

**MAUI PLANNING COMMISSION
PORTION OF REGULAR MINUTES
ITEM E-1, F-1 AND F-2
JANUARY 24, 2017**

Chair Tsai: You want to start it? Well, alright. You guys all right with continuing. Okay, so Director?

Mr. Spence: Okay, Commissioners we are on Agenda Item E, Number 1. This having voted on the D&S Ventures County Special Use Permit application by Mr. Derek Hoyte for the Camp Maui Project. We have prepared a draft Decision and Order and this is here for your consideration. I note that on number F-1, also for D&S Ventures the applicant has filed a Motion to Reopen the Hearing and we should probably I don't know which you want to take up first?

Chair Tsai: Corp. Counsel?

Mr. Giroux: You know what you can do is call them all up on the agenda and then we can decide in what order because if you do the cart backwards it's gonna affect...if the D&O, if you wanna defer the D&O until you clear up those two other motion that's your choice.

Chair Tsai: But what about the public hearing or testimony?

Mr. Giroux: Yeah, we need to get that on the record.

Chair Tsai: Bu we gotta do that after we figure out which order we're gonna do it at, right?

Mr. Giroux: Yeah.

Mr. Spence: Carolyn can you hear this? Gentlemen you must speak into the microphone.

Chair Tsai: Sorry, we're trying to figure out logistic how we're gonna proceed here, since we have multiple items.

Mr. Giroux: Yeah and again it's gonna be the matter of sense that you know, how these motions are gonna affect each other and then in what sequence that the board wants to take them up. So the Chair...if you wanna make a call and just say you know which of these you wanna pick up first as far as efficiency and if the board has an issue with your decision they can...we can discuss that. But again, it's just a matter of putting the cart before the horse or we can call all of these up on the agenda, take public testimony and then figure out what motion you wanna start debating or hearing from first.

Chair Tsai: Let's go with that. So let's take up all the items and then we're gonna open the floor for public testimony regarding this. So—

Mr. Giroux: Got to read it all into the record.

Chair Tsai: Yeah.

Mr. Giroux: The motions.

Chair Tsai: So Director?

Mr. Spence: There's a motion to take it all up?

Mr. Giroux: No, no, no just to make sure that we have all of the items on the agenda.

Mr. Spence: Okay, so Commissioners we're taking up E-1, the Draft Decision and Order regarding the County Special Use Permit regarding Mr. Derek Hoyte of D&S Ventures LLC, for Camp Maui. We're also taking up Communications Item F-1 and F-2. F-1 is the applicant, D&S Ventures LLC, Motion to Reopen the Hearing on its request for a County Special Use Permit for existing unpermitted outdoor recreational activities. And then Number 2 is also applicant, D&S Ventures, Motion to Amend Its Application for a County Special Use Permit for existing unpermitted recreational activities.

E. ADOPTION OF WRITTEN DECISION AND ORDERS

1. **Having voted on July 12, 2016 to deny the County Special Use Permit application by MR. DEREK HOYTE of D&S VENTURES, LLC for the Camp Maui Project in order to retain, rehabilitate, and improve a historic site with accessory guided tours including a challenge course, museum, zipline, and onsite parking on 17.519 acres in the County Agricultural District at 2065 Kauhikoa Road, TMK: 2-7-012: 086 (por.), Haiku, Island of Maui. (CUP 2015/0002) (P. Fasi)**

The draft Decision and Order was prepared by Planning Department staff and reviewed by the Department of the Corporation Counsel.

- a. **Applicant D AND S VENTURES, LLC's Objections to Draft Findings of Fact, Conclusions of Law and Decision and Order Denying Request for a County Special Use Permit; Exhibit A (Applicant D and S Ventures, LLC's Exhibit List with the Exhibits attached thereto); Exhibit B (Applicant D and S Ventures LLC's [concurrently filed] Motion to Reopen Hearing on its request for a County Special Use Permit for existing unpermitted outdoor recreational activities at Camp Maui, Haiku, Maui, Hawaii); Exhibit C (Applicant D and S Ventures, LLC's [concurrently filed] Motion to Amend its Application for a County Special Use Permit for existing unpermitted outdoor recreational activities at Camp Maui, Haiku, Maui, Hawaii); Certificate of Service received on January 17, 2017. (P. Fasi)**

AN EXECUTIVE SESSION MAY BE CALLED IN ORDER FOR THE COMMISSION TO CONSULT WITH THEIR ATTORNEY ON QUESTIONS AND ISSUES PERTAINING TO THE COMMISSION'S POWERS, DUTIES, PRIVILEGES, IMMUNITIES AND LIABILITIES PURSUANT TO SEC. 92-5(a)(4), HRS.

The Commission may take action to adopt, adopt with modifications, or take some other action regarding the proposed Findings of Fact, Conclusions of Law, and Decision and Order.

F. COMMUNICATIONS

- 1. Applicant D and S VENTURES, LLC's Motion to Reopen Hearing on its request for a County Special Use Permit for Existing Unpermitted Outdoor Recreational Activities at Camp Maui, Haiku, Maui, Hawaii received on January 17, 2017.**

AN EXECUTIVE SESSION MAY BE CALLED IN ORDER FOR THE COMMISSION TO CONSULT WITH THEIR ATTORNEY ON QUESTIONS AND ISSUES PERTAINING TO THE COMMISSION'S POWERS, DUTIES, PRIVILEGES, IMMUNITIES AND LIABILITIES PURSUANT TO SEC. 92-5(a)(4), HRS.

The Commission may take action on the request.

- 2. Applicant D and S VENTURES, LLC's Motion to Amend its Application for a County Special Use Permit for existing unpermitted outdoor recreational activities at Camp Maui, Haiku, Maui, Hawaii. Received on January 17, 2017.**

AN EXECUTIVE SESSION MAY BE CALLED IN ORDER FOR THE COMMISSION TO CONSULT WITH THEIR ATTORNEY ON QUESTIONS AND ISSUES PERTAINING TO THE COMMISSION'S POWERS, DUTIES, PRIVILEGES, IMMUNITIES AND LIABILITIES PURSUANT TO SEC. 92-5(a)(4), HRS.

The Commission may take action on the request.

Mr. Giroux: We can take public testimony on any of those items.

Chair Tsai: Okay. So Paul has to—

Mr. Giroux: ...(inaudible)...

Chair Tsai: Okay, all right so where's my list here. So I have a list here from people who wanted to wait to testify so you may come—

Mr. Cal Chipchase: Chair if I might before the Commission takes public testimony introduce myself and raise an objection to that. My name is Cal Chipchase. I represent the applicant. This is Christopher Goodin, he's also counsel for the applicant. This is a Chapter 91 proceeding in that it is a hearing required by law that effects an applicant, effects a person's rights,

privileges or duties under the law. It's governed by Chapter 91 as a consequence of that and under Chapter 91 public testimony is typically not accepted as part of the contested case hearing. Your agenda notes that.

At the prior hearing the public testimony I understood was not going to be considered as part of the contested case, the hearing on the application, but is informational only. Reviewing the Commission's draft decision it's clear that it based its decision on public testimony and so rather than exacerbate that problem here I would object to the taking of further public testimony as part of this Chapter 91 proceeding.

Mr. Giroux: Your objection's noted, and it's just that we are, we are under a dual issue here. We have Chapter 92 concerns and we have Chapter 91 and I heard your concern. The board can you know assert its adjudicatory function exception to Chapter 92. My advice at this point is that because of the issue that we did have people come to testify at the public hearing and that are multiple issues being raised that you may want to hear from the public as far as what their positions are. You had a petition to intervene that was withdrawn so that raises more issues as far as you know what is the public participation in our land use and planning process?

Chair Tsai: So we're gonna continue with public testimony. Commissioner Hudson?

Mr. Hudson: Thank you, Chair. I believe there was at least one or two people here that wanted to testify, but we told them that it would be after lunch and they might have left.

Chair Tsai: I have...well, let me see the list here. I have about one, two, three...we have five people here. Is Stephen Hynson...are you here? Ann Bassel? Okay, Jake Rohrer. Okay, so we're missing two. Then we have also Peter Rorher and then Danny Coltart? He's not here. So you wanna—

Mr. Robinson: Lunch break.

Chair Tsai: Yeah, okay.

Unidentified Speaker: ...(inaudible-not speaking into microphone)...

Chair Tsai: You guys also want to testify also?

Unidentified Speaker: ...(inaudible)...

Chair Tsai: Right, okay. You know what, with that then we're just going to break for lunch at this point and come back that way everybody gets to come back and testify. I think that's the best solution. Okay, thank you.

Mr. Spence: What time?

Chair Tsai: Be back 1:05.

A recess was called at 12:05 p.m., and the meeting was reconvened at 1:13 p.m.

Chair Tsai: Okay, Maui Planning Commission is called back to order. We're on the—

Mr. Spence: E-1.

Chair Tsai: So public testimony. I have a list from this morning. Individuals who want to testify. Please come forward, you have three minutes. Identify yourself please. Stephen Hynson?

Mr. Stephen Hynson: Good afternoon Commissioners. My name is Stephen Hynson. I live at 88 Nohea Place.

Chair Tsai: Please speak to the mic.

Mr. Hynson: Stephen Hynson, 88 Nohea Place, just a few lots mauka of where the zipline is located. And I wanna thank you for the opportunity to give my testimony this afternoon. I understand there was a move to not allow testimony. Today, I want to support and urge the Commission to accept the written finding. Material facts of this, that was stated in the written finding have effectively not changed. In fact, things have gotten worse. There's been continued grading. This grading has negatively impacted the drainage during this last major rain storm a few weeks ago. There's a small lake that had been created on the property. If in fact it is a historical site there is continued destruction of historical artifacts. You just don't bring in a bulldozer and start bulldozing. They've added a new large tent structure. I'd estimate it's somewhere 30, 40 feet in diameter in the front of the property. They've added a bungee jump to the tower. So as you can you know there is continued activity, expanded activity and this doesn't hold well for the future.

Under the standards for reviewing a special use permit again as stated in the written statement none of those criteria have been met. So there are definitely grounds for acceptance of this written document. I understand that we're gonna be challenged or you're gonna be challenged on procedural issues. I would suggest that this is nothing more than a delaying tactic that I hope the Commission sees it is well within their rights to make a decision on this.

If you do decide to go forward, and hear additional testimony from the lawyers representing the defendant, a concern we have is that if in fact the permit was accepted and approved, we don't want the activities there enlarged, but they're just showing signs of this is what they're trying to do. In this case they're running ...(inaudible)...the neighbors. That's all I would like to say at this point and also request if there might be the possibility to respond later in this hearing to

whatever is presented by the lawyers for the applicant. Thank you very much and any questions?

Chair Tsai: Thank you.

Mr. Hynson: Thank you.

Chair Tsai: Ann Bassel?

Ms. Ann Bassel: Good afternoon, I'm Ann Bassel and I'm Stephen Hynson's wife. I also live at 88 Nohea Place. We're about three very long narrow lots up from the zipline. So all the noise, visible tower of 35, 40 feet, of course there's the talk of the 80-foot tower and I just want to reiterate what Stephen said that having read your decision and having been here for the July 12 hearing. I wasn't here in August, for the 12. I completely agree with your decision and hope that you go ahead and make the order. And one of the things that I fail to understand in July, I still don't understand if the property is owned Tenants in Common, three different people, groups, there's an LLC, these were the original family owners, and then the applicant how can the application be granted to someone who owns 50 percent of the property? And even though I understand that there is a subdivision being worked on, there's been an application for a subdivision those are very, very difficult to get. There's one 5/8-inch water meter. I don't...I've never heard that there's any love for the other owners of the property so I don't...I think to wait for a subdivision that could take years and in the meantime this continues, bungee jumping is added, anyway I thank you. And it's a commercial operation. This has nothing to do with agriculture. We raise tilapia, and aquaponics. We have a greenhouse. I have goats, a sheep. We lease land for horses, and we raise...we've grown fruit trees and koa trees. This is agricultural and it's very upsetting to hear the screaming and the entertainment going, partying down below. Thank you.

Chair Tsai: Thank you. Jake Rohrer?

Mr. Jake Rohrer: Hello, I'm Jake Rohrer. I live on Kaupakalua in Haiku, and I appeared before this committee, commission last summer together with perhaps a dozen nearby neighbors where all of us voiced our objections to the noise and the intrusion from the operation of the Northshore Zipline. We further expressed outrage at the aggressive and uncaring manner in which the applicant established and continues to run his business. And we're thankful that the committee, commission heard us and voted accordingly to deny the special use permit application. You made a finding at that time that the applicant demonstrated a willful disregard for the consideration of neighbors and continues to operate contrary to an order to cease and desist which I am told recently that that may or may not exist. I just don't know. And concluding with the applicant should not be rewarded with an approval. And in the earlier hearing there was a comment about a \$9 million sale and profits made and that's the American way and I agree and I do not begrudge the applicant and his profits, but it's also the American way to play

by the rules and not trample your neighbors underfoot. *The Maui News* headlines sums it up like this, operating without a permit is a way of life for Haiku zipline business. The location changes but Derek Hoyte's story remains the same. He finds a picturesque piece of land, strings up a few ziplines and operates nonpermitted tours until the counties come knocking. Maui County hasn't knocked loud enough. The ones in Washington did. *The Maui News* headline is an accurate description of the applicant's past practices. Unpermitted businesses without zoning approval or community input. No community input ever and trespasses on adjoining properties are hallmarks.

The Planning Commission's decision to deny a permit was unanimous. As Commissioner Robinson I believe concluded, when you're disingenuous and this is what happens, a lot of people gets special use permits but they do it in a different way. And since the July hearing the only change I'm aware of, although we've just heard of several others is the addition of a new attraction called the Leap of Faith where you walk a plank and jump 40-foot of the tower and I can only imagine the additional noise as shrieking thrill seekers jump into the void and join in concert with screaming zipliners. I find it disingenuous indeed to add this attraction in the face of the complaints by the neighbors. So on behalf of local residents, all of us, we ask that you deny the applicant's motion to reopen the hearing and bring this matter to its conclusion. That's all. Thank you.

Chair Tsai: Thank you. Peter Rorher?

Mr. Peter Rorher: I believe I shouldn't talk right now I'm too upset. I will—

Chair Tsai: Okay. Danny Coltart, you want to come forward and testify. Please identify yourself you have three minutes.

Mr. Daniel James Coltart: Yeah, Daniel James Coltart. I live right next door to the zipline. If I could take a moment to pass my phone around. I went to Kinkos to try to get the picture blown up but for whatever reason I couldn't get the photograph that I have of the view from my...I feel like a picture's worth a thousand words. So if I could pass my phone around to you commissioners and let you take a look at the photograph?

Mr. Giroux: Hold on.

Chair Tsai: I don't have a problem with it but, Deputy?

Mr. Giroux: Because we have no way to preserve this into the record we're not going to accept it at this point.

Mr. Coltart: Okay. I'm about 250 feet away with a clear shot to the tower which is 40 feet tall. They zip to the right, they zip to the left and they jump off that bungee that we just talked about.

My wife and I can hear the talking. Forget about the screaming, we can just hear them talking because there's a clear shot from...there's nothing between us that's why I wanted to show you the picture. It's like a 40-foot tower, it looks like a military tower with a machinegun turret or something sitting right in my view which used to be my skyline view. And so it's depreciating the value of my property, the quality of my life. I play acoustic guitar, have 30, 40 original songs that I'm recording, my wife is a massage therapist. She does work on just friends and family but it's totally disruptive. We have to keep the door shut when they're operating and which I don't have air-conditioning in my house. I can't just leave the screens open. It's just totally disturbing. Let alone the noise, the visual impact of that in front of us is so horrendous that Derek came over the other day to you know, to offer me some money to come up and stand before him and put in a good word for him. I turned him down because the amount of money that he's talking about isn't even remotely close to what I'm losing. As Ann and Steve said, I have a diversified fruit orchard, I get 85 cents a pound for my fruit. I have horses also boarding on my property and I dry...dehydrate bananas, macadamia nuts. We make 85 cents a pound while he's making \$15,000 a day looking onto my property. The only view that he has is our properties that he's zipping along side of.

Ms. Takayama-Corden: Three minutes.

Mr. Coltart: It's a 1,500 long...1,500-foot long piece of property and I'm 1,500 feet long, five acres right alongside of him parallel. And basically he's trying to hush me up and I'm not about to be hushed up. The last time I was here and presented my case when I came home, the next morning there was a wine bottle smashed on the front of my driveway. Took me a half hour to pick up all the shards. Now I don't know who did that, but in 38 years I never had a bottle of wine shattered on the front of my driveway. The following week Derek came to my house and stormed up my driveway and slammed down a bunch of paperwork saying you know, that there was a sound check done and they're within their decibel level. And I say to that, not true. It's totally disruptive. Totally loud. And sometimes when they scream—

Chair Tsai: Please conclude, your three minutes are up.

Mr. Coltart: --well, they scream from one tree to the other which is hundreds of feet away to each other. Thank you for hearing me.

Chair Tsai: Thank you.

Mr. Coltart: And I hope you do the right thing and you know protect us innocent people. Thank you.

Chair Tsai: Danny, hold on a second. I have a question for you.

Mr. Coltart: Sure.

Chair Tsai: You mentioned, you said a bungee cord jump?

Mr. Coltart: Yeah.

Chair Tsai: Is that a new addition since we?

Mr. Coltart: Well, they've been bungeeing off of different things all along. But from what I...I can see them jump off so there is a bungee there, yes. I can see it and I never noticed that before but I can witness it. They jump right off the tower I guess off of a little plank. And there's no way to stop screaming. I don't care if they put up a sign because it's uncontrollable. A friend of mine went on a bungee jump one time, his wife told him he screamed all the way down. He didn't even know he was screaming all the way down. It's uncontrollable. That's a picture of it there. But that's my view from my, right from my bedroom, my living room. I have to actually put up tapestries over my porch.

Chair Tsai: Yeah, we can admit that piece as... thank you.

Mr. Coltart: You're welcome.

Chair Tsai: I have a Missy Prosser?

Ms. Mary Ann Prosser: Hi, my name is Mary Ann. I'm Danny's wife and thanks for being here. I'm unhappy I'm here. I resent the heck out of the fact that not only do I have to suffer through this thing for 10 years, but I've gotta take my time to come out here, to stand against somebody. It's just not even in my nature. I don't want any of it. The part that concerns me, after the last meeting not only was the sound of it uncontrollable which that's my point is it doesn't matter...the zipline has said that they would address these issues of screaming with their clients. But my point is I know for sure it's uncontrollable based on what a lot of other people have said. It's an uncontrollable scream. It doesn't matter how hard the zipline guides try and make the people not scream. When you're jumping off a cliff you're gonna scream and you don't even know you're gonna scream so whatever it is they're gonna try and do to make this okay it's not gonna be okay. Our house happens to run along perpendicular, parallel to the zipline. And there's not a room in our house that we can get away from it. There's no getting away from it and granted there are times of the day when oh, an hour will go by and it is quite, but it's nothing we can count on. I cannot have a client or friend or family over for healing bodywork without knowing for sure that we're gonna get disrupted one way or another with screaming. We have a long-term rental on our property that is sitting empty now because we can no longer say things like it's quiet, private, sanctuary. I know that's a special interest not in my backyard kind of thing but these are the kind of things that we used to attract renters for a place. And we can no longer use any of those words to describe our sanctuary because it's not a sanctuary any more. It's an amusement park. It's a carnival and it never ends and it hasn't

ended and it hasn't changed and we've been asked to come here and say it has changed and it hasn't changed. And my point is I'm not saying anything against the quality of these people, but they don't have ability to change an uncontrollable factor. And that's what I'm here to talk about that there isn't any way they're going to be able to make it okay with us. We've lived with it for 10 years and I'm just frazzled at this point. Every day I wake up and all I wanna do is just get out, get away from our property. We've been working really hard toward our retirement, selling produce for 85 cents a pound, working our way to our agricultural, you know in our agricultural zone and getting our farming plan together. We've had to work really hard to live in a agricultural zone which we don't feel like we live in an ag zone any more. We don't have the privilege of what we paid for and we have tangible losses in our privacy, in our quality of life.

Ms. Takayama-Corden: Three minutes.

Ms. Prosser: And they don't have a permit to do it and I would encourage you to just say no, keep saying no. We'd like them to go someplace else and do it where they're not going to disrupting. ... (Inaudible)... running a zipline in an inappropriate zone which is agriculture. And as far as I know they don't have any ag. So that's all I have to say.

Chair Tsai: Thank you.

Ms. Prosser: Any questions?

Chair Tsai: Okay, anyone else wish to testify at this point? Please come forward, identify yourself and you have three minutes.

Mr. Lance Gilliland: Aloha. Aloha, my name's Lance Gilliland. I live at 1835 Kauhikoa Road. I'd like to also reserve my right to come back and ... (inaudible)... on the other points that they may bring up during this meeting. I'm going to go through two scenarios and one is going to be my statement and the other one is going to be addressing some of their responses to the last July meeting.

To the planning commission, the property description is inaccurate. It is 36 acres, not 17.5. It's not subdivided. It has never been subdivided since he started this in 2009. Three owners own it. It's a tenants in common. Prior to 2009 when Derek purchased ownership in this property, Skamania Clark County had already educated him on the proper process to build and run a zipline. His education included the permitting process, codes, et cetera that required addressing before proceeding. He had also learned that just because you're the landowner in this case one of three does not give you the right to do whatever you want and asking for forgiveness rather than permission will send you to jail and force you to pay large fines. Not to mention being disliked in the community of which he probably never showed his face and he never shows his face at any of these hearing either. Even with the hearings with my aunty them, he never shows his face.

Derek has chosen to throw out all the...all that he has learned and played the same game here on Maui. The prudent business man would not spend an enormous amount of money unless he has enough money to put it back to the original status. Derek must have that money.

I will bullet point the game he's play with Maui County community, us, the commissions, both the Planning as well as the Variance and Appeals Commission. Three owners, acres again 36 acres, 36 acres not 17.5. Three owners, tenants in common. Don't let him fool you that he is trying to subdivide. He has decided to renege on his original subdivision of a recent move and recently moved his...his entire operation from one area to an upper parcel. Originally that was for one of the other owners. One of the first things Derek did once he acquired the property in 2008-09, was trying to take property out of ag status for what reason I don't know, actually was to try to run my uncle them out broke because they're retired. At the same time he began clearing property and outlining his ziplines. He kicked the cattle out that had grazed there for over 80 years telling the other two owners that they were hindering his ability to make money, though it made money for them, not much, we just sell our cow, we get beef, we don't have to buy meat. Asked the other two owners to sign permit for the zipline, they denied. Had always denied it from day one. He was well aware of that. Tried to use a special use permit...tried special use permit using his historical value as a means to get around all the owners signatures. He has outright disobeyed the orders of both the Planning Commission and the Appeals Commission. The Appeals Commission informed him that not to build that 80-foot tower. What he did is build a bungee cord. So that's a new activity and he's marketing it as well.

All said, Derek must be directed to return the property to its original status when he purchased it in 2008 and 09, subdivide the property and then apply for permits for a zipline activity to include the community involvement. That's the proper way to do it. It took me 11 years to get my water meter and my home because I followed the rules. He should be no different. No different.

I have two more minutes. Derek...(inaudible)...for community fraud. The public...he is promoting the zipline it's not legitimate, it's not permitted, it's unregistered. And last jail for stealing from Maui County because I don't know where you put any money you collect from he's not recognized. From everything I could see, I'm not a lawyer, but I don't recognize his business. I don't know where he's giving our taxes money. Where is he reporting his revenues, I don't know. I don't think we collected anything from him. But again, thank you and I'll come back, some other points when they come up.

Chair Tsai: Thank you Lance. Oh, Commissioner Robinson?

Mr. Robinson: Is there any other information that you wanna give to us now?

Mr. Gilliland: I would if I may? I do have some things that I'd to address that they've submitted.

Mr. Robinson: Do you have any information from what, from the last commission hearing compared today and the environment that's going on now?

Mr. Gilliland: Absolutely. Nothing has changed. I live a quarter mile from this activity down makai. I can still hear everything clear as day. You know I think it's a violation of having my kids being subject to F bombs. You know I don't teach my kids that in my home, but you can hear it from my house a quarter mile away. You're welcome to come see my house and hear it. You know nothing has stopped. You know, the traffic is still the same. I'm constantly telling people okay you gotta go further up the road, further up the road. I can tell them go down a road and a...you know? You know they're visitors and go up the road. But nothing has changed. In fact, every time you tell him not to do something, he does more. Because he has not yet cease and desist. He doesn't care what you guys say. He's outright disrespectful on everything you guys have to say period and that's a fact and I'd be happy to stand up there and go...(inaudible)...here.

Chair Tsai: Thank you. I also have a Fred Borsum?

Mr. Fred Borsum: Yeah, you're gonna have to kinda excuse me. I'm not real good at this kinda stuff, but good afternoon. My name's Fred Borsum. I live at 2060 Kauhikoa Road. And I represent myself and my family here. I've never met Mr. Hoyte, but he's represented by one of the biggest law firms in the state I do know that and we are not. But we're relying on this commission to do the right thing.

First off, I wanted to set the record straight from the last hearing. The attorney accused the neighbor, one of the neighbors who I don't know, of I think corralling the other people to come to the meeting. I don't know if corralling is the proper word but it was referred to that. That is not true. We all got letters in the mail, registered letters and that's why we came.

I noticed the attorneys at one time kept referring to the operation as improving a historical site. What does a zipline have to do with a historical site? Is the property registered as a historical site? I don't know.

We have seen Mr. Hoyte's ziplines have been less than upfront in the past. How do we know the same will not happen here? We don't need a Disneyland in this area. I don't know how an 80-foot tower would fit into this whole scenario. What are the other plans?

In closing, Mr. Hoyte has turned his nose up to the neighbors and the County. He has been a bully and we don't need a bully in this neighborhood. Thank you very much.

Chair Tsai: Thank you. Robert Freidlander?

Mr. Robert Freidlander: Hello, thank you for letting me speak. I don't even live in his

neighborhood where this people. I live at...my name is Robert Freidlander. I live at 280 West Waipio Road and there's a zipline 40 feet away from my house. I've been a resident of Maui for 40 years. I work my...I worked the whole time to afford a piece of property that's ag land that is ag land in order to have a retirement peaceful home. I started building a home that took me 15 years to get started because I had to go through three different permit and subdivisions to get to the point. I've done everything legal and now I have a zipline 40 feet from my house. I have the same problem these people have and I am here to address you guys to say there's gotta be regulations. There's gotta be ways that people can have a say in what goes on right next. In the same way that you know there's neighbors that wanted to have a bed and breakfast and they had to go through all this stuff to get a bed and breakfast and have community input. We were never given community input and nothing's ever happen. And I'm just here to say that the County and the Planning Commission has to come up with some plan to stop this from happening in small neighborhoods where the noise level and the activity level is so great that it makes your life miserable. And you know, and again, the person in our valley is a bully as well and it's the same thing and the County has to do something to stop it from happening to every neighborhood. There has to be regulations that say there should be so many feet and I mean a lot of feet before a zipline could be in a neighborhood. I mean, the original ziplines that came to Maui were on gigantic pieces of property that bothered nobody and that's why they were allowed. And I assume they had permits. The one next to me doesn't have a permit either. And I hope you guys do something about it. Thank you.

Chair Tsai: Thank you. Okay, anyone else wish to testify at this moment? Please identify yourself. You have three minutes.

Ms. Zandra Amaral Crouse: My name is Zandra Amaral Crouse, a native to Maui. And I'm not here on this issue but what I hear and as I look at you commissioners, you know, you guys most of you are all local guy so you understand 'cause you've seen it happen here on Maui. And I had the opportunity to speak to both of you and I like you guys from what you say, but basically cut it short. When it comes to disrupting a neighborhood especially one where babies live, it's not pono, it's not right. It's not. I live at the end of Ohukai, mauka side, Haleakala Ranch and way up, and way up my cousin Brandon is rounding up cattle and it's way, way, way up past the water tank, past...you can hear it simple because of where I am located. And my children live in Haiku. My in-laws the Souzas used to live in Haiku. They've both passed since. So we spend a lot of time up in that area. And I'm sorry, but yes it does, noise is a factor. It really is. I mean, I think ziplines are fun, I'd never go on them on my age. But I'd like to try one day. But it's not the people guys, it's not the people and no one should be given an exemption at the cost of our people, no one. It's just not right. People spend hundreds of thousands of dollars following the rules and I humbly ask for you Chair and of these young men do what is right, get the appropriate permits, but until such time that it passes the neighbors and the landowners. I think this body should not approve. But thank you for your time. It's just my mana`o. Mahalo.

Chair Tsai: Thank you. Anyone else wish to testify? Please come forward. Identify yourself

you have three minutes.

Mr. Peter Rohrer: My name's Peter Rohrer. I live at 2108 Kaupakalua Road. I've endured this zipline since its conception in 2010. I've called it to the Police, and County, and Planning and your attention how wrong this is. And nothing's been done.

This man is the opposite of pono. He doesn't do anything right. If you look at his track record he has several other problems with counties and states running ziplines. So he's been fined a considerable amount of money. And you guys make the rules but you don't enforce them. Mr. Hoyte's been fined near three-quarter of a million dollars in fines which is running daily, another \$1,000 every day he operates illegally.

He was told not to do anything else on this property and like you've seen, he has. I...last time I spoke to you I got in some trouble for speaking up and I thought this was America you know, you could speak up especially with this. I was intervening his variance which is just a ploy to get around the law of needing a special use permit which he's never had and never will have. So the other rule, the only other rule to have a zipline is you cannot be a nuisance to the neighborhood. Obviously he is a nuisance to the neighborhood. I've had a petition I've circulated to the closest 50 neighbors, every one of them signed it. They can't stand the zipline.

To let this go on and on is a travesty. I mean the man makes over \$15,000 a day when he operates even if he is being fined a \$1,000 a day he is gonna continue forever. I really can't say anything else. I'm very upset by this. It's cost me tens of thousands of hours of sleep, half a million dollars of value to my property. I've been to psychologists and psychiatrists over a hundred times. I'm...the life I used to have I don't have any more. Anywhere on my property on the west side there it is, as soon as I ...I don't even have to walk out of my house to see him. I can roll over in bed and see him and they can see me in my living room, any one of my decks.

The situation is that you're allowing it to continue and you need to step up to the bat and employ your power here otherwise how do we handle this?

Chair Tsai: Thank you, Peter. Anybody wish to testify? Seeing none, public testimony is now closed. You already did.

Unidentified Speaker: I did, but there was one important thing I did—

Chair Tsai: I'm sorry, you only get one chance, yeah. Okay, so...

Mr. Spence: So Commissioners, I'm sorry we should be a little bit louder in what we're discussing. We're just discussing whether...there's three agenda items related to this. One is a motion is to reopen the hearing, another is to amend the application, and then another is to take up the draft Decision and Order. So I think it...what we were saying is it's a little premature to

take up the draft Decision and Order when we haven't heard or the Commission hasn't made a decision whether to reopen or to allow the amendment of the application. So my thought would, it would...I don't know what you want to take up first, the reopening or the...well, you would have to reopen in order to receive the amendment to the application. So that's the one we would take up first and I would submit that Mr. Chipchase and Mr. Goodin would present their case at this time

Mr. Cal Chipchase: Thank you, Director. Chair if I may and if I'm...my volume's too low I'll speak up but if I could for the sake of everyone in the audience and really for this body's sake as well if I could just speak to them all at once because I think they're interrelated and I don't mean to take up any more of the afternoon than we have to in this proceedings. If there are specific questions or you have to take the motions in order I completely understand that but for purposes of you know my intention, my presentation I'll talk about them together if that's all right.

Mr. Spence: Okay.

Mr. Chipchase: Okay, thank you. You know I understand that you guys all have to do and I respect that and I get it and I hope you understand that I have a job to do too and part of my job...

Mr. Higashi: Can you identify yourself?

Mr. Chipchase: Oh I'm sorry, I did earlier.

Chair Tsai: Hold on a second. Commissioner Hedani?

Mr. Hedani: Can we have the testifier speak into the microphone because it's being broadcast through Akaku?

Chair Tsai: Yes. Can you please make sure?

Mr. Chipchase: Is that better?

Chair Tsai: That's better.

Mr. Chipchase: Yeah, okay. I introduced myself earlier, glad to do it again. My name is Cal Chipchase. I'm counsel for the applicant. With me at the table is my partner, Chris Goodin who is also counsel for the applicant. I appeared before you for the July hearing as well with PBR as our planner. And you know what I wanted to convey and just I suppose since I may not have been heard I'm gonna speak on all the matters at the same time, the three agenda items for the sake of efficiency because they're all related. And then however, the Commission decides to

take them up in terms of decision making you know we understand and don't object to.

The point I was making is that everyone's got a job to do and I hope you understand that part of my job is to preserve a record, the record that we're creating here in this proceeding including the record that we created back in July. And so I do have to object again to the further public testimony not only for the reasons that I stated earlier because I was off agenda topic. The testifiers do not speak to the specific agenda items which are to adopt the findings, to reopen or to amend the application. So that testimony for all the reasons that I said earlier and for that additional reason shouldn't be considered. I also object to the receipt of additional evidence. The Commission has not reopened proceedings and so additional evidence cannot be received. If it were I would have an opportunity to submit rebuttal evidence at a further hearing.

But you know, the proceedings matter, procedure matters and when we don't follow proper procedure the decisions however right they may seem can be infracted or can be reached for the wrong reasons. And so the point I wanted to speak to first is a comment that was...that I made at the last hearing and that is that the applicant had reached an agreement with the County in a meeting with the Director and with the County's attorney and with other members of the Planning Staff that the County would accept D&S's application even though it was only going to be signed by D&S and not the other co-owners and that the BVA proceedings, the Board of Variance and Appeals proceedings any NOV would be stayed as long as D&S pursued an application and that the County would process that application to this point to decision even though D&S continued to operate.

Now at the last hearing the Commission doubted my representations and I can understand that, but to make sure there is no doubt we've submitted a sworn declaration from the attorney for the County, the Planning Department's attorney saying exactly that and that's Exhibit 1.1 to our filings. And so I use that as an example of what happens when a proceeding doesn't follow the right procedures. When decisions are made on something other than evidence. There references to those facts that he continued to operate and subject to a cease and desist order in the draft Findings and Conclusions. But those aren't the facts. The facts are as I represented them then and as the County attorney has sworn in this declaration at 1.1 today.

The problem with accepting public testimony and treating it as evidence in a 90, Chapter 91 proceeding is exactly that. It isn't evidence. It's no made under oath, it's not subject to cross-examination and there's no opportunity for rebuttal. Those are fundamental procedural guarantees and in Chapter 91 proceeding. They didn't happen at the last proceeding. Instead what should have happened is that the public testimony should have been given. The public testimony closes and then the 91 proceeding begins and any decision is made on the evidence introduced in the Chapter 91 proceeding. That's not how we went forward. And as a consequence of that the draft Decision is based on public testimony not the evidence that is actually before the body.

That leaves us with a question where do we go from here? We can press forward, you can adopt the written findings and decision and we can take it up on appeal. Those are your rights. Those are our rights. Totally respect if that's what you choose to do. But we've suggested in the two motions that we filed is that we do it again. That we reopen the proceedings and do them right according to Chapter 91 and the law of due process. As part of that reopening the applicant has proposed to amend its application to delete the 80-foot zipline tower and any additional challenge course elements that would require Planning Commission approval. Essentially to approve the operation as it stood on the day of the application. That is what we propose to do reopen the proceedings, allow us to amend the application and let's have a full and correct hearing that results in a decision up or down that is actually based on the evidence not unsworn testimony that is not subject to cross-examination and is not open to rebuttal. That is my request to the Commission today. Thank you.

Chair Tsai: Okay, I'm gonna open the floor for the Commissioner's questioning or jump to a motion. Commissioner Higashi?

Mr. Higashi: Are we now open for questions?

Chair Tsai: Yes.

Mr. Higashi: Okay, I'd like to ask the attorney you stated that your applicant met with the Planning Department and you were informed that as long as they had put in their application that they could continue with their business?

Mr. Chipchase: Let me be absolutely precise and if I wasn't absolutely precise let me be that way.

Mr. Higashi: Sure.

Mr. Chipchase: I think I was but to the extent that it was misunderstood. As long as we put in the application the Department would process it even though we continued to operate.

Mr. Higashi: You got permission for that?

Mr. Chipchase: No, no, no, no. I'm not representing and Will can correct me if I do that the Department approved the operation. All the Department did was process, agree to process the application even though we continued to operate. That is what I represented, that is what is in Mr. Kolby's declaration.

Chair Tsai: Go ahead.

Mr. Higashi: Your applicant was aware that the County issued an order to cease and desist

operations, correct?

Mr. Chipchase: Yes, Commissioner.

Mr. Higashi: So consequently why is it that your applicant continued to operate when the County had issued you a cease and desist order?

Mr. Chipchase: The applicant exercised his rights under County Code and the Administrative Procedures to appeal that cease and desist to the BVA because he does not believe that the cease and desist was properly issued. The matter is pending before the BVA. Those proceedings as well as the NOV were stayed while we processed this application.

Mr. Higashi: Okay, I'd like to just further this particular discussion. Did your applicant start this operation, this zipline operation in 2009 or 2010 according to the records?

Mr. Chipchase: I'm not going to comment beyond the record. Whatever is in the record that was submitted as part of the application is what we stand on. I'm not here to introduce new evidence as part of that unless the matter is reopened. And if it's reopened then we'll have a further hearing and that would be an entirely appropriate question for witnesses to address.

Mr. Higashi: So you're saying that you will not answer based upon the documents that you presented to us?

Mr. Chipchase: I'm saying that I will not comment on or introduce new evidence. Whatever the documents say, whatever the application says is the record on which we've stood and which we're standing for purposes of this proceeding unless the matter is reopened.

Chair Tsai: I'm gonna expand on that with another question. With that do you actually show proof, can you show proof that the applicant has any type of permit to operate?

Mr. Chipchase: This body's job is not an enforcement body whether a permit is required is not—

Chair Tsai: I'm not asking that question. I'm asking if you can show proof because obviously have a understanding think that the cease and desist order is not with reason. So I...so if you have a permit to operate and we tell you not to operate then that is a reason for challenge. I'm asking a very simple question do you have a permit to operate in initially? So if you don't have a permit then you have no right to operate.

Mr. Chipchase: If you're asking whether we have a special use permit, so let's be specific the answer the is no which is why we're before this body. If you're asking whether we believe but not withstanding a special use permit the operation is lawful, the answer is yes and that's the

reason for the appeal to the BVA. In agreement with the County we agreed to not pursue that appeal if this application is granted. Instead of challenging the County's right or power I should say to require a permit we believe that it would be more appropriate for everyone to go through the process. As part of that process we submitted the application for the special use permit.

Chair Tsai: Director?

Mr. Spence: Thank you. Yeah when...okay, boy it's been a long time since I've looked back at whatever agreement so...

Mr. Chipchase: Yeah, I think it was Augusts 2015 Director so it's been a while.

Mr. Spence: Yeah. It's been quite a while, but you get into an enforcement issue like this it's...we said okay, let's give the guy an opportunity to become legal and obtain a permit. And so they filed their application for a special use permit and come before this body, have a public hearing, et cetera. If this body grants a permit then you know everything's pretty pau, I mean well then we can, we can talk about whatever fines had accumulated and what do they owe the County and all that. If this Commission denies the permit I'm not gonna suggest anything to the applicant on how they should proceed from there but certainly is a, there's a pending BVA appeal and there's other avenues of other sorts. I would say for the record we did...I don't think it could ever be characterized by the County that we said yes, it's absolutely fine for you to go ahead and operate. We knew they were operating, we didn't say, fine please go ahead and do this. That would, I think that would be a mischaracterization. It's like okay, how do we resolve this? One way is to come get a special use permit. Let's go down that avenue pending these other appeals. So that's the way we did that. That sound all right?

Mr. Chipchase: Sounds exactly right Director.

Mr. Spence: I would hate to misstate it.

Chair Tsai: Commissioner Robinson?

Mr. Robinson: Are you allowed to tell us when you were hired?

Mr. Chipchase: I believe I can. I mean, I don't think there's any problem with that except for my recollection and that is fuzzy but it's been several years.

Mr. Robinson: So...

Mr. Chipchase: More than two years chair or Commissioner or that's...I'm not trying to be coy, I just don't remember the exact date.

Mr. Robinson: Before the August 24, 2015 meeting with?

Mr. Chipchase: Oh yes, well before that.

Mr. Robinson: How much before that?

Mr. Chipchase: At least a year before that.

Mr. Robinson: Year before that? Okay, thank you.

Chair Tsai: Commissioner Hudson?

Mr. Hudson: Thank you, Chair. I'm looking at the Findings of Facts, Conclusion of Law, and Decision and Order Denying Request for the County Special Use Permit of Existing Non-Permitted Outdoor Recreational Activities at Camp Maui, Haiku, Maui, Hawaii. I don't find anything wrong with this document. I think this is a fair and accurate representation of what occurred. The applicant, the one that's saying that we should reopen the case I, I really don't see why. I think the applicant...we went from proper channels, proper procedure when everybody was notified that we're having a hearing on a certain, certain date. If had information to bring such as all of this he should have done his due diligence and brought them at that time instead of coming with this voluminous thing now after-the-fact in my opinion.

Chair Tsai: Commissioner Hedani?

Mr. Hedani: Since we're covering three different things are we gonna hear from them on the reasons for their request for opening it up again or their reasons for amending their application?

Chair Tsai: I think that's what they already presented as to the reasons unless...

Mr. Hedani: I didn't hear any reasons for...I mean, I didn't hear any explanation of an amendment to the application or...did you present that?

Mr. Chipchase: I'd be happy to Commissioner. So the reasons for amending the application were in response to concerns that the operation would be expanded, in particular an 80-foot tower which was part of the Planning Department's proposed or their report and recommendation, recall that the Planning Department recommended approval of the permit including the additional tower. There were concerns raised by neighbors specifically related to that tower and expanding operations. The applicant has decided that rather than pursue that expansion it would amend its application assuming that reopening is approved to delete that additional element and any other expansion.

Chair Tsai: Commissioners, so we're here to either deny if I'm understanding this correctly

Corp. Counsel?

Mr. Giroux: Review three items on the agenda.

Chair Tsai: Right.

Mr. Robinson: ...(inaudible-not speaking into a mic)...

Chair Tsai: Corp. Counsel?

Mr. Giroux: Okay, as far as procedurally I think it's about what do guys want to focus on? So it was suggested that we probably got to take care of the issue of does this body want to entertain the issue of allowing the applicant at this juncture to amend the application? And they've submitted their pleadings, they've submitted their reasons, they've submitted whatever affidavits I believe along with those...that request. So you might want to...again, I'm going to go to my box theory of create one box 'cause it gets confusing, right? So let's take that one box and look at the issue of do you as a body want to allow the applicant at this juncture to amend their application?

And that raises issues, procedural issues, legal issues, emotional issues about how are you processing this permit? How are you processing the fact that you're balancing the public hearing concerns along with the private Chapter 91 procedural concerns because those are also being thrown into the mix as far as why they want to reopen the hearing and why they're objecting to some findings of fact. So I think we need some discussion as to what is the feeling of the body regarding the issue of amending a permit application at this juncture after you have heard public testimony, after you've had a contested case hearing and the order of Findings of Facts and Conclusions of Law are now in draft form?

If you come to a decision at that juncture then you can go to the next issue of if the body is amicable to an amendment then how do you process the reopening of this procedure because that's a whole nother can of worms that it's gonna...we're gonna have...create another box and we're gonna start making space for that discussion.

Chair Tsai: Commissioner Higashi?

Mr. Higashi: I have a clarification from Corporation Counsel. This particular application as it is being presented doesn't seem like it completely went through the permit process as we normally do with permits except the fact that the applicant requested a meeting with the Planning Department to appeal the cease and desist order which according to what I understand the Director says is that they said that as long as they're processing the permit that they can continue doing what they're doing?

Mr. Giroux: I don't think that's entirely accurate, but let me just try to, try to kind of or you know get this into where we can get into a discussion. I think one issue that's causing some confusion is is that there's a separate process going on which is the enforcement process which is also administrated by the same department and it just so happens to have the same director. Not pointing fingers but just so there's clarity that in administrative law it gets confusing because sometimes the sheriff, the judge, the executioner is the same guy who's also your administrative staff.

Mr. Spence: I didn't know I had so much authority.

Mr. Giroux: Well, that's why they so...(inaudible)...things about you, you got all this power. But he's sitting over there as your staff, but he's also the administrative arm of an enforcement agency. So during those talks there was issues that were raised that brought to light that there is a separate process that your commission, this planning commission processes permits. So as part of their negotiations it was decided that this process should be used. Depending on the outcome it could make the enforcement process moot or it could make it worse. So you know, you know what I'm saying snake eyes, right? You're gonna go all the way, it's either a homerun or you strike out. But the sheriff over there got an enforcement issue, you have a permitting issue. That's why it's so important that we're understanding Chapter 92, the public process, a public hearing, and Chapter 91, the private rights of a contested case and that's where, you know, that's where we're trying to focus because there's a procedural process that it's very important that we understand. We are at the crux of reviewing the findings of facts, conclusion of law, we had a hearing and the request on the table is can we change our request and can we have another hearing? The power and discretion of this body is that you have every right to have that discussion and make a decision based on your discretion. That's the discussion we want on the record right now.

Chair Tsai: Commissioner Castro, then Commissioner Duvauchelle?

Mr. Castro: The options, there was three options. One was to reopen, amend, what was the third option?

Mr. Giroux: To basically clarify or adopt the Findings of Fact, Conclusions of Law. Those are the three big options. With each option you have three lesser options, right. If you don't allow the motion to amend then it's not amended. If it's not amended, you don't open to have another hearing. If you don't open to have another hearing you decide on whether you want to adopt your findings of fact, conclusions of law.

Mr. Castro: Thank you.

Chair Tsai: Commissioner Duvauchelle?

Ms. Duvauchelle: I have a question for counsel?

Mr. Chipchase: Yes, Commissioner?

Ms. Duvauchelle: You can see we need to keep it simple so I have a couple of questions. So your basis for amending is that you're not building an 80-foot tower and your basis for asking to reopen is that we didn't have adequate information in front of us at the prior commission hearing?

Mr. Chipchase: Close and close I will say.

Ms. Duvauchelle: Okay.

Mr. Chipchase: On the amendment, it's not only to eliminate the 80-foot tower but any additional challenge course elements. So the operation as it stood when we filed the application that's what we're...we would seek approval for if the application were amended. So strike out any part of the director's report and recommendation that talks about new elements including the 80-foot tower. That's, that's the amend.

On the reopening, it's not exactly that you didn't have the benefit of that evidence. That's part of it, but if I can and I'll try to be non-lawyerly I guess...

Ms. Duvauchelle: Please.

Mr. Chipchase: Since we spend years learning to be lawyerly, it's a hard skill to unlearn. The contested case is like a small trial like an administrative trial and there's certain protections and procedures that go along with that, we call it due process, right? And as part of those protections and procedures, one thing is all witnesses have to be sworn. All right, anybody who's gonna offer testimony that you're gonna base your decision on has to be sworn. Another is that anyone you're gonna base your decision on who testifies has to be subject to cross-examination. The decision as presented to us in the draft findings is based on public testimony that was neither sworn nor subject to cross-examination. So that's an evidentiary and procedural error. So that's one basis for reopening.

The second or the third I should say part of those guarantees is the right to submit rebuttal evidence. So if evidence is properly admitted before this Commission say it's a sworn witness, they're subject to cross-examination, the applicant has a right to submit rebuttal evidence to say no, no that's actually inaccurate or it's mitigated by these factors or whatever and that is a component of what you have before you. We did not previously have an opportunity to submit rebuttal evidence to testimony that shouldn't have been accepted as evidence. And so we would like to reopen the proceedings so that we have a correct Chapter 91 proceeding where if there are multiple parties, multiple parties have the opportunity for counsel, have the opportunity

to name witnesses and do those things that you would normally see in a Chapter 91 proceeding. If you have a proceeding like we do there's one applicant, the only intervenor withdrew its application, the public testimony is part of the 92 portion that your counsel was speaking to. It's not part of the 91. You have to base your decision on the 91. And as presented to us in those findings it was not and that's why we suggest reopening is the right course here. It basically allows us an opportunity, allows the Commission an opportunity to do it again and to do it right.

Ms. Duvauchelle: Okay, we need to move things along so it's kind of like a Hail Mary, but to be honest with you nothing to me has changed. I mean, I stand by what we decided at our last meeting, but thank you.

Chair Tsai: Thank you. Commissioner Robinson?

Mr. Robinson: Question. I just want to clarify, I think with the Notice of Violation and the Department non-position is a client usually knows that they're in violation, you know, tell them that they can't operate, but it would behoove them to have some good will when they show up in front of the planning commission that they actually understood the County's position and they would probably want to cease and desist on their own instead of rolling the dice and making more money and hopefully get a favorable, a favorable view in the commission's eyes like we did with the applicants of the SUPs up in the Makawao where they're doing their weddings and all these other applicants that come in front of us, they all are in the same situation. They all have, they're not able to operate, they can choose to, they can choose to do it even without a permit and then they come in front of us and then of course and we say, well how come you kept on doing it, and said, well it's my right, I can do it. But you know, it's up to them, right? But it usually doesn't work out too well for them because it shows that you know, they're not listening to the community and to the County which they're asking a permit for. So I think that's why we're kinda confused like how come these guys can keep on doing it? Well, they can because technically, legally, loopholey they can keep on doing it but that doesn't mean they're freed of the burden of the violation if we don't agree to it.

Counsel, I guess the question I have for you is, I heard you state that in our findings of fact that you felt that there wasn't a chance for you folks to rebuttal on some of the findings of facts. Can you share to me what numbers, what numbers in that findings of fact that you had a disagreement with?

Mr. Chipchase: Happy to, and we presented that in detail in our objections so every finding and every conclusion to which we object both our general and our specific objections are set forth in writing and I know you don't mean for me to read that to you, but it is available.

Mr. Robinson: Numbers?

Mr. Chipchase: If you'd like me to go through and identify them all I'm happy to. So Commissioner we have general objections based on due process which we've talked about at length now. We've got a general objection based on what appears to me to be a misapplication of the Maui County Code. We have specific objections to findings of fact 3, 5, 6, 7, 8, 9, 10, 11, 12, and conclusions of law 2, 4, 5, 6, 7, 8, I believe that's the last one 8. And our reasons for that are detailed in the writings.

Mr. Robinson: So I just wanna verify, 1, 2, and 4 there was no objections?

Mr. Chipchase: If you'll give me a moment I'll do my best to confirm that. That's correct.

Mr. Robinson: Okay, thank you.

Mr. Chipchase: You're welcome.

Chair Tsai: Commissioners, correct me if I'm wrong Corp. Counsel, what I'm understanding is that the counsel for the applicant...(inaudible)...simplifying a motion and if they have any specific objections to the process which we conduct our meetings so forth, if we, of course deny the motion they still have the opportunity to appeal and that's the route they can choose to go down. Correct?

Mr. Giroux: Right. Under Chapter 91, they have a...you know, after you've approved the findings of fact, conclusions of law, then they have 30 days to appeal to the Circuit Court as to issues of procedure and process.

Mr. Chipchase: As well as fact and law.

Mr. Giroux: Yes, and that's why they're objecting to the conclusions of fact and the conclusions of law at this point to preserve their record as to what they're objecting to and that would then be argued at the Circuit Court as to what, what their position is.

But can I ask some questions of Mr. Chipchase?

Mr. Chipchase: I've never had a Corp. Counsel ask me any questions in a hearing before so I think I welcome it.

Mr. Giroux: You know, I want to welcome you to the chaos of administrative law. But you know intellectually this is a really interesting issue for I think for all attorneys who are faced with this dichotomy between Chapter 92 and Chapter 91. So I just wanna, you know these questions, please don't take them personal but as, you know, as an attorney and as somebody who has to work with...in the arena of this field I just wanna try to make some things clear so that we could have some clarity and this might help the commission to understand their role in the process.

But I just wanna make sure you were present at the public hearing and you were present at the contested case hearing?

Mr. Chipchase: They were conducted it appears simultaneously with considerable overlap accepting some public testimony before we presented and public testimony after we presented and there...so that, that occurred. So I don't know that I can draw a dichotomy between the two hearings for you they seem to have operated in tandem. It was not apparent that the commission would base its decision on the public testimony, the 92 portion of it until the draft findings and conclusions were issued.

Mr. Giroux: Okay. And just to clarify the Chair usually asks at the beginning of any meeting that if there's anybody in the public that if they have anything on any agenda item that they can step up and they can testify to. So Chapter 92 requires us to do that in light of the fact that some people might not be able to stay or they might not be able to hear the whole hearing. So I can see that there's gonna be people at the beginning of any public meeting who are gonna stand up and Chapter 92 says that by law at that point we have to accept their testimony orally, in writing or any data and information that they have at that time. Chapter 92 requires it by law. So I think that's...one of the issues that you're raising is is that how does the commission separate that process from their contested case proceeding, am I?

Mr. Chipchase: I would say in part that's true. The most fundamental thing of course is how do they use the public testimony? If the public testimony is used as evidence in the 91 proceeding then there's been a procedural violation and that's what occurred here.

Mr. Giroux: Okay. And so let me under the...under Chapter 91 it says that they're not supposed to take any, use any evidence that's outside of the contested case. But within the County Code it requires them to have a public hearing. So how do you suggest that they overcome that dual role of being harbingers of public process and the adjudicators of a private right?

Mr. Chipchase: I actually really appreciate this almost theoretical discussion at this point, but it's, it's I don't know if it's interesting to anyone else in the room. It's interesting to me and counsel.

Mr. Robinson: And I'll remind you that we aren't getting paid, but you guys are, so please...

Mr. Chipchase: So I mean, I should talk a lot. Anyway, I can comment on how I've seen it done in a number of bodies, a number of administrative bodies that I've appeared before on a whole range of clients and whole range of issues. Honolulu Planning Commission for example will take public testimony, close public testimony and then begin the contested case so that there's a clear demarcation of the process from public to private. And the public portion of it while it's part of the transcribed record is not part of the basis on which the commission makes its

decision. I've appeared many, many times before the LUC. The LUC is kind of a funny animal because it has a 92...it has some obligation to take public testimony even in contested case hearings. And so what it will do is swear every witness in. Every witness takes an oath, they're still limited in their time, but then they're open to all counsel for cross-examination before the witness sits down and then he can be recalled by counsel.

Mr. Giroux: Did you ask for that process in this situation?

Mr. Chipchase: I had no idea that process was happening. I had no idea that we were having a 92 proceeding and using that evidence in the 91 contested case until I got the draft findings of fact, conclusions of law, decision and order. I thought that up and to that point the decision would be based on the record actually submitted into evidence in the 91 proceeding to protect the commission's decision. It wasn't. 'Cause we could go through the findings that I've rattled off. It's quite clear that it's based on public testimony which is in fact in many, many instances directly contrary to the evidence that was submitted before this body in the 91 proceeding.

Mr. Giroux: Did at any time you ask for any type of subpoenas?

Mr. Chipchase: No, I had no need to subpoena witnesses. My witnesses appeared voluntarily.

Mr. Giroux: Okay, but what about witnesses that you had objections to as far as what you believed they were saying that was not true or true or not true?

Mr. Chipchase: We had no notice that any witnesses would appear as public testifiers or certainly as witnesses in 91 proceeding. No documents were submitted to us before the hearing, no exhibit lists were submitted to us before the hearing, no witnesses was submitted to us before the hearing. Absolutely no notice that anyone was gonna show up and be treated as a testifier in a 91 proceeding.

Chair Tsai: Counsel, I'm no attorney and never claimed to be one, but I can say in all fairness when we have public testimony and I've been in this commission for a number of years it's fair for both sides to be presented so I think that in your particular case your applicant can easily represent himself but he didn't and he could have other people on his side to represent him as well and he didn't so that's a fair opportunity we give to everybody and you cannot challenge something that's what we believe is fair in all aspects.

Mr. Chipchase: If I could just correct one thing. Mr. Goodin informed me and reminded me really that two days, was it was it two days, two days before the hearing Mr. Rohrer submitted written testimony. It was not identified as an exhibit to be introduced in the contested case proceeding. Indeed he's not a party. He withdrew his application to intervene. So two days before the hearing we did have notice of written testimony and that's the extent of the prehearing notice that we received.

Chair Tsai: Commissioner Higashi?

Mr. Higashi: Yes, I have a concern about this particular process we're doing right now because the argument that is made by the applicant or the attorney is that the process that we've been using which was public testimony without giving oath has been past practice including the County Council. When people come and give public testimony they're not sworn in before they give testimony and it sounds like that's something that they're trying to do to modify what we've been done in the past which means that if this is gonna be now the practice we're gonna have a major problem with everyone coming to testify to be sworn in before and on top of that, on top of that, the rebuttal for the applicant to come and question the person who's testifying makes the process unmanageable.

Chair Tsai: Right. Okay, all so can I get a decision, motion from the Commission? Commissioner Robinson?

Mr. Robinson: I make a motion to go to Executive Session.

Mr. Hedani: Second.

Chair Tsai: Okay, motion to go to Executive Session, second by Commissioner Hedani. All in favor?

Mr. Spence: Six ayes.

Chair Tsai: We're going to Executive Session.

It was moved by Mr. Robinson, seconded by Mr. Hedani, then

**VOTED: To Go Into Executive Session.
(Assenting – K. Robinson, W. Hedani, L. Hudson, S. Duvauchelle,
S. Castro, R. Higashi)
(Excused – P. Canto, L. Carnicelli)**

The Commission then went into Executive Session from approximately 2:32 p.m. to 2:50 p.m. The regular meeting was then reconvened at 2:53 p.m.

Chair Tsai: Maui Planning Commission is called back to order. Do I get a motion?

Mr. Robinson: I guess I'll go first. We have...which one are we attempting first?

Mr. Spence: We should probably, probably deal with all three items, the three agenda items. I

don't know if you want to do them...probably get a motion on just one so the record's clear.

Mr. Giroux: Yeah, do you want to separate the question?

Mr. Robinson: I wanted to make an amendment that wasn't inclusive of all three.

Mr. Spence: Okay.

Mr. Robinson: I mean, not amendment, motion. My motion is to deny opening, reopening this application or reopening the hearing on its request.

Mr. Hudson: Second.

Chair Tsai: Okay, we have a motion to deny reopening of this application. Second by Commissioner Hudson. Discussion?

Okay, let's call for a vote. Director, can you repeat the motion please?

Mr. Spence: The motion is deny reopening the hearing.

Mr. Hedani: Put something on the record.

Chair Tsai: Okay, Commissioner Hedani?

Mr. Hedani: Nothing that I've heard today changes my mind about the decision that we reached. And on that basis I don't hear anything that would necessitate a reopening of this.

Chair Tsai: Commissioner Duvauchelle?

Ms. Duvauchelle: I concur with Commissioner Hedani. I don't...there may be some technical, I don't see any issues that have changed that would want me to change our Commission decision.

Chair Tsai: Okay, Commissioner Robinson?

Mr. Robinson: I'd like to apologize, I would like to make that motion to deny reopening and amending. Thank you.

Chair Tsai: Okay, are you okay with that second?

Mr. Hudson: Yes, I'll stay with that second.

Chair Tsai: Okay, Commissioner Hedani?

Mr. Hedani: Based on that amendment, I didn't hear anything today that would change my opinion relative to amending the application. If all of the towers were reduced from 40 feet to two feet I might change my mind because nobody would be screaming, but to eliminate the 80-foot tower and to retain the existing operation does not remove any of the problems that we encountered in the first application.

Chair Tsai: Any other discussion? Okay, call for a vote. All in favor?

Mr. Spence: That's six ayes. None opposed. Motion carries.

ACTION ON ITEMS F-1 AND F-2:

It was moved by Mr. Robinson, seconded by Mr. Hudson, then

**VOTED: To Deny the Motion to Reopen Hearing and Motion to Amend Application.
(Assenting – K. Robinson, L. Hudson, W. Hedani, S. Duvauchelle, S. Castro, R. Higashi)
(Excused – P. Canto, S. Carnicelli)**

Mr. Spence: So then Commissioners then we go back to Item E-1 regarding the draft Decision and Order.

Chair Tsai: Commissioner Hedani?

Mr. Hedani: Move to accept the Findings of Fact, Conclusions of Law, Decision and Order, the draft that has been presented to the Commission today.

Mr. Hudson: Second.

Chair Tsai: Okay, moved by Commissioner Hedani, second by Commissioner Hudson. Discussion? None. Director would you please repeat the motion?

Mr. Spence: The motion is to accept the draft Decision and Order as your decision and order.

Chair Tsai: Call for a vote. All in favor? Oh, Commissioner Hedani?

Mr. Hedani: Since my name's attached to it now.

Chair Tsai: My name and I'm signing it.

Mr. Hedani: For the record, I think the applicant was represented by counsel in the meeting that we had. Most of the documents that I saw today represent a challenge to the procedure that we took as opposed to the findings that we ended up with. And from my perspective if Counsel was present and objected to the manner in which our meeting was held then he should have expressed it at that time.

Chair Tsai: Commissioner Higashi?

Mr. Higashi: I'd like to say that on the positive side for Mr. Hoyte's application I think if they stuck strictly with the idea of doing the historical thing with the 4th Division Marines, I think they would have had no problem. The problem comes in when you have illegal construction going on with ziplines, et cetera with no proper permit becomes a major problem with what's happening with this particular project application consequently I would go along and deny the...

Chair Tsai: We've already denied it. Commissioner Hedani?

Mr. Hedani: I must say that I was impressed with the wealth of information that you provided us today. This was impressive.

Mr. Chipchase: I appreciate that. Thank you, Commissioner.

Chair Tsai: And no trees were harmed during this process.

Mr. Chipchase: Many trees were harmed Commissioner, Chair, many trees.

Chair Tsai: Okay, any other discussion? Okay, Director?

Mr. Spence: The motion is to accept the Decision and Order as your Decision and Order.

Chair Tsai: All in favor?

Mr. Spence: That's six ayes.

Chair Tsai: No opposition. Motion carries.

ACTION ON ITEM E-1:

It was moved by Mr. Hedani, seconded by Mr. Hudson, then

**VOTED: To Approve the Proposed Findings of Fact, Conclusions of Law, and Decision and Order.
(Assenting – W. Hedani, L. Hudson, K. Robinson, S. Duvauchelle,
S. Castro, R. Higashi)**

(Excused – P. Canto, S. Carnicelli)

Chair Tsai: Next agenda item?

Mr. Chipchase: Commissioners, I know you do have a hard job and I know you guys aren't paid and appreciate the attention you put to this. We put I think, Commissioner Robinson you said six feet of paper before you. That might be a slight exaggeration.

Mr. Robinson: Six inches.

Mr. Chipchase: Six inches, more than that Commissioner, way more than that and I appreciate your time working on it. Thank you.

Submitted by,

Carolyn Takayama-Corden
Secretary to Boards & Commissions II

RECORD OF ATTENDANCE

Present

Stephen Castro
Sandy Duvauchelle, Vice-Chairperson
Wayne Hedani
Richard Higashi
Larry Hudson
Keaka Robinson
Max Tsai, Chairperson

Excused

Pua Canto
Lawrence Carnicelli

Others

Will Spence, Director, Planning Department
James Giroux, Deputy Corporation Counsel, Department of the Corporation Counsel
Rowena Dagdag-Andaya, Deputy Director, Department of Public Works