

**BOARD OF VARIANCES AND APPEALS
REGULAR MEETING
August 27, 2015**

A. CALL TO ORDER

The regular meeting of the Board of Variances and Appeals (Board) was called to order by Chairman Abbott at approximately, 1:33 p.m., Thursday, August 27, 2015, in the Planning Department Conference Room, first floor, Kalana Pakui Building, 250 South High Street, Wailuku, Island of Maui.

A quorum of the Board was present. (See Record of Attendance)

Chairman Abbott: The meeting of the Board of Variances will now come to order, it is approximately 1:33 p.m. Let the record show we have a quorum.

C. APPEALS

Chairman Abbott: At this point I'm going to change it a little bit. Mr. Kolbe would you please come up and direct us with just a few comments before we get started and then we'll go back to our normal schedule.

Mr. Tom Kolbe: Ok thank you. Tom Kolbe on behalf of the County of Maui for all matters today. Just to give you an update on the two hearings that was set for an Appeal Hearing; the Copp/Munoz, NOV Appeal and the D&S Ventures Appeal.

The parties have been trying to resolve these matters and are able to resolve of them today and are going to be requesting a continuance of the other one for approximately six months, for a certain application to be filed with the department. So there won't be any hearing on either of those motions or either of those appeals today.

The third matter, Mr. Naiditch is here, and I'm ready to address whenever the Board would like to. I just wanted to give you the heads up on those evidentiary hearings.

Chairman Abbott: Thank you.

B. PUBLIC TESTIMONY

Chairman Abbott: Ok. We'll call public testimony.

Mr. Kolbe: Ok. Thank you.

Chairman Abbott: Please step up to the mic and give us your name please, appreciate it.

Mr. Peter Rohrer: Good afternoon Commission Members and Citizens of Maui County. My name is Peter Rohrer. I am here to personally report to this commission what's going on in my neighborhood and ask that you protect me and my tenants and neighbors from the noise.

My home of the last 44 years is adjacent to the agriculture property where North Shore Zip line operates a commercial, amusement activity in Haiku off Kauhikoa. About 5 ½ years ago my neighbor tore down my fence- - that's still down- - tore down hundreds of trees, put debris and boulders on my

property, built a commercial platform and strung cables from tree to tree and began selling tickets to the thrill seeking zip line.

By nature selling joyrides is selling the right for their customers to yell as loud as they want. Almost every day I wake to the screams of zip liners. There's a constant influx of people coming and going on rides all day. The ride operator yells over excited joyriders the same spiel, group after group, hour after hour.

There are people standing everywhere taking selfie pictures, videotaping their experiences and posting them on social media accounts. My friends have even seen my property and house on line.

The joyriders and thrill seekers who by passes from North Shore zip line ride the rides starting as early as 8:00 a.m. and leave as late as 6:00 p.m. or later, 6 days a week, 52 weeks a year. There's no escaping the loud and excessive noise. I've lost countless, thousands of hours of sleep. I've had to have therapy and medication for over three years and I continue to. There's only one day a week when my family, my tenants and neighbors- - all domestic animals and wild animals are subject constant horrendous loud noises of their amusement operations. Dogs bark often when they hear zippers.

The operation has significantly decreased the value of my property as well as my neighbors from the commercial noise we are forced to endure. It has also decreased my quality of life. I have been going to doctors for years and continue to. I have yet to see an environmental impact study of how this commercial activity affects humans, animals and the natural inhabitant of wild birds in our area.

Before my neighbor built his amusement park next to my home, there was a serene and tranquil - -it was serene and tranquil. Small birds such as cardinals and pheasants built their nest as long as I've lived here until the zip line was built and I've seen a significant decrease in their flocks now.

If this wasn't bad enough on February 22nd of this year, my neighbor decided he would trespass again on my property ...(inaudible)... and he built on to the existing platform facing my property. . . my house and increased it by three times its size its original size and put it directly in my face. Leaving me no privacy whatsoever, this platform was also modified with another large platform 30 feet above the original one with another new zip line running from it. The ride operators count it as its latest greatest zip line.

They are often as loud as the paying customers and often they point me out less than 100 yards away- - look at that fool taking pictures of us on his deck. The rope ladder that connects these two zip line platforms . . . the operators often shake and say when the customers are part way up- - "Hawaiian earthquake" promoting more screaming. When a lady who lives nearby kindly asks "Can you please ask the customers to keep the noise down a little?" they replied "F-ing No, we're here for the f-ing tips."

A commercial zip line is out of character in our peaceful, quite neighborhood. I've had a - - circulated a petition of all the closest neighbors, I got 46 signatures; I could get a 146 if I needed to. I have thousands of photos, DVD- - this committee is my only hope and that of my neighbors to stop and put off this commercial activity in my neighborhood.

Imagine if your neighborhood had a zip line activity next to your home. Who's going to stop them if not you? This tree that the platforms on, the closest one to me is a foot and a half off my property. I have no privacy whatsoever in my entire house. I can see them from my bed, from my living room, from my kitchen, from both my decks, from anywhere up top on my property.

This has made me feel like I'm living in a gold fish bowl, I have absolutely no privacy, it's constantly on my mind, they interrupt my day constantly- - there's no napping, there's no sleeping, I have sleep issues to start with. I rarely get to bed before 2:00 to 4:00 a.m. They wake me up at 8:00 a.m. This is surely speeding up my demise; and in our constitution aren't we guaranteed the right for freedom and happiness and perhaps sleep?

Can I go on? Do you want some more? I've got plenty more, I've got that much more- - Here's a petition, 46 people/neighbors signed it. I have letters, 12 letters from other close neighbors, the closest neighbors that live next to the zip line. I can share - - I have videos. Do you want to see a DVD of it in operation? A two minute DVD?

This is - - Sam, can you go on? I just can't . . . Can I talk some more? Or Sam, why don't you go for a while? Let me know if I can go longer, cause I've got lots.

Chairman Abbott: We understand your concern.

Mr. Rohrer: This is only one of the pages of the three that I wrote for this.

Chairman Abbott: We understand your concern and we're taking it all into our minds. But this is a matter that is in litigation with parties and attorneys and everything else. We will only be able to decide on the final result and until we get that, we cannot help anybody.

Mr. Rohrer: Alright, well I know that it is illegal to operate a zip line without a Special Use Permit which he hasn't had for years, and if it's a nuisance to the neighborhood, which obviously he is.

Chairman Abbott: You may Mr. Rohrer submit written testimony, if should you like.

Mr. Rohrer: Certainly. Like I said, I've got 12 letters from the closest neighbors, you should read them. I have letters from my doctors, you should read them.

Chairman Abbott: Then I would suggest you put it in whatever form is necessary, written and submitted.

Mr. Rohrer: Can you copy them right here? I have them with me.

Mr. Sam Schnider: We have a couple of them copied.

Chairman Abbott: Well, why don't you take an extra day or two, get them all together and submit them all at the same time. Cause then everybody has it. Ok, we can do it now; we can take one or two.

Mr. Rohrer: He's made my life a living hell.

Chairman Abbott: We understand your frustration. Hi sir, can you identify yourself please?

Mr. Sam Schnider: My name is Sam Schnider.

Chairman Abbott: Sam Schnider?

Mr. Schnider: Yes.

Chairman Abbott: Thank you.

Mr. Schnider: I represent Peter Rohrer but I also visited the zip line. I just wanted to point out that the zip line- - I took pretty much the ride as a rider, there's no mention during the whole zip line ride of any historical sites. There's no mention of any farming that's going on. There's one beat up jeep that gets passed very quickly. The guides spend all their time training on the equipment of the zip line, how to use the equipment, how to ride the ride - - and any of the archaeological stuff is completely absent from the actual tour itself.

So, it doesn't seem to me like there's any retention, rehabilitation or improvement of a site going on. I looked at a lot of other files about this man who runs the zip line- - he's a zip line guy, he does zip line business. He's done it in Clark County, Washington. He's done it in Skamania County, Washington. He does it without permits. Afterthought, he gets applications that try to describe the operation as an agricultural operation where he's carrying people on apple picking tours from one place of the property to another place on the property. It's always an afterthought and it's always just trying to figure out a way to describe something that is not agricultural as an agricultural tour.

I just wanted to point out that one of the issues here that is going on is that if it's really considered to being a permitted use in an AG zone, there's no going to be public input to whether the zip line is really permitted on this property. The whole point is - - AG zoning to get owners involved to get a certain amount of input on when AG zones are encroached upon and to allow these things to be matters of public debate. Peter obviously does want to be involved in the public debate.

The Special Use Permit process is designed to have owners come in and contribute to that whole discussion and figure out "Is this really the type of use that we want in this area?" Peter wasn't notified because of the procedural way that this appeal came up, it's not actually- - it doesn't need to notify owners around the 500 foot radius. So, the possibility that this would be something that doesn't need a Special Use Permit at all could be very hazardous to the whole area and to the whole zone in which this amusement park operation is going on.

We have a lot of other letters from other owners in the area, other testimony and we will submit that in a written form. There's a lot of people that are very directly affected by this and it's pretty much unanimous that there's not really farming going on and that this is not something that's about farming or history and it's just an amusement park.

Chairman Abbott: Thank you Mr. Schnider. Thank you Mr. Rohrer.

C. APPEAL (Continued...)

1. Determine a hearings officer to preside over the following matter:

JACK R. NAIDITCH representing **DAN BLESSING**, owner of **ISLAND CREAM**, Appeal of the Planning Director's decision to revoke sign permit S2015/0087 for a second business identification sign at the Lahaina Gateway Plaza which is located at 305 Keawe Street, #511, Lahaina, Hawaii; TMK (2) 4-5-011:008 (BVAA 2015/0003); (M. Balberdi)

Chairman Abbott: Ok. Will the staff read the agenda item and state the purpose of the application please?

Ms. Malia Balberdi: *Reads item into record.*

Chairman Abbott: Thank you. Is there a presentation?

Ms. Balberdi: No, there isn't.

Chairman Abbott: Mr. Kolbe.

Mr. Kolbe: Thank you Mr. Chair. It's my understanding that this is actually the hearing to go ahead and make a determination on whether or not this body is going to be ruling on this appeal or whether or not a hearings officer will be appointed.

Chairman Abbott: Correct.

Mr. Kolbe: So, I guess- - I represent the County and Mr. Naiditch can weigh in as he sees fit. But that's my belief of what's supposed to happen today.

Chairman Abbott: That's what we understood- -I understood also. Richelle?

Ms. Richelle Thomson: Thank you. So basically the Board can choose whether to hear the appeal yourselves, as you were going to with the other matters today. Whether you want to appoint an outside hearings officer or whether one of you wants to be appointed as the hearings officer and handle it outside and then report back to the Board. Either way, the Board makes the final decision, whether it's an outside hearings officer or if you want to hear it yourself, that's your option too.

My opinion is that this seems like a fairly straight forward matter, so you may want to keep it yourselves. But it's completely up to you. And I have a list of the hearings officers and the parties may have already consulted and come to an agreement if that's the route, if you wanted to choose an independent one.

Mr. Raymond Sung: Question for Corporation Counsel. If a hearings officer is chosen from the list, is that a taxpayer expense? Do the parties bear the expense?

Ms. Thomson: It's a taxpayer's expense.

Mr. Sung: But those outside hearings officer are compensated at their normal rates? Or at contract acted rates with the County?

Ms. Thomson: They are contracted rates.

Mr. Sung: Is it appropriate to ask what the hourly rates are?

Ms. Thomson: It's \$200.00 per hour.

Mr. Sung: Thank you.

Ms. Thomson: It's really up to you. Probably what you would want to do is just have a discussion about whether you feel comfortable handling the appeal yourselves or whether you'd like to go ahead and appoint an outside hearings officer or if one of you wants to be a hearings officer outside. . . then of course you'd be doing that for free.

Chairman Abbott: Questions from the Board or opinions or suggestions?

Mr. Jack Naiditch: Thank you. My name is Jack Naiditch; I just wanted to ask whether I can make a comment before you make a deliberation? It might help you in your deliberation.

Chairman Abbott: Please.

Mr. Naiditch: Mr. Kolbe and I have not discussed a hearing officer. I didn't know that Mr. Kolbe would be Corp Counsel representing the Planning Department on this matter. So, I haven't talked to him yet about that.

One of the things you might want to consider is given the nature of the dispute and I don't know whether you've had an opportunity to read the notice of the appeal, is that we're going to ask that the trier fact- - which would be you or the hearings officer make a site visit and look at the site. Because I think it's important in understanding that to make a decision.

So that's one of the consideration that you may want to consider, because we will ask for that. We think it's very necessary. I can tell you why now, but I think that once you read through this you'll see what the issues are and that a site visit is appropriate.

That's all I wanted - - I'll leave it to the discretion of the Board as to how they're going to decide as to whether there's a hearings officer. If you decide that there is a hearings officer, I'd like an opportunity to talk to Counsel to choose one if that's ok with you folks. And if we can't choose one then you folks can pick one. Thank you.

Chairman Abbott: Thank you.

Ms. Thomson: If you'd like to - -if the parties wanted to choose their own hearings officer you could give them 30 days to work that out. If they're unable to work it out, they could come back and then you could appoint one. So you can do it that way if you'd like, since they haven't had the opportunity to confirm and pick one at this time.

Chairman Abbott: Chad?

Vice-Chairman Fukunaga: So then that hearings officer would then report back to the Board ... (inaudible)...

Ms. Thomson: Exactly. So the hearings officer would basically handle all the collection of evidence and would make a report to you and propose findings of facts and you would consider that record and then you'd be the final decision maker. It kind of sounds like that's what I'd recommend, is that we give the parties 30 days to pick a hearings officer on your own, if you're unable to then come back to the body.

Mr. Naiditch: So my understanding, if we can determine a hearings officer then this case will be heard by hearing officer.

Ms. Thomson: Is that what the Board is leaning toward? Or did you want to keep it yourselves? Given the fact that the appellant is going to be asking for a site visit and it may be a little more difficult to get the entire Board out there. Or one of you could be the hearings officer.

Mr. Max Kincaid: This hearing officer would report back to the Board their findings.

Ms. Thomson: Correct.

Chairman Abbott: Whether it's one of us or the group as a whole, it's going to report back to the Board with all of the information gathered, required, garnished- - or the hearings officer would do basically the same thing on a paid basis. So if you Mr. Naiditch and you Mr. Kolbe want to hold for 30 days to discuss this, if you want to select a particular hearings officer, that's your privilege.

Mr. Naiditch: Thank you.

Chairman Abbott: I don't see- -

Mr. Sung: We should vote on it- -

Chairman Abbott: No, I understand. I'm just laying all things out on the open here. So, we have a motion to either - -

Mr. Sung: Actually, more discussion please.

Chairman Abbott: Pardon me?

Mr. Sung: More discussion please.

Chairman Abbott: More discussion?

Mr. Sung: Right. Is there anyone that can give us a meaningful ballpark estimate for how long in hours it would take for a hearings officer to come through the evidence and look at everything and then come to a recommendation to be submitted back to the Board?

Ms. Thomson: I'll probably ask Tom Kolbe for some information on that; maybe a ballpark range.

Mr. Kolbe: Ballpark figure . . . if we take aside the issue about a site visit which - - it's in Lahaina is what we're talking about. So it's an hour each way. That issue aside in my opinion this hearing shouldn't take longer than three hours.

Mr. Sung: So we're talking six hours- - \$600.00 at \$200.00 an hour plus travel time which may or may not be billed?

Mr. Kolbe: I don't want to speak for how long Mr. Naiditch's case would take. But again considering travel time I think six hours is probably more than enough time.

Mr. Sung: Mr. Naiditch, do you- - are you in agreement more or less with that? We're not talking about orders of magnitude difference?

Mr. Naiditch: We're not talking about order of magnitude whether it's a couple more hours, it may be, we have two witnesses, I don't know how many witnesses he will have, I don't know how cross-examination goes. So, my sense is its more realistic maybe five hours. But we're not talking about a huge- -we're not talking about three day trial.

Chairman Abbott: John, please.

Mr. John Rapacz: Thank you Mr. Chair and speaking as a former hearing officer on similar matters. It's going to depend on how much of the provided subchapter four contested case procedures are conducted. I agree that the hearing itself may take the number of hours that folks have been talking about, but there may be motions, there may be discovery issues, there may be subpoenas issued . . . there will have to be draft recommendation by the hearing officer, there may be an opportunity for the parties to present exceptions to that recommendation before all of that is presented to the Board.

And I think, probably if the parties avail themselves and the hearing officer allows it, most of those procedures I think realistically you're looking probably more like 40 hours all together. Even for a three hour hearing, there's so much else going on beforehand and afterwards.

Mr. Sung: That's \$8,000.00.

Chairman Abbott: Mr. Naiditch?

Mr. Naiditch: We will be giving the County a discovery request. We've gotten most of the documents already; we don't anticipate or have a motion to compel that because we don't anticipate the county's going to resist the discovery. I don't see any other motions that we have. I think the hearing officer can hear - - we're not going to file a motion for some prejudgment because the hearing officer can hear that at the hearing.

With all due respect to Mr. Rapacz, I don't think 40 hours is realistic I think that's a little bit excessive, I think it could be if it gets complicated it could be 20 hours, I think Mr. Kolbe's of the same view. Right Tom?

Mr. Kolbe: Mr. Rapacz does raise a good point which is that they have to develop to look at the record but then they have to write out their findings and recommendations to this Board. In my five or six hours I wasn't including that time, so that is true. In terms of discovery, I don't think that would add a significant amount of time to the hearings officer's billing - - which is that time to what the County has to do.

And in terms of motion work, I can envision one motion that I might file, however that really wouldn't significantly add to the time that the hearings officer have to take. So maybe it's not quite 40 hours- 20 hours seems a little closer to the number but it would be a little bit more than five to six. That's correct.

Chairman Abbott: Thank you. More discussion or questions? Howie? Pat?

Mr. Howie Kihune: My comment is first for this Board is do we have someone on this Board who wants to step up and take this position?

Chairman Abbott: I have thought along the same lines. My concern is does anyone other than Raymond who is an attorney, understand the legal ramifications and the presentation and the evidence and the motions and all of this other stuff? I don't.

And I think it is wise that we turn this over to somebody who knows how to do it. I know it is expensive, I understand that but it's also the best protection of everybody. That's my opinion.

So if there is no further discussion, I'm going to make a motion that we select a hearing officer for this particular matter and have the item then brought back to the Board for final approval.

Ms. Thomson: Just to clarify, are you going to give the parties a time period to identify a hearing officer on their own, from the approved hearing officer list and then if they can't reach an agreement come back - - give you 30 days?

Chairman Abbott: 30 days I think is more than adequate.

Ms. Thomson: Ok.

Mr. Naiditch: I would just suggest, my client has waited sometime before he filed, we filed this appeal. We would ask that we shorten the time for us to determine a hearing officer. Tom and I know each other very well, we can work this out much quicker and I would prefer just coming back in the two weeks from now when you have another meeting. You have it every two weeks- -every second Thursday?

Ms. Thomson: Right, twice a month.

Mr. Naiditch: Twice a month, so the next meeting, the next regularly scheduled meeting, if that's okay with Mr. Kolbe and give us that time frame to do this.

Ms. Thomson: Well, what we could do is if you have not chosen one, then you could come back, but if you have chosen one you don't need to come back.

Mr. Naiditch: No need, ok. Thank you.

Ms. Thomson: But I wanted to clarify since - - I would withdraw your motion and then just make it a new fresh one - -

Chairman Abbott: Ok, I'll withdraw that motion. Howard please.

Mr. Kihune: Comment. Would it be unreasonable Richelle, that this Board regardless could possibly have an outside counsel person going - - would it be unreasonable for us as a group to visit the site? Because I think based on what's being put forward here and what may be coming from our person or counsel . . . I think we probably may visually wanna see exactly what is in there . . . regardless of what the report says.

Ms. Thomson: I don't think that would be a problem as far as scheduling a site visit. In that case in given that this is a fairly discreet topic - -this appeal, so you may want to just hear it yourselves.

Mr. Sung: Comment. So I would build on Howard and Richelle's comments and really, if we are going to take the time to make a site visit, then we should hold off on making the decision to refer this to a

hearings officer or reserve it to the Board ourselves. Because it may be that once we get there, we can clearly see whether this is something of an order of magnitude that is appropriate to refer out to a professional hearings officer or it's something that we are capable of dealing with ourselves.

And I would certainly say just from my perspective, given the cost ballpark estimate, I think it's a material enough amount that if it's possible to save the county some money in our collective judgment, then maybe it's something that we should consider.

So I agree that if we do wind up doing a site visit, we should hold off on the decision on whether or not to refer to a hearings officer until after the site visit. Thank you.

Chairman Abbott: Question. Would the site visit require a majority or a quorum in order to be substantial or to substantiate or do we need a quorum to make a decision?

Ms. Thomson: Yes. It would be a meeting of the Board, so you would need quorum.

Chairman Abbott: We would need a quorum. But I mean would a quorum be necessary to actually go on the excursion? Would five people be required to take the bus/van to go over and look at the situation to report back to the Board? Or can two people – three people? I just want to cover all the bases here.

Ms. Thomson: It gets a little more complicated- - I don't know if staff has any recommendations on how to handle that or Tom may? Thanks.

Mr. Rapacz: Thank you Mr. Chair. My understanding is that for the Board to gather at a site visit, there has to be a quorum. And that's not because there's going to be a vote or a decision taken but just because it is a meeting of the Board.

Mr. Kolbe: If I could just add one wrinkle to that. I want to avoid the situation in which it's possible that the members that would vote to either grant or deny the appeal hadn't considered all of the testimony and all of the evidence that's put before them.

So the one issue you may want to consider is that if you do schedule a site visit and you only have five people, there may be issues with 91-11 H.R.S. which requires those other folks to either not vote or to go out and do a site visit themselves.

So I just throw that out there as one more wrinkle in terms of whether you need a quorum, you also need to - - when you vote, have considered all of the evidence.

Mr. Sung: Hi Tom, just for clarification, your concern is that the considering of all the evidence is not on the initial vote of the Board on whether to refer to an officer or not but on the ultimate vote of the matter on appeal?

Mr. Kolbe: Yeah, that's correct. So in other words- - absolutely- - I don't think we need everybody to consider that to decide if you want a hearings officer.

Mr. Sung: Right. Thank you.

Chairman Abbott: John?

Mr. Rapacz: Mr. Chair, also I understand the Board's reasoning for the consideration that if there's already a site visit, it is more conducive to having the whole Board hear the matter but bear in mind that the Board would also have to gather to make decisions on any questions that come up before the actual hearing itself. The Board would have to hear any motions and rule on those motions. The Board would have to rule on any discovery issues if there are any and the Board would have to meet to do all of those things, in addition to the site visit and the hearing itself.

Mr. Sung: John, would those be special meetings or regularly scheduled meetings on Thursdays?

Mr. Rapacz: That would be up to the Board.

Mr. Sung: Ok. Thank you.

Chairman Abbott: I'm sorry I didn't hear that last part.

Mr. Rapacz: That would be up to the Board whether they would hold special meetings to handle all of those pre and post hearing matters or whether they would just schedule those matters for a regularly scheduled meeting.

Chairman Abbott: Thank you.

Mr. Sung: One last question for staff. In recent memory, how many times has this Board decided to not refer it to an outside hearings officer? And either reserve the hearings matters for itself or to one of its members?

Mrs. Carolyn Cortez: Hi Carolyn Cortez with the Planning Department. As far as I know, the Board has always referred it to a hearings officer.

Mr. Sung: Thank you.

Chairman Abbott: That's what my memory says too.

Mr. Kolbe: I know I personally have done one before the BVA.

Ms. Thomson: And you had two on your schedule today.

Chairman Abbott: I still think that in the light of all of the information that's been passed back and forth, the opinions of Counsel and Planning Department, I still think it's wise in this particular instance to refer it a hearings officer on their choice. If they say they can do it in two weeks, then I feel we could probably schedule it for the next meeting which is September - - something, I don't know what it is right off hand.

Ms. Balberdi: September 10th.

Chairman Abbott: But that's my opinion. And I would make that motion, if that is sufficient with Richelle to what I've covered.

Ms. Thomson: So just to kind of rephrase. You're moving to authorize the parties to jointly select a hearings officer if they're unable to select one then they would need to come back before the Board on the next hearing date.

Mr. Naiditch: No need to come back to the Board if we select one?

Ms. Thomson: Right. Is that what you were looking to do?

Chairman Abbott: Yes, and that's fine. That's my motion.

Mr. Kihune: Second.

Chairman Abbott: We have a second. Any discussion? I'll call for a vote. All those in favor of the motion say "Aye." Any opposed, please say "No."

Members: "Aye."

Chairman Abbott: Any "Nos?" No. We're **granting the hearings officer** with all of the stipulations set forth by Richelle, either two weeks or whenever we get it done. But let's do it right and let's not worry about it. I just want everybody to be fair and I'm not a lawyer. Thank you very much.

Mr. Naiditch: Thank you very much.

Chairman Abbott: Thank you.

It was moved by Chairman Abbott seconded by Mr. Kihune then,

VOTED: Motion to grant the hearings officer to be chosen by parties.

(Assenting: G. Abbott, C. Fukunaga, P. DePonte, T. Espeleta, H. Kihune, W. Greig, R. Sung. J. Reyher-Colon, M. Kincaid.)

C. APPEAL (Continued...)

2. **KEITH KIRSCHBRAUN OF WRIGHT & KIRSCHBRAUN** representing **ROBERT E. COPP JR. AND DOROTHY M. MUNOZ** Appeal of the Planning Director's Notice of Violation (NOV 2014/0013) for the zip line activity within the County's Agricultural District without a Special Use permit pursuant to §19.30A.060 (H), Maui County Code, for property located at 2065 Kauhikoa Road, Haiku, Maui, Hawaii; TMK (2) 2-7-012:086 (BVAA 2015/0001)

Chairman Abbott: Ok. We'll now item #2 on the agenda.

Ms. Balberdi: *Reads item into record.*

Chairman Abbott: Thank you. Is there a presentation?

Ms. Balberdi: No, there isn't.

Chairman Abbott: Will the applicant please come forward, speak into the mic, state your name and are you agreeable to waiving of the reading of the staff report?

Mr. Paul Horikawa: Hi! Good afternoon Mr. Chair and members of the Board. My name is Paul Horikawa and my clients will waive the public reading of the notice as well as the staff report.

Chairman Abbott: Thank you. Please proceed.

Mr. Horikawa: Just one matter of clarification. I know that the appeal as filed by the Law Firm of Wright and Kirschbruan, earlier this week- - I believe it was on Tuesday, I filed a withdraw in substitution of counsel by which I now represent the appellants in this matter, Mr. Copp as well as Mrs. Munoz.

Chairman Abbott: Mr. Kolbe?

Mr. Kolbe: Hi, Tom Kolbe on behalf of the County. This case has been resolved. By way of agreement with Mr. Horikawa and his clients, the County is dismissing with prejudice the Notice of Violation that was issued against Mr. Copp and Mrs. Munoz on this property and therefore would render this appealed move. I don't think anything else needs to happen in this particular case.

Chairman Abbott: Ok. Thank you.

Mr. Horikawa: Yes, Mr. Chairman and Members of the Board we had extensive negotiations with the county and as a result of those negotiations, it's my understanding that the Planning Director will be dismissing the Notices of Violation that were issued on December the 11th of 2014; and that's the subject of this particular proceeding.

I would note and because Mr. Rohrer is here and he expressed some concern. There was a finding by the Circuit Court in June of last year in which the Circuit Court found that Mr. Copp and Mrs. Munoz had nothing to do with the zip line that Mr. Rohrer is complaining about. They don't live close to the property; they didn't participate in the construction of the zip line.

In fact, as far back as 2009, they had filed complaints with the County about the zip line being constructed, they filed numerous complaints and these are in the exhibits that would've been presented to the Board in which they complained about what was being done on the properties, specifically what was done with respect to the zip line.

My understanding is that Mr. Hoyte or his company - - they had cut lines similar to what Mr. Rhorer had mentioned to you earlier today, they had cut the lines and chased cattle of the property. The property had been rented or leased from pasture purposes but they were basically- - those individuals and their cattle was basically driven off the property.

So my clients really had nothing to do with the property. My- - Mr. Copp and Mrs. Munoz, I think there more than 80 years of age and so- - they filed these complaints awhile back and one of the things that happened is that they were made parties to a lawsuit, which I can understand that; that was Mr. Rhorer's lawsuit.

But they really have had nothing to do with this in fact, they've objected to the filing of the zip line itself. I think Mr. Kolbe and my clients would like to thank Mr. Kolbe as well as staff for their understanding of what happened in this case and I think this is the correct result; in which my clients had nothing to do with the zip line and it's being dismissed, and I think that's proper and I would ask that the Board go along with that.

Ms. Thomson: My understanding is that no further action needs to be taken by the Board at this time.

Chairman Abbott: Ok. Thank you.

C. APPEAL (Continued...)

- 3. CALVERT G. CHIPCHASE AND CHRISTOPHER T. GOODIN OF CADES SCHUTTE LLLP** representing **D & S VENTURES, LLC** Appeal of the Planning Director's Notice of Violation (NOV 2014/0013) for the zip line activity within the County's Agricultural District without a Special Use permit pursuant to §19.30A.060(H), Maui County Code, for property located at 2065 Kauhikoa Road, Haiku, Maui, Hawaii; TMK (2) 2-7-012:086 (BVAA 2015/0002)

Chairman Abbott: Ok Malia will you call the next item 3 on the agenda please?

Ms. Balberdi: *Reads item into record.*

Chairman Abbott: Is there a presentation?

Ms. Balberdi: No, there isn't.

Chairman Abbott: Mr. Kolbe?

Mr. Kolbe: Hi, thank you. Tom Kolbe on behalf of the County. Mr. Chipchase and Mr. Goodin are attorneys from Honolulu and basically what happened is earlier this week, they flew over and met with members of the Department and worked out an agreement that we would defer hearing on this particular Notice of Violation for a period of six months. So they can have the opportunity to go ahead and to submit the application which is in the title that they operated this particular use without the Special Use Permit.

So our agreement was that I could come here and advise this Board of this request for the continuance. Six months was chosen kind of arbitrary to try to decide a date where a subdivision application would likely be completed or at least could've been completed. As well as some action on the Special Use Permit, which they've agreed to apply for.

Mr. Rohrer. . . I also understand his concerns and I will just say this . . . that a Special Use Permit of this type would be the type of hearing that would be public and folks would have the opportunity to weigh in on it, perhaps to intervene or whatever types of remedies that they have as neighbors to comment on this Special Use Permit.

So my request today is for a continuance to one of the February calendars to revisit this issue and this particular appeal and to not take any further action while the permitting process and the subdivision applications are being processed.

Chairman Abbott: Thank you.

Mr. Sung: Question for Corporation Counsel. Richelle, are there any deadlines and automatic triggers that would occur but for our requiring those deadlines to be told in order to grant the continuance.

Ms. Thomson: Not if the continuance is requested by all the parties then you don't trigger any automatic deadlines.

Mr. Sung: Thank you.

Chairman Abbott: Howie?

Mr. Kihune: Question for Mr. Kolbe. Is there any reason why or is there going to be continued use of the property as a zip line for the next six months?

Mr. Kolbe: Yes.

Mr. Kihune: And why would that be? Because he is in violation . . . so my recommendation would be that he would have to cease all operations for the remainder of the time until he applies and gets everything together because he's operating illegally.

Mr. Kolbe: Let me say this as attorney for the County, some of the issues that you raise are the types of questions and issues that I think would need to be discussed in Executive Session, because they go the legal rights and obligations of the County.

I'll tell you this, that generally speaking due process right issues come up anytime that there is a granting or denial of a permit and we are here at this particular hearing where the applicants, the appellant's of the - - of our decision have told us that we're wrong. So, one of the issues that we're going to be arguing about is the legality of whether or not they even need a Special Use Permit.

I can go into further detail but at this point, the Department is not going to be taking that particular type of action unless it's ordered to.

Mr. Kihune: No I understand. I appreciate it.

Mr. Sung: Can we go into Executive Session for further discussion?

Ms. Thomson: We just need to clearly state on the record the purpose for the Executive Session and then we can vote to go in.

Mr. Sung: Essentially to clarify the matters that Tom said he would not be able to do but for Executive Session.

Ms. Thomson: Ok. Tom's not going to be allowed to be in Executive Session. It's just going to be us. Ok, just so you know.

Mr. Sung: Will you need a briefing from Tom in order to be able to brief the Board properly?

Ms. Thomson: No, I can't actually confer with Tom, so that would be a conflict. But I can discuss with you some of your options related to taking action on this matter.

Mr. Schnider: I would like to make a brief notification.

Chairman Abbott: Excuse me Mr. Schnider, you were given a chance to speak before I called - - gave you the opportunity to speak before your item was called to give you the time. You've already spoken; right we're stuck with another way to go here.

Mr. Schnider: This is actually about we plan to notify that we will be looking into filing a motion to intervene.

Chairman Abbott: Well, that should be done not through the Board. That's through your attorneys. Is that correct?

Mr. Schnider: ... (Inaudible)...

Ms. Thomson: It depends on the type of matter as to intervention and the respective deadlines.

Chairman Abbott: Anybody want to make a motion to go into Executive Session?

Mr. Teddy Espeleta: I make a motion.

Mr. Sung: Second.

Chairman Abbott: And seconded. Any discussion? All in favor say "Aye."

Members: "Aye."

Chairman Abbott: Any nos? No nos. The Board will now go into Executive Session.

It was moved by Mr. Espeleta seconded by Mr. Sung then,

VOTED: Motion to move into Executive Session.

(Assenting: G. Abbott, C. Fukunaga, P. DePonte, T. Espeleta, H. Kihune, W. Greig, R. Sung. J. Reyher-Colon, M. Kincaid Jr.)

EXECUTIVE SESSION: 2:23 p.m. to 2:45 p.m.

Chairman Abbott: Ok the hearing is now back in session.

Ms. Thomson: Just to remind everybody of where we're at. We're considering whether or not to grant the joint request of the parties to defer the hearing on the appeal for item number C.3 for six months. That is the current request.

Chairman Abbott: Thank you. Any discussion? Comments? Is there a motion?

Mr. Sung: I'd like to make a motion Chair.

Chairman Abbott: Thank you, please.

Mr. Sung: I would move to grant the parties a continuance but not for six months but rather for a shorter reasonable time provided that the appellant submits the appropriate applications for a permitted use. Is that the right terminology?

Ms. Thomson: Special Use.

Mr. Sung: A Special Use Permit. The concern here is that we really think that six months is a long, long time. And we would really like to see the parties be incentivized to not delay given the concerns of third parties that we are now made aware of.

So the idea would be that if this Board settles upon a shorter reasonable time than six months, and we know that the appellant is going through the motions to diligently prosecute the application for a Special Use Permit, then we would be amendable to a continuance and we would require a progress report at the end of that shorter period and if no progress has been made or not sufficient progress has been then this Board can reserve the decision on whether or not to go forward with the appeal.

I'd like to hear during discussion I guess, on any ideas on what the appropriate shorter period would be.

Chairman Abbott: Mr. Kolbe.

Mr. Kolbe: I don't mean to interrupt, but I can cut to the chase a little bit and then part of the requirements or agreements that we've reached is that they will submit their Special Use Permit within a specified time that's less than 30 days.

So, if you wanted to set that, I can amend my request for a continuance to provide you a progress report that the application has been submitted. And if that would help move things along in light of your concerns about the timeliness of this, that's no problem. And I believe that - - I can't speak for Mr. Chipchase, but I think that his client would also agree to that in light of the fact that-that's what's planned in any event.

Mr. Sung: So are you saying that you would be amendable to modifying your request from six months to one month?

Mr. Kolbe: Well, the reason we chose six months is that's pretty much the shortest amount of time that the subdivision agreement probably could be processed. The Special Use Permit is going to have to go through public noticing and a number of other things. So it's not realistic that they could get the Special Use Permit any sooner than six months and that's the earlier end of things.

Could I maybe suggest that we provide you with a progress report 30 days from now and/or come back for hearing on the 30 days?

Ms. Thomson: I have maybe a workaround here- - you could pick a time frame at which they need to come back for a status report and on that date- - not that-that would be the scheduled hearing date, but on that date, the Board will decide whether or not to reset the appeal hearing.

Mr. Kolbe: That's fine with the County and I'm pretty sure that Mr. Chipchase would be able to get agreement from his client. So if that's what you would like to do, we can certainly move this along and provide you with information about the status of the Special Use Permit.

Mr. Sung: So just for clarification, is the suggestion that it's possible to rather than grant a six month or three month kind of continuance to grant it 30 days at a time conditioned on satisfactory progress reports?

Ms. Thomson: If that's what the Board wishes.

Vice-Chairman Fukunaga: I have a question for Mr. Kolbe. So you say you have an agreement that they would submit certain applications within 30 days, what if they do not submit within 30 days, do you have in your agreement what would happen then?

Mr. Kolbe: We haven't reached a settlement agreement in this case. What we've done is we've agreed to defer this hearing so that they can submit their application but I will represent to that their time frame is actually within 10 days.

So I think that the application is forthcoming soon. We don't have any particular penalty built into this discussion in terms of what happens if they don't submit it. But obviously if they don't submit then we would be going forward with our hearings and- - 'The parties haven't waived any of their legal remedies in terms of how this would all work.

Mr. Sung: Just out of curiosity, will you have the ability to seek injunctive relief if they're not keeping to their agreement and timetable?

Mr. Kolbe: Yeah, the way the violations are setup- -injunctive relief through the Circuit Court is something that can seek.

Mr. Sung: Sorry, affirmatively you are allowed to seek?

Mr. Kolbe: That's an option that I think is built into the ordinance. We could seek injunctive relief through the courts, through the circuit court.

Chairman Abbott: Ok, so we have a motion.

Ms. Thomson: For clarity, it'd probably be better to restate your motion.

Mr. Sung: Well then is Tom going to modify his request on the six months or are we just going to keep it at there and we're just going to make the motion on our end as to modifying the time?

Ms. Thomson: I think you can just make it on your end.

Mr. Sung: So, if I have this correctly and please jump in if I don't. I would move to grant the parties a 30 day continuance with the requirement of the submission of a progress report to this Board either before or no later than the end of that 30 day period and the Board would then reserve the discretion to further extend the continuance or not depending on the progress report and other factors that this Board may appropriately consider.

Chairman Abbott: We have a motion, do we have a second?

Mrs. Reyher-Colon: I second.

Chairman Abbott: We have a motion and a second. Any discussions or questions?

Vice-Chairman Fukunaga: I'm not quite sure exactly where that 30 day falls . . . but say if it's one day after our second meeting from now then I think we have one day ... (inaudible)... and then they'll have another two weeks so perhaps we should say the day before our second meeting from now.

Chairman Abbott: I believe John has something- -

Mr. Rapacz: That would be September 24, would be the meeting closest to 30 days.

Chairman Abbott: The start of the 30 days begins today?

Mr. Sung: As opposed to a number of days.

Ms. Thomson: So if you wanted to amend the main motion, you could amend it so that the progress report must be made to the Board on the September 24th meeting. So then we can schedule it as a regular item.

Chairman Abbott: Ok. That starts the count down.

Mr. Sung: I so amend my motion to require the progress report by September 24th. Close of business, or first thing?

Ms. Thomson: If you schedule it for that meeting, then they're going to have to submit obviously prior to.

Mr. Sung: So we would schedule it for the September 24th meeting. Is that clear enough for staff?

Mrs. Carolyn Cortez: Carolyn Cortez with the Department of Planning, if you put the deadline as September 24, 2015, the information will not be in your packet. I mean I guess Tom would just appear here before you in person.

Mr. Sung: As far as the progress report? I think that's sufficient.

Mrs. Reyher-Colon: Yeah.

Mr. Sung: I'd be ok with that. Ok. Motion still made.

Vice-Chairman Fukunaga: Second.

Chairman Abbott: Second. Ok. Discussion?

Mr. Kihune: I'd like to make a comment, regarding this whole issue and I still think as I stated before, it's just difficult to allow a business who is in violation to continue on without the permit. I know we're talking about the applicant or the owner applying for a Special Use Permit, but, I just need to make that comment and make that statement.

He's in violation, it's more asking for forgiveness then asking for permission and legally I know it's in his right to do so, but it doesn't sit very well and I don't think it sits well with the neighbors and the surrounding property owners and I just needed to make that comment.

Chairman Abbott: Thank you. I concur.

Vice-Chairman Fukunaga: I just like to say "allegedly", you don't know that he's in violation.

Mr. Sung: I would also say that I appreciate Corporation Counsel's forthrightness and explanation; and it is mentioned that the Statue does provide for injunctive relief, if that's what the Department of

Corporation Counsel decides to do. Obviously it's within their discretion; I would just first of all hope that the applicant keeps to its deadlines and its agreement. But in the event that it does not, I would hope that's basically all it is- - hope that the Corporation Counsel Department would strongly consider all of its options including the injunctive relief available to it by law. Thank you.

Chairman Abbott: Any further discussion? We have a motion and a second. All in favor of the continuance with the rules set forth by Counsel and Mr. Sung and Mr. Kolbe, I'll call for a vote. All in favor say "Aye."

Members: "Aye."

Chairman Abbott: Any opposed? Thank you. **Continuance is granted** with the request and the modifications and requirements, so noted.

Mr. Kolbe: Thank you.

Mr. Kihune: Thank you.

It was moved by Mr. Sung seconded by Vice-Chairman Fukunaga then,

VOTED: Motion to approve continuance of item and request for progress report to be given to Department of Planning by September 24, 2015.

(Assenting: G. Abbott, C. Fukunaga, P. DePonte, T. Espeleta, H. Kihune, W. Greig, R. Sung, J. Reyher-Colon, M. Kincaid Jr.)

D. APPROVAL OF THE JULY 9, 2015 MEETING MINUTES

Chairman Abbott: Ok. Moving on, as we have no minutes to approve, I think we'll waive that part.

E. NEXT MEETING DATE: SEPTEMBER 10, 2015

Chairman Abbott: Any new business? Any discussion? If not, the next meeting is September 10th.

F. ADJOURNMENT

Chairman Abbott: Ok. Meeting is adjourned.

There being no further to come before the Board, the meeting adjourned at 2:57 p.m.

Respectfully submitted by,

Chalsey Kwon

CHALSEY R. K. KWON
Secretary to Boards & Commission II

Board of Variances and Appeals
Approved Minutes-August 27, 2015
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RECORD OF ATTENDANCE

Members Present:

G. Clark Abbott, Chairman
Chad Fukunaga, Vice-Chairman
Patrick DePonte
Teddy Espeleta
Howard S. K. Kihune
William Greig
Raymond Sung
Juanita Reyher-Colon
Max Kincaid Jr.

Others:

John Rapacz, Planning Program Administrator, Department of Planning
Carolyn Cortez, Staff Planner, Department of Planning
Malia Balberdi, Staff Planner, Department of Planning
Chelsea Rabago, Staff Planner, Department of Planning

Chalsey Kwon, Secretary to Boards & Commission II, Department of Planning
Richelle Thomson, Deputy Corporation Counsel, Department of the Corporation Counsel