

CAUSE NO. 2023DCV-3214-E

CONCERNED OWNERS OF PORT ROYAL	§	IN THE DISTRICT COURT
	§	
	§	
v.	§	___ JUDICIAL DISTRICT
	§	
PORT ROYAL BY THE SEA CONDOMINIUM OWNERS ASSOCIATION, INC.	§	NUECES COUNTY, TEXAS
	§	

**PLAINTIFF'S ORIGINAL PETITION,
REQUEST FOR DECLARATORY RELIEF AND
APPLICATION FOR A TEMPORARY RESTRAINING ORDER,
INJUNCTIVE RELIEF, AND APPOINTMENT OF A RECEIVER**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Concerned Owners of Port Royal, Plaintiff, and files this, its Original Petition, Request for Declaratory Relief, and Application for a Temporary Restraining Order, Injunctive Relief, and Appointment of a Receiver, complaining of Port Royal by the Sea Condominium Owners Association, Inc., Defendant, and in support thereof would show as follows:

I. PARTIES, JURISDICTION, VENUE AND DISCOVERY

A. Parties

1. Concerned Owners of Port Royal ("COOPR") is an unincorporated non-profit association of Owners of condominium Units at Port Royal by the Sea, formed pursuant to Chapter 252, Texas Business Organizations Code. COOPR has not been issued a driver's license or Social Security number.

2. Port Royal by the Sea Condominium Owners Association, Inc. (the "Association") is a Texas non-profit corporation which may be served with process through its registered agent,

R. Bryan Stone, at the Association's registered office street address, 802 N. Carancahua, Suite 450, Corpus Christi, TX 78401. Service of process is requested.

B. Jurisdiction

This Court has jurisdiction over this matter because COOPR seeks injunctive relief and because the amount in controversy exceeds the Court's minimum jurisdictional limits. COOPR seeks monetary relief over \$250,000.00 but less than \$1,000,000 and non-monetary relief.

C. Venue

Venue is proper in Nueces County because all or a substantial part of the events or omissions giving rise to COOPR's claims occurred in Nueces County.

D. Discovery

Discovery is to be conducted under Discovery Level 2 pursuant to Rule 190, Tex. R. Civ.

P. COOPR seeks both monetary and injunctive relief.

II. FACTS

1. This lawsuit is being pursued to stop implementation of a ruinous financial assessment adopted due to prior financial mismanagement, without adequate planning and preparation, and to seek court guidance and intervention for the governance of a condominium association whose membership is threatened by an out-of-control, self-perpetuating Board of Directors.

2. Port Royal by the Sea Condominiums ("Port Royal") is a residential condominium project located on Mustang Island, Nueces County, Texas. Port Royal consists of five buildings containing 210 residential units constructed in approximately 1984, along with ancillary commercial components, including a restaurant and meeting space.

3. Port Royal is governed by the Association. The Association's governing authority is its Board of Directors. The Board makes virtually all decisions for the Association except for items reserved for the vote of Members of the Association, consisting principally of election of directors and amendments of the governing documents.

4. From the time the buildings at Port Royal were constructed in 1984 until August 2017, Port Royal was an upscale resort community near the beach with its own private boardwalk. It had a thriving rental trade through which Owners of Units at Port Royal could include their units in the rental pool for Port Royal and thereby earn rental income from tourists and visitors, with amenities including private swimming pools and other recreation facilities.

5. In August 2017, Hurricane Harvey, a Category 4 hurricane, made landfall in Texas and Louisiana with strong winds and torrential rain, causing massive flooding and more than 100 deaths. Hurricane Harvey inflicted massive damage on Port Royal, affecting all the buildings, and rendering Building 2 completely uninhabitable. Port Royal was not habitable at all for months afterward for most of the Units while the staff and contractors of Port Royal worked to remediate the flooding damage resulting from Hurricane Harvey.

6. By its own admission, the Board has spent \$65,866,279.00 on disaster related outflows on contractors, lawyers and operating expenses. As of August 1, 2023, almost six years later, Building 2 is still uninhabitable. Many of the other buildings still have not had their elevators replaced or roofs repaired. Owners of Units in Building 2 are at this moment actively pursuing litigation against the Association arising out of the misapplication the resources available to the Board of Directors to repair Building 2, or to alternatively compensate the Unit Owners for the value of their property. In short, Port Royal bears little resemblance to its prior grand appearance and sits dilapidated in disrepair.

7. The Association had multiple policies of insurance in effect when Port Royal was struck by Hurricane Harvey, including windstorm insurance and business interruption insurance. Several of those policies paid millions of dollars in proceeds from the claims filed on behalf of the Association as a direct result of Hurricane Harvey. The Association collected windstorm insurance claims proceeds, business interruption insurance claims proceeds of approximately and casualty property insurance claims of \$38,617,389.00. In addition the Association incurred debt from Owners and banks of \$3,322,701.00.

8. In addition to the insurance money and loans, the Association levied against the Owners assessments of \$3,700,000.00 in 2017, \$5,250,000.00 and 2018, \$1,000,000.00 in 2020, \$1,500,000.00 in 2021, \$5,900,000.00 in 2022 and \$1,000,000.00 in 2023 for a total of \$18,350,000.00 of assessments, not including the \$20,000,000.00 additional assessment which is the subject of this proceeding. Every assessment has been followed by another assessment and still the project lies in disrepair with no firm plans for rehabilitation other than platitudes and vague goals.

9. The Board of Directors of the Association is charged under the governing documents of the Association with administering the assets and finances of the Association and with overseeing the maintenance and repair of the common elements of Port Royal, including but not limited to the building exteriors, roofs, foundations, central installations of utilities, and the grounds.

10. The Board of Directors of the Association has failed to take appropriate or timely action to repair the damage resulting from Hurricane Harvey. They have instead taken a haphazard, ill-conceived set of actions to make a few repairs, while at the same time spending tens of thousands of dollars on consultants and engineers to study the repair needs of Port Royal without

using the available insurance claims proceeds to get the buildings repaired. The presiding financial officer of the Board of Directors, Rich Van Buren, has remained the same throughout this entire period.

11. At their May 12, 2023, meeting, the Board of Directors of the Association voted to form a “construction committee” to oversee the project to repair the damage from Hurricane Harvey. That committee was then unilaterally disbanded by the President of the Association less than one month later, preventing it from studying the needs of Port Royal and coming up with solutions for the many problems it faces. In the alternative, the President presented his own plan without opportunity of the Owners to advise and confer.

12. The Board of Directors of the Association then approved an assessment at the June 2, 2023, meeting to fund the repairs from the damage resulting from Hurricane Harvey. Certain entrenched, long term members of the Board of Directors declined to accept the decision of the majority of the Board and, with much acrimony, certain members of the Board resigned in disgust. However, less than a month later, on June 12, 2023, after a change in the composition of the Board of Directors, the newly constituted Board announced that they rescinded the prior assessment and that the Board levied instead a \$20,000,000.00 assessment, nearly double the previous assessment, with little or no specifics other than incurring over \$10,000,000.00 of additional debt along with the assessment. That amounts to an average assessment of at least \$100,000.00 per owner, on top of all the other assessments already imposed.

13. The Board of Directors has not selected a general contractor for any major repair or replacement project, has not taken any bids and does not plan to bring the improvements up to current code standards, instead relying on attempts to get the project grandfathered. No City of Corpus Christi permitting or environmental approvals have been obtained at this time. The

Association has not secured a loan to pay for repairs, instead passing the assessment without a plan to enable them to secure a loan. The Association does not have a defined scope of work or any schedule in place. Instead, the Board intends to collect huge sums from the Owners and then later come up with a plan. The President has taken advice from an industrial and governmental engineering design company with admittedly little or no experience with multifamily or hospitality projects. Allowing the assessment to go forward would permit the Association to financially cripple the Owners, and subject the Association to \$10,000,000.00 of additional debt, while at the same time not require the Board of Directors to use good business judgment in planning the Association's approach to the repairs related to Hurricane Harvey.

14. The Board of Directors has an established track record of failing to use assessments for the purposes intended. For instance, roof and window replacement assessments were redirected for other purposes, elevator assessments have been paid by the Owners for work which has not been completed and assessments were used to repay Board member loans and general operating costs.

15. COOPR was formed by Owner of Units at Port Royal to act on their behalf in initiating in this lawsuit affecting the enforcement of a restrictive covenant and for the protection, preservation, and operation of Port Royal, as authorized by Section 202.004(b), Texas Property Code.

16. Attached hereto and incorporated herein for all purposes is the Affidavit of Johnnie B. Long verifying the above facts.

III. CAUSES OF ACTION

A. Breach of Fiduciary Duty

1. The foregoing facts are incorporated herein by reference as if set forth verbatim.

2. The Association has a fiduciary duty to the Owners of the Units at Port Royal in the reconstruction and repair of the Units and the Common Elements. The Association breached that duty by failing to restore the Units and Common Elements at Port Royal properly and promptly, using the insurance claims proceeds the Association received. Instead, they used insurance claims proceeds to pay for things other than the damaged property for which the proceeds were paid.

3. Further, the Association has a fiduciary duty to use insurance claims proceeds to protect the Owners from loss of property value or added personal obligation to pay for repairs that should be paid through insurance. The Board of Directors of the Association failed to use the funds available to it, resulting in their decision on June 12, 2023, to impose an assessment on the Owners to compensate for the Association's mismanagement of its assets and failure to properly discharged its maintenance duties.

4. Further, since the Board has commenced an unrelenting campaign of assessments with no visible progress, the value of condominium units at Port Royal has been significantly diminished at a time when beachfront properties throughout the area have significantly increased in value.

5. The Association's breach of duties harmed the Owners that COOPR represents. They now face catastrophic financial burdens for payment of the assessment or potential foreclosure on their property resulting in loss of their investment. COOPR requests that the Association be found liable for breach of fiduciary duty, and that the Court grant COOPR injunctive relief to protect the Owners from the mismanagement of Port Royal, as spelled out fully below.

B. Breach of the Declaration and Bylaws

1. The foregoing facts are incorporated herein by reference as if set forth verbatim.
2. Section 10 of the Declaration states that the Association, “shall be the governing and administrative body for all Unit Owners for the protection, preservation, upkeep, maintenance, repair, operation and replacement of the Common Elements, and the government, operation and administration of the Project Property and the condominium regime established hereby....” Section 27 of the Declaration imposes a duty on the Association to maintain and repair the Common Elements, stating that, “All portions of the Common Elements shall be maintained, repaired or replaced by the Board or its representative at the Common Expense of all Unit Owner.” The Association has fallen short of that duty.
3. The Association, acting through its Board of Directors, has mismanaged Port Royal and its finances, misapplied funds, paid excessive rates to contractors without bids and failed to use available insurance proceeds to pay for the repairs, among other things. Such failure has resulted in the Association seeking to charge Owners unreasonable and exorbitant amounts which have been approved by the Board of Directors of the Association hastily, without Owner input, without adequate planning, and in a way that is arbitrary or capricious.
4. Furthermore, the Declaration provides that the Owners are obligated to pay assessments for “expenses lawfully agreed to by the Association or the Board”. COOPR would show that the Board has not determined what they will specifically use the \$20,000,000.00 assessment for other than some generic references while declining to provide specifics on multiple occasions, and therefore the assessment was not levied lawfully for expenses. The minutes of the Board meetings bear proof. Instead, the assessment is to create a slush fund for the Board to use or misuse as it arbitrarily decides later. Given the Board’s history of mismanaging and

misapplying large sums of money, there are grave concerns about what the Board will do with all the assessment money if it is collected. Based on past history it is more likely that the Board will fall far short of its goals and will require another large assessment from the Owners for work which is never completed.

5. In addition, the Bylaws of the Association provide, in Section 4.1, that, “The Board of Directors shall have the full power and authority to assess or charge the members of the Association for funds required for the performance of its objects and purposes as set forth in the Declaration....” The Board does not have the power to levy assessments without having a specific purpose and plan for use of the funds.

6. The Owners represented by COOPR have been harmed by those breaches of duty by the Association. The announcement of the assessment imposes on the Owners an immediate duty to disclose the assessment to any prospective purchaser of their Units, such that the Association has already harmed the Owners. They will be further harmed if the Association takes action to collect, either through the payment of an unlawful assessment, or through loss of the title to their Units due to non-payment of the assessment. Further, the Board does not allow Owners who refuse to pay the assessments to vote on Owners’ matters such as election of Board members, and therefore their action is tantamount to assessment taxation without representation. The assessment also harms the ability of Owners represented by COOPR to sell their Units. COOPR therefore seeks injunctive relief as spelled out more fully below.

C. Negligence

1. The foregoing facts are incorporated herein by reference as if set forth verbatim.
2. COOPR would further show that the Association was negligent in levying the assessment because the Board of Directors failed to meet their duty to use good judgment in setting

the assessment by fixing the amount at \$20,000,000.00 without adequate details and planning. Such breach of their duty proximately caused them to impose assessments of Owners of Units at Port Royal that are untethered to any conscious or deliberate determination of the true financial needs of the Association.

3. As a result of that negligence the Owners represented by COOPR have sustained property damage in terms of the loss of value of their investments in Port Royal. COOPR therefore asks for relief from the harm caused by the Association's negligence through a declaratory judgment finding the \$20,000,000.00 assessment illegal and invalid.

IV. REQUEST FOR DECLARATORY RELIEF

The Owners represented by COOPR, and the Association, are parties interested under the Declaration and the Bylaws and their legal rights and liabilities under them are affected by this controversy. COOPR therefore requests a determination of the right of the Association to impose a \$20,000,000.00 assessment to replace insurance claims proceeds the Association failed to allocate responsibly, and of the right of the Board of Directors to impose such a large financial burden on the Owners of Units at Port Royal without first developing a comprehensive repair plan. Therefore, COOPR hereby requests a declaratory judgment that the \$20,000,000.00 assessment levied by the Association's Board on June 12, 2023, is improper, invalid and may not be charged by the Association or collected from the Owners at this time.

V. APPLICATION FOR TEMPORARY RESTRAINING ORDER AND INJUNCTIVE RELIEF

COOPR hereby applies for a temporary restraining order, a temporary injunction, and upon trial for a permanent injunction, immediately prohibiting the Association, its officers, directors,

employees and agents from engaging in the following acts, with respect to the \$20,000,000.00 assessment approved by the Board of Directors of the Association on June 12, 2023:

1. Billing Owners;
2. Filing any lien affidavits or notices;
3. Attempting to collect;
4. Claiming the debt is owed to any third party;
5. Using the assessment as collateral for a loan;
6. Listing it on any resale certificate;
7. Incurring any debt to finance the improvements to be covered by the assessment;
8. Entering into contracts to commence or complete the improvements; and,
9. Suspending any Owner's right to vote or other rights or privileges of ownership due to non-payment.

In that regard, COOPR would show that the assessment levied by the Association presents an imminent threat of irreparable harm for which there is no adequate remedy at law. Specifically, if the Association is not enjoined from collecting the \$20,000,000.00 assessment and it is later determined that the assessments was not valid, then (1) the Owners who have paid the assessment, and (2) the Owners whose Units were foreclosed on for non-payment of the assessment, will have no source of recovery. This is because the Association cannot raise funds of any substantial amount except by assessing Owners of Units, or by borrowing money which the Owners will have to repay. The Association would have no way to compensate the Owners for the wrongful assessment without requiring the Owners to pay the compensation.

VI. APPLICATION FOR APPOINTMENT OF A RECEIVER

COOPR hereby applies for appointment of a receiver to oversee the affairs of the Association and to take over governance of the Association from the current Board of Directors pursuant to Section 64.001(3), Texas Civil Practice & Remedies Code. In that regard, the Owners represented by COOPR have a joint interest in the Common Elements which the Association, acting through its Board, governs and has responsibilities of maintenance and care.

COOPR requests that the receiver appointed by the Court be charged with:

1. Overseeing the preparation of a detailed plan to repair and restore Port Royal to the condition it was in prior to the landfall of Hurricane Harvey,
2. Overseeing the preparation of a detailed plan to finance those repairs;
3. Conducting a vote of the Members of the Association and to obtain approval of a majority of all Owners of Units at Port Royal(including those who have not yet paid the assessment) for the repair plan and financing plan; and,
4. Conducting an election for a new Board of Directors of the Association.

VII. ATTORNEY'S FEES

COOPR is entitled to recover attorney's fees pursuant to Section 5.006, Texas Property Code, and the Texas Declaratory Judgment Act, Chapter 37, Texas Civil Practices & Remedies Code. COOPR seeks all reasonable and necessary costs, expenses and attorney's fees incurred as a result of the Association's wrongful conduct, both at trial and for appeal.

VIII. JURY DEMAND

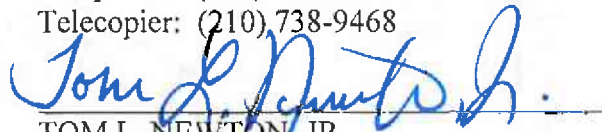
COOPR hereby demands trial by jury and tenders the required fee.

IX. PRAYER

WHEREFORE, PREMISES CONSIDERED, COOPR requests that the Association be cited to appear, that COOPR be granted a temporary restraining order, a temporary injunction, and appointment of a receiver, that this case be tried before a jury, and that the Court award COOPR a permanent injunction, reasonable and necessary attorney's fees, court costs, post-judgment interest, and such other and further relief as to which it may show itself justly entitled, whether at law or in equity.

Respectfully submitted,

ALLEN, STEIN & DURBIN, P.C.
6243 IH-10 West, Suite 700
P.O. Box 101507
San Antonio, Texas 78201
Telephone: (210) 734-7488
Telecopier: (210) 738-9468

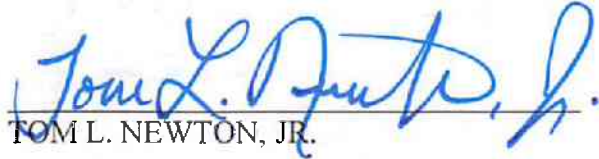


TOM L. NEWTON, JR.
State Bar No. 14982300
Email: tnewton@asdh.com

ATTORNEYS FOR PLAINTIFF,
CONCERNED OWNERS OF PORT ROYAL

CERTIFICATE AS TO COUNSEL

Pursuant to Rule 6, Nueces County Local Rules of Administration, the undersigned hereby certifies that Port Royal by the Sea Condominium Owners Association, Inc. is represented by counsel, and that such counsel has given notice of the hearing and an opportunity to appear to oppose the application of COOPR for a Temporary Restraining Order.


TOM L. NEWTON, JR.

3470 312/2478050

CAUSE NO. _____

CONCERNED OWNERS OF
PORT ROYAL

v.

PORT ROYAL BY THE SEA
CONDOMINIUM OWNERS
ASSOCIATION, INC.

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IN THE DISTRICT COURT

___ JUDICIAL DISTRICT

NUECES COUNTY, TEXAS

AFFIDAVIT OF JOHNNIE B. LONG

STATE OF TEXAS §
 §
COUNTY OF BEXAR §

BEFORE ME, the undersigned Notary Public, on this day appeared before me Johnnie B. Long, who being know to me personally, or having been identified through presentation of a governmentally issued photographic identification, and having first been duly sworn on his oath to tell the truth, deposed and said:

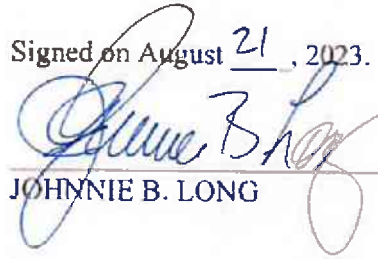
1. "My name is Johnnie B. Long. I am over the age of eighteen years and fully competent to testify. I have personal knowledge of the facts stated herein, and they are all true and correct.
2. "I am the Manager of Timeless Luxury Homes, LLC ("Timeless"). Timeless is the Owner of Unit 3113 at Port Royal by the Sea Condominiums, which it acquired on or about January 31, 2014.
3. "As the Manager for Timeless I have kept apprised of the condition of Port Royal in general, and Unit 3113 in particular, since the acquisition of the Unit by visiting the property, talking with other Owners, Board members and management, and by reviewing the news and updates message from the Association.



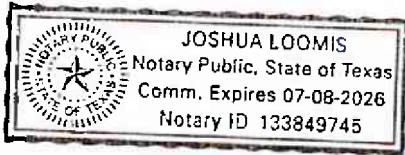
4. "I paid special attention to the news about Port Royal since Hurricane Harvey because of the impact those developments have on the value of the investment Timeless has in Unit 3113.
5. "I have reviewed the factual allegations in the lawsuit prepared on behalf of Concerned Owners of Port Royal ("COOPR") by attorney Tom Newton, and they are true and correct.
6. "I am a member of COOPR and believe that the \$20,000,000.00 assessment approved by the Board of Directors of Port Royal by the Sea Condominium Owners Association, Inc. (the "Association") would not be necessary if the insurance money received by the Association because of Hurricane Harvey would have been used to repair the damage for which the proceeds were paid.
7. "I am personally involved in the construction industry. I have reviewed the documents of the Board of Directors of the Association related to their plans for repair and restoration of the building at Port Royal. It is my opinion that the Board is acting prematurely in passing an assessment because they do not yet have a comprehensive repair plan, budget, or a contractor.
8. "Attached hereto as Exhibit A-1 is a collection of thirty-six photographs of various parts of Port Royal, numbered COOPR 00001-0000036. I am personally familiar with what is shown in these photographs because I have personally observed those objects within the last seven days. These photographs fairly and accurately depict the condition of the common elements at Port Royal. They show the unrepaired damage and generally dilapidated condition of the buildings at Port Royal."

Further Affiant saith not.

Signed on August 21, 2023.


JOHNNIE B. LONG

SUBSCRIBED AND SWORN TO before me, a Notary Public, this 21 day of
August, 2023.




NOTARY PUBLIC, STATE OF TEXAS

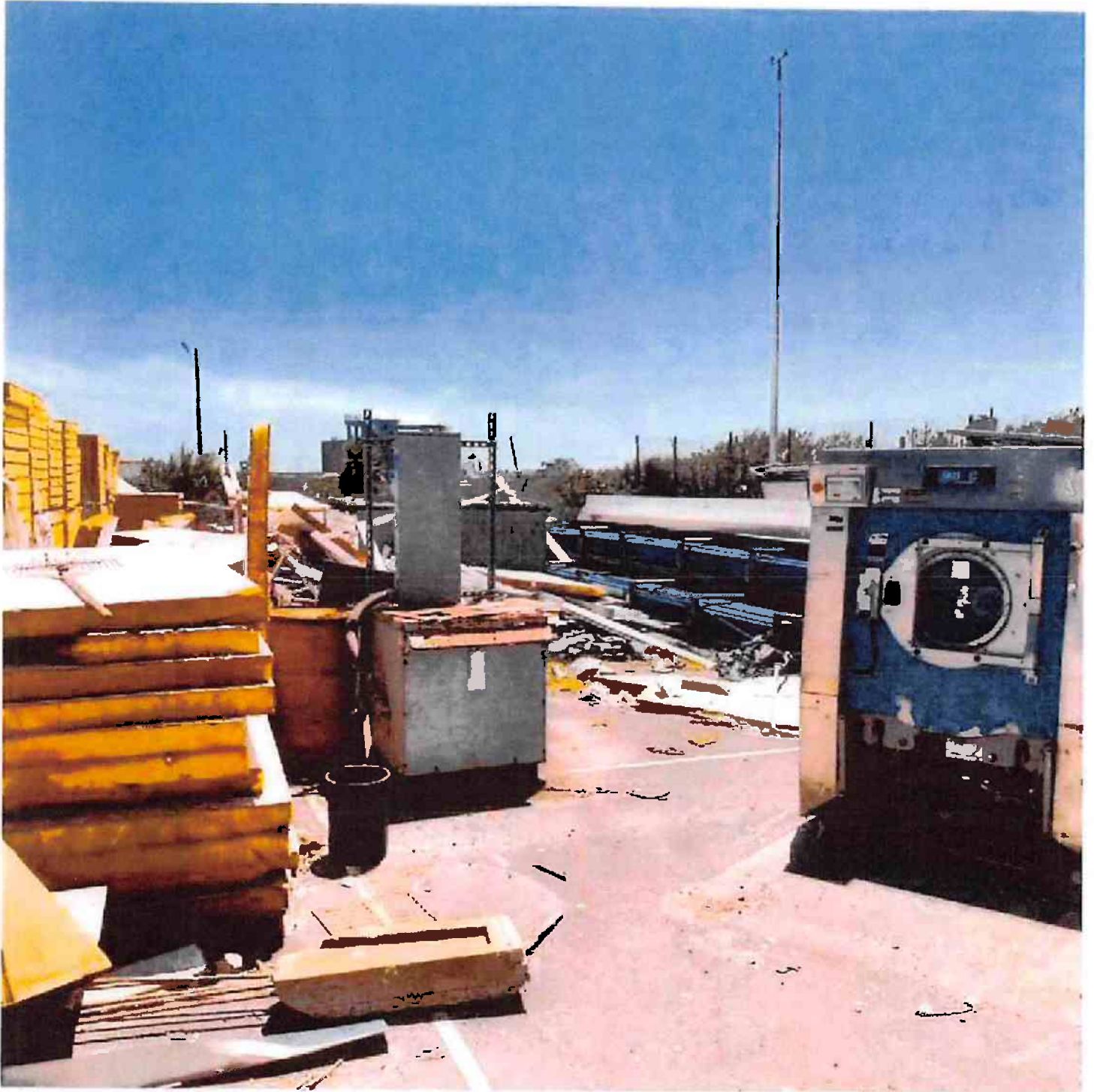
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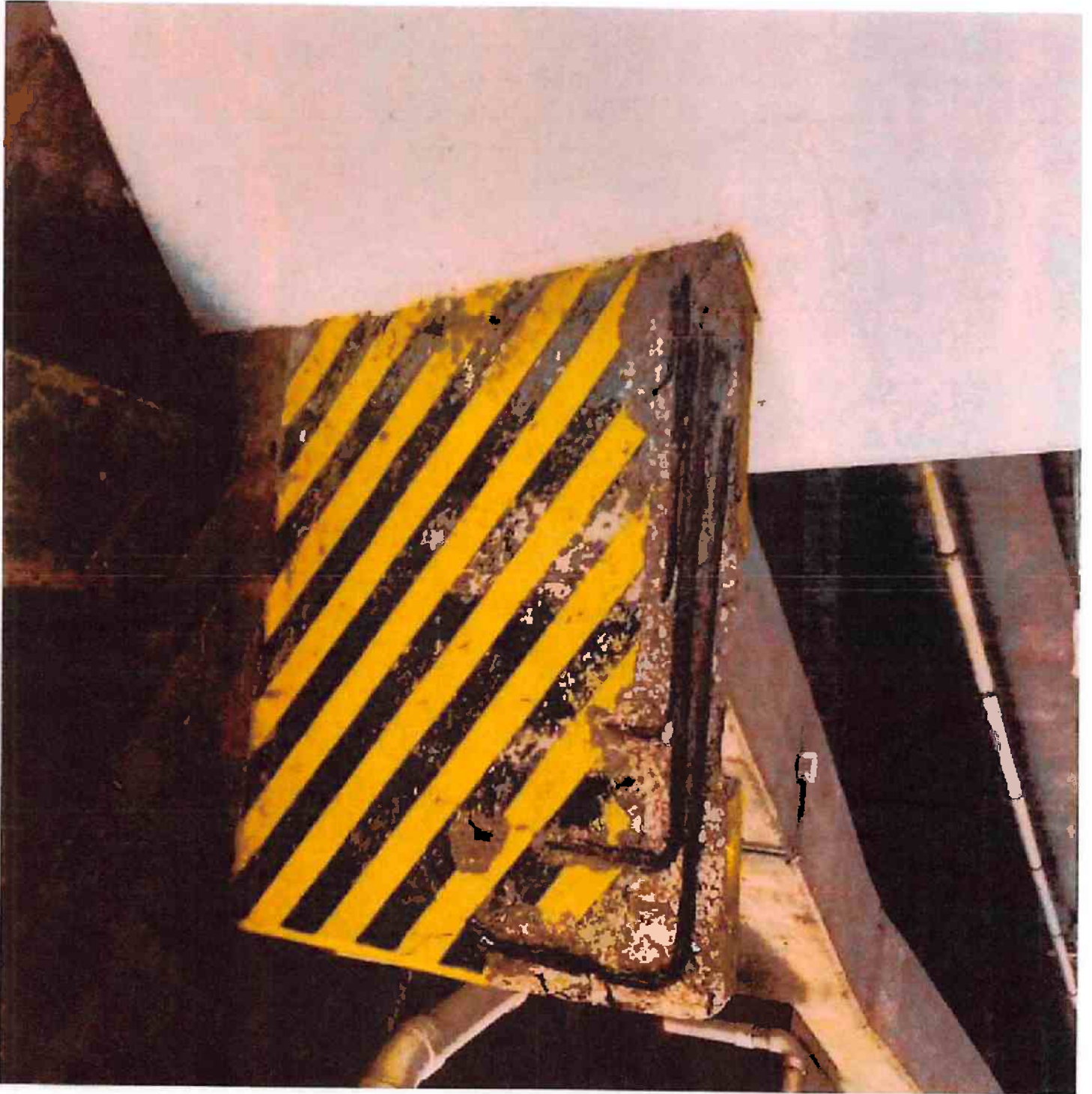
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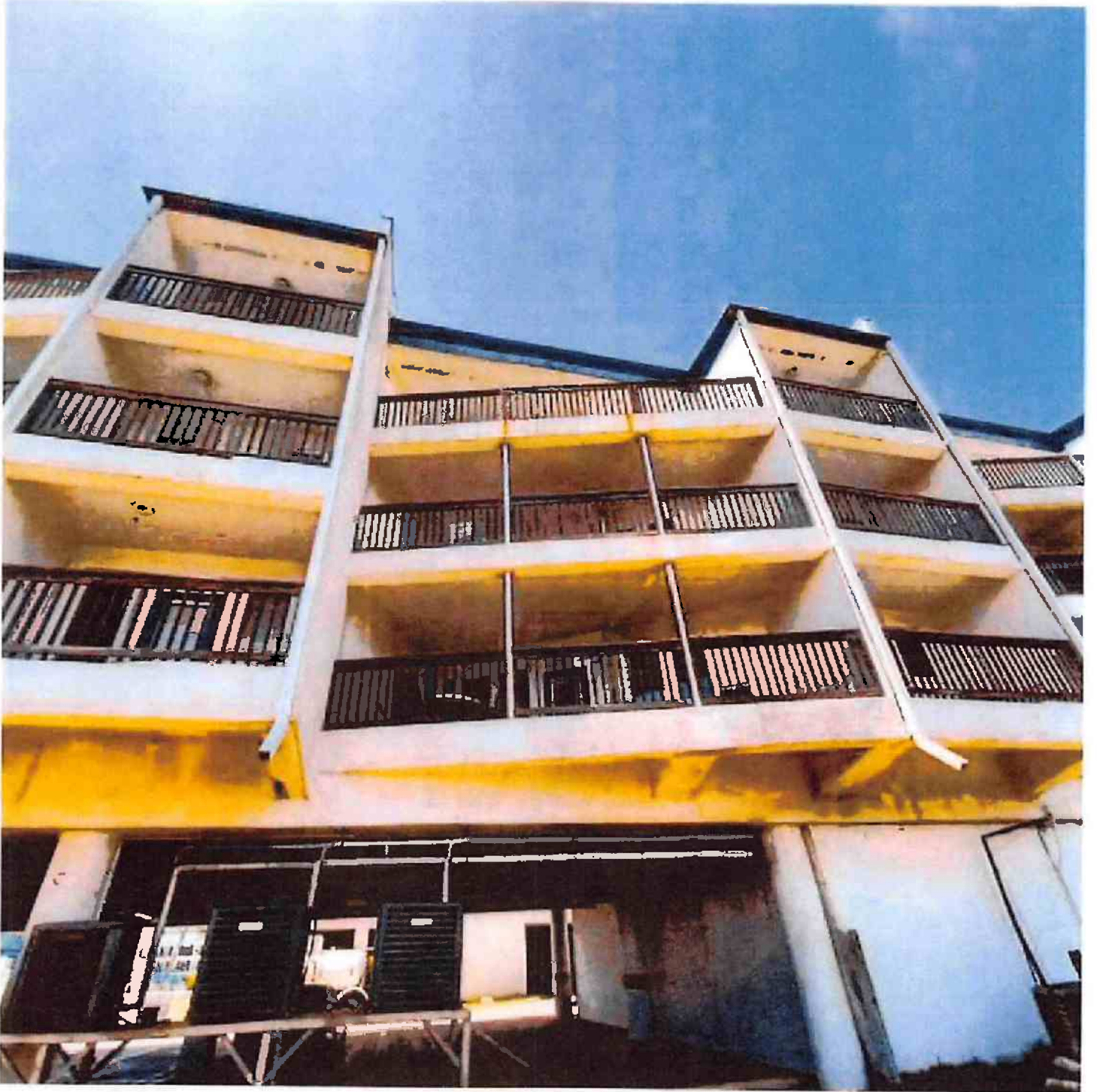
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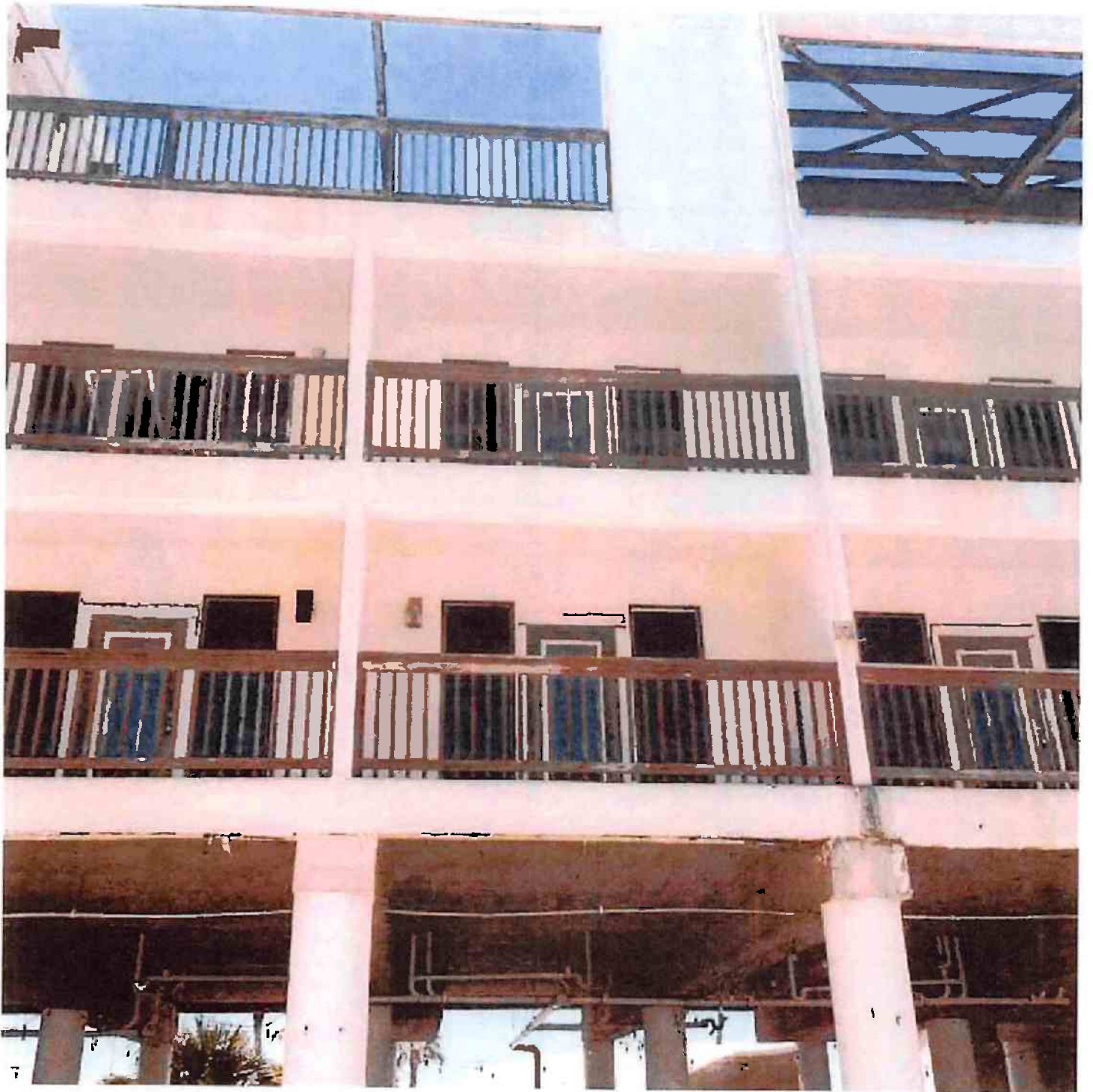
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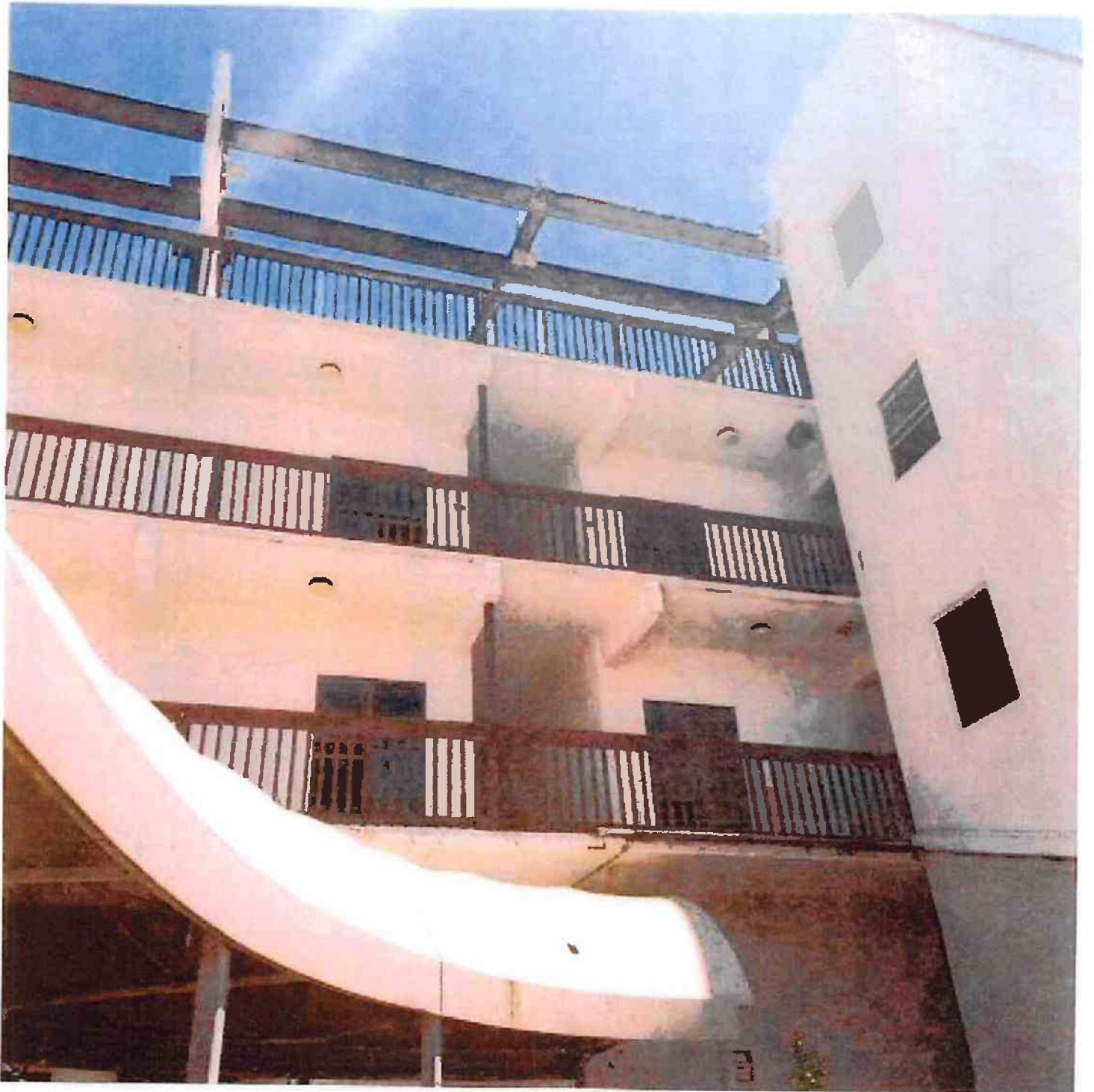
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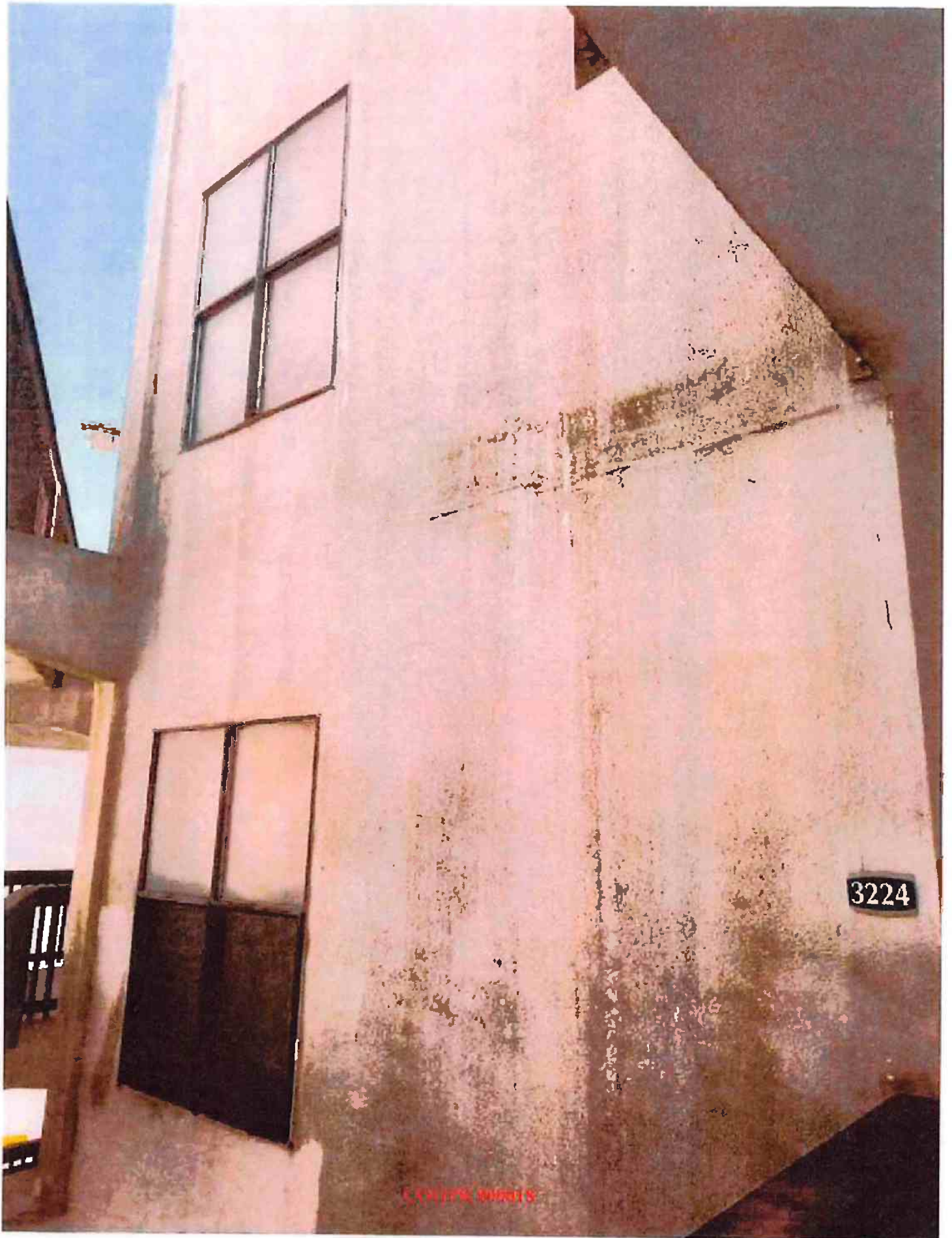
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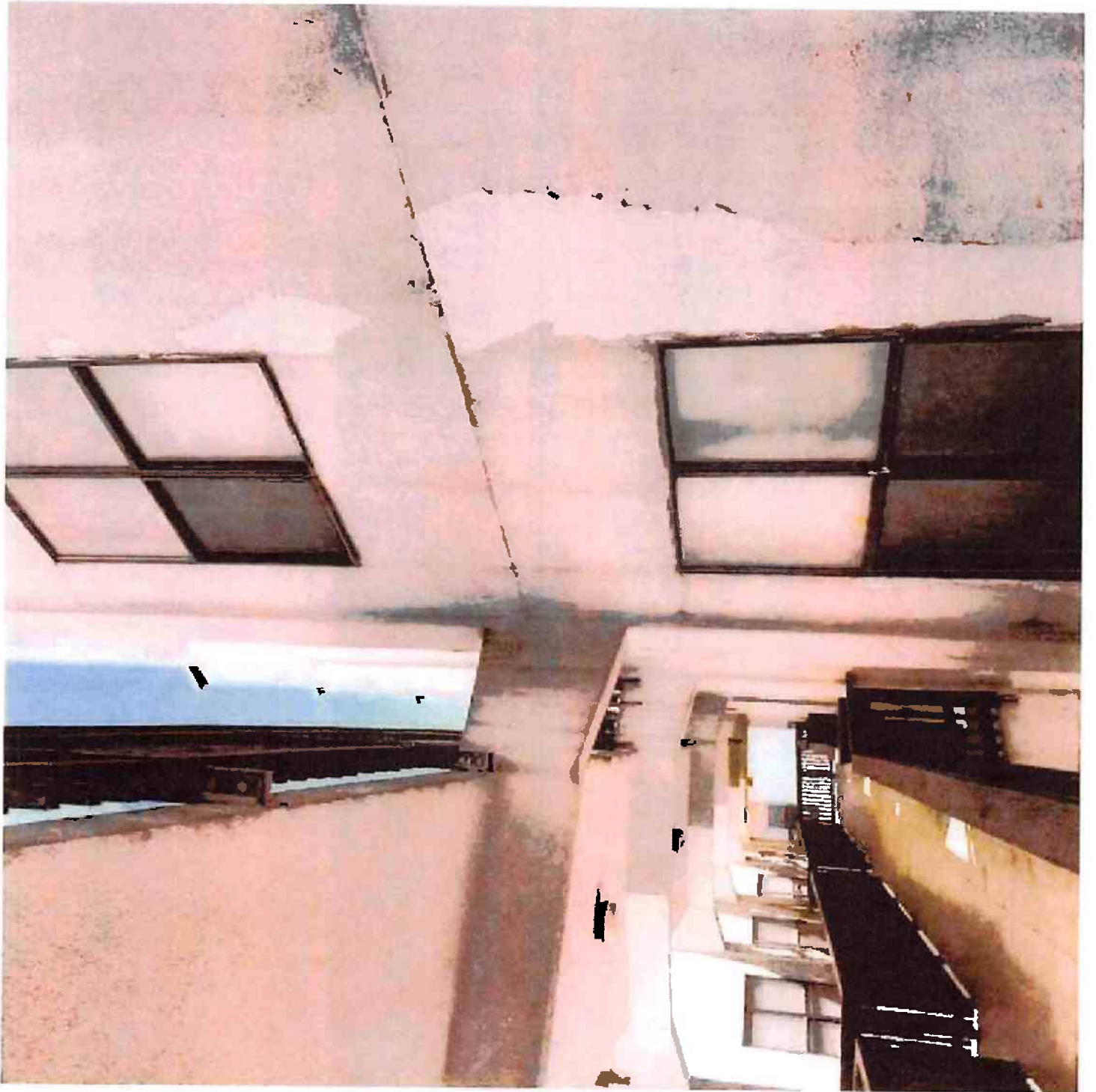
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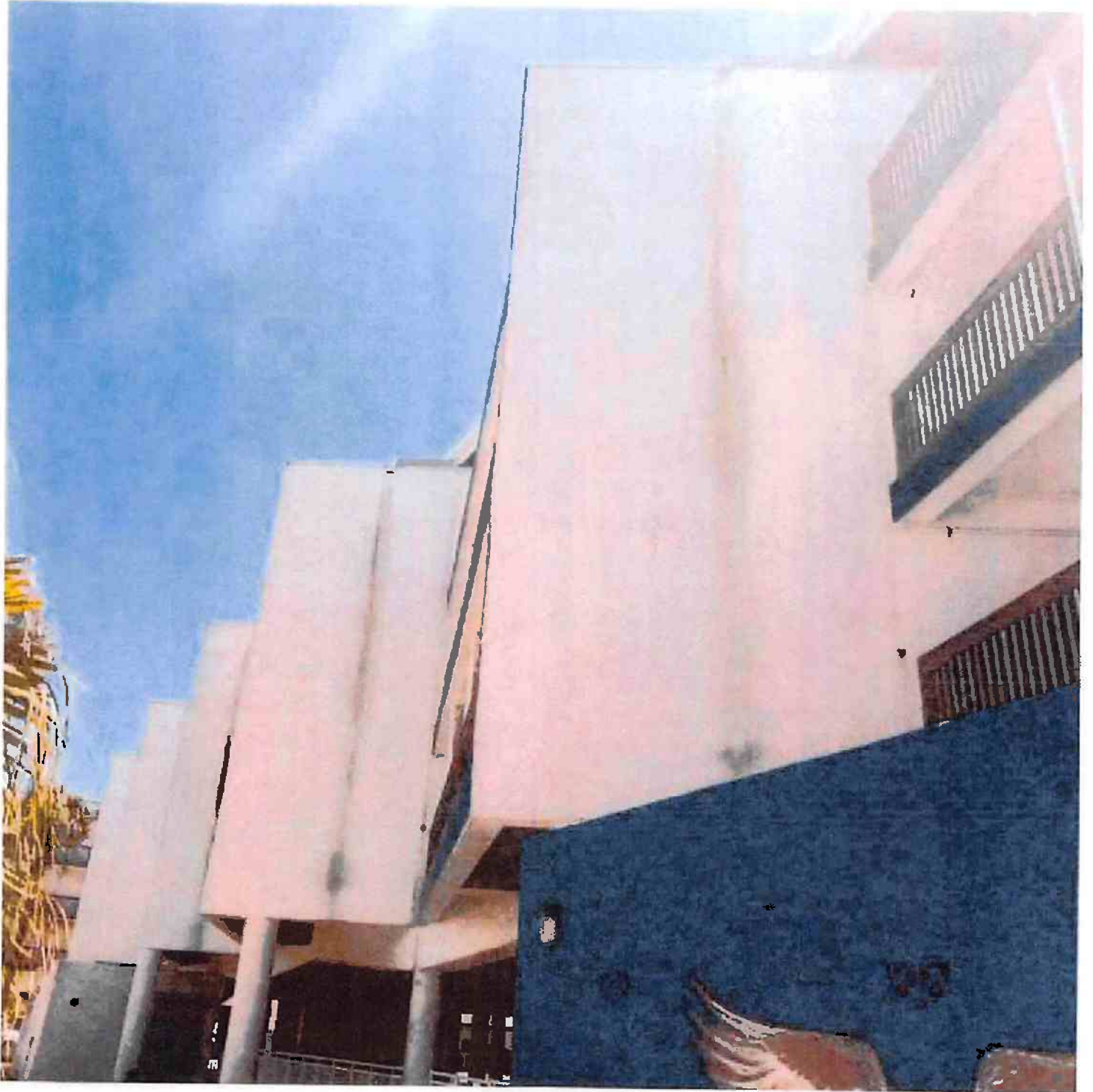
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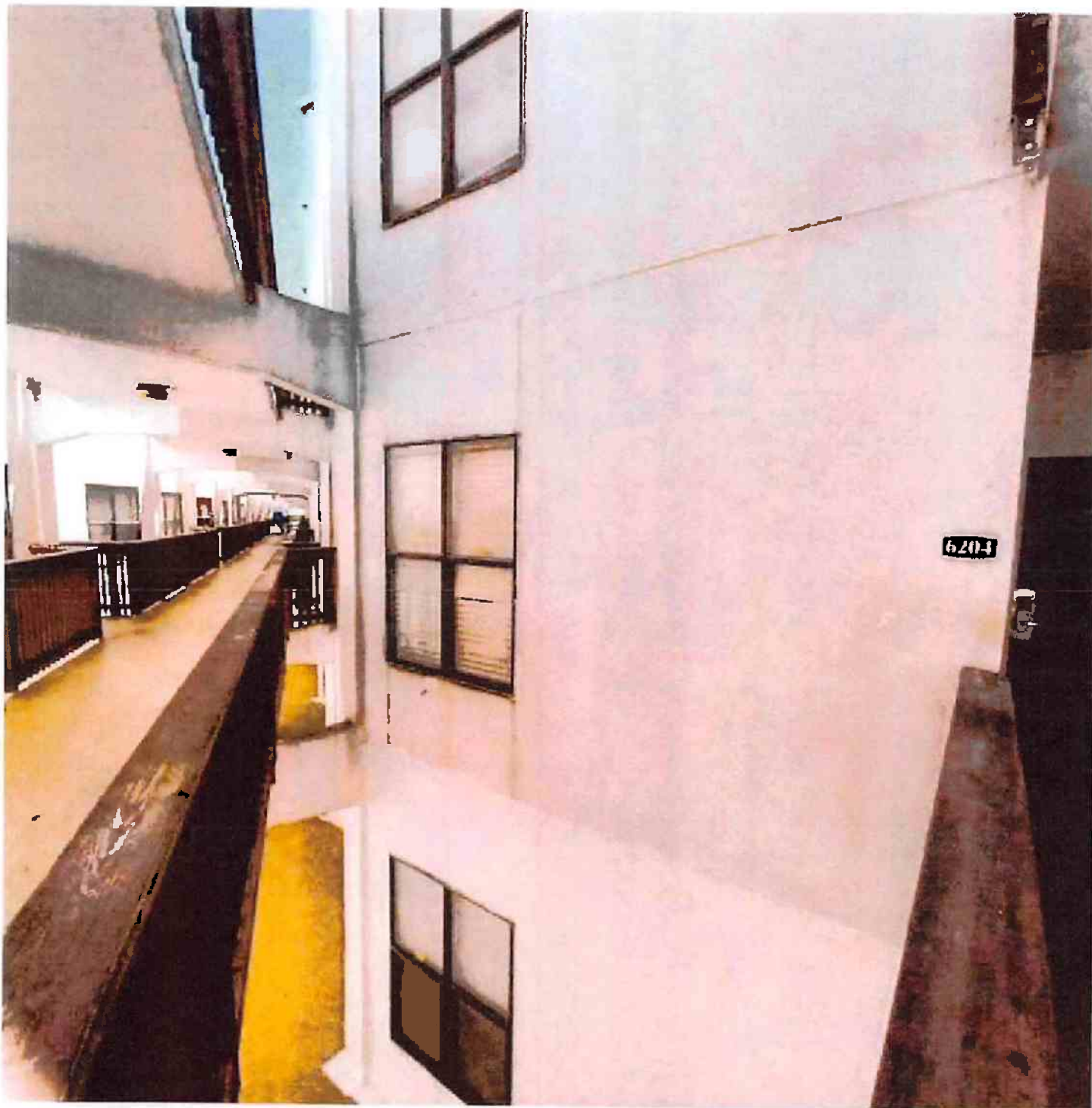
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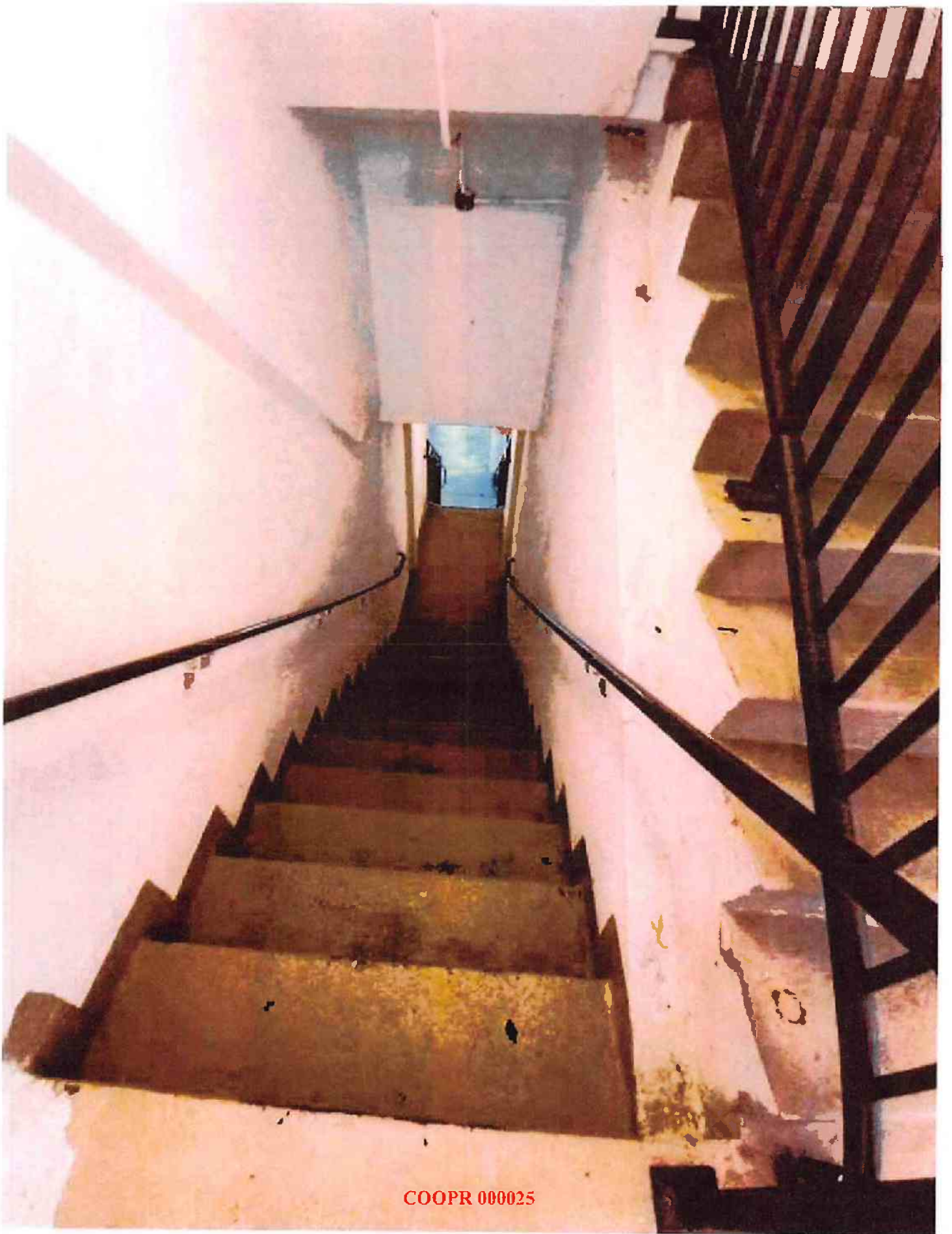
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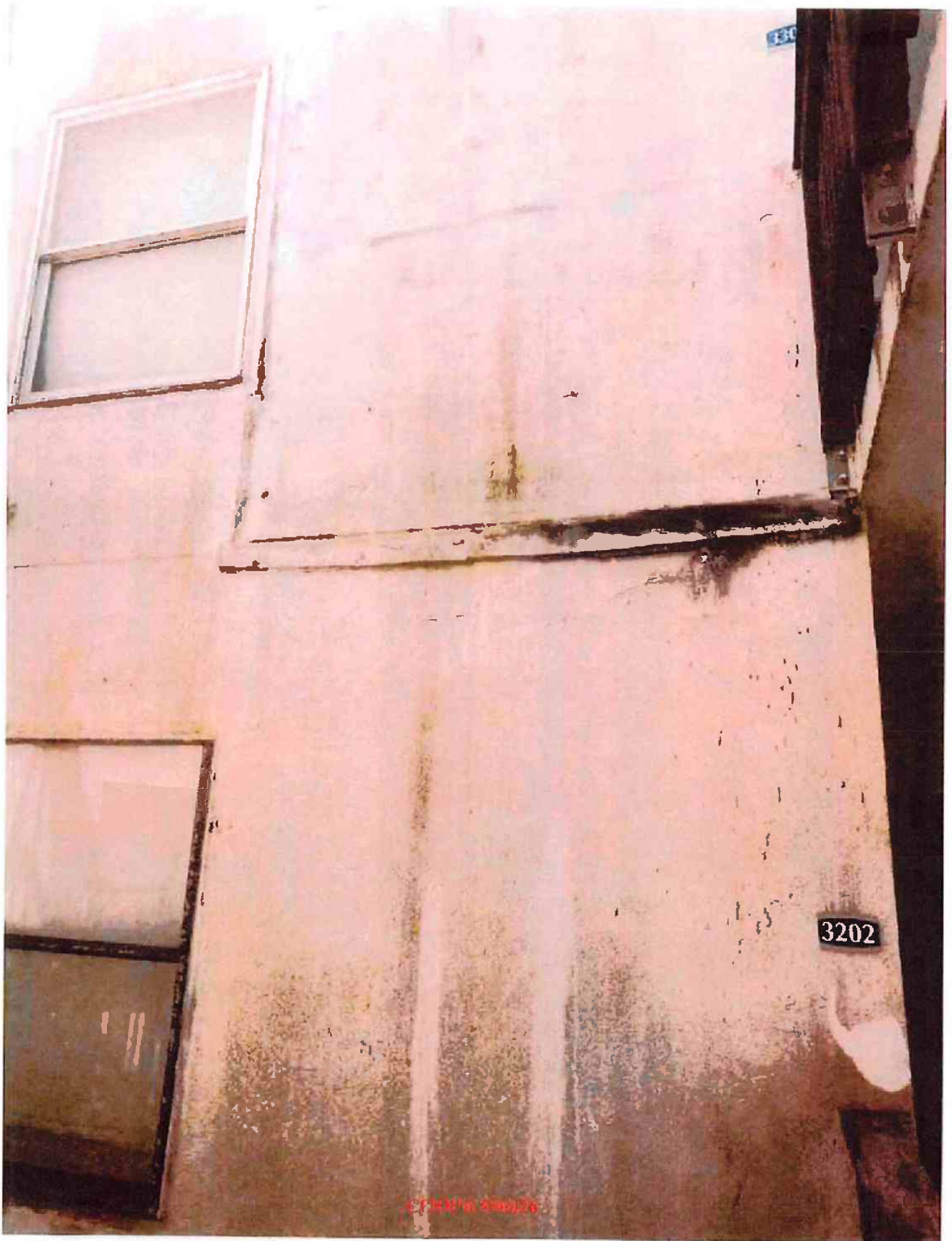
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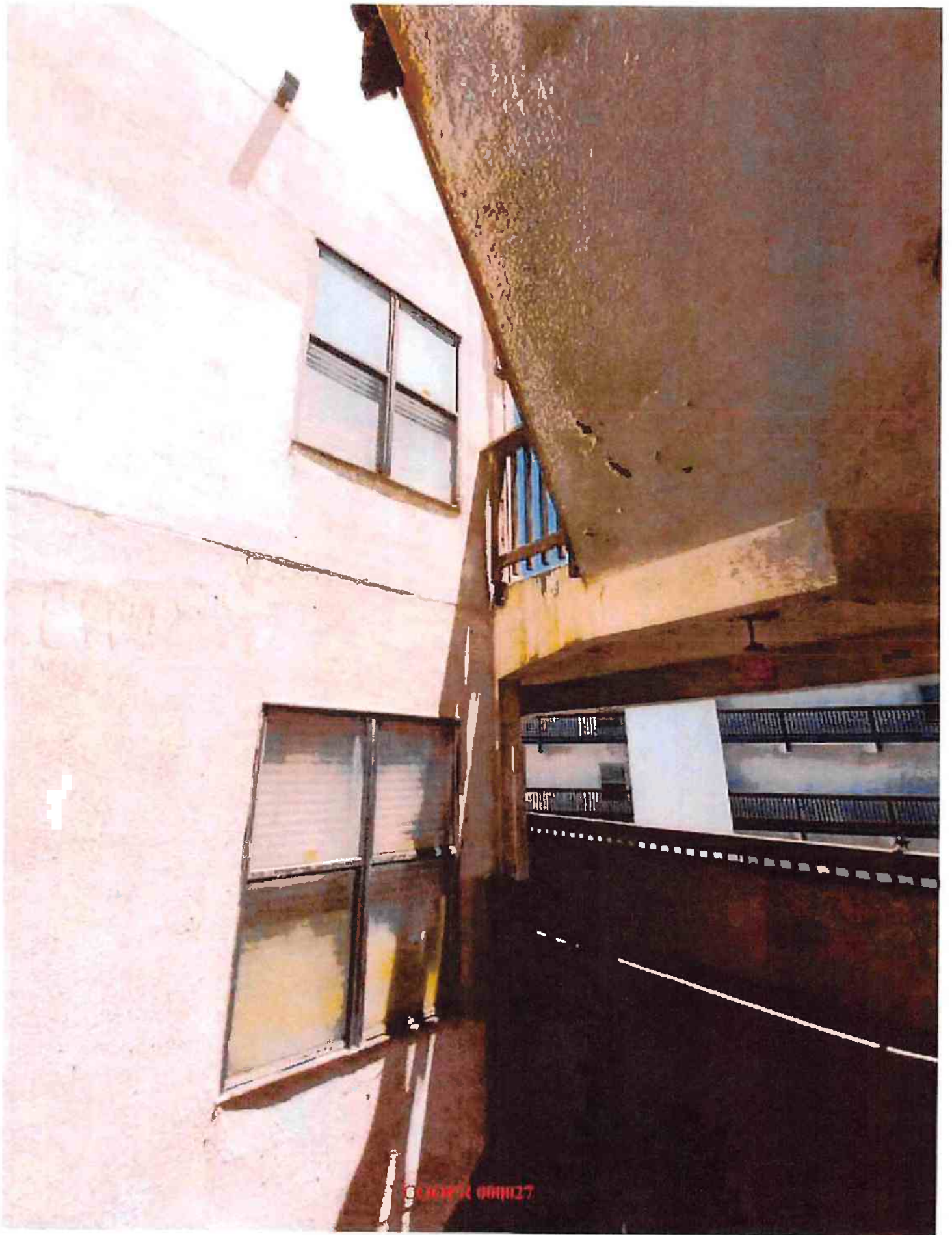
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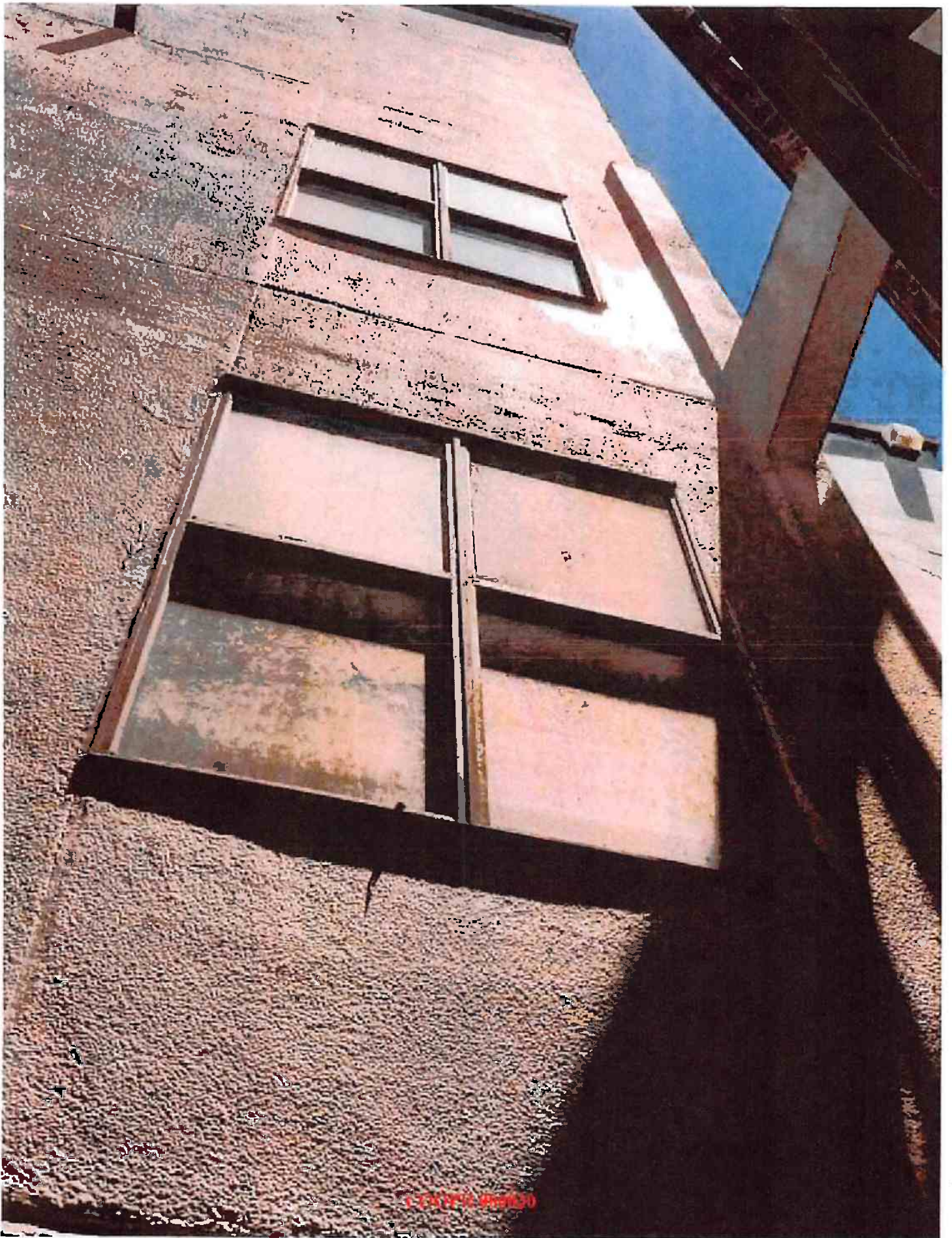




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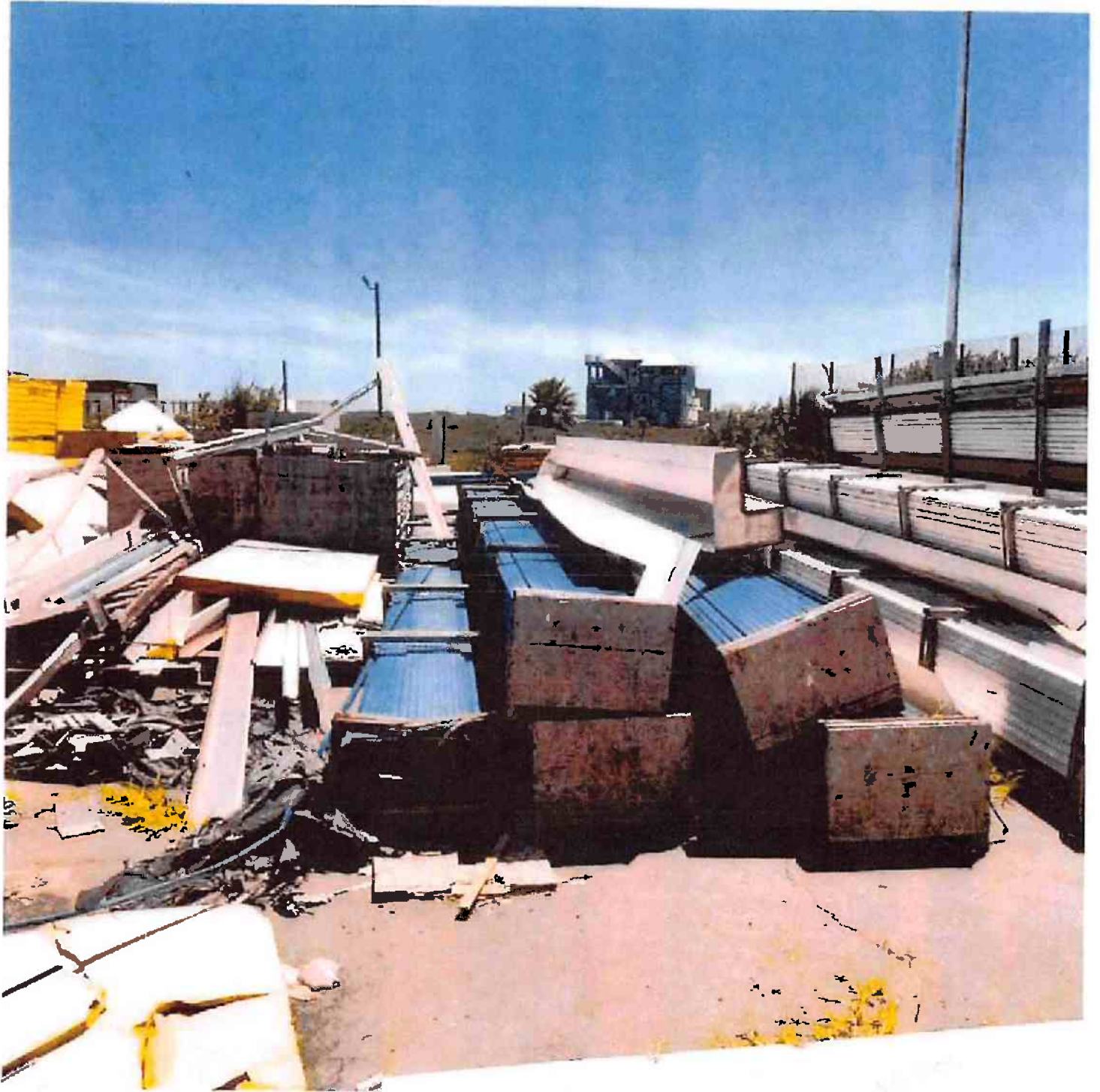
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