

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO

CIVIL DIVISION

MIAMI TOWNSHIP  
BOARD OF TRUSTEES,

Plaintiff,

-vs-

DARREN POWLETTE, et al.,

Defendants.

\* CASE NO. 2019 CV 05444  
\*  
\* JUDGE SKELTON  
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\*  
\* DEFENDANTS' REPLY  
\* MEMORANDUM IN SUPPORT  
\* OF DEFENDANTS' MOTION  
\* FOR SUMMARY JUDGMENT  
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Now come Defendants, by and through Counsel, and hereby submit the following Reply Memorandum in Support of their Motion for Summary Judgment. There are no genuine issues of material facts which remain to be litigated and Defendants are entitled to judgment as a matter of law.

Respectfully Submitted,

/s/ Gregory S. Page

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Attorney for Defendants

## MEMORANDUM

Defendants' Motion for Summary Judgment should be granted. It is apparent that the Plaintiff has a fundamental misinterpretation of Ohio's agritourism statute and the zoning regulations at issue herein. The undisputed facts reveal that the Defendants are not violating any legitimate zoning regulation. They are using the Property as an agritourism facility, which is a permitted use under the zoning resolution, as a matter of law. As such, Defendants are entitled to judgment as a matter of law and Defendants' Motion for Summary Judgment should be granted.

Throughout Plaintiff's Motion for Summary Judgment and Memorandum in Opposition to Defendants' Motion, Plaintiff constantly refers to the "primary" use of the barn. There is certainly NO standard in the agritourism statute or the zoning regulation that references or requires that a particular use of the barn has to be the "primary" use.

To be sure, R.C. 519.21 provides:

R.C. § 519.21 provides, in pertinent part:

"Powers not conferred on township zoning commission by chapter:

(A) Except as otherwise provided in divisions (B) and (D) of this section, sections 519.02 to 519.25 of the Revised Code confer no power on any township zoning commission, board of township trustees, or board of zoning appeals to prohibit the use of any land for agricultural purposes or the construction or use of buildings or structures *incident* to the use for agricultural purposes of the land on which such buildings or structures are located... and no zoning certificate shall be required for any such building or structure. . . .

The statute prescribes that that use of the barn must be incidental to the agricultural purpose of the land. If its use is incidental, then the township has NO zoning authority over it.

“Incidental” means minor or casual, subordinate in significance or nature, occurring as a chance concomitant or consequence, accompanying but not a major part of something, not of prime or central importance.<sup>1</sup>

In this case, Powlette’s use of the barn need only be incidental to the agricultural purpose or use of the land. Of this, there can be no doubt. It most certainly does NOT need to be the “primary” use as the Township suggests. Interpreting this statute in favor of the property owner, which this Court must, it is apparent that Powlette’s use of the structure is incidental to the agricultural purposes of the land. As such, the township has no zoning authority over the structure.

The township attempts to cajole this Court into believing that Powlette must prove the “primary” use of the barn is for agricultural purposes. This is simply not the burden. However, it is additional evidence of the township’s ongoing attempt to extend the scope of restrictions in the statute, in contravention of longstanding precedent regarding private property owner’s use of their land. See *State ex rel. Erica Scadden Zoning Enforcement Officer Franklin County Development Department v. Arthur Willhite*, 2002-Ohio-1352, 02-LW-1099, 01AP-800 (holding, restrictions on the use of real property by ordinance, resolution or statute must be strictly construed, and the scope of the restrictions **cannot be extended** to include limitations not clearly

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<sup>1</sup> Webster’s Dictionary.

prescribed by the State of Ohio); See also, *Freedom Twp. Bd. of Zoning App. v. Bd. of Mental Retardation* (1984), 16 Ohio App.3d 387, 390. (Emphasis added).

Despite the township's misguided position, it is clear that Powlette is using the property for agricultural and agritourism purposes. He most certainly satisfies at least one of the criteria set forth in the statute. Of note, in its memo contra, Miami Township never even addresses the Powlette's arguments about the educational, entertainment, historical, cultural and recreational use of the property. Most likely because the township knows it has no counter argument.

It is evident that the property is being used for "an agriculturally related educational, entertainment, historical, cultural, or recreational activity... conducted on a farm that allows or invites members of the general public to observe, participate in, or enjoy that activity." On Powlette's farm, guests make the decision to use the property because it has alpacas, farm animals, and other agriculturally related activities to engage in in conjunction with the celebratory event. *See previously filed Affidavits*; See also, *Affidavit of Denise L. Dyer*. Without these agricultural activities, there would be no celebratory event. The township seeks to divide and then conquer these activities; but, they are co-dependent, one does not exist without the other.

Denise L. Dyer and her family were visitors of the farm who recently held a celebratory event at the farm. She has averred:

"Our visit to Stoney Hill Farm was planned because we needed a large place for all of our children and grandchildren and wanted to provide an educational experience for them while having fun on a farm as none of our grandchildren had been on a farm before. Darren provided education about alpacas and even gave us the opportunity to feed them. He also taught the children about the chickens and ducks and let them gather eggs that we could keep for ourselves."

It is clear that when guests come to the farm, and when the farm is reserved, it is being done so in order to create an experience on the farm. This evidence, combined with all of the previously submitted affidavits from visitors, is completely undisputed.

The township also appears to be confused as to what “viticulture” is and how it may or may not be relevant to the issues at hand. “Viticulture” is simply the growing and harvesting of grapes, which, under Ohio law, is an agricultural use of the land. The township however obscures the issue by claiming Powlette is not using the barn “primarily” for viticulture. In short, who cares?

Nowhere in any statute is there any reference to using a barn primarily for viticulture. Nonetheless, the township would lead this Court to believe that if Powlette is not using the barn “primarily” for viticulture, then his use of the barn violates its zoning ordinance. This is utter nonsense and demonstrates a lack of understanding of the statute (R.C. 519.21).

R.C. 519.21 makes clear that the township has no authority to regulate the “use of any land for agricultural purposes or the construction or use of buildings or structures incident to the use for agricultural purposes of the land on which such buildings or structures are located.” The township further has no authority to regulate buildings or structures “primarily used for vinting and selling wine.” The township is confusing “viticulture” (growing and harvesting of grapes) with “vinting” (producing wine from fruit).

In order to avoid township regulation, if one were vinting wine, the structure would have to be used primarily for vinting and selling wine. Such is not the case herein. Powlette has never claimed he was using the barn “primarily” for the vinting and selling of wine.” However, the

township is attempting to coax the Court into believing that the standard applied to “the vinting and selling of wine” is the same standard to be applied to agritourism. However, the agritourism statute does not require that the building or structure be primarily used for anything. Rather, the statute says the structure must be “incident” to the agricultural purposes of the land. The statute is essentially stating the opposite of what the township argues. The township argues “primary” use when the statute requires only an incidental use (which is basically the opposite of a “primary” use).

The township also misconstrues the current use of the land for hay production and hay storage. The township argues that since Powlette himself is not harvesting the hay, then somehow this changes the nature of the land. Nothing could be further from the truth. Farmland is leased throughout the State of Ohio, and it does not change the nature of the land being farmed. To be sure, land does not lose its agricultural purpose because someone other than the direct property owner is the party harvesting the commodity.

Powlette’s property is being used for agricultural purposes and the barn is being used for purposes incidental to the property’s agricultural use. This includes both agritourism and other agriculturally related activities.

This Court ought to be mindful of the intent of the agritourism statute, which was to add value to farmland and farms, not decrease it. As such, the agritourism statute should be liberally construed in an effort to fulfill its intent. Conversely, The Township’s zoning regulation should be strictly construed as a restriction on Powlette’s private property rights. Utilizing this longstanding statutory construction approach, it is eminently judicious that a liberal construction

of the agritourism statute, combined with a strict construction of the zoning ordinance, results in the determination that Powlette is using the property in a permitted manner.

Of course, this is supported by the State of Ohio. The Ohio Department of Commerce has already determined that Powlette's use of the barn to host weddings and other celebratory events IS "agritourism". This only makes sense in light of the intent of the statute.

Of note, other townships in the Second District have determined that the use of farms and barns on those farms for weddings and other celebratory events is agritourism and they permit the activity. *See Affidavit of Darren Powlette*. To be sure, at least Caesarscreek Township and Spring Valley Township have made this determination.

The township also claims that the property is not advertised for agritourism. This, again, shows a complete and total failure on the township's part to investigate this matter. The only advertising available to the public is replete with references to and discussions about the myriad agricultural activities that guests engage in. Photographs of guests with the animals, on hayrides, stories from guests, posts from guests, all reveal the nature of the property and the activities that take place on the property. Again, the township does not care. It reached a decision on this matter three years ago and has refused to reconsider its position. Miami Township has never contacted anyone from the Ohio Department of Commerce or any other agency of the State of Ohio to determine whether the use of these structures for weddings and other celebratory events is "agritourism." Moreover, Miami Township has not consulted with anyone outside of the Township to discuss the issue or get an opinion on its position. The township's discussion of Powlette's advertising is simply another example of just how uninformed the township is.

Powlette is an agritourism provider. When considering the wide range of agriculturally related activities the guests of the farm engage in; and, combining that with the Court's obligation to construe ambiguities in the statute in favor of the landowner; it is beyond dispute that Powlette is engaged in lawfully permitted agritourism on the Property.

Since there is no genuine issue of material fact remaining to be litigated, Powlette and Stoney Hill are entitled to judgment as a matter of law. For the foregoing reasons, Defendants respectfully request that this Court GRANT their Motion for Summary Judgment.

Respectfully Submitted,

/s/ Gregory S. Page

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Attorney for Defendants

Certificate of Service

I hereby certify that the foregoing was served upon all Counsel of Record via the Montgomery County Clerk of Courts E-Filing system on this 4th day of November 2021.

/s/ Gregory S. Page  
Gregory S. Page (0065264)

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Plaintiff,

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CASE NO. 2019 CV 05444

JUDGE SKELTON

AFFIDAVIT OF DARREN POWLETTE

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DARREN POWLETTE, being first duly cautioned and sworn, upon personal knowledge and belief, states and avers as follows:

1. I am one of the Defendants in this matter.
2. I am personally familiar with the facts contained in this Affidavit.
3. I acquired the property at 7757 Upper Miamisburg Road in Miami Township, Ohio in May of 2016.
4. Since at least 2003, the 26-acre Property has been used to grow and bale hay.
5. When I first acquired the property, the farm was supplying between 800 -900 bales of hay each year.
6. For the past two years, the farm has been supplying approximately 3000 bales of hay each year.
7. I continue to use the barn for hay storage on a daily basis.
8. I continue to store farm equipment, including farm's John Deer tractor and trailer, in the barn on a daily basis.
9. I continue to house the alpacas in the barn in hot weather and extremely cold weather.
10. Attached to this Affidavit as Exhibit A are true and accurate copies of photographs of visitors to the property who are engaged in activities at the farm before, during and in conjunction with their celebratory event.

11. Cheryl Dixon, who is a resident of Caesarscreek Township, Greene County, Ohio, under a similar zoning scheme, is permitted to use her farm for agritourism activities, including the hosting of weddings and other celebratory events on her property.
12. Gregg Sparks, who is a resident of Spring Valley Township, Greene County, under a similar zoning scheme, is permitted to use his farm for agritourism activities, including the hosting of weddings and other celebratory events on his property.
13. True and accurate photographs of a celebratory event taking place on Sparks' farm are attached as Exhibit B.
14. To be sure, in 2017, fifteen percent (15%) of all weddings in the United States took place on a farm. This number increased to 18% in 2019. *The Knot 2019 Weddings Study*.
15. Statistics show that less than ceremonies hosted in a religious institution have dropped significantly, from 41% in 2009 to 22% in 2017. *The Knot 2017 Real Weddings Study*.

FURTHER AFFIANT SAYETH NAUGHT.

  
Darren Powlette

Notary Public

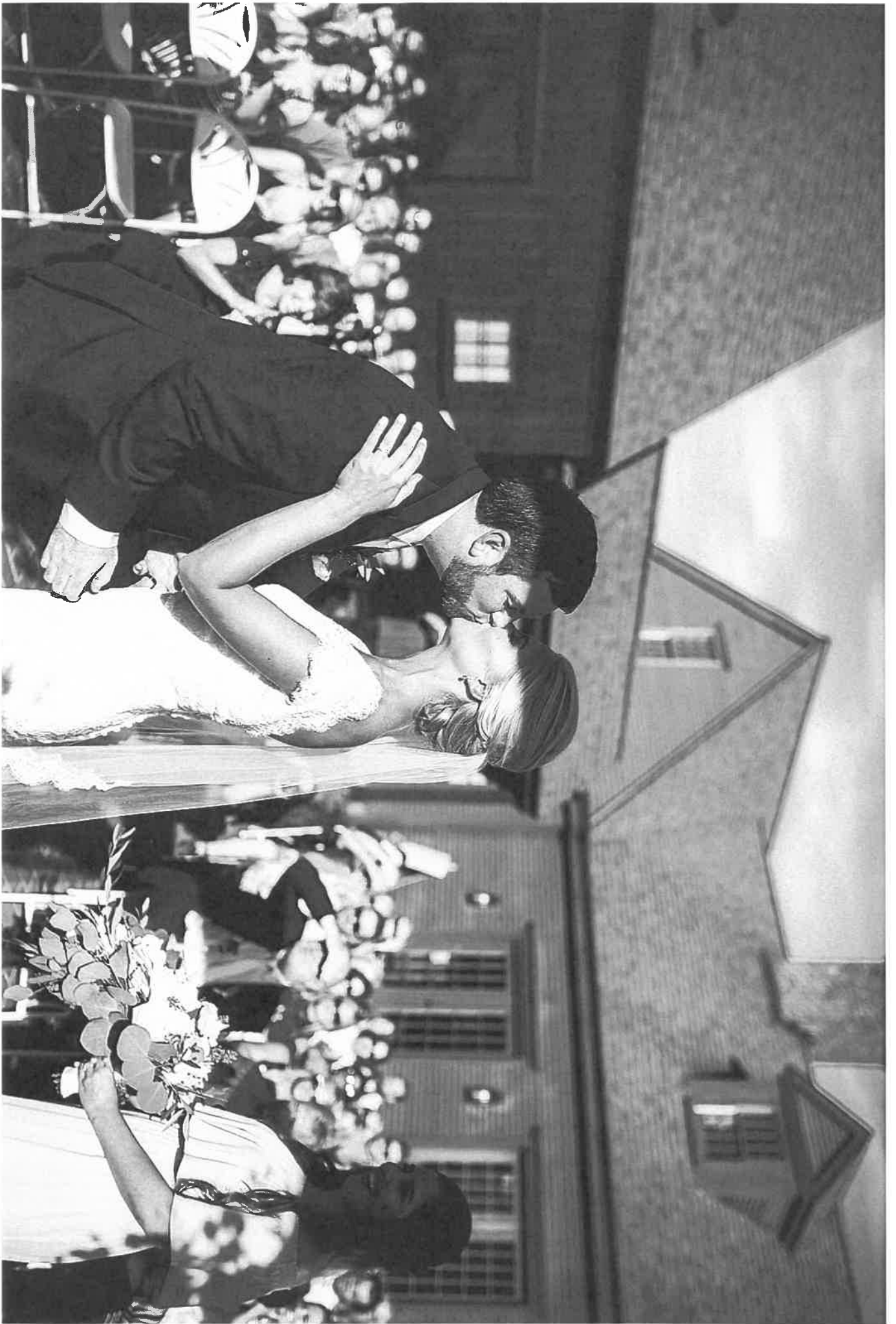
Sworn to and subscribed before me, a Notary Public in and for the State of Ohio, on this  
4<sup>th</sup> day of November 2021.



GREGORY S. PAGE  
ATTORNEY AT LAW  
NOTARY PUBLIC  
STATE OF OHIO  
My Comm. Has No  
Expiration Date  
Section 147.03 R. C.

  
Notary Public  
My commission expires:

## EXHIBIT A

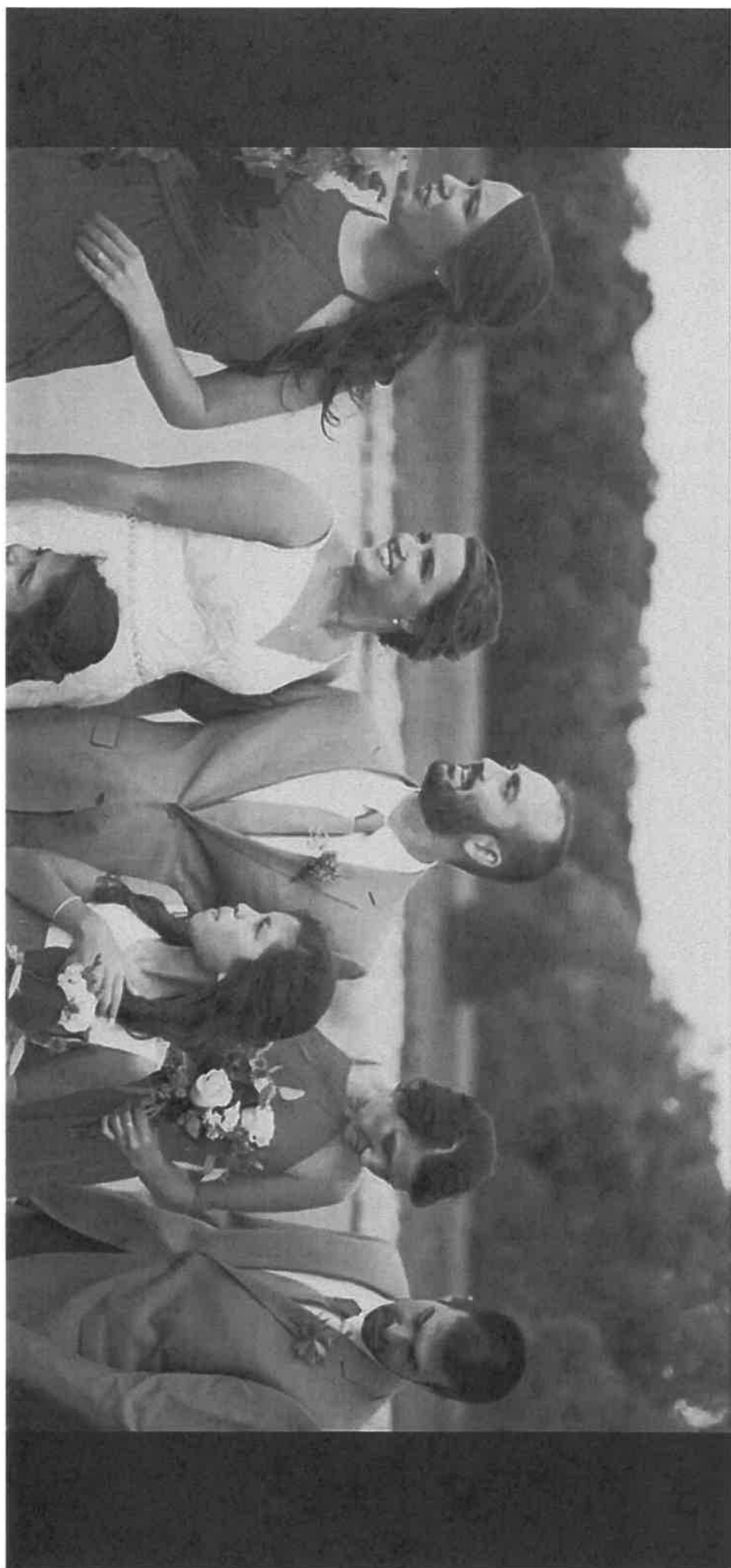




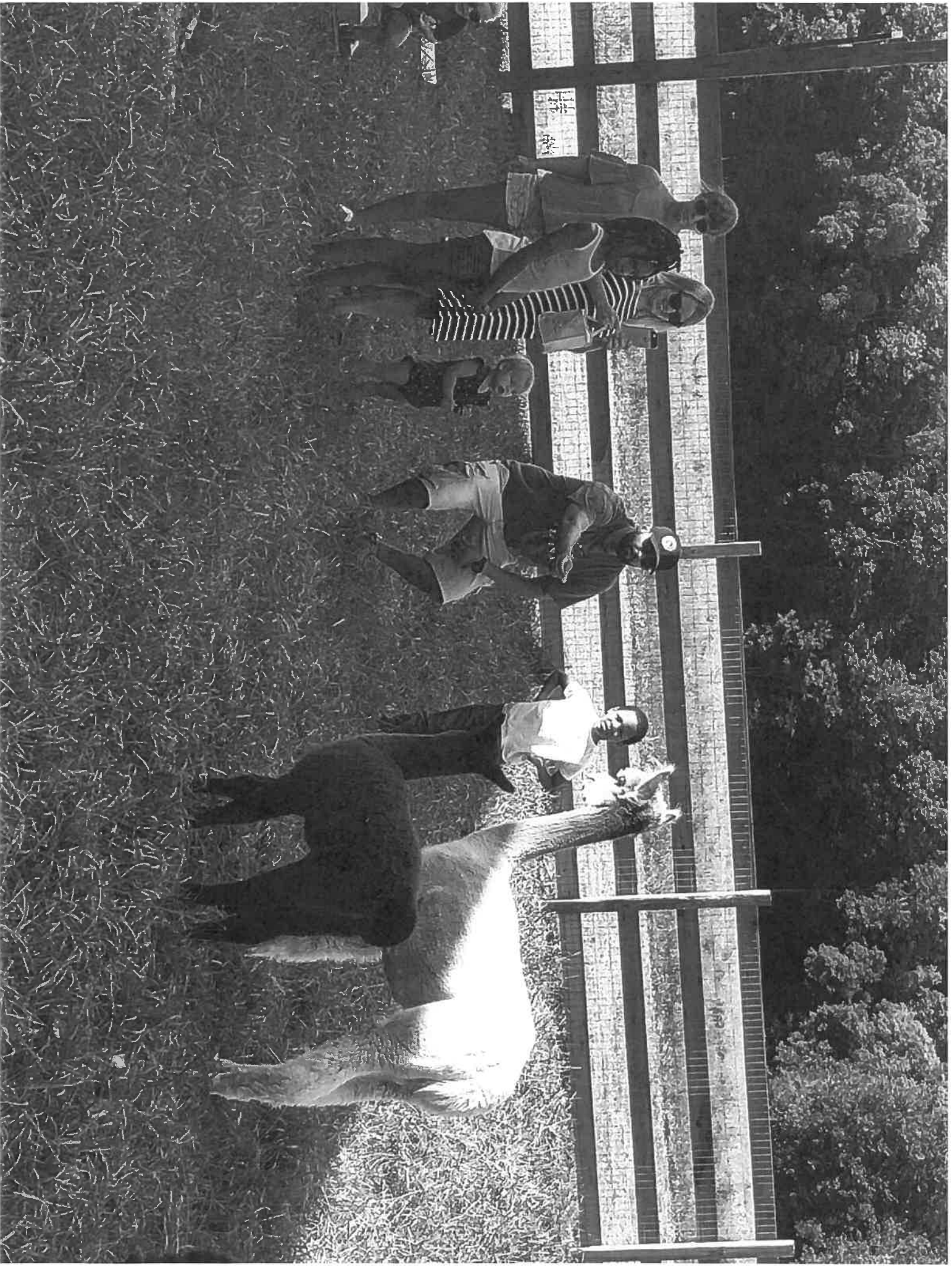










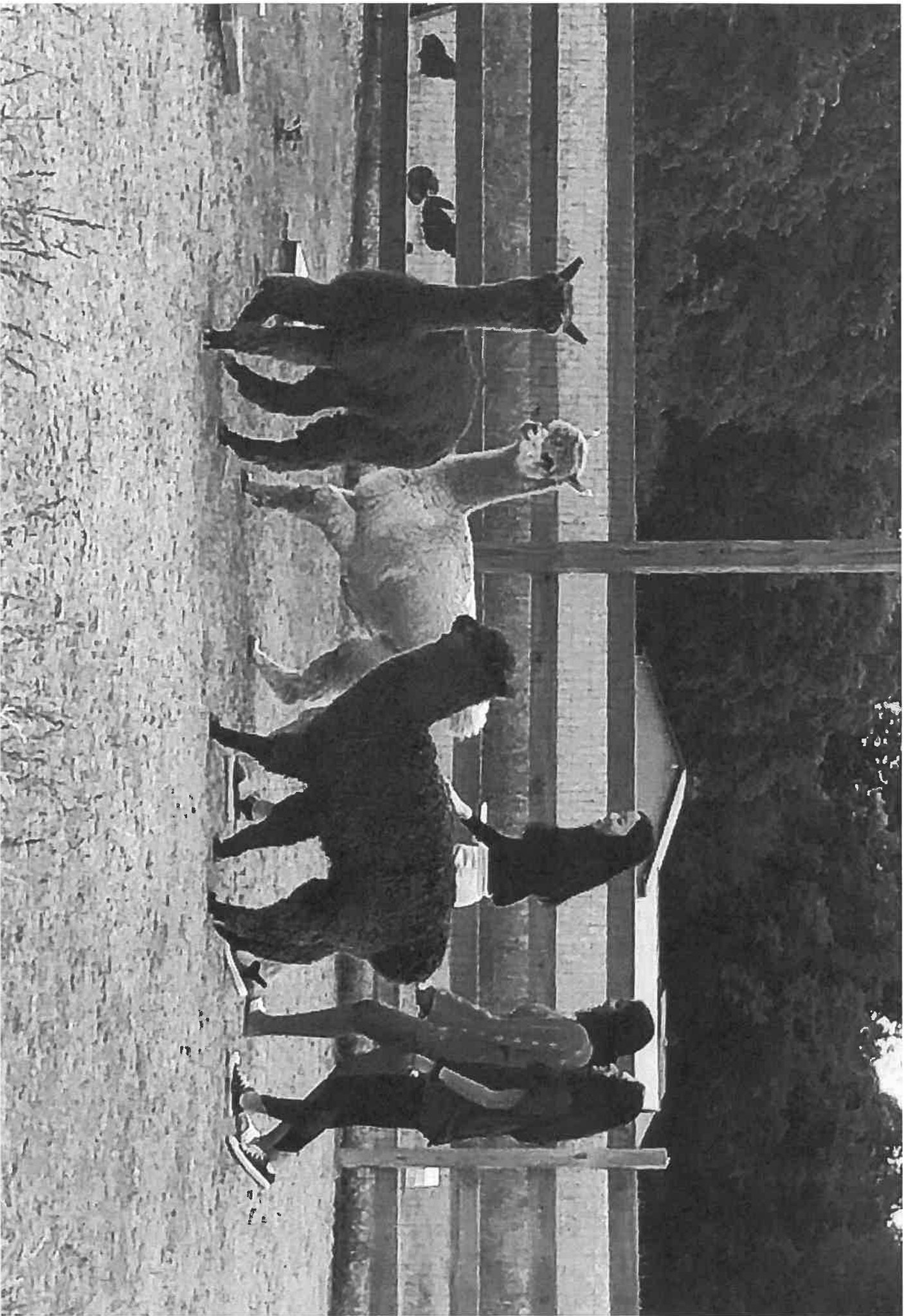


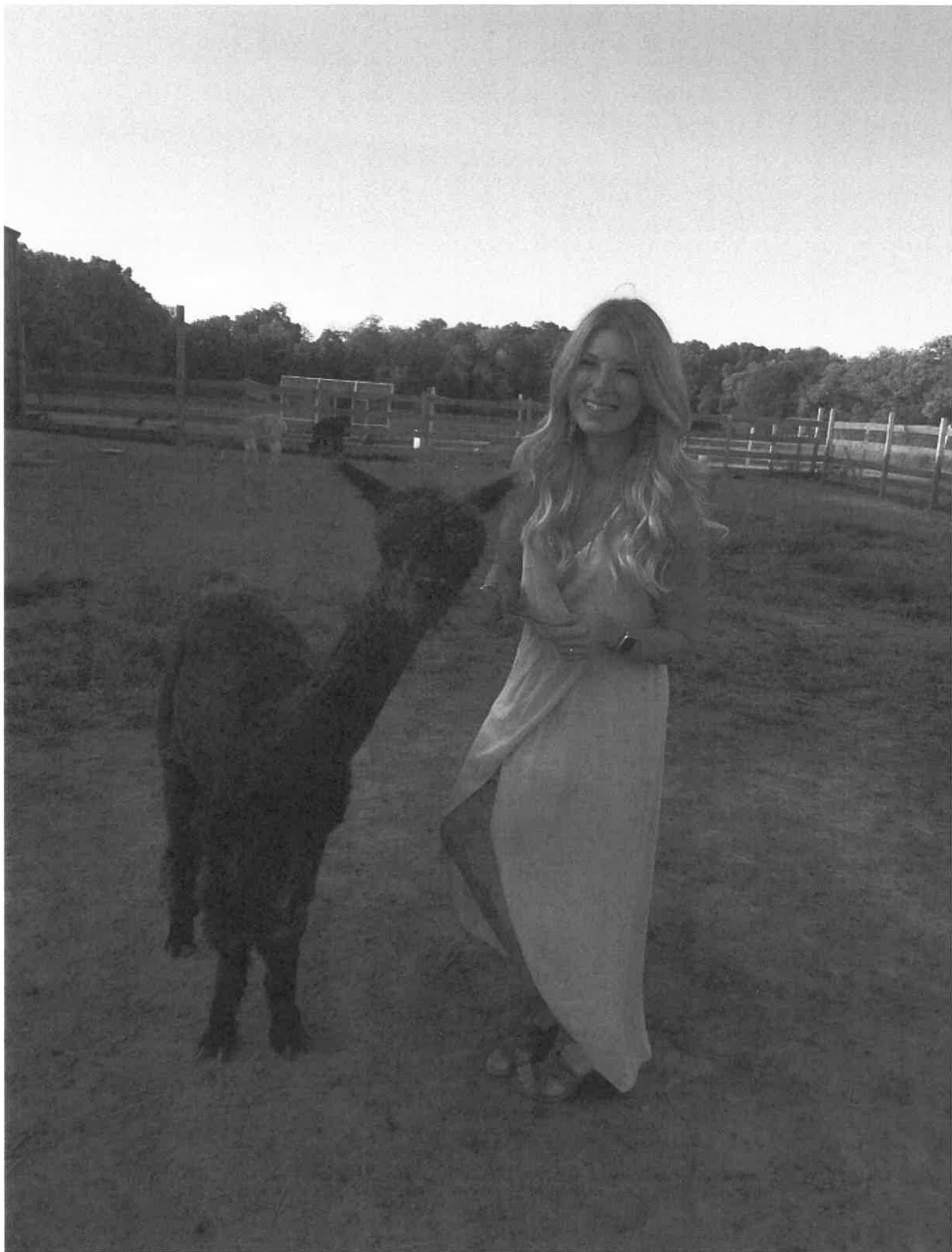






















## EXHIBIT B



