner still needs to perfect his title.

However, unlike the Boathouse Area, it is not clear whether the Parcel's owner has established adverse possession over the Yard Area. Specifically, it is not known when the Yard Area was first fenced in (i.e., if the fence existed before 1944), or how long the private use of this area has occurred. It is believed that over the last 70 years the Parcel's owners have used this area as a yard as it otherwise has no utility to the City—but it is not clear that such use meets the elements of adverse possession, notably that the use was exclusive, hostile, open and notorious. While the Parcel's owner may be able to make a case for adverse possession over this portion of the right-of-way, the matter is not so clear such that the City should concede this point. Rather, it is the City Attorney's Office's position that because the Parcel's owner cannot make a definitive showing that the adverse possession of the Yard Area commenced prior to 1944 that

the City should not concede title to this portion of the right-of-way because of the Parcel's owner's adverse possession claim and that any such claim should be made in court.

Vacation of Right-of-Way

While the City Attorney's Office does not believe that the Parcel's owner has made a preliminary showing of adverse possession of the Yard Area, the City Attorney's Office supports the request of the Parcel's owner, the City Engineer, and the area Alder to vacate this portion of the right-of-way. Given how this Parcel and this portion of right-of-way was developed almost 100 years ago and over the intervening years, the Yard Area is an unusable piece of the S. Few St. right-of-way, at least to anyone other than the Parcel's owner. Because we have already lost title to the Boathouse Area⁷, the Yard Area now sits cut-off on three sides between the Parcel's driveway apron retaining wall, the Parcel, and the Boathouse Area. Hence, this area now essentially amounts to a detached portion of right-of-way with no utility to the City, even if we have the fence removed. Indeed, the City cannot build a sidewalk or road over this area (as it would go nowhere), any public improvements to the Yard Area would essentially be in what appear to be the Parcel's backyard, the detached nature of the Area could present public safety concerns if opened up to the public, and given the location near the shoreline there are no public utilities nearby which could benefit from placing facilities in this area. Hence, as a result in the unique manner in which the Parcel, the right-of-way, and the Yard Area have developed over time, this Area has no actual or potential use to the City as right-of-way. The City Engineer and the area Alder concur with this conclusion and therefore support the vacation of this area. Indeed, vacation will benefit the City (and the Parcel's owner) by not only clearing up title to this land, but by placing this Area on the tax rolls as part of the Parcel.

Assuming that the council decides that vacating the Yard Area of the right-of-way is appropriate, then it only makes sense to proceed with a full vacation of both the Yard and Boathouse Areas. Because the City has already lost title to the Boathouse Area, the vacation of this portion of the right-of-way will help the Parcel's owner establish a clear recorded title over this land and save the City time and resources that would otherwise be spent "defending" a civil suit for which we would have no grounds of defense.

Conclusion


Given the analysis above, and for the reasons stated herein, it is the City Attorney's Office's opinion that the resolution to vacate the Yard and Boathouse Areas of the S. Few St. right-of-way adjacent to 714 S. Few St. should be adopted by the Common Council in recognition of the Parcel's owner's adverse possession claim, along with the unique historical record relating to this land and the lack of utility for the City in the Yard Area. It should further be noted that this Office does not feel that this decision, to

⁷ While we have lost title to the Boathouse Area through adverse possession, the Parcel's owner has yet to perfect that title.

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vacate a portion of the right-of-way in response to an adverse possession claim made following the issuance of a notice of encroachment, would set a bad precedent for the City in protecting its right-of-ways in the future because it is unlikely that the unique facts of this case will rise again.



Doran Viste

ATTACHMENT 1: GRENLIE SURVEY OF 714 S. FEW ST.

LEGAL DESCRIPTIONS:

AREA 'A', PATHHOUSE + ENCLOSED LAWN, PART OF SOUTH FEW STREET, AS PLATTED IN THE ORIGINAL PLAT OF THE CITY OF MADISON, LYING ADJACENT TO LOT 10, BLOCK 179, OF SAID PLAT, AND DESCRIBED AS FOLLOWS: COMMENCING AT THE MOST NORTHERLY CORNER OF THE SAID LOT 10; THENCE S44°54'53"E ALONG THE SOUTHWESTERLY R/W LINE OF FEW STREET 31.59 FEET TO THE POINT OF BEGINNING; THENCE N45°00'E 12.23 FEET TO A MEANDER LINE (M.L.) OF LAKE MONONA; THENCE S45°00'W 12.23 FEET TO THE POINT OF BEGINNING; THENCE N44°54'53"E 24.32 FEET TO THE POINT OF BEGINNING, TOGETHER WITH LANDS BETWEEN THE M.L. AND THE HIGH WATER MARK OF LAKE MONONA. CONTAINS APPROXIMATELY 600 SQ. FT.

AREA 'A1', BATHHOUSE ONLY, PART OF SOUTH FEW STREET, AS PLATTED IN THE ORIGINAL PLAT OF THE CITY OF MADISON, LYING ADJACENT TO LOT 10, BLOCK 179 OF SAID PLAT, AND DESCRIBED AS FOLLOWS: COMMENCING AT THE MOST NORTHERLY CORNER OF LOT 10, THENCE S44°54'53"E 51.59 FEET TO THE POINT OF BEGINNING; THENCE N45°00'E 12.23 FEET TO A MEANDER LINE (M.L.) OF LAKE MONONA; THENCE S45°00'W 12.23 FEET TO THE POINT OF BEGINNING; THENCE N44°54'53"E 24.32 FEET TO THE POINT OF BEGINNING, TOGETHER WITH LANDS BETWEEN THE M.L. AND THE HIGH WATER MARK OF LAKE MONONA. CONTAINS APPROX. 360 SQ. FT.

AREA 'A2', ENCLOSED LAWN ONLY, PART OF SOUTH FEW STREET, AS PLATTED IN THE ORIGINAL PLAT OF THE CITY OF MADISON, LYING ADJACENT TO LOT 10, BLOCK 179 OF SAID PLAT, AND DESCRIBED AS FOLLOWS: COMMENCING AT THE MOST NORTHERLY CORNER OF THE SAID LOT 10; THENCE S44°54'53"E 31.59 FEET TO THE POINT OF BEGINNING; THENCE N45°00'E 12.23 FEET TO THE POINT OF BEGINNING; THENCE S45°00'W 12.23 FEET TO THE POINT OF BEGINNING, TOGETHER WITH LANDS BETWEEN THE M.L. AND THE HIGH WATER MARK OF LAKE MONONA. CONTAINS 240 SQ. FT.



**THOM R. GRENLIE
REGISTERED LAND SURVEYOR
400 S. Nida Avenue St. Verona, Wis. 53693 (608) 945-8882**

SURVEY PLAT MAP

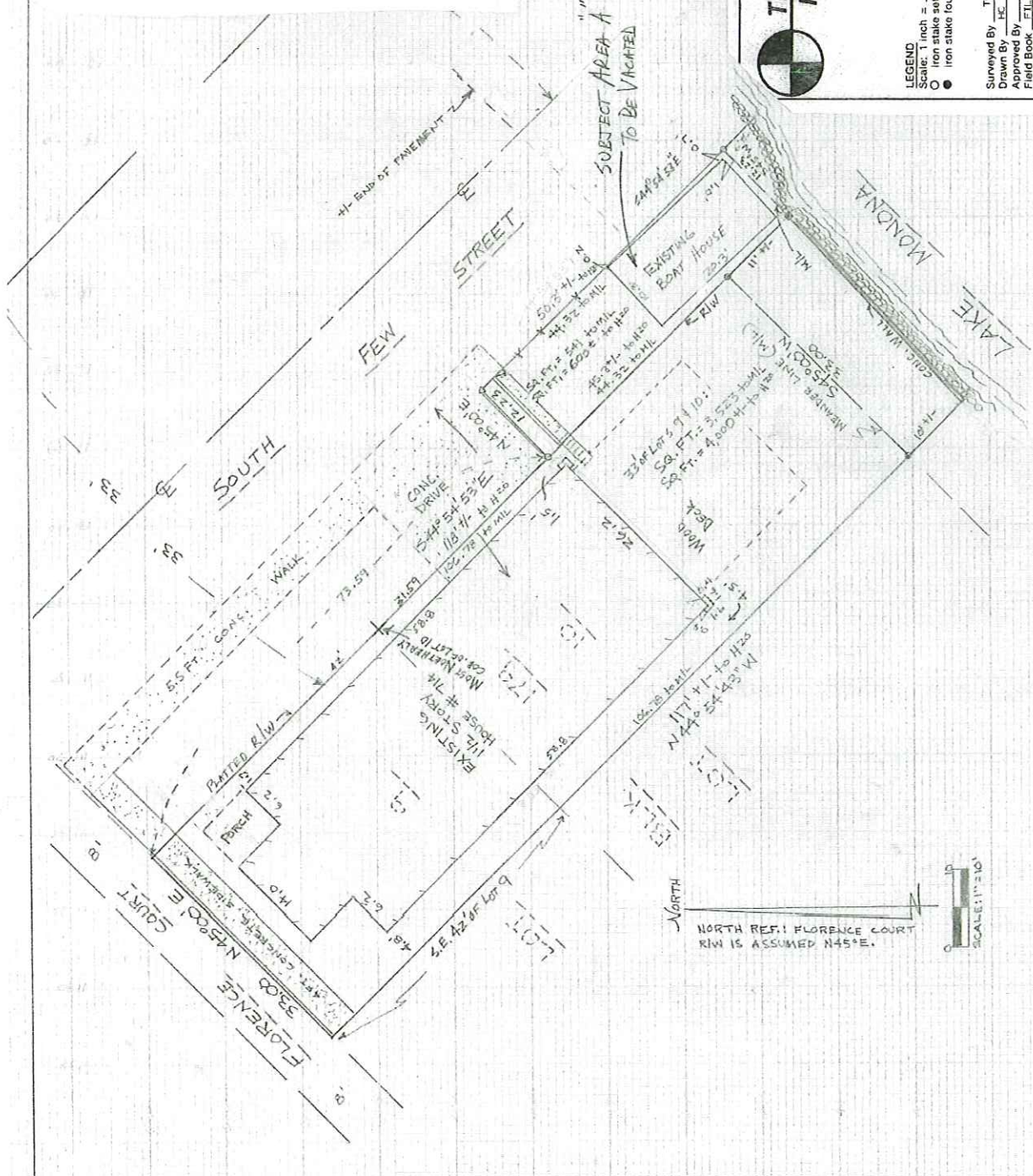
SURVEYED FOR: RICHARD GOODKIN 25G-1843
774 S. FEW ST., MADISON, WI 53703
DESCRIPTION: LOCATION: THE NE 3/4 OF LOT 10,
BLOCK 179, ORIGINAL PLAT OF CITY OF MADISON,
DANE COUNTY, WISCONSIN.

SURVEYOR'S CERTIFICATE
I hereby certify that I have surveyed and mapped
the lands described herein and that the map is a cor-
rect representation in accordance with the information
provided.

Thom R. Grenlie
Thom R. Grenlie S-1051

LEGEND
Scale: 1 inch = 10 ft.
O Iron stake set
● Iron stake found Tape/File

Surveyed By: TG EH
Drawn By: HC
Approved By: [Signature]
Field Book: FILE
Survey Date: 8-2-12
Map No.: 2002-L
Revised:

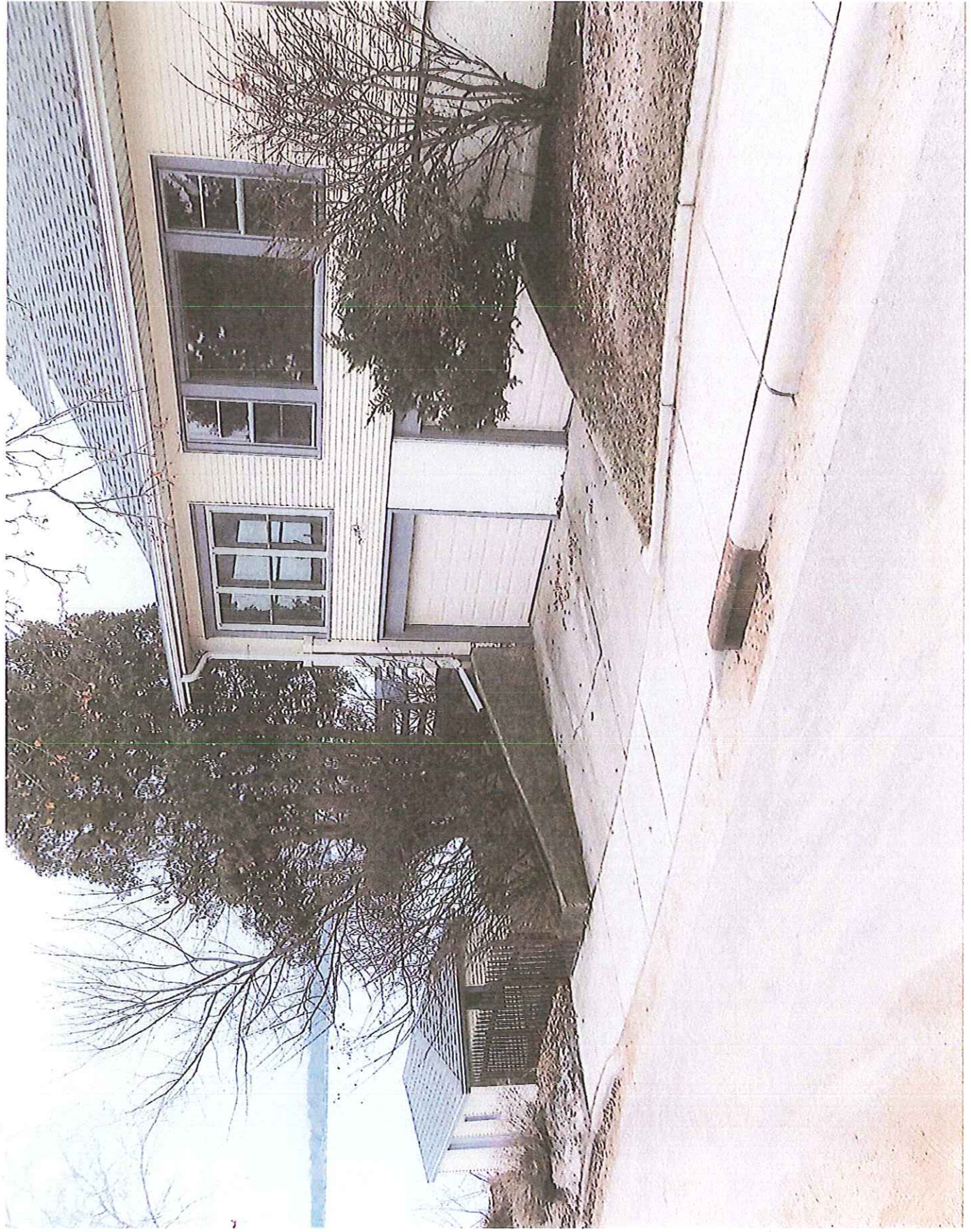


ATTACHMENT 2: PHOTOGRAPHS DEPICTING YARD AREA

GOODKIN, 714 S. FEW STREET
HOUSE, FENCE, AND BOATHOUSE AS SEEN FROM FEW STREET

TAKEN 2/23/2012

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GOODKIN, 714 S. FEW STREET
HOUSE, FENCE, AND BOATHOUSE AS SEEN FROM STREET END

TAKEN 2/23/2012

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THE "BOATHOUSE PARCEL" SEEN FROM FEW STREET
GOODKIN, #14 S. FEW STREET

TAKEN 2/23/2012

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THE "SOATHOUSE PARCEL" (ON CLOSER SIDE OF FENCE) AND THE STREET END
GOODWIN, 714 S. FEW STREET
TAKEN 9/23/2012



PHOTO 1, STREET-END PARK WITH BENCH. THE AREA IN QUESTION IS BEHIND THE BUSHES ON THE RIGHT SIDE OF THE PICTURE.



PHOTO 2: TAKEN FROM SOUTH FEW STREET SIDEWALK, ABOUT 5 FEET FROM THE EDGE OF THE AREA IN QUESTION (TO THE RIGHT OF THE FENCE). STRAIGHT AHEAD IS THE PRESENT STREET-END PARK.

