

FILED
COURT OF APPEALS
DIVISION II

2015 JAN 22 AM 11:51

STATE OF WASHINGTON

BY  _____
DEPUTY

No. 46728-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STUART MCCOLL (Plaintiff)

Appellant

v.

Geoffrey Anderson (Defendant)
Clallam County DCD Administrator (Defendant)
Clallam County Prosecutor (Defendant)

Respondents,

APPELLANT'S OPENING BRIEF re-filed

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TABLE OF CONTENTS

	Page
A. Assignments of Error	4
B. Statement of the Case	5
C. Argument	7
D. Conclusion	13
E. Appendix,	14
Clear color pictures of Exhibits from Admissions by permission of the court per RAP 10.3(a)(8)	
Exhibit 1	from Admissions Exhibit A
Exhibit 2	from Admissions Exhibit B
Exhibit 3	from Admissions Exhibit C
Exhibit 4	from Admissions Exhibit D
Exhibit 5	from Admissions Exhibit E
Exhibit 6	from Admissions Exhibit F

Table of Authorities

Washington State Cases

Ecology v. Pacesetter, 89 Wn.2d 203 1977 (Damages)
Hunt v. Anderson, 30 Wn.App. 437, 635 P.2d 156 (Damages)
Asche v. Bloomquist 132 Wn.App 784, 798 (Property Right)
Karasek v. Peier 22 Wn. 419, 428 61 P. 33 (cited in Asche)
White v. State 9 131 Wn.2d 1, 929 P.2d 396
Qwest v. City of Bellingham 161 Wn.2d 353
Paxton v. City of Bellingham, 129 Wn. App. 439 2005
Cost Mgmt. Servs. v. Lakewood 170 Wn. App. 260 2012
Eyman v. McGhee 173 Wn. App. 684 851 2013
Erection Co. v. Depart. of L & I 121 Wn.2d 513 518 1993
Crown Cascade v. O'Neal 100 Wn.2d 256 261 1983

Statutes

RCW 90.58.030(3a)
RCW 90.58.140(1)
RCW 90.58.210(1)

Clallam County Code and Shoreline Management Program

CCC 35.01.020(8)
CCC 35.01.040(2)
CCC 35.01.130(2)
CCC 35 .01.130(3)
Clallam County Shoreline Management Program "CCC SMP"

A. Assignments of error

Assignments of Error

1. The court erred in dismissing the Plaintiff's entire case without applying the applicable statutes, codes, and case law that grant the Plaintiff access to a writ of mandamus, warrant of abatement, and damages.

2. The court erred while denying a writ of mandamus in asserting the Plaintiff had another remedy at law only to contradict later concluding there indeed was no alternative.

3. The court erred by substituting the word "May" for the word "Shall" when reading and applying the law. "Shall" imposes a mandatory duty.¹

Issues Pertaining to Assignments of Error

Whether a court abused its discretion in not allowing Plaintiff's right to seek a trial for a writ of mandamus under RCW 90.58.210(1) claiming plaintiff had an alternative remedy in a warrant for abatement ?

¹ 121 Wn.2d 513 518 (1993) 852 P.2d 288 Erection Co. v. L&I

Whether the court indeed certified the Plaintiff had no other remedy, a key component of a writ of mandamus, when it denied the Plaintiff access to a warrant for abatement ?²

Whether the prosecuting attorney for Clallam County had a clear duty to act, a clear component of a writ of mandamus ?³

Whether the court abused its discretion in dismissing Plaintiff's case for a warrant of abatement allowed under RCW 7.48.020 .

Whether the Plaintiff's view is a property right through zoning ordinance if blocked by Defendant's illegal structure. ⁴

Whether the Plaintiff has a claim for damages through a Conclusions of Law found in case law.⁵

B. Statement of the Case

THROUGH HIS SIGNED ADMISSIONS DEFENDANT ANDERSON ADMITS, AND THE EXHIBITS CONFIRM, VIOLATING CLALLAM COUNTY'S SHORLINE MANAGEMENT CODE CHAPTER 35 AND WASHINGTON STATE'S SHORELINE MANAGEMENT ACT RCW 90.58 AND BLOCKING THE PLAINTIFF'S LAKE VIEW

² 129 Wn. App. 439, 440 Paxton v. City of Bellingham;
170 Wn. App 260 Cost Mgmt v. City of Lakewood

³ 129 Wn. App. 439, 440 Paxton v. City of Bellingham

⁴ 132 Wn. App. 784, 798 Asche v. Bloomquist

⁵ 89 Wn.2d 203 1977 Ecology v. Pacesetter Conclusion of Law No. 9

Without permits, Defendant in 2008 substantially increased the size and changed his boathouse structure by driving large piles into the floor of the lake and leveling his boathouse to accommodate a rooftop deck that was not originally contemplated or permitted in 1980⁶. With or without permit leveling a boathouse roof and building a deck atop is always illegal.⁷ Clear pictures show the Defendant's unpermitted work before and after in Admissions Exhibits A, B, & C (Appendix Exhibits 1, 2, 3)⁸

In 2012, Defendant added a structure that blocks the Plaintiff's view of the lake and added additional docking structures adjacent to the Plaintiff's shoreline.⁹ The before and after pictures presented through Admissions, Exhibits E & F (Appendix Exhibits 5 & 6), show the structure blocked the view and Defendant admitted blocking Plaintiff's view.¹⁰

⁶ CP125 - pg 4 #5 Admits "... hired in 2008 Kappert's Enterprises to drive four new pilings ...", #6 Admits "In 2008 you leveled your boathouse roof and added 6 feet onto the south end of the boathouse as well as 6 feet to your dock ...", pg 6 #14 Admits "You never acquired a permit to do any work on your dock or the shorelines of Lake Sutherland after 2000."

⁷ CCC SMP 5.18-C-1.d "... boathouses shall have sloped roofs with a minimum pitch of 3:1 (horizontal to vertical)"

⁸ CP125 Exhibits A,B,C - See clear color pictures in the Appendix Exhibit 1, 2 & 3, same as black and whites in Admissions marked therein as Exhibits A, B, C

⁹ CP125 - pg 7 #16 Admits "The document attached thereto as Exhibit F shows your boathouse with a bamboo privacy screen structure installed to the East side of the boathouse roof." See clear color Exhibit 1 in Appendix

¹⁰ CP125 - pg 7 #17 Admits "The document attached thereto as Exhibit E as compared to Exhibit F shows the bamboo privacy screen blocked the Plaintiff's Westerly lake view." See clear color Exhibits 5 & 6 in Appendix.

Defendant Anderson Admitted mooring floating docks on the east side of his boathouse immediately adjacent to the Plaintiff's shoreline, in Admissions Exhibit D (Appendix Exhibit 4).¹¹

The Plaintiff filed suit against the named Defendants asking for Damages and a Warrant of Abatement under a nuisance claim against Anderson, and a Writ of Mandamus against the County.

C. ARGUMENT

Orders granting Summary Judgment to the non-moving party (the Plaintiff) are reviewed by engaging in the same inquiry as the court and the evidence and the reasonable inferences therefrom most favorable toward the nonmoving party (the Plaintiff).¹² A trial court's grant of summary judgment is reviewed de novo under the summary judgment standard of CR56(c). A summary judgment is proper if reasonable persons could reach only one conclusion from the facts submitted and the facts are to be construed in favor of the

¹¹ CP125 - pg 5 #10 Admits "The document attached hereto as Exhibit D shows your Livingston boat tied up and/or stored on your floating dock structures during spring, summer, or fall." See clear color Exhibit 4 in Appendix

¹² Wn.2d 1, 929 P.2d 396 White v. State

nonmoving party (the Plaintiff).¹³ Courts, when interpreting the Shoreline Management Act RCW 90.58 the chapter, shall do so liberally to give full effect to the objective and purpose for which it was enacted which is to protect the shorelines of Washington State against violators.¹⁴

When anyone in Washington State decides to build or alter a structure or drive piles on the shorelines that person must get a permit.¹⁵ The Prosecuting Attorney for Clallam is required to enforce violations.¹⁶ The Plaintiff may pursue a

¹³ 161 Wn.2d 353, Qwest v. City of Bellingham

¹⁴ RCW 90.58.900 "This chapter is exempted from the rule of strict construction, and it shall be liberally construed to give full effect to the objective and purposes for which it was enacted."

¹⁵ RCW 90.58.030(3)(a) Definitions " 'Development' means a use consisting of the construction or exterior alteration of structures; dredging; drilling; dumping; filling; removal of sand, gravel, or minerals; bulkheading; driving of piling; placing of obstructions; or any project or a permanent or temporary nature which interferes with normal public use of the surface waters overlying lands subject to this chapter as any state of water level."

RCW 90.58.140(1) Development Permits "A development shall not be undertaken on the shorelines of the state unless it is consistent with the policy of this chapter and, after adoption or approval, as appropriate, the applicable guidelines, rules, or master program."

CCC 35.01.040(2) Permit Requirements "Any development regulated by this Chapter requires one of the following types of permit approvals prior to site preparation or construction of said activity."

¹⁶ RCW 90.58.210(1) " ... the attorney for the local government shall bring such injunctive, declaratory, or other actions as are necessary to ensure that no uses are made of the shorelines of the state in conflict with the provisions and programs of this chapter, and to otherwise enforce the provisions of this chapter."

CCC 35.01.130 (2) "The Clallam County Prosecuting Attorney shall bring such injunctive, declaratory, or other actions as are necessary to ensure that no uses are made of the shorelines of the County in conflict with the provisions and programs of this chapter or the Shoreline Management Act of 1971, and to otherwise enforce the provisions of this chapter and the Shoreline Management Act of 1971."

Warrant of Abatement.¹⁷ The Court through Judge Rohrer's Summary Judgment orders which favored the Defendant has denied the Plaintiff all access to the courts to adjudicate these facts and this claim.¹⁸

There is no dispute regarding the facts entered into this case through Admissions.¹⁹ Other than Warrant of Abatement, the Defendant did not argue in his Motion for Summary Judgment, nor did the judge identify anywhere in his final Orders or Memorandum that the Plaintiff had an alternative remedy than Writ of Mandamus. Indeed, by default the court certified the Plaintiff had no other remedy by signing the order dismissing the Plaintiff's warrant of abatement claim.

20

THE COURT BY SIGNING THE 2ND ORDER CERTIFIED NO OTHER ADMINISTRATIVE OR LEGAL REMEDY EXISTS, THEREFORE PLAINTIFF SHOULD BE ALLOWED TO PURSUE A WRIT OF MANDAMUS.

The court erred in its original order citing a 2nd reason to deny a writ of mandamus.²¹ The order contradicted

¹⁷ RCW 7.48.020 "Such a action may be brought by any person whose property is, or whose patrons or employees are, injuriously affected or whose personal enjoyment is lessened by the nuisance."

¹⁸ CP 140 page 2 ln 15 "The Mandamus claim ... is dismissed with prejudice."

¹⁹ CP 125

²⁰ CP 177 pg 5, ln 6 "Motion for Reconsideration is DENIED."

established case law regarding whether a judge can substitute the word "May" for the word "Shall" in interpreting law.²² The Prosecutor is required to enforce the law and it is not optional.²³ ²⁴ There are no exceptions in law that apply here that allow the Prosecutor to ignore his statutory responsibility. The court must give words in statute their plain and ordinary meaning unless a contrary intent is evidenced in statute.²⁵ It is well settled that the word "shall" in a statute is presumptively imperative and operates to create a duty.²⁶

THE COURT ERRED IN STATING THERE WAS A CONTRARY INTENT THAT APPLIES HERE THAT ALLOWS THE PROSECUTOR TO IGNORE HIS IMPOSED STATUTORY DUTY STATED AS "SHALL" STATED IN BOTH RCW AND CLALLAM COUNTY CODE.

The court in its order dismissing Plaintiff's summary judgment therefore also denied the Plaintiff access to damages

²¹ CP 140 pg 2, ln 4 Judge Roher wrote "There is no clear duty to act."

²² Eyman v. McGhee 173 Wn. App. 684 851 2013 ("Shall" is a mandate) Erection Co. v. Dept. of Labor and Industries 121 Wn.2d 513 518 1993 ("Shall" mandate) Crown Cascade v. O'Neal 100 Wn.2d 256 261 1983 ("Shall" creates duty)

²³ RCW 90.58.210(1) "... the attorney for the local government shall bring such injunctive, declaratory, or other actions as are necessary to ensure that no uses are made of the shorelines of the state in conflict with the provisions and programs of this chapter, and to otherwise enforce the provisions of this chapter.

²⁴ CCC 35.01.130(2) " The Clallam County Prosecuting Attorney shall bring such injunctive, declaratory, or other actions as are necessary to ensure that no uses are made of the shorelines of the County in conflict with the provisions and programs of this chapter or the Shoreline Management Act of 1971, and to otherwise enforce the provisions of this chapter and the Shoreline Management Act of 1971.

²⁵ 121 Wn.2d 513 518 Erection Co. v. Dept. of L & I

²⁶ 121 Wn.2d 513 518 Erection Co. v. Dept. of L & I

accessible to him through a conclusion in law stated by the Supreme Court in Ecology v. Pacesetter and restated years later in Hunt v. Anderson. The conclusion of law in Pacesetter states "Conclusion of Law No. 9 states: If one house sits far ahead of the others, then for that one person's financial benefit, he would be allowed to cause a drastic invasion into the aesthetics of the neighborhood and a tremendous financial loss to all of his neighbors".²⁷ The judge in this case here refused to read or acknowledge the Plaintiff's citation to this conclusion of law in open court or to address the conclusion of law in his written opinions and memorandum although the Plaintiff repeated demanded he do so.^{28 29} The judge in open court stated "I did not see it. I did not see it." when confronted by the Plaintiff why he was refusing to acknowledge the Conclusion of law cited presented in his Motion.³⁰

An illegal and un-permitted shoreline structure, as is the case here, Ecology v. Pacesetter, and Hunt v. Anderson, that blocks a valuable view, allows a Plaintiff to pursue the violator

²⁷ 89 Wn.2d 203 1977 Ecology v. Pacesetter "Conclusion of Law No. 9 ... a tremendous financial loss to all of his neighbors."

²⁸ RP 166A pg 29, ln 23 Rohrer states "I did not see it, I did not see it."

²⁹ RP 172 - no mention of Ecology v. Pacesetter Conclusion of Law No. 9

³⁰ RP 166A pg 29, ln 23 "I did not see it. I did not see it."

for damages.^{31 32} Leveling a boathouse roof and building a deck atop is always illegal with or without a permit.³³ Adding a screen structure to the illegal deck compounds the original violation further.³⁴

PACESETTER'S CONCLUSION OF LAW NO. 9 ALLOWS PLAINTIFF TO SEEK DAMAGES FOR SHORELINE VIOLATIONS - SPECIFICALLY A BLOCKED VIEW.

The Plaintiff also has a statutory right to pursue damages if the facts show Defendant violated the Shoreline Management Act and Clallam County Codes.³⁵ The Defendant admits the illegal structures he built blocked the view of the Plaintiff and indeed the sole purpose of the structure itself was to block the Plaintiff's view.^{36 37}

The Plaintiff has a property right to a view, protected by the United States Constitution, granted to him through zoning

³¹ 30 Wn.App. 437, 635 P.2d 156 Hunt v. Anderson "... the underlying findings establish that the loss of view substantially reduces the values of the shoreline properties ... thus entitling them to protection against that economic loss ..."

³² 89 Wn.2d 203 1977 Ecology v. Pacesetter

³³ CCC SMP 5.18-C-1.d " .. boathouses shall have sloped roofs with a minimum pitch of 3:1 (horizontal to vertical)"

³⁴ CCC 35.01.020(8) "... construction or exterior alteration of structures ... "

³⁵ CCC 35.01.130(3) "Any person ... who violates any provision of this chapter ... shall be liable for all damages to the public or private property arising from such violation."

³⁶ CP 125 Admit pg 4 #6, pg 6 #14, pg 7 #16 & #17

³⁷ See Exhibits in Appendix 4 & 5 from Admissions Exhibits E & F.

ordinance which the Plaintiff relied upon when he purchased his property.³⁸ Plaintiff has rights conferred by statute.³⁹

AS STATED THROUGH ASCHE V. BLOOMQUIST, RCW 90.58, CCC 35, AND CCC SMP - ZONING ORDINANCES GRANT A PROPERTY RIGHT TO THE PLAINTIFF THAT PROTECTS HIS VIEW COMPROMISED BY THE DEFENDANT'S ILLEGAL DECK AND STRUCTURE ATOP THE ILLEGAL DECK WITH THE ONLY PURPOSE INDEED BEING TO BLOCK THE PLAINTIFF'S VIEW.

D. Conclusion

For the reasons set forth above the Appellant respectfully requests that the Court reverse all the Summary Judgment rulings and Orders against the Plaintiff's motions and remands the entire matter back to Judge Rohrer's Clallam County courtroom for proper adjudication for Warrant of Abatement, Writ of Mandamus, and damages.

Respectfully Submitted this 21 day of January, 2015.


Stuart McColl, Pro Se

³⁸ 132 Wn.App. Asche v. Bloomquist 784, 798

³⁹ 22 Wn.App. 419, 428 61 P.33 Karasek; as cited in Asche v. Bloomquist

E. APPENDIX

Per RAP 10.3 (a)(8) The Appellant requests this court to allow these Exhibits to be attached here. They are contained in the record on review found in Anderson's Admissions, Designation of Clerk's Papers sub #125. The exhibits are the same exact picture exhibits referred to in the Admissions as Exhibit's A, B, C, D, E and F. They are included in this Appendix strictly for accuracy & clarity in an effort to preserve the original record.



Exhibit A - ADMISSIONS

Exhibit 1 - Appendix

appeals case 467238-3-II



Exhibit B - Admissions

Exhibit 2 - Appendix

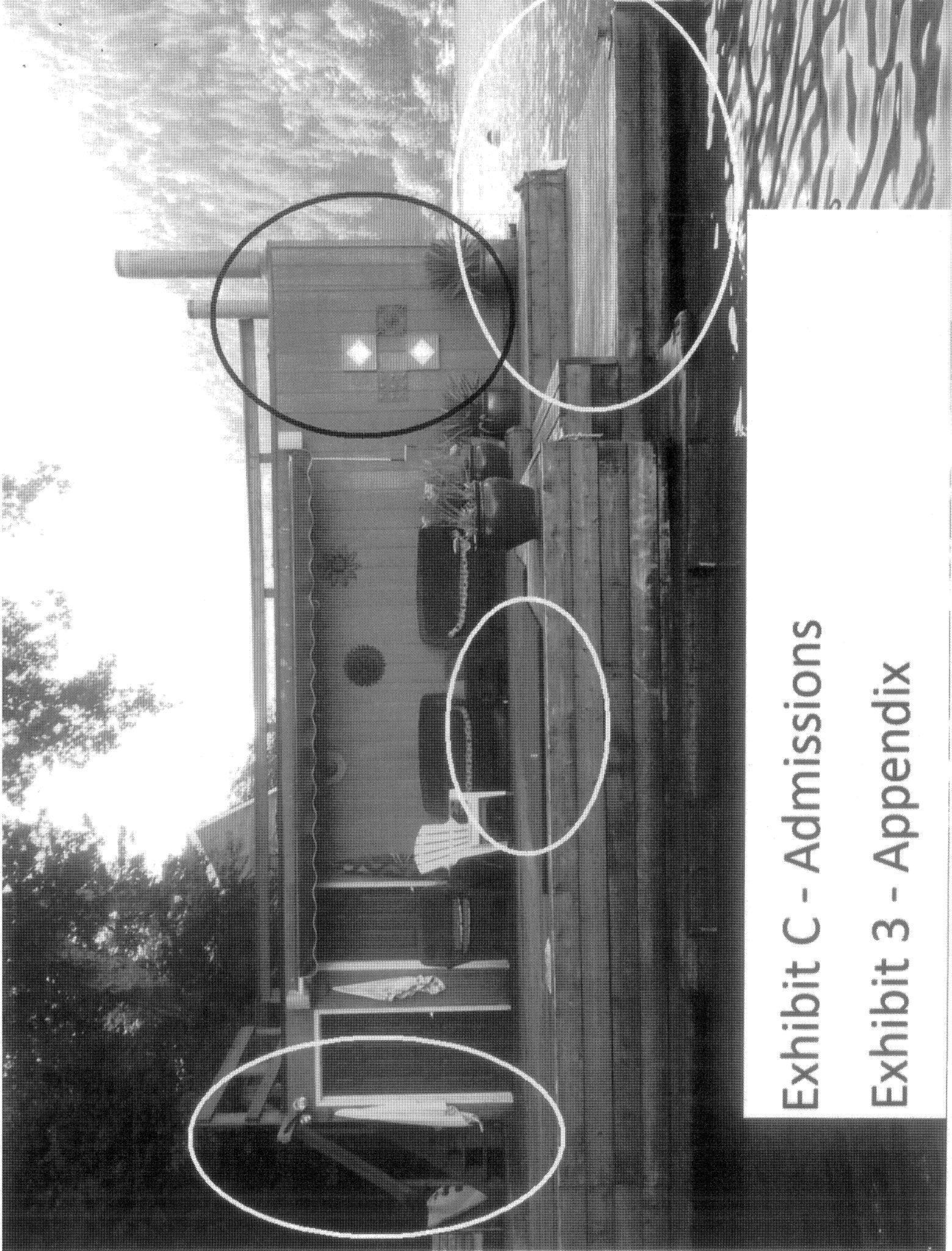


Exhibit C - Admissions

Exhibit 3 - Appendix

Exhibit D - Admissions

Exhibit 4 - Appendix

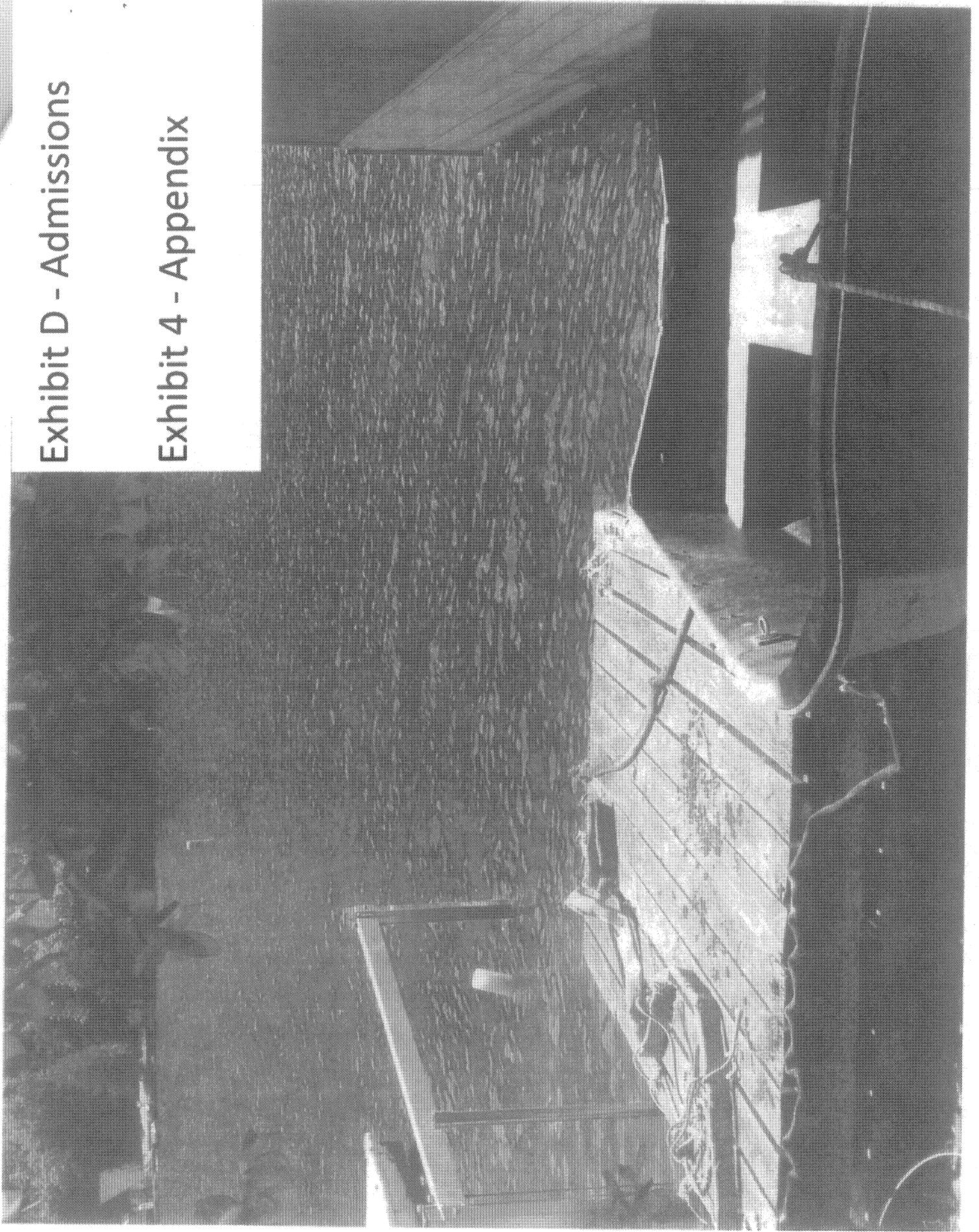
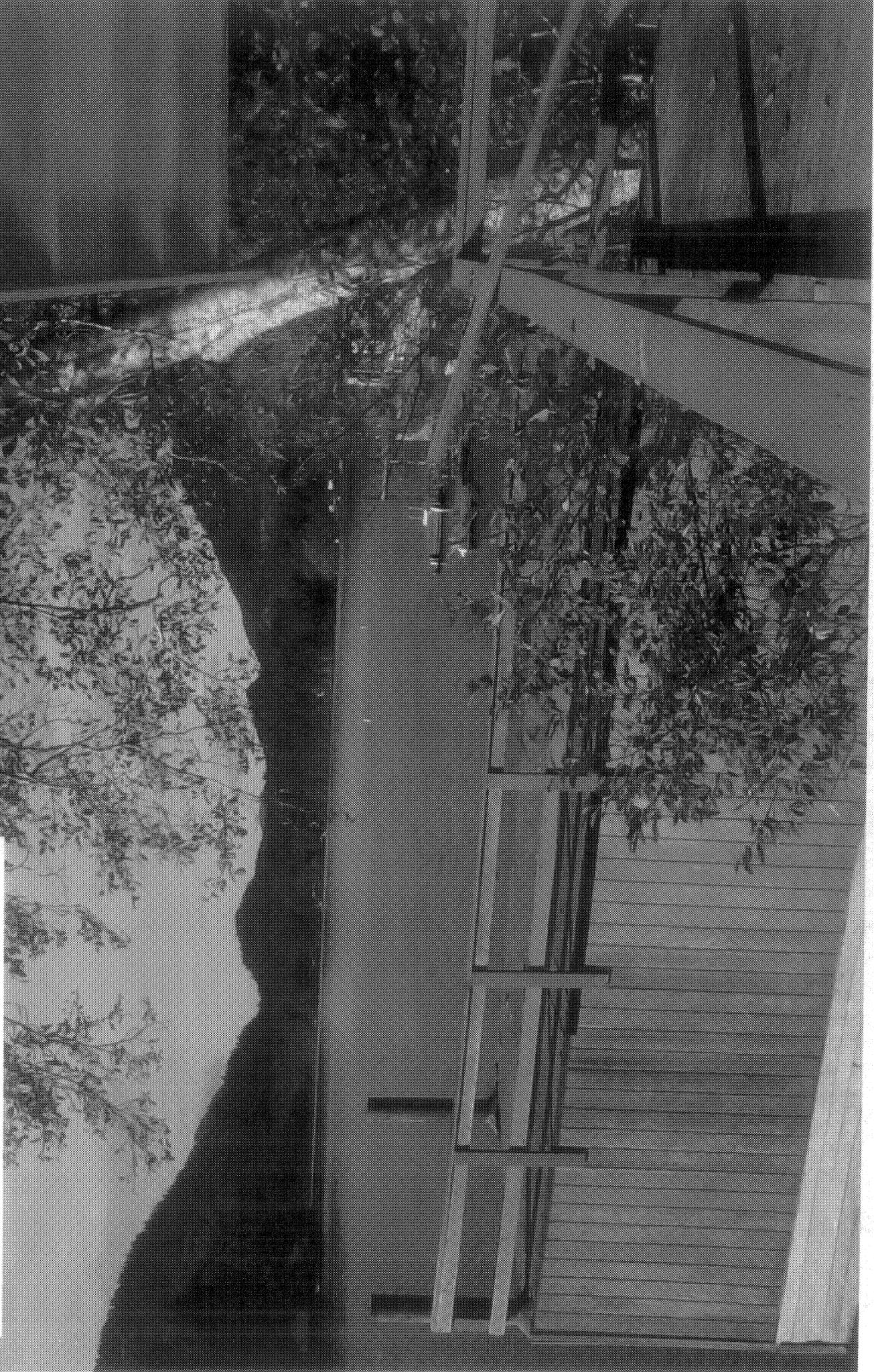


Exhibit E - Admissions
Exhibit 5 - Appendix



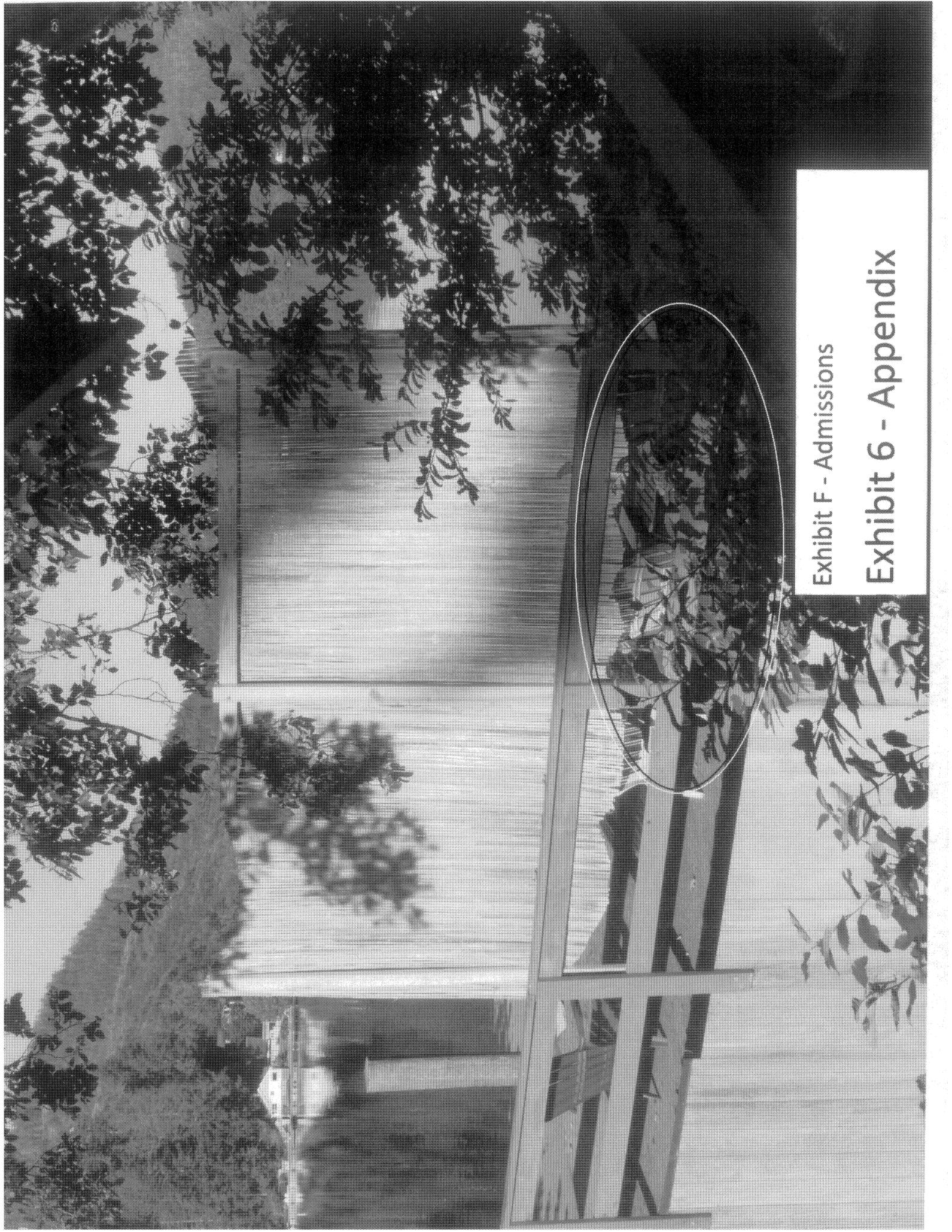


Exhibit F - Admissions
Exhibit 6 - Appendix

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DEPUTY

IN THE APPELLATE COURT OF WASHINGTON
IN AND FOR THE COUNTY OF CLALLAM

STUART F. MCCOLL, Appellant,

Plaintiff,

vs.

GEOFFREY A. ANDERSON, Respondent,

ADMINISTRATOR of the CLALLAM
COUNTY DEPARTMENT OF COMMUNITY
DEVELOPMENT, Currently Sheila Miller,
Respondent

PROSECUTOR of CLALLAM COUNTY,
Currently Will Payne, Respondent

Defendant..

Case No. 46728-3-II

Clallam County Case No.
13-2-00571-1

Proof of Service by Mail

TO: Mark Johnsen, Atty for Clallam County

On this day I deposited in the U.S. Mail a properly stamped and addressed envelope to:

KTC atty for Clallam County
701 5th Avenue, Suite 3300
Seattle, WA 98104

Containing 1 copies each of: Appellant's Opening Brief - refiled with 6 exhibits

I declare under penalty of perjury under the laws of the State of WA that the foregoing is true and correct, that I am at least 18 years old, and a resident of WA State, Executed at Sequim, WA this 21 day of Jan, 2015.

x Janet McColl Janet McColl

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PROSECUTOR of CLALLAM COUNTY,
Currently Will Payne, Respondent
Defendants.

Case No. 46728-3-II

Clallam County Case No.
13-2-00571-1

Proof of Service by Mail

TO: Dave Johnson, Atty for Anderson

On this day I deposited in the U.S. Mail a properly stamped and addressed envelope to:

Johnson, Rutz, Tassie atty for Anderson
804 South Oak
Port Angeles, WA 98362

Containing 1 copies each of: Appellant's Opening Brief - refiled with 6 Exhibits,

I declare under penalty of perjury under the laws of the State of WA that the foregoing is true and correct, that I am at least 18 years old, and a resident of WA State, Executed at Sequim, WA this 21 day of Jan, 2015.

X Janet McColl Janet McColl

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