

GET Committee

From: Mike J. Molina
Sent: Wednesday, January 30, 2019 8:36 AM
To: GET Committee
Subject: FW: Change in recommendation: Michele McLean and Patrick Wong should not be confirmed
Attachments: BVA Zipline Appeal-61836.pdf

From: Anthony Ranken <anthony@rankenlaw.com>
Sent: Tuesday, January 29, 2019 8:02 PM
To: Kelly King <Kelly.King@mauicounty.us>; Keani N. Rawlins <Keani.Rawlins@mauicounty.us>; Tasha A. Kama <Tasha.Kama@mauicounty.us>; Riki Hokama <Riki.Hokama@mauicounty.us>; Alice L. Lee <Alice.Lee@mauicounty.us>; Mike J. Molina <Mike.Molina@mauicounty.us>; Tamara A. Paltin <Tamara.Paltin@mauicounty.us>; Shane M. Sinenci <Shane.Sinenci@mauicounty.us>; Yukilei Sugimura <Yukilei.Sugimura@mauicounty.us>
Subject: Change in recommendation: Michele McLean and Patrick Wong should not be confirmed

Dear Chairman Molina and members of the G.E.T. Committee:

When I and others testified before this Council, we asked that you defer the confirmation hearings of Patrick Wong and Michele McLean for a week or two in order to give them time to evaluate their position regarding the disastrous zipline settlement, and time to work with us to try to fix the situation. As it happened, the one-week continuance of the G.E.T. hearing has given us that period of deferral without the Council having to vote on it, and has given Patrick Wong and Michele McLean a chance to recognize their error and work with us to correct the damage their decision has done. During this past week, I asked them both to agree to the deferral of their nominations so that they would have time to consult with the new mayor, receive direction on this issue, and work with me and the neighbors of the zipline to see how they can help correct the situation. But they have both pointedly refused to cooperate with us in that endeavor. Pat Wong has cut off all communication and although Michele McLean has listened to our point of view she has given no indication that she has changed her own view of the zipline settlement. Therefore I, and the two dozen neighbors of the Kauhikoa zipline whom I represent, regrettably find ourselves in the position of asking this Council to reject both of their nominations.

Mr. Wong continues to circle the wagons; before he stopped communicating he informed me that he will not allow me to talk to any of the people in County government who might be potential witnesses for our appeal, and he will invoke attorney-client privilege and not let me see the internal communications between his department and the planning department concerning the settlement decision. That significantly hampers my ability to successfully pursue the appeal.

Ms. McLean has the power to waive the attorney-client privilege and allow us to see the communications between departments that formed the basis of the decision, but she has not been willing to do that either, so the whole matter remains shrouded in secrecy. Even the settlement agreement itself is still being kept secret. When I finally obtained it through a FOIA/UIPA request, whole paragraphs of it were redacted out with a black magic marker.

Michele McLean has only held her job as planning director for half a year and thus has not developed much of a record for this Council to examine. But we do have this zipline decision, and as a case study it is very revealing of the kind of planning director she would be if confirmed. Apparently, the kind who listens only to developers and business, not to the citizens, the kind who gives access to the monied interests and not to the people she is supposed to serve, the kind who does secret deals behind the scenes without consulting or even notifying the members of the public who will be affected by those deals.

For more detail on the zipline case and why the Planning Department and Corporation Counsel's settlement was such a betrayal of the people of Maui, please read the attached "Appeal Application [Notice of Appeal]". (I submitted a copy with my written testimony before the January 23rd hearing but I don't know if you received it or not.) If you'd like to minimize your reading time, please begin with the 3-paragraph "Introduction and Background" on page two of the attached, and then you can skip to the 8th page of the PDF, which bears the heading "Justification for Appeal (Supplement to Form 2)".

Based on the testimony received by the council, Michele is obviously well liked by many who have had dealings with her – especially developers and their representatives. But this is not a popularity contest. This confirmation hearing is a key moment for Maui Nui – it's about the future of our islands. The person who becomes planning director will have either full control or great influence over most of the land use decisions made on Maui over the next four years. As a result of her decision on the zipline issue, Michele McLean has now fully revealed herself to be a developer's dream director.

A couple of the testifiers at Ms. McLean's confirmation hearing sought to dismiss her disastrous zipline decision with comments like "everyone makes mistakes." But sometimes a so-called mistake can be very revealing. The zipline fiasco is a case study which reveals Michele McLean's true colors. Moreover, we have given her every opportunity to acknowledge her error, to say that she received poor legal advice from corporation counsel, to explain that she did not view all the relevant information before making her decision. It's true that she did not view any of the materials submitted to the Planning Commission by the neighbors of the zipline and by my office. But in fact Michele did have access to that information. She was present at the head of the table during the entire Planning Commission hearing on the special use permit application. Although she cut it short before the lunch recess for the convenience of the developer's attorneys and before the public could testify (because those attorneys had other matters to handle back on Oahu that afternoon), we did submit a pile of written testimony and exhibits which she could have read but did not.

One of the permitted uses of ag land is for preservation of historic sites, but that doesn't mean they can operate a zipline. The County's December 6th letter approving the settlement is attached to our BVA appeal documents (8th page from the end). It is a transparent farce of an excuse for allowing a developer to open an amusement park on ag land. You can read the letter for yourself, but here in essence is how Michele and her attorney justify the Kauhikoa zipline: Ziplines are "a re-creation of marine training facilities of the type that existed at Marine bases [on the mainland] that were active when Camp Maui was," and therefore ziplining is permitted at North Shore Zips' site – and apparently anywhere within the hundreds of acres between there and Giggle Hill, which is the center of the sprawling Marine camp.

You don't need legal training to see the glaring flaw in that logic. There was never a zipline at Camp Maui and ziplining has nothing to do with any military training activity anywhere. And furthermore the County Code permits preservation only of "**buildings, sites, or landscapes**" of historical or archeological significance; it does not permit preservation (or "re-creation") of **activities** of historical significance.

But when someone makes a mistake that causes suffering to others, there are three things that need to be done. The first is to admit the mistake -- to admit what it was specifically, not just in vague terms – and to apologize for it. The second is to reflect on what one has learned from the mistake and how one would handle a similar situation in the future. And the third is to do whatever is necessary to correct the negative effects on others that were caused by the mistake. Michele has done none of these things. She does not deserve your approval as Planning Director.

As for Patrick Wong, his administration is not a friend of the environment, is not dedicated to the strong enforcement of Maui's land use laws, and is not looking out for the people of this community. Pat Wong does not believe in open government. His administration does its own thing, working behind the scenes with businesses and developers, denying the people access.

We saw that he is well-liked by his staff, but maybe that's partly because he gives them free rein. When they behave irresponsibly in representing the county, or even dishonestly as in this case, there are no consequences. And he apparently gives them no supervision. The fact that Pat didn't know about what was going on in this zipline case

land use case for all these years, a case that's made front page news a number of times, a case with significant broader implications, pursuing it through notices of violation and through permit hearings and circuit court litigation, in the Planning Department, in the BVA, in the Planning Commission, in the courts, and Pat has been corporation counsel that entire time, and he doesn't know about it? When I first went to meet with him he said he was "playing catch up" – just learning about what had happened. Pat should not be giving his deputies free license to simply throw away a big case, like Koa Holiona did when he stipulated after one day of the contested case that historical preservation was the principal use engaged in by the zipline company. And Pat should not be giving his deputies free license to then settle a case that's been pending in one form or another for four years, without at least consulting their boss. I don't know what he thinks is his job description, if it doesn't include at least that minimal level of supervision!

There are other issues of concern that have arisen regarding both Michele McLean: a similar, back-door settlement of the Paia Inn controversy that gave the developer a 75% discount on fines and apparently traded a promise of land use rights for payment of the remaining fine. And there are other serious black marks on Patrick Wong's record – such as his anti-environmental and budget-busting handling of the injection wells issue. I will try to address these in a separate e-mail.

Thank you for your time and attention to this important matter.

Please look for another, much shorter e-mail from me about the one key question that I think needs to be put to both Michele and Pat.

Sincerely,

Anthony Ranken

Anthony Ranken & Associates
222 N. Church St.
Wailuku, Hawaii 96793
(808) 244-7011

APPEAL APPLICATION
(NOTICE OF APPEAL)

Applicant/Appellant's Name:	Marian Prosser et al. (see attached), through their attorney Anthony L. Ranken		
Telephone No:	(808) 244-7011	E-mail:	anthony@rankenlaw.com
Mailing Address:	222 N. Church St., Wailuku, Maui, Hawaii 96793		
Applicant/Appellant's interest, if not owner:	affected residents of Haiku, Maui		
Owner's Name:	D&S Ventures Ltd., LLC, and Derek Hoyte		
Telephone No:	(808) 521-9220	E-mail:	cchipchase@cades.com
Mailing Address:	c/o Calvert G. Chipchase, Esq.		
Project Name:	Camp Maui	TMK:	(2) 2-7-012:086-0000
Street Address:	2065 Kauhikoa Road, Haiku, HI 96708		
Applicable Ordinance(s), Rule(s), or Regulation(s) and Section(s):			
Maui County Code section 19.30A.050			
Nature of appeal (description of the facts material in consideration of the appeal presented, the alleged error committed by the agency, and any relevant statutes, ordinances, or administrative rules pertaining to the matter under appeal):			

Please see attached "NATURE OF APPEAL" Supplement

RECEIVED
2014 JUL -1 10 3:22
COUNTY OF MAUI
DEPT. OF LAND & NATURAL RESOURCES
PLANNING & ZONING DIVISION

(FORM 1)

NATURE OF APPEAL
(Supplement to Form 1)

APPELLANTS: Marian Prosser, Daniel Coltart, Ann Bassell, Stephen Hynson, Leslie Ann Spencer, Nelson Ka'aimalani Spencer, James Rohrer, Laurie Rohrer, Lance K. Gilliland, Rick Heiman, Ellen Osborne, Robert Friedlander, Jennifer Friedlander, Ronald Serle.

INTRODUCTION AND BACKGROUND:

After giving D&S Ventures repeated warnings about its illegal zipline activity in 2013 and 2014, finally on December 11, 2014 the County of Maui Planning Department issued a Notice of Violation (NOV) to D&S Ventures Ltd., LLC, the operator of the North Shore Zips zipline in Haiku, for operating an illegal zipline on a property that it co-owned at 2065 Kauhikoa Road, Haiku, Maui, Hawaii. The NOV correctly stated that D&S was in violation of Maui County Code § 19.30A.060(H), which requires a County Special Use Permit for uses not allowed in the agricultural zone. D&S was ordered to cease and desist all zipline activity, and fines began accruing at the rate of \$1,000 per day. D&S did not pay the fines nor cease the illegal activity, and appealed the NOV. The County agreed to stay enforcement of the fines while D&S applied for a County Special Use Permit to operate a zipline on the property.

But on December 6, 2018 Maui County Planning Director Michele C. McLean abruptly reversed her department's longstanding position that D&S's zipline required a Special Use Permit, and instead indicated (in a letter signed on her behalf by Planning Program Administrator John S. Rapacz) that D&S's zipline was a legal principal use of the property and did not require a County Special Use Permit.

In this appeal, Appellants are urging the Board of Variances of Appeal to find that the Planning Department's letter of December 6, 2018 declaring the zipline legal was premised upon legal and factual errors which must result in invalidation of that letter and of the settlement agreement which is dependent on it. The evidence in this contested case will also show that the Planning Director's decision to withdraw the Notice of Violation and declare the D&S zipline legal without a Special Use Permit was arbitrary and capricious and was a clearly unwarranted abuse of discretion.

STATEMENT OF ERRORS COMMITTED BY APPELLEE DIRECTOR OF PLANNING AND RELIEF REQUESTED IN THIS APPEAL:

It is respectfully prayed that the Board of Variances and Appeals **reverse** the following decisions, orders, and actions of the Planning Director:

- (1) The decision to abandon the County's four-year effort to enforce the Notice of Violation issued to D&S Ventures in December 2014, terminate the contested case hearing which

began on October 30, 2018 ("In the Matter of the Appeal of D&S Ventures, LLC," Docket No. BVAA T2015/0002), and instead enter into the "Confidential Settlement Agreement" which is attached hereto as Exhibit "A", allowing the zipline to continue operating without obtaining a Special Use Permit (this includes the Director's acceptance of Exhibit 1 to that Settlement Agreement);

- (2) The letter dated December 6, 2018 signed by Planning Program Administrator John S. Rapacz which is attached to the Confidential Settlement Agreement as its Exhibit 2; and
- (3) The stipulation entered into by the Planning Director through Deputy Corporation Counsel John H. Holiona and through Planning Program Administrator John S. Rapacz, that under Maui County Code § 19.030A.050, zipline operator D&S Ventures is engaged in **principal** uses of its property that include agricultural land conservation and the retention, restoration, rehabilitation, or improvement of building sites or cultural landscapes of historical or archaeological significance. (This stipulation is detailed in the transcript of said hearing, relevant pages of which are attached hereto as Exhibit "B".)

This appeal should also be deemed to include all actions and decisions made by the Planning Director, herself or through her deputies, staff, or attorneys, that contributed in any way to the handling of the above-referenced contested case proceeding or to the Confidential Settlement Agreement.

IDENTIFICATION AND INTERESTS OF APPELLANTS:

The parties filing this appeal are:

- 1 & 2. Daniel Coltart and Marian Prosser, next-door neighbors to North Shore Zips.
- 3 & 4. Stephen Hynson and Ann Bassell, close neighbors of North Shore Zips.
- 5 & 6. Leslie Ann Spencer and Nelson Ka'aimalani Spencer, close neighbors of North Shore Zips.
- 7 & 8. James and Laurle Rohrer, neighbors of North Shore Zips.
9. Lance K. Gilliland, neighbor of North Shore Zips.
10. Rick Heiman, neighbor of North Shore Zips.
11. Ellen Osborne, neighbor of another property on which the same company, D&S Ventures, is proposing a zipline.
- 12 & 13. Robert and Jennifer Friedlander, concerned citizens and neighbors of another illegal zipline in Haiku in which D&S owner Derek Hoyte is also involved.
14. Ronald Serle, concerned resident of Haiku.

All of the appellants are residents of Haiku, Maui. They are aggrieved by the Planning Department's above actions because those actions allow an illegal commercial operation to be carried out upon agriculturally-zoned land, and that operation negatively impacts their quality of life. The ways in which it does so include the incessant, uncontrollable screams of the zipline's customers as they ride the zipline, the noise of the zipline cables, and other noises uncharacteristic of and inappropriate for a rural, agricultural community; visual intrusion; and

excessive traffic generated by the zipline business on a narrow road with no markings or lane divider.

As citizens of Maui County, the appellants are concerned not only about the impacts of the D&S zipline upon their peaceful rural community, but also about the perversion of Maui's land use and zoning laws and the dangerous precedent that would be set for other ziplines and other kinds of unlawful and detrimental land uses if the Planning Department's decision is allowed to stand. The appellants are also aggrieved because they devoted large amounts of their precious time to attending public hearings, in response to notices by the Planning Department that they would have an opportunity to give testimony and share their knowledge of facts relevant to the D&S zipline, but they were denied the opportunity to testify and were not informed or consulted at all when the Planning Director made the decision to explore settlement of the D&S appeal. As a result of the Director's failure to consult with the affected members of the community and her failure to inform herself of relevant information concerning the effects of the zipline upon its neighbors, the resulting settlement is extremely one-sided in favor of D&S, and contains virtually no terms which will have any meaningful effect in protecting the neighboring residents from the deleterious effects of the zipline operation.

RELEVANT STATUTES, ORDINANCES OR ADMINISTRATIVE RULES:

The Procedural Rules governing the Board of Variances and Appeals, § 12-801-81, states that the Board may reverse the decision or order of the Planning Director if it finds any one of the following to be true: the decision or order was "(1) Based on a clearly erroneous finding of material fact or erroneous application of the law, or (2) Arbitrary or capricious in its application, or (3) A clearly unwarranted abuse of discretion."

Maui County Code § 19.30A.050(A) provides that only the following uses and structures shall be permitted in the agricultural district:

A. Principal Uses: 1. Agriculture; **2. Agricultural land conservation**; 3. Agricultural parks, pursuant to chapter 171, Hawai'i Revised Statutes; 4. Animal and livestock raising, including animal feed lots and sales yards; 5. Private agricultural parks as defined herein; 6. Minor utility facilities as defined in section 19.04.040, Maui County Code; **7. Retention, restoration, rehabilitation, or improvement of buildings, sites, or cultural landscapes of historical or archaeological significance**; and 8. Solar energy facilities, as defined in section 19.04.040, Maui County Code, and subject to the restrictions of chapter 205, Hawaii Revised Statutes, that are less than fifteen acres, occupy no more than thirty-five percent of the lot, and are compatible with existing agricultural uses; except that land with soil classified by the land study bureau's detailed land classification as overall (master) productivity rating class D or E need not be compatible with existing agricultural uses.

B. Accessory Uses: Uses that are incidental or subordinate to, or customarily used in conjunction with a permitted principal use, as follows: 1. Two farm dwellings per lot, one of which shall not exceed one thousand square feet of developable area; 2. One farm labor dwelling per five acres of lot area. On the island of Maui, the owner or lessee of the lot shall meet two of the following three criteria: a. Provide proof of at least \$35,000 of gross sales of agricultural product(s) per year, for the preceding two consecutive years, for each farm labor dwelling on the lot, as shown by State general excise tax forms and federal form 1040 Schedule F filings; b. Provide certification by the department of water supply that agricultural water rates are being paid if the subject lot is served by the County water system; or c. Provide a farm plan that demonstrates the feasibility of commercial agricultural production. On the islands of Moloka'i and Lana'i, the owner or lessee of the lot shall meet both of the criteria provided by subsections 19.30A.050.B.2.a and 19.30A.050.B.2.b; 3. One agricultural products stand per lot, for the purpose of displaying and selling agricultural products grown and processed on the premises or grown in the County, provided that said stand shall not exceed three hundred square feet, shall be set back at least fifteen feet from roadways, shall have a wall area that is at least fifty percent open, and shall meet the off-street parking requirements for roadside stands provided by section 19.36.010 of this code, except that paved parking shall not be required; stands that display or sell agricultural products that are not grown on the premises shall be required to obtain a special permit pursuant to chapter 205, Hawai'i Revised Statutes; 4. Farmer's markets, for the growers and producers of agricultural products to display and sell agricultural products grown and processed in the County; structures shall have a wall area that is at least fifty percent open; markets shall operate only during daylight hours and shall not operate on parcels less than ten acres; the director of public works may impose additional requirements if a building permit is required for any structures; markets that display or sell agricultural products that are not grown on the premises shall be required to obtain a special permit pursuant to chapter 205, Hawai'i Revised Statutes; 5. Storage, wholesale and distribution, including barns; greenhouses; storage facilities for agricultural supplies, products and irrigation water; farmer's cooperatives; and similar structures that are customarily associated with one or more of the permitted principal uses or, for the purpose of this section, are associated with agriculture in the County; 6. Processing of agricultural products, the majority of which are grown in the County; this includes the burning of bagasse as part of an agricultural operation; 7. Energy systems, small-scale; 8. Small-scale animal-keeping; 9. Animal hospitals and animal board facilities; if conducted on the island of Moloka'i, such uses shall have been approved by the Moloka'i planning commission as conforming to the intent of this chapter; 10. Riding academies; if conducted on the island of Moloka'i, such uses shall have been approved by the Moloka'i planning commission as conforming to the intent of this chapter; 11. Open land recreation as follows: hiking; noncommercial camping; fishing; hunting; equestrian activities; rodeo arenas; arboretums; greenways; botanical gardens; **guided tours that are accessory to principal uses, such as farm or plantation tours, petting zoos, and garden tours**; hang gliding; paragliding; mountain biking; and accessory restroom facilities. If hiking, fishing, hunting, equestrian activities, rodeo arenas, hang gliding, paragliding, or

mountain biking are conducted for commercial purposes on the island of Moloka'i, such uses shall have been approved by the Moloka'i planning commission as conforming to the intent of this chapter. **Open land recreation uses or structures not specifically permitted by this subsection or by subsection 19.30A.060.H shall be prohibited; certain open land recreation uses or structures may also be required to obtain a special permit pursuant to chapter 205, Hawaii'i Revised Statutes;**

12. Except on Moloka'i, bed and breakfast homes permitted under chapter 19.64 of this code that are: a. Operated in conjunction with a bona fide agricultural operation that produced \$35,000 of gross sales of agricultural products for each of the preceding two years, as shown by State general excise tax forms and federal form 1040 schedule F filings; or b. In compliance with all of the following criteria, provided that the bed and breakfast home is not subject to a condominium property regime pursuant to chapter 514A, Hawaii Revised Statutes: i. The lot was created prior to November 1, 2008. ii. The lot is comprised of five acres or less; and iii. An approved farm plan has been fully implemented and is consistent with chapter 205, Hawaii Revised Statutes; or c. Located in sites listed on the State of Hawaii Historic Register or the National Register of Historic Places.

13. Parks for public use, not including golf courses and not including commercial uses, except when under the supervision of a government agency in charge of parks and playgrounds; and

14. **Other uses that primarily support a permitted principal use; however, such uses shall be approved by the appropriate planning commission as conforming to the intent of this chapter.**

JUSTIFICATION FOR APPEAL

An appeal may be granted only if the Board finds one of the following:

1. That subject decision or order was based on an erroneous finding of material fact or erroneously applied to the law.

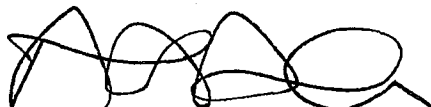
Please see attached "JUSTIFICATION FOR APPEAL" Supplement

2. That the subject decision or order was arbitrary or capricious in its application.

Please see attached "JUSTIFICATION FOR APPEAL" Supplement

3. That the subject decision or order was a clearly unwarranted abuse of discretion.

Please see attached "JUSTIFICATION FOR APPEAL" Supplement



Applicant's Signature

01/07/2019

Date

(FORM 2)

JUSTIFICATION FOR APPEAL

(Supplement to Form 2)

The Procedural Rules governing the Board of Variances and Appeals, § 12-801-81, state that the Board may reverse the decision or order of the Planning Director if it finds **any one** of the following to be true:

- (1) the decision or order was “based on a clearly erroneous finding of material fact or erroneous application of the law” – Appellants will demonstrate material and significant factual errors and erroneous application of the law.
- (2) the decision or order was “arbitrary or capricious in its application,” or
- (3) “a clearly unwarranted abuse of discretion.”

Appellants see the second and third grounds as closely related and applicable to the same alleged errors of the Appellee, and will therefore discuss the application of those two standards together in the below analysis.

1. The Subject decision or order was based on an erroneous finding of material fact or erroneously applied the law.

The analysis contained in the Department of Planning’s December 6, 2018 letter declaring the D&S zipline legal is based on both legal and factual errors which render it invalid and subject to reversal by this Board. The factual error is the contention that ziplines “are a re-creation of training facilities of the type that existed at Marine bases that were active when Camp Maui was.” In fact there is no evidence that ziplines or anything like them were used by the Marines at all, much less as a training device. The only evidence that D&S produced were a couple of photos taken in the 1940s at a Marine facility in South Carolina, showing Marines using a rope bridge and a wire ladder. Both of those devices involved the soldier standing on one rope or wire and grabbing another so as not to fall, as he moved slowly along the tightrope of the lower rope or wire. It bears no resemblance to hanging by a harness from a zipline as gravity takes you downhill at speeds of up to 40 mph. The latter requires no effort at all and has no training benefit.

The legal error contained in the Department’s December 6, 2018 letter to D&S’s planning company is that while the “historic preservation” subsection of the County Code’s agricultural zoning law permits as a primary use the retention, restoration, rehabilitation, or improvement of **buildings or sites** of historical significance, the County’s letter incorrectly reads into that law not just places but **activities**: it holds that the **activity** of a zipline is a permissible principal use of the property because the activity is “a re-creation of training facilities of the type that existed at Marine bases that were active when Camp Maui was, and it is part of the A.7 principal use.”

Moreover the Planning Department’s December 6 letter incorporates by reference the December 5, 2018 letter from D&S’s retained Planning Company, PBR Hawaii, Inc. But that

letter too contains numerous misrepresentations as well and thus cannot serve as a valid basis for the County's December 6 letter or the December 6 settlement agreement. These errors will be fully exposed during the course of the contested case hearing on this appeal.

The legal and factual errors made by the Department in the December 6, 2018 letter are enough all by themselves to invalidate the settlement. But in addition Appellants will show, through the evidence presented at the contested case hearing in this matter, that the Planning Department's actions which underlie the settlement of the Notice of Violation were arbitrary and capricious and were a clearly unwarranted abuse of discretion.

**2 & 3. The Subject decision or order was arbitrary or capricious in its application and
The Subject decision or order was a clearly unwarranted abuse of discretion.**

It was arbitrary, capricious, and a manifest abuse of discretion for Appellee Director of Planning to:

- A. find that historical preservation and agricultural land conservation were principal uses of the property;
- B. accept the December 5 letter from D&S Ventures' planner which states that the zipline was a "guided tour" of the former Camp Maui; and
- C. fail to consult with the affected parties (i.e., neighbors of the zipline including Appellants) in order to craft reasonable mitigation measures to include in a settlement, thereby signing off on a settlement agreement the terms of which were dictated by D&S and are clearly designed **not** to be enforceable in any way that would be of benefit to those living next door to or near the zipline.

The Maui County Code in § 19.04.040 defines "principal use" as the "primary or predominant use" of a property. The first two synonyms for both "primary" and "predominant" that appear in a standard google definition search are "main" and "chief," so the principal use of a property is its main use or chief use. The County's letter of December 6 exempts North Shore Zips (D&S Ventures) from the requirement of obtaining any land use permit on the grounds that its principal use of the property involves historic preservation. One of the questions to be answered in this appeal is whether the County could reasonably find that the principal use – i.e., the "primary," "predominant," "main," or "chief" use of the D&S Ventures property is historic preservation. The evidence to be presented at the contested case hearing on this appeal will show that the answer is clearly "No," and that to the extent that the County's decision rested on such a theory, it is arbitrary, capricious, and a manifest abuse of discretion. The only **principal** use of the North Shore Zips property is and always was a zipline thrill ride and was never historical preservation, as shown by the following facts which will be proven during the course of the contested case hearing:

The sign on the road fronting the D&S business merely says "North Shore Zips" and makes no mention of Camp Maui or any historical importance or use of the property.

As of September 2018 the website for North Shore Zips (D&S Ventures' trade name) promoted the business as a thrill ride, and contained almost no mention of the site's history other than a passing, unexplained reference to "Camp Maui":

www.nszipline.com

22

Maui Zipline! 7 Zipline Adventure on Maui's North Shore!

Maui Zipline Tour

On this Maui zipline tour, you will soar high through the canopy of giant eucalyptus trees on 7 different ziplines, while overlooking Maui's verdant North Shore. Imagine your thrill as you reach heights of 70' and speeds to 40 mph, with ziplines up to 900' long! Fast, fun, and exhilarating, the North Shore Zipline Co's "Camp Maui zipline Tour" was designed to thrill first time zippers, as well as the most experienced zipline enthusiasts.

NO MENTION

Y.
nor

→

On the "About Us" page, the website described the business as follows – note that the justification for the zipline does not even mention historic preservation nor does the description of the activity which follows have anything to do with "Camp Maui" or historic preservation:

About Us

We are a family owned and operated business established for the purpose of providing unique, exhilarating, and safe challenge course experiences, in support of sustainable agricultural farm operations. Our goal is to enrich the lives of our guests by providing them with a memorable outdoor experience that they will cherish for years to come. This business is our life and life is GOOD!

Our Motto

**"The Adventure Starts
Here!"**

It continues:

Maui's original treetop zipline adventure! Costa Rican style (i.e. tree-to-tree) canopy tour, with 7 ziplines, multiple platforms, swinging bridges, verdant upcountry views and award winning customer service. Family friendly, kid approved, with children 5 and up welcome to participate. Padded 3 point zip harness's allow for full freedom of movement while zipping (i.e. freestyle). Association of Challenge Course Technology (ACCT) trained, professional tour guides are there to help make the experience safe, as well as fun for all ages. The adventure starts here! Open 6 days a week, weather permitting. Reservations required.

North Shore Zips also advertises on the websites of several activities promoters such as MauiActivities.com and TripAdvisor, and likewise on those websites it is not a guided tour they are promoting but a thrill ride – on several sites no mention is even made of Camp Maui.

D&S Ventures does not offer or promote any tours of the property, does not have any interpretive plaques on the property pointing out any sites of historical interest, and does not have any personnel trained or certified as interpretive guides.

D&S demonstrates by its actions that it attaches no historical importance to the remnants of Camp Maui that remain on its property – it uses the cement slabs from the Camp Maui dormitory foundations to store its earthmoving equipment, chemicals, and other supplies out of the view of any visitors.

D&S has claimed in its appeal of the NOV that its zipline is permitted because it is a “guided tour” of a historic site, Camp Maui. That is a shallow ruse. No one screams during a guided

tour of a historical site. Among the evidence that Appellants will present in the contested case hearing is an audio recording of just eight minutes in length, made from inside the house of Appellants Marian Prosser and Daniel Coltart, in which one hears no less than 10 screams, two whoops, and a holler.

When the County Council decided to include guided tours of historic sites in its list of accessory uses on ag land, it certainly did not contemplate scream-inducing thrill rides. Such a use is not consistent with the clear intent of the ordinance permitting guided tours, which is to allow non-intrusive accessory uses such as, in the words of the ordinance, "farm or plantation tours, petting zoos, and garden tours." A petting zoo or a garden or plantation tour is a far cry from an amusement-park-style thrill ride on which over a hundred people a day get to face their fears and zoom through the air at heights of 70' and speeds to 40 mph, with ziplines up to 900' long! per D&S's website, which states that the activity is "designed" not to tour a historical site but "to thrill first time zippers, as well as the most experienced zipline enthusiasts."

Nowhere in any of its literature and nowhere on its website or any other website does D&S claim to offer a "guided tour" of any kind. This is for the simple reason that the people coming to ride the zipline are not seeking a guided tour. They are seeking a thrill ride. If D&S actually offered and conducted guided tours then most of their current customers would not be interested and would choose another zipline company. Guided tours have nothing to do with D&S's business model.

The zipline does not go near any of the crumbling cement slabs nor any other site of historical interest. The zipline was illegally constructed, without required permits, before D&S Ventures came up with the idea of passing off their zipline as a "tour" of an historical site, and the path of the zipline has not been altered since the decision to call it a "tour" was made.

As documented by recordings of the experiences of witnesses who went on the zipline, the guides make little or no mention of Camp Maui, World War II, or any history of the area. After assembling the customers and helping them on with their ziplining gear, some of the guides spend 20 to 40 seconds mentioning the military history of the area (while others say nothing at all about it), but after that brief bit of history the focus is exclusively on ziplining and trying to make the experience as exciting, scary, and scream-inducing as possible for the participants. The guides often shake the rope ladders as the participants climb up to the next zipline platform, just to scare them (and elicit more screams).

The evidence at the contested case hearing will show that of the over 1,000 people who posted online reviews of their visit to the property, less than 1 in 20 mentioned anything about the history of the property, and of those few who did mention it, it was a side note and the main thrust of the review was, as with the other 95%, their thrilling and scream-inducing zipline ride, with comments like "I screamed till I was hoarse!" None of the over 1,000 reviews indicated that Camp Maui was the reason for their visit to the property.

There is nothing of historical interest to preserve. The property, lying at the edge of the former Camp Maui farthest from its headquarters, was the site of a few outlying dormitories, some remnants of a road, and the Camp Maui dump. All that remains of the dormitories is a handful of crumbling cement slabs that were the foundations of the dorms and that are identical to scores of other slabs that can be found on many other properties in the area. There is a far more effective and relevant memorial to Camp Maui and the soldiers who stayed there, at the Fourth Marine Division Memorial at Giggie Hill, which was the center of Camp Maui, and thus there is no valid argument that preservation of the cement slabs on the D&S property adds anything of historic value.

In any case, the only relevant question for enforcement of the NOV was whether the zipline was legal at the time the Notice of Violation was issued in December 2014. Even if D&S had later managed to adopt a "principal use" of historical preservation, there is no legitimate argument that D&S was engaged in any type of historical preservation at the time the NOV was issued. Therefore the NOV was valid, the County was entitled to enforce it, and D&S would not have prevailed in its appeal of the NOV.

That brings us to the next point – that the Department of Planning abused its discretion in the settlement process because it forfeited its strong case against D&S and got no appreciable benefit for the community in return. When the decision was made to enter into a settlement, neither Appellee nor anyone in her department consulted any of the Appellants or their attorney (or any other interested member of the community), despite their longstanding and passionate involvement in all the hearings that had taken place and despite the fact that they were the ones directly affected by the zipline and could have offered much valuable input regarding effective mitigating measures to incorporate into the settlement. As a result of Appellee's arbitrary failure to consult with the interested parties, she entered into a settlement that contains no effective or enforceable measures designed to mitigate the noise impacts of the zipline business. The December 5, 2018 letter incorporated into the settlement did not address the impact of zipline riders' screams upon the zipline property's neighbors – although the screaming of zipline customers has always been the biggest problem generated by the zipline, nothing in the December 5 letter or anywhere else in the settlement documents even mentions the word "screams."

CONFIDENTIAL SETTLEMENT AGREEMENT

THIS CONFIDENTIAL SETTLEMENT AGREEMENT (the "Agreement") is made this 6th day of December, 2018, by and between D & S Ventures Ltd, L.L.C., also known as D and S Ventures, L.L.C. and D & S Ventures LLC ("D&S"), and the County of Maui through its Department of Planning (the "Department").

R E C I T A L S:

WHEREAS, D&S is an owner of real property that was once part of historic Camp Maui during World War II, and the property is located at 2065 Kauhikoa Rd Haiku, County of Maui, Hawai'i and identified by Tax Map Key: (2) 2-7-012:086-0000 (the "Property"); and

WHEREAS, on or about December 11, 2014, the Department issued a notice of violation to D&S, identified by File No. 20140013 (the "NOV"), for operating a zipline on the Property without a County Special Use Permit; and

WHEREAS, D&S disputes the NOV; and

WHEREAS, D&S appealed the NOV to the Maui Board of Variances and Appeals (the "BVA") in a proceeding docketed as No. BVAA T2015/0002 (the "BVA Proceeding"); and

WHEREAS, the BVA Proceeding is presently pending before the BVA; and

WHEREAS, pursuant to an agreement with the Department to, among other things, stay the BVA Proceeding and the accrual of fines under the NOV, on or about October 1, 2015, D&S submitted an application for a County Special Use Permit ("CUP") in a proceeding before the Maui Planning Commission, docketed as No. CUP 2015/0002 (the "Planning Commission Proceeding"); and

WHEREAS, the Planning Commission Proceeding is presently pending before the Planning Commission;

EXHIBIT A

NOW, THEREFORE, to avoid the time, burden, and expense associated with the BVA Proceeding and the Planning Commission Proceeding, and in consideration of the mutual promises and covenants contained herein, D&S and the Department (together, the "Parties" and each a "Party") agree to a compromise and settlement as follows:

AGREEMENT:

1. [REDACTED]

2. **Enforcement.** In response to the letter attached hereto as Exhibit 1, the Department has issued a use determination letter (attached as Exhibit 2) stating that if D&S conducts the uses of the property in the manner represented, the represented uses, structures and activities are permitted. The parties agree that if D&S' use of the property deviates from the representations in Exhibit 1, some uses of the property might not be permitted uses. If it appears that a use or uses

conducted on the property are not permitted, the Department will treat the enforcement issue as a first offense and issue a notice of warning to D&S. In response to a notice of warning, D&S may request a meeting and the parties shall meet to discuss the matter on a mutually agreeable date and time. Thereafter, the Department may take further enforcement measures as appropriate, including issuance of a notice of violation or filing of a lawsuit. An appeal of any notice of violation shall not stay enforcement of this agreement.

3. **Confirmation.** The Department accepts the letter attached as Exhibit 1 and through its letter attached as Exhibit 2 confirms that the existing and proposed activities and improvements, taken collectively, are permitted uses by right and do not require any land use permits under Section 19.30A.050(B)(10), Maui County Code.
4. **Inspection.** The Department may conduct inspections of the physical site improvements described in the letter attached as Exhibit 1 after the timeframes established in Exhibit 1, including but not limited to the new signs and new bamboo plantings within three months, and the new challenge course elements within one year, after giving D&S at least one week's notice. The Department may conduct inspections of the operations as described in Exhibit 1, including but not limited to the number of participants on any one tour and the historic information provided by tour guides, at any time that the operations are open to the public, without prior notice. At the start of any such inspection, Department representatives shall identify themselves as Department representatives.

5. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

6. **Withdrawal.** D&S will withdraw its appeal in the BVA Proceeding and withdraw its CUP application in the Planning Commission Proceeding.

7. **No Admission of Liability.** The Parties acknowledge and agree that this Agreement, the fact of settlement, and the settlement negotiations cannot and will not be construed or deemed to be evidence of, or used at any time as, an admission, concession, presumption, or inference of fault, wrongdoing, or liability in any case, action, or proceeding in any court, arbitration, administrative agency, or other tribunal, or in any manner for any purpose whatsoever; provided, however, that this Agreement may be used in an action by a Party to enforce its terms and provisions. The Parties further represent and agree that the promises and covenants in this Agreement are to be understood as necessary elements of the settlement and compromise of disputed claims and defenses.

8. **Construction.** The terms of this Agreement have been negotiated at arms length among knowledgeable Parties. The Parties agree that the normal rules of construction that any ambiguity in a document is construed against the drafting

Party shall not apply to the interpretation or enforcement of this Agreement, as the Parties each participated in the drafting of this Agreement.

9. **Applicable Law.** This Agreement shall be interpreted under the Code and administrative rules of the County of Maui, and the laws of the State of Hawai'i.
10. **Amendments.** This Agreement shall not be altered, amended, modified, or otherwise changed in any respect except by a writing executed by all the Parties hereto. Each Party hereby acknowledges and agrees that it will make no claim at any time that this Agreement has been orally altered or modified in any respect whatsoever.
11. **Binding Effect.** This Agreement shall be binding upon and inure to the benefit of the Parties, their respective executors, administrators, personal representatives, heirs, affiliates, successors, and assigns.
12. **Attorneys' Fees, Costs, and Expenses.** Except as otherwise stated in this Agreement, none of the Parties will make a claim against another Party for attorneys' fees, costs, or expenses incurred in connection with the claims settled pursuant to this Agreement.
13. **Captions or Headings.** The captions or headings of paragraphs in this Agreement are inserted for convenience, reference, and identification purposes only, and shall neither control, define, limit, nor affect any provisions of this Agreement.
14. **Counterparts.** This Agreement may be executed in counterparts, and PDF and facsimile signatures shall be binding. When executed and delivered by any Party to this Agreement, each counterpart shall be deemed an original regardless of the order of its execution and delivery and the several counterparts together shall

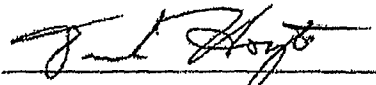
constitute one document as though all signatures affixed to any counterpart were affixed to a single document.

15. **Survival.** All representations, warranties, covenants, and agreements contained herein shall survive the execution of and performance under this Agreement.
16. **Severability.** If any provisions of this Agreement or the application thereof to any person or circumstance shall be invalid or unenforceable to any extent, the remainder of this Agreement and the application of such provisions to other persons or circumstances shall not be affected thereby.
17. **Confidentiality.** The Parties agree that the Claim and the provisions of this Agreement are confidential and, except as may be necessary to preserve and enforce any rights created by this Agreement, shall not be disclosed by them or their attorneys to any third person without the other Parties' prior written consent; provided, however, that information provided in a joint press release prepared by the Parties are not covered by this Confidentiality provision; further, any Party may disclose the amount paid under this Agreement on a need-to-know basis: (a) in as limited a manner as possible to persons to whom such disclosure is reasonably necessary for the conduct of their personal or business affairs (such as accountants, auditors, tax advisors, financial planners, tax authorities, or as required by law); or (b) when compelled by a court or governmental authority of competent jurisdiction.
18. **Integration Clause.** This Agreement represents and contains the entire Agreement and understanding between and amongst the Parties herein with respect to the subject matter of this Agreement and supersedes any and all prior

oral and written Agreements and understandings. It is admitted by the Parties that no representation, warranty, condition, understanding, or agreement of any kind with respect to the subject matter of this Agreement shall be relied upon unless incorporated herein and the consideration for this Agreement is all the consideration that shall be given and this Agreement evidences a compromise settlement in full satisfaction of all released claims.

IN WITNESS WHEREOF, this Agreement has been executed by the Parties on the day and year first above written.

D & S VENTURES LTD, L.L.C.,
ALSO KNOWN AS D AND S VENTURES, L.L.C. AND
D & S VENTURES LLC

By 
Its Managing Member

COUNTY OF MAUI
DEPARTMENT OF PLANNING

By _____
Its Director

oral and written Agreements and understandings. It is admitted by the Parties that no representation, warranty, condition, understanding, or agreement of any kind with respect to the subject matter of this Agreement shall be relied upon unless incorporated herein and the consideration for this Agreement is all the consideration that shall be given and this Agreement evidences a compromise settlement in full satisfaction of all released claims.

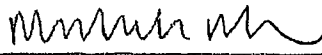
IN WITNESS WHEREOF, this Agreement has been executed by the Parties on the day and year first above written.

D & S VENTURES LTD, L.L.C.,
ALSO KNOWN AS D AND S VENTURES, L.L.C. AND
D & S VENTURES LLC

By _____

Its _____

COUNTY OF MAUI
DEPARTMENT OF PLANNING

By 

Its Director



PBR HAWAII & ASSOCIATES, INC.

December 5, 2018

THOMAS S. WITTEN, FASLA
Chairman / Principal

R. STAN DUNCAN, ASLA
President / Principal

RUSSELL Y. J. CHUNG, FASLA, LEED® AP BD+C
Executive Vice President / Principal

VINCENT SHIGEKUNI
Vice President / Principal

GRANT T. MURAKAMI, AICP, LEED® AP BD+C
Vice President / Principal

TOM SCHNELL, AICP
Principal

KIMI MIKAMI YUEN, LEED® AP BD+C
Principal

W. FRANK BRANDT, FASLA
Chairman Emeritus

ANN MIKIKO BOUSLOG, PhD
Project Director

RAMSAY R. M. TAUM
Cultural Sustainability Planner

RAYMOND T. HIGA, ASLA
Senior Associate

CATE GULLISON, AICP
Senior Associate

MARG SHIMATSU, ASLA
Senior Associate

DACHENG DONG, LEED® AP
Senior Associate

SCOTT MURAKAMI, ASLA, LEED® AP
Associate

MICAH McMILLEN, ASLA, LEED® AP
Associate

NATHALIE RAZO
Associate

Ms. Michele McLean, Director
County of Maui
Department of Planning
2200 Main Street
One Main Plaza, Suite 315
Wailuku, HI 96793

SUBJECT: REQUEST FOR CONFIRMATION OF PERMITTED PRINCIPAL AND ACCESSORY USES AT CAMP MAUI HA'IKŪ, MAUI TMK: (2) 2-7-012:086 (PORTION)

Aloha Director McLean,

On behalf of D&S Ventures, LLC ("D&S"), we submit this request for confirmation of the permitted by right existing principal and accessory uses of the 17.5-acre property located at 2065 Kauhikoa Road in Ha'iku, Maui (the "Property"). The Property is identified as a portion of tax map key ("TMK"): (2) 2-7-012:086 and illustrated in the attached exhibit for reference.

The Property is located in the County's Agricultural Zoning District. The County has agreed that ongoing "Principal Uses" of the Property under Section 19.30A.050(A), Maui County Code ("MCC"), which are permitted by right without any land use permits, include agricultural land conservation and retention, restoration, rehabilitation, or improvement of buildings, sites, or cultural landscapes of historical or archaeological significance.

D&S and its lessee preserve, restore, and improve the historic landscape and sites of a portion of Camp Maui, a former U.S. Marine Corps base used during World War II. Camp Maui once occupied 1,600 acres in Haiku and encompassed the entire Property. Camp Maui is recognized as a historic site by the State Historic Preservation Division and assigned a State Inventory of Historic Places ("SIHP") No. 50-50-06-3530. There are eight features of the historic site on the Property, including seven building foundations and a portion of the historic road that serviced the mauka reaches of Camp Maui. To date, D&S and its lessee have invested in excess of \$400,000 in historic preservation, restoration, and improvement of the site, exclusive of land acquisition costs and real property taxes.

Please confirm that the existing and proposed hiking and guided tour activities, including the challenge course with ziplines, are permitted "Accessory Uses" by right and do not require any land use permits under Section 19.30A.050(B)(10), MCC, because they are open land recreational uses accessory to the permitted Principal Use of retaining, restoring, and improving the historic site(s) and historic landscapes of Camp Maui.

As accessory to historic preservation, the following describes D&S' operations and identifies existing and proposed mitigation regarding the accessory uses:

HONOLULU OFFICE
1001 Bishop Street, Suite 650
Honolulu, Hawaii 96813-3484
Tel: (808) 521-5691
Fax: (808) 523-1402
E-mail: syadmirin@pbrhawaii.com

printed on recycled paper

EXHIBIT 1

Ms. Michele McLean, Director

SUBJECT: REQUEST FOR CONFIRMATION OF PRINCIPAL AND ACCESSORY USES AT CAMP MAUI
HA'IKŪ, MAUI TMK: (2) 2-7-012:086 (PORTION)

December 5, 2018

Page 2 of 4

1. Historic Preservation and Interpretation

- a. Visitors view historic vehicles as they enter the Property.
- b. Tour guides provide an opening talk regarding Camp Maui.
- c. Visitors have the opportunity to see the museum and learn about Camp Maui.
- d. Tour guides will provide historic information as part of climbing on, approaching or waiting at each platform and tower.
- e. Interpretive displays with historic information will be added to the challenge course platforms within three months from the date of this letter. Anticipated cost: \$3,000.
- f. Increase the size of the existing poster boards with photos within three months from the date of this letter. Initial anticipated cost: \$1,000.
- g. Interpretive displays will be added next to each historic feature depicting and/or describing each feature to the extent known within six months from the date of this letter. Copies of displays with the sizes noted will be sent to the County. Initial anticipated cost: \$3,000.
- h. Offer regular walking tours within two months from the date of this letter. Frequency of walking tours to be determined based on demand.
- i. Maintain the historic foundations by keeping them clear of vegetation, unless the vegetation helps provide a buffer between the guided tours and the neighboring properties or can be used as an interpretive tool. Anticipated cost: \$1,500/year.
- j. Update the preservation plan and submit to the State Historic Preservation Division within six months from the date of the letter, and to complete all preservation within three months of receiving acceptance from the State Historic Preservation Division. Anticipated cost: \$5,000.
- k. Prepare an updated site map for visitors to identify the historic features on the Property within three months from the date of this letter. Anticipated cost: \$1,500.
- l. D&S intends to improve the museum enclosure within a year from the date of this letter. Anticipated cost: \$25,000 to \$75,000.
- m. D&S intends to create new museum displays within six months from the date of this letter. Anticipated cost: \$10,000.

2. General Operations

- a. Hours of business operations: 7:30 AM to 7:00 PM, daily
- b. Guided tours: Monday through Saturday with occasional special events on Sundays. Hours of guided tours for June 1 to September 15: 8:00 AM to 6:00 PM. Hours of guided tours all other days: 8:00 AM to 5:00 PM. Ziplining tours shall begin no earlier than 8:20 AM, with the exception that the practice run, which is a separate zipline from the zipline tour itself, shall begin no earlier than 8:00 AM.
- c. Challenge courses components will be limited to current operations and other components that simulate or replicate Camp Maui or WWII era training activities as may be added in the future.
- d. Camp Maui museum features historic artifacts, two WWII-era planes, two jeeps and informational displays.

Ms. Michele McLean, Director

SUBJECT: REQUEST FOR CONFIRMATION OF PRINCIPAL AND ACCESSORY USES AT CAMP MAUI

HA'IKŪ, MAUI TMK: (2) 2-7-012:086 (PORTION)

December 5, 2018

Page 3 of 4

- e. Property features historic building foundations and road, historic vehicles and historic baseball field.
- f. The museum will be open to the public.
- g. Public schools may visit the museum free of charge.
- h. Confirmation that all structures are permitted or have an exemption, or will seek within 60 days from the date of this letter necessary approvals from the County.

3. Zipline/Challenge Course Tour Operations

- a. Maximum number of participants on any one Zipline/Challenge Course Tour: 15.
- b. Maximum number of participants on the Zipline/Challenge Course Tour at any one time: 45.
- c. Guide to participant ratio: approximately 1 guide to every 5 participants.
- d. Maximum number of people on property for a tour at any one time: 75.
- e. Maximum number of tour participants per day: 200.
- f. D&S intends to create a new challenge course area that includes tires between Tower 2 and Tower 1 and a wall-climbing feature on Tower 1. Anticipated cost: \$25,000. Installation of the new challenge course area shall be completed within one year of the date of this letter.
- g. There shall be no expansion of the zipline activities, courses and structures without prior written approval from the Department. Any expansion of other challenge course activities and structures shall be in compliance with Maui County Code.

4. Sound Attenuation

- a. Verbal instruction and written signs to encourage guests to keep voices down.
 - i. There are existing signs that read, "Please be considerate of our neighbors and keep your voices down. Mahalo!" on the first challenge course tower and the platform after "Ridgeline" zipline.
 - ii. An additional sign will be added on the platform before "Ridgeline" zipline within 30 days from the date of this letter.
 - iii. Additional signs (number, size, and content to be determined) encouraging further sound attenuation with military themes, which themes may include but may not be limited to "loose lips sink ships" and "silent" or "covert missions," will be added on every platform within three months. Initial anticipated cost: \$1,000.
- b. No amplified sound will be used during challenge course tours at any time. The tour guides, however, require the use of radio communication.
- c. Bamboo will be planted along the southern boundary of the property as shown on the attached site plan within three months from the date of this letter to provide a visual and sound screen. The bamboo will cover approximately 200 feet of the boundary area. The bamboo will be the type that can grow to at least 40 feet tall within two years of planting. The bamboo will be appropriately cultivated to reach maturity and appropriately maintained. Initial anticipated cost: \$10,000 to \$15,000.

Ms. Michele McLean, Director

SUBJECT: REQUEST FOR CONFIRMATION OF PRINCIPAL AND ACCESSORY USES AT CAMP MAUI
HA'IKŪ, MAUI TMK: (2) 2-7-012:086 (PORTION)


December 5, 2018

Page 4 of 4

- d. Use of the quietest zipline equipment practicable without requiring the replacement of equipment before the end of its useful life or redesign of the challenge course. The County will be provided with information regarding the SuperSwaged zipline cable and the trolleys currently in use.

Mahalo nui for your consideration of confirmation of the permitted Principal and Accessory Uses with the above conditions. Please feel free to contact me with any questions at 521-5631 or kyuen@pbrhawaii.com.

Aloha,



Kimi Yuen
Principal

Exhibit

cc: Derek Hoyte/D&S Ventures, LLC
Calvert Chipchase/Cades Schutte
Christopher Goodin/Cades Schutte

ALAN M. ARAKAWA
Mayor

MICHELE CHOUTEAU MCLEAN
Director

JOSEPH W. ALUETA
Deputy Director



COUNTY OF MAUI
DEPARTMENT OF PLANNING

December 6, 2018

Ms. Kimi Yuen, Principal
PBR Hawaii
1001 Bishop St., Ste. 650
Honolulu, HI 96813-3484

Dear Ms. Yuen,

**SUBJECT: ON BEHALF OF D&S VENTURES, LLC; USE DETERMINATION FOR
PROPERTY LOCATED AT 2065 KAHIKOA ROAD, HAIKU, MAUI,
HAWAII; TMK: (2) 2-7-012:086-0000 (PORTION)**

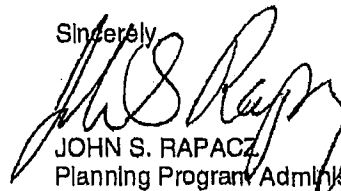
We are writing in response to your letter dated December 5, 2018 (attached hereto), by which you ask whether particular uses and activities are permitted as of right, or whether land use permits or approvals may be required, for the property at 2065 Kauhikoa Rd Haiku, County of Maui, Hawai'i and identified by Tax Map Key: (2) 2-7-012:086-0000 (the "Property"). In short, if you conduct the proposed uses and activities as represented in your letter, you will not need County or State land use approvals.

The property's relevant use designations are as follows: 1) State: Agriculture; and 2) Maui County Zoning: Agriculture. Those designations allow the proposed uses as follows: 1) State: HRS 205-4.5(a)(8) allows "Retention, restoration, rehabilitation, or improvement of buildings or sites of historic or scenic interest"; and 2) Zoning: MCC 19.30A.050.A.2 allows "Agricultural land conservation"; and MCC 19.30A.050.A.7 allows "Retention, restoration, rehabilitation, or improvement of buildings, sites or cultural landscapes of historical or archaeological significance." As for the particular use of "challenge course" (including zip-lines, rope bridges, and related facilities): those activities are a re-creation of training facilities of the type that existed at Marine bases that were active when Camp Maui was, and it is part of the A.7 principal use.

If you conduct uses or activities that differ from those represented in your request letter, those differing uses or activities might not be permitted uses, and could be violations of state and county land use regulations, subject to fines and injunctive relief.

Thank you for your inquiry. Should you have any questions or concerns, you may contact Paul Critchlow, Staff Planner, at paul.critchlow@co.maui.hi.us or (808) 270-5795.

Sincerely,


JOHN S. RAPACZ
Planning Program Administrator

For: MICHELE C. MCLEAN
Planning Director

EXHIBIT 2

D&S Ventures, LLC
December 6, 2018
Page 2

Attachment (December 5, 2018)

xc: Michele McLean, Planning Director (PDF via email)
John Hollona, Corporation Council (PDF via email)
Danny Dias, Staff Planner Supervisor (PDF via email)
Paul Critchlow, Staff Planner (PDF via email)
Christi Kelikoa, Staff Planner (PDF via email)

MNM:JSR:lp

K:\WP_DOCS\PLANNING\BVA\APPEALS\2015\0002_D&SVentures_NOV\Response -Use Determination Ltr

BEFORE THE BOARD OF VARIANCES AND APPEALS

COUNTY OF MAUI

THE STATE OF HAWAII

In the Matter of the APPEAL of)

D & S VENTURES LLC)

2065 Kauhikoa Road, Haiku, Hawai'i)

Tax Map Key: (2)2-7-012:086-0000)

Docket No.:

BVAA T2015/0002

From Actions of the Director of the)
Department of Planning Zoning)

Admission and Enforcement (NOV)

dated December 11, 2014 and)

identified as NOV 20140013) related)

to Maui County Code §)

19.30A.060 (H) (portion))

For the Project Identified as)
Camp Maui)

TRANSCRIPT OF PROCEEDINGS

Taken at Department of the Corporation Counsel,
County of Maui, 200 South High Street, Wailuku, Hawaii 96793,
commencing at 9:13 a.m., on October 30th, 2018, pursuant to
Notice.

BEFORE: SANDRA J. GRAN, CSR NO. 424
Registered Professional Reporter

EXHIBIT B

1 APPEARANCES:

2 Arbitrator:

3 E. JOHN McCONNELL, ESQ.
4 Attorney at Law
5 33 North Market Street, Suite 200
6 Wailuku, Hawaii 96793
7 Telephone 808-244-6531
8 Email judgemccconnell@msn.com

9 For the Appellant:

10 CALVERT G. CHIPCHASE, ESQ.
11 CHRISTOPHER T. GOODIN, ESQ.
12 Cades Schutte LLP
13 1000 Bishop Street, Floor 12
14 Honolulu, Hawaii 96813
15 Telephone 808-521-9200
16 Fax 808-540-5073
17 Email cchipchase@cades.com
18 Email cgoodin@cades.com

19 For the County of Maui:

20 JOHN H. HOLIONA, ESQ.
21 Deputy Corporation Counsel
22 Department of the Corporation
23 Counsel, County of Maui
24 200 South High Street
25 Wailuku, Hawaii 96793
Telephone 808-270-7740
Email john.holiona@co.maui.hi.us

ALSO PRESENT: Derek Hoyt, David Callies (left at lunch), Kimi Yuen, and John Rapacz

Chris Hoyt, Michael Dega, and Jaap Eijzenga entered after lunch.

1 record.

2 MR. CHIPCHASE: So just real quick, Koa, one thing
3 that we didn't do earlier that I wanted to take of before you
4 make the representations is to introduce Chris Hoyt, Derek
5 Hoyt's son, who is present as well.

6 HEARING OFFICER McCONNELL: Yes. All right.

7 MR. HOLIONA: Your Honor, while we were off the
8 record Mr. Chipchase and I along with Mr. Rapacz, we came to a
9 stipulation as to one of the issues in this matter and
10 basically how it reads is:

11 D & S Ventures LLC is conducting at least two of the
12 principal permitted uses: one being ag. land conservation and
13 the other historic preservation. We just put historic
14 preservation to kind of shorten what the entire language is in
15 the code, but I think understands what it is.

16 HEARING OFFICER McCONNELL: Okay. Come again. At
17 least two of -- I saw that there's three criteria; right?

18 MR. HOLIONA: For?

19 HEARING OFFICER McCONNELL: Go ahead. I'm sorry.

20 MR. HOLIONA: Well, basically what I said is what
21 our stipulated -- stipulation is.

22 HEARING OFFICER McCONNELL: Yeah, I understand.

23 MR. HOLIONA: So what that does, it addresses --
24 actually, it shortens this hearing to some extent where the
25 expert witnesses do not have to be here longer to testify. So

1 basically we've agreed to kind of -- that stipulation to help
2 with expediting this hearing.

3 HEARING OFFICER McCONNELL: And the two matters you
4 mentioned?

5 MR. CHIPCHASE: So, Judge, if I may jump in -- and
6 Koa, correct me if I get anything wrong -- but that would be
7 under Code § 19.030A.050 Permitted uses. The county
8 stipulates that under subsection A, D & S is engaged in at
9 least two principal uses, that would be agricultural land
10 conservation, which is Item 2 of the principal uses, and
11 Item 7 of the principal uses, which would be the retention,
12 restoration, rehabilitation, or improvement of building sites
13 or cultural landscapes of historical or archaeological
14 significance.

15 HEARING OFFICER McCONNELL: Retention, restoration,
16 improvement of architectural sites of historic significance.

17 MR. CHIPCHASE: Historical or archaeological
18 significance, Judge, Item 7.

19 HEARING OFFICER McCONNELL: Okay. Anything further?

20 MR. HOLIONA: No. That's it.

21 MR. CHIPCHASE: That's our stipulation, Your Honor.

22 As we talked about off the record, that would
23 conclude the hearing today and the testimony of Dr. Dega and
24 Mr. Eijzenga subject to their re-call. We would like to keep
25 the hearing on schedule for tomorrow for now, but we'll advise

1 Your Honor as soon as possible whether it's a go and if so,
2 when.

3 HEARING OFFICER McCONNELL: Okay. And we are still
4 on for December -- what was that -- 3rd?

5 MR. HOLIONA: The 3rd? Well, I think we had said
6 the week of December 3rd, I don't think we had a specific date
7 in mind or set yet.

8 HEARING OFFICER McCONNELL: I'm returning on the
9 30th.

10 MR. HOLIONA: Okay. So I -- you know, any time the
11 week of December 3rd depending on schedule availability is
12 fine.

13 MR. CHIPCHASE: That's right, Your Honor.

14 HEARING OFFICER McCONNELL: Okay. Thank you all
15 very much. Appreciate it.

16 MR. CHIPCHASE: Thank you, Judge.

17 HEARING OFFICER McCONNELL: And you'll let me know?

18 MR. CHIPCHASE: Will do.

19 MR. GOODIN: Thank you, Judge.

20 MR. HOLIONA: Thank you, Judge.

21 (The proceedings were adjourned at 2:41 p.m.)
22
23
24
25

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the preceding document was submitted to the Department of Planning, and was served on the date indicated below upon the following Departments by the means indicated.

Michele C. McLean

(Appellee - Director's Name)

Director of Planning

(Department)

Department of Planning

(Department's Address)

One Main Plaza

Wailuku, Hawai'i 96793

US
MAIL

☐

PERSONAL
DELIVERY

☒

FACSIMILE

☐

Certified Receipt No: _____

Patrick Wong
Department of Corporation Counsel
County of Maui
200 South High Street
Wailuku, Hawaii 96793

US
MAIL

☐

PERSONAL
DELIVERY

☒

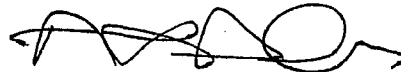
FACSIMILE

☐

By U.S. Mail & Email to:

Calvert G. Chipchase cchipchase@cades.com
Christopher T. Goodin cgoodin@cades.com
Cades Schutte
1000 Bishop Street, Suite 1200
Honolulu, HI 96813

DATED: Wailuku, Maui, Hawaii, January 7, 2019.



(Applicant/Appellant's Signature)

Marian Prosser et al. (see attached), through their attorney Anthony L. Ranken

(Applicant/Appellant's Name—Print)

Print

(FORM 3)

Reset