

BOARD OF APPEALS
COUNTY OF HAWAII

HEARING TRANSCRIPT
MARCH 12, 2004

A regularly advertised hearing on the petition of DOUTOR COFFEE CO., HAWAII, INC. (BOA 03-001 and 04-001) was called to order at 11:03 a.m. in the West Hawai'i Mayor's Office, Conference Room, 75-5706 Kuakini Highway, Suite 103, Kailua-Kona, Hawai'i with Chairman Evarts Fox presiding.

PRESENT: Evarts Fox
Valta Cook
Anson Chong
John Langenstein

ABSENT & EXCUSED: George Curtis
Gerald Yamada

Patricia O'Toole, Counsel to the Board
Alice Kawaha, Staff to the Board

And approximately 26 people from the public in attendance

PETITIONER: DOUTOR COFFEE CO. HAWAII, INC. (BOA 03-001) - Appeal of Decision by the Planning Director dated February 11, 2003 relating to a public tour operation in an Agricultural District without a Special Permit (Notice of Violation and Order). The property consists of approximately 28.5 acres located on the west side (makai) of Māmalahoa Highway, approximately 300 feet south of the Keōpū Cemetery, Hienaloli 2nd, North Kona, Hawai'i, TMK: (3) 7-5-11:24.

PETITIONER: DOUTOR COFFEE CO. HAWAII, INC. (BOA 04-001) - Appeal of Decision by the Planning Director dated December 18, 2003 relating to a public tour operation in an Agricultural District (Notice of Violation and Order). The property consists of approximately 28.5 acres located on the west side (makai) of Māmalahoa Highway, approximately 300 feet south of the Keōpū Cemetery, Hienaloli 2nd, North Kona, Hawai'i, TMK: (3) 7-5-11:24.

FOX: The next out of order will be Board of Appeals 03-001 and Board of Appeals 04-001. We do have a Petition for Intervention and the Van Pernis -.

PUBLIC: Mark Van Pernis, he was here earlier.

Fox: He left?

PUBLIC: Yeah, he left 'cause he didn't know how soon this matter would be heard. I think he intends to return. There are numerous other people here on those two matters as well.

FOX: Mr. Moore, there's a, you have a Stipulation?

MOORE: Yes, we do, Mr. Chairman. Michael Moore, appearing for Doutor Coffee. We entered into a stipulation with the Planning Director to continue this matter. Essentially, what we've come to an agreement with the Planning Director is that we will file a Petition to Amend the Special Permit that has been granted to Doutor Coffee. The issue here revolves around the use of a large tour bus, and we were cited for doing that. The concerns were that the bus was on the Mamalahoa Highway, was unloading and loading passengers on the highway. And we, the recent understanding with the Planning Director is that we will construct an off-site parking location so that the bus can be accommodated off of the highway. Whether or not the Planning Commission will grant that to us is still yet to be determined. But if we are able to obtain that amendment to the Special Permit, then that should moot these appeals; and we would dismiss these appeals. So we're asking for a continuance.

FOX: Does the County have any comments?

LEITHEAD-TODD: No comments. We have an agreement that we would do that and allow them to proceed.

FOX: Okay.

O'TOOLE: Do you have a position on the intervention?

MOORE: It's a little late, no, we don't have -. As I understand the rules, as long as you file your petition within 10 days prior to the first hearing, then you're procedurally okay; and Mr. Van Pernis does own property directly adjacent to the Doutor Coffee site. So -.

VAN PERNIS: If I could address -.

MOORE: I assume that he would be granted standing. Again, this whole matter may be moot, but I don't have any position with regard to that.

O'TOOLE: We may as well in case he doesn't -.

FOX: We will, I'll go ahead and grant Mr. Van Pernis standing as an Intervenor. Mr. Krueger, do you have anything that you want to add to the -?

KRUEGER: I need a microphone. Mr. Chairman, my name is Dennis Krueger and I'm an attorney with Ashford and Wriston; and I'm here in behalf of Dean Yokoyama, who is also present. Mr. Moore's representation with regard to the violation, I think, is a little short of the full representation of the nature of the violation. I don't know how much history this Board has with regard to this matter, but this matter has been going on now for well over a year-and-half, perhaps longer. There was an initial Contested Case Hearing. There was a decision made by the hearings officer, there were

Findings of Fact and Conclusions of Law reached by the hearings officer which were adopted by the Planning Commission, and there were a number of conditions imposed upon Doutor Coffee in order to allow them to continue to use this Special Use Permit. And Mr. Tsukazaki, who was representing Doutor in that hearing, asked the Planning Commission, he took exception to certain aspects of the decision by the hearings officer. One aspect of that was that there were certain conditions that the Planning Commission required Doutor Coffee to undertake prior to conducting its tours on this property; and Mr. Tsukazaki asked that those be delayed for a period of six months to enable Doutor to continue the tour operation, which it was conducting the entire time while seeking a Special Use Permit to allow it to do that.

But the Planning Commission said, no, you have to stop what you're doing and meet those conditions of approval. That was close to a year ago, I believe. I can't remember the exact date but I can give it to you. None of those conditions of approval were ever undertaken and the tour operation was never stopped. The violation that was given to Doutor Coffee on December, in December of 2003 was a citation by the County indicating that they had failed to comply with all of those conditions, that they were, they hadn't done anything, they had done nothing. My client lives immediately adjacent to this property; and one of the pre-conditions was that they were supposed to put up a hedge or some further planting screen to prevent his house from being impacted by the traffic that was being conducted on this property. They've done nothing; and it's been, they've been flaunting that. It has been going on for a year, at least. On a regular basis, they're still conducting tours up there. They haven't done any of the conditions of approval. And what they're asking the County to do, and apparently what the County is agreeing to do is to allow them to -. They've sought, by the way, since the approval of the Special Use Permit, they had come back at least three times to the Planning Commission asking the Planning Commission to amend in different fashions the condition of approval with regard to the bus because the bus is, they've said, "You will not be allowed to use large buses. You have to use a small bus which holds 15 passengers or less." They've come back at least three times under different motions under Robert's Rules of Order, and so forth, asking the Planning Commission to change that condition of approval. They've refused to do that.

They're now asking to amend the condition of approval which is going to take another lengthy process until it becomes a Contested Case as well. In the meantime, they are still going to continue doing this same tour business, that they've been doing illegally and not in conformity with the Special Use Permit, while they're moving through the process of seeking to amend this condition, which the Planning Commission has refused to allow to amend three times.

So I think it's disingenuous for them to come here today and say they think that that will resolve the issue. It won't. And I don't believe it's appropriate to continue this hearing until they get that amendment. I mean, you could be talking about an indefinite period of time during which they're still conducting their business in violation, in accordance with the violation that the County has issued.

So I think you need to hear that matter and you need to determine whether or not they should be allowed to continue doing what they're doing illegally before the amendment is considered.

FOX: Mr. Moore, do you -?

MOORE: Simply that my client met with the Planning Director and addressed the concerns that the Planning Director has. They are in the process of meeting all of the conditions of approval of the Special Permit and have reached an agreement with the Planning Director, that the Planning Director has requested them to file a Petition to amend the Special Permit, and let the Planning Commission decide that matter. And that is the reason why the Planning Director and our client asked me to put off this appeal; and there's no reason to have a hearing when this is really something that the Planning Commission should address. They're the ones who issued the Special Permit.

FOX: And you are -?

VAN PERNIS: I'm Mark Van Pernis and I got here a little late, 10 after 11, when you folks were going to begin at 10.

FOX: Eleven o'clock.

VAN PERNIS: Eleven o'clock. Yeah, I got here 10 after 11. I am told that my Petition to Intervene was granted?

FOX: It has been granted.

VAN PERNIS: All right. Could I be heard on this matter?

FOX: I'm going to continue at the request of the other party; and when we take our next meeting, you certainly may be heard then. And your attorney has already -.

VAN PERNIS: I am an attorney.

KRUEGER: I'm not his attorney.

FOX: All right.

VAN PERNIS: All right. And he doesn't represent me. So I happen to be an attorney.

FOX: All right. That's good.

VAN PERNIS: All right. I own the property. I think I'm on the other side of the Doutor property from Mr., or from Mr. Krueger's client. Now, I want to join and perhaps say a little more emphatically some of the things that I know personally about this matter. First of all, Mr. Krueger is right. The Doutor has basically from the inception, before they ever asked for their permit and all times thereafter, basically, ignored all of the requirements, and all of the impositions, and all of the laws of the County of Hawaii. Mr. Moore has stated that while they're doing something with the County Planning Director, I do not believe that he has accurately represented that situation to you. I would request that he present to you something in writing from the Planning Director showing the fact that those are things that he has asked, that are going on. My understanding is only that the Planning Director has been approached and has told them the procedures they must follow. It's not in any way indicated that there's going to be any resolution other than the way the resolution was already done.

FOX: The County has some -?

LEITHEAD-TODD: My conversations with Planning Director Yuen, our understanding with the Doutor Coffee was that we would continue the matters before the Board of Appeals and allow them to go forward to the Planning Commission to amend their Special Permit.

VAN PERNIS: That is -.

LEITHEAD-TODD: And part of that would be the, what they would be seeking is to construct a site off the highway where the bus could go.

VAN PERNIS: My understanding is the matter is currently before the Circuit Court and the Planning Commission would not have any jurisdiction. Secondly, I want to emphasize, this relates to what counsel here has just said, a large part of the problem here is that the, when they constructed their improvements on the property, they did not construct, Doutor did not construct any improvements that would allow for large tour buses that they're using to exit onto the property from the highway. With the result, I have personally been involved in a situation where the bus was parked in the middle, half on the road, with, heading north, with people getting on the bus in the middle of the road; and I had to basically take evasive action while I was driving by. I drive that road everyday taking my child to school.

But what I want to emphasize is that while all of this bureaucratic process takes place, they have not complied with any requirement of law. They continue to run the buses, they continue to be in violation. I have observed the violations. They are running a commercial operation up there without compliance with any of the requirements, not any of that compliance has taken place. So I am very much concerned that you folks would say, well, let's put this off and let them continue to violate for another indefinite period of time.

I know Mr., at the last hearing I was in front of the Planning Commission, Mr. Yuen and Corporate Counsel present at that time advised the Planning Commission that they did not have any jurisdiction in this matter because the matter was before the courts. I find it hard to believe that Mr. Yuen would now say that you can, is saying something else. So I would request you -. Again, I had no notice that this matter was contingent until literally I walked in here today; and I have a major problem with the Applicant and County Corporation Counsel basically stipulating to continuance when they're not the ones that are being damaged. They're not the ones that, for instance, my property has a lot of excess noise. Right next door they have a fountain, and they're conducting mass tours, and dinners and meals, and all sorts of things that are specifically prohibited, noise violation, specifically prohibited by the Planning Commission's orders and findings in this Special Permit. We're the ones that have to live with this. It's easy for you guys to say, well, we just put this off an indefinite period of time, while these guys continue the violations; and then it's then left to us to enforce this thing. What's next? We have to file a lawsuit to enjoin this because the County is not doing anything to shut it down even though they have said that they are in violation.

So I have a strong objection to a continuance here. I think it's basically another strategy by Doutor to delay this matter; and I have an objection to you folks of basically agreeing to a continuance at, to the damage of the neighbors while the County and Doutor basically are going to take years to try to administratively further delay this step. We've already been forced in court, into court once; and we have a dangerous situation here. There's a flooding area coming down right across the street. Hualalai Farms directly across from them, there's no shoulders there. They have these large tour buses that literally park on the road, sometimes headed north with people getting on the bus from the middle of the street. I have a major problem with these folks' arrogance and your complicity. And, thank you.

FOX: County, do you have any response?

LEITHEAD-TODD: I can only tell you what my understanding of the Planning Director's meeting with the Applicant was, that he was going to give them the opportunity to go and amend the permit 'cause he felt that that would take care of the violations.

FOX: Mr. Mooers?

MOOERS: That's correct. I was present at the meeting.

FOX: All right. I'll make a ruling we continue.

KRUEGER: Mr. Chairman, I don't know if you want to hear, there are other people here, I think, that came -.

FOX: I'll hear at the next session.

O'TOOLE: You'll have to hear them.

FOX: Oh.

KRUEGER: They're here in response to the public -.

FOX: Did they -? They didn't file -. But they may come and talk if they want to. They're supposed to file one of these things (sign-up sheets).

COOK: Mr. Chair, can I ask Mr. Van Pernis a question?

FOX: Sure.

COOK: You indicated that this matter was before the court? Could you elaborate on that, please?

VAN PERNIS: I would defer to Mr. Krueger in that respect.

KRUEGER: Yes. Mr. Cook, the matter, the Planning Commission's decision to issue a Special Use Permit has been appealed to Judge Ibarra. There is a briefing schedule that was just issued where the Applicant, the Appellant, which is my client, is required to file their opening brief by April 12th. The respondents are required to file their responsive brief by, I believe, May something, second or third week in May; and there's a hearing on the appeal in the first or second week in June before Judge Ibarra. And there was a request, again, as I mentioned earlier, by the Applicant before the Planning Commission, it seems like a month or so ago now, to, in essence, have the Planning Commission reconsider again its decision to deny the Applicant the use of one large bus with a capacity of 60 passengers for the use of their business. And I argued at that time that the Planning Commission didn't have jurisdiction to consider that matter because the permit and its terms were on appeal in the Third Circuit Court. The Planning Commission ultimately chose not, what Mr. Tsukazaki was asking the Planning Commission to do at that time was to have someone on the Planning Commission please make a motion to reconsider, in essence, the issue of the bus. And after meeting in Executive Session with Corp. Counsel, I believe with Ms. O'Toole, the Planning Commission came out and chose not to make any motion. I don't know what the basis was for the Planning Commission's decision not to do that, whether it was lack of jurisdiction or some other basis; but they did not agree to, none of the Planning Commissioners at that time chose to file or make any motion.

COOK: Is there an injunction or something in the Circuit Court against the Planning Director moving forward with the Special Use Permit?

KRUEGER: No, there isn't. There is case law, though, that implies, and I've given that to Ms. O'Toole before, that once a matter is on appeal, as it is when it goes from a Circuit Court to the Appellate Court, that that body that issued the original decision loses jurisdiction and that they would need to go to the Appellate Court, in this

case to Judge Ibarra, to obtain permission to do something with the permit since it's on appeal, since that issue is on appeal.

VAN PERNIS: May I further repeat, Mr. Cook, that at that same meeting Mr. Krueger just referred to, Mr. Yuen advised the Planning Commission that Mr. Krueger is correct, that they have no jurisdiction to grant the, or to make the further motions that Mr. Tsukazaki was asking for at that time. So I don't know to what effect that affects your jurisdiction, but it certainly seems to me that the suggestion that they can come back to the Planning Commission either with or without Mr. Yuen's support seems to be contrary to law.

FOX: Mr. Cook, go ahead.

COOK: Well, you know, I mean, we can't control what the Planning Commission does; and I was only concerned about this, if it directly relates to us. And I think we have to sort of go with the Planning Commission at this point on that issue.

KRUEGER: I agree. I don't know if it directly relates to you in this appeal, but I think it relates to the request that has been made by the Applicant for the purpose of the continuance. In other words, if the Planning Commission doesn't have jurisdiction to consider an amendment to the application until the appeal is heard by Judge Ibarra, that alone would delay this proceeding until -. I mean, it would delay any further consideration until at least June because he wouldn't be able to apply and have the Planning Commission take action on this application until that time. So then you're talking about a period of time and after that before any determination would be made about whether or not he could amend the condition of approval. It could very well mean that Judge Ibarra would completely overturn the decision of the Planning Commission and send it back, or deny their request for a Special Use Permit.

But my point to this body is that the matter is, the appeal before you is of a decision of a violation that the County has issued for not just using the bus. It relates to, I'm sure you have the notice in front of you, but it relates to 15 different conditions of approval, none of which have been met by the Applicant. So the amendment of the condition relating to the bus isn't going to resolve the other conditions of approval, which I understand Mr. Moore to be saying, well, we're going to try to meet -. They've been flaunting the fact that they've done nothing up there to meet any of these conditions of approval for months, for a year. My client has been continuously calling Mr. Arai and other members of the Planning Department saying, "What are you going to do about this thing?" You know, you waited until they got the -. You know, the hearing on this Special Use Permit was conducted, they got the Special Use Permit, but it's subject to all these conditions; and they haven't done anything, and they still continue to use large buses.

You know, I'm affected, I'm right next door to these people. You know, what are you going to do? And finally, the County went out and cited them in December and said, "You're right, they haven't done anything, seems they haven't, you know, complied with any of these conditions of approval." Doutor, then, of course, appealed that decision to

this body and now want you to defer any consideration of that request and subsequently any determination of whether or not they're in violation until they now make another application to the County to amend the condition, which could take months or years, during which time they're continuing to conduct business up there, and continuing to do those things that the Planning Commission told them they couldn't do until they complied with those conditions of approval.

So I just don't think, it's just disingenuous to say, you know, we're acting in good faith with the County trying to amend the condition of approval. It's going to take more than that. And I think this Board should consider this appeal so that there's determination of whether or not they're in violation. And I understand the request to continue, but I think if it's going to be continued, it should be for a reason other than to allow the Applicant to amend the condition of approval. Because, I think, that's just going to, they're just delaying, again, any action by the County and any, you know, resolution of the problem that the neighbors have been having up there with the operation of this business.

VAN PERNIS: I'd like to add this, that the violations that are before you are not just the matter of the bus. And they, I don't think they are addressing anything by their alleged attempt to revise the permit other than the issue of the bus. And if you're going to continue it, I would ask you to continue to a date certain. If you're just going to continue it till all these matters are dealt with, they're going to, you know, it's going to be forever; and, meanwhile, those of us who have property up there are suffering everyday.

When they turn on this fountain and they bring 60 or 100 people down next door to my property, we have, we've got decibel meters, you know, decibel meters are way over 70, which is the -. You know, basically, if you want to turn on a car alarm next door to you, well, that's the sort of noise we're getting. And we bought five acres, we're growing coffee, we bought peace and quiet in the agricultural area. These guys are treating this as if it's a commercial shopping center in Japan. And, again, the pattern of practice here has been to delay these things indefinitely while they continue to run all these businesses. They don't wait till they get the permits to do what they're doing. They just do it and then wait to see if they get caught. They started doing it before they even applied for the permit. Then they got caught, had to apply for the permit. Then they went through procedure and had, were granted a permit subject to special conditions. They haven't complied with any of those conditions. They continue to violate. They get cited for violation. Now they're before you saying delay it. If you're going to delay it, please delay -, and I have a problem with you delaying everything when they're only addressing a few things they say with Mr. Yuen, - delay it only to a date certain, 'cause otherwise it'll be years. You wouldn't even be on this body by the time this matter -. They will certainly appeal Judge Ibarra's decision, which I think it's likely, will overturn their permit altogether, to the Supreme Court, which is another four or five years. And, in the meanwhile, we're just, we're talking about constant commercial activity in a dangerous situation. I think you should take some responsibility here rather than the easy way out.

FOX: Board, you have any -?

CHONG: I just think that the form here, that to address these issues, as Mr. Van Pernis said, we went through days of testimony and evidence before in a Contested Case before the Planning Commission. The Planning Commission has issued a Special Permit to allow the tour operations. It's a matter of compliance with the conditions. We're working together with the Planning Department to address the concerns of the Planning Department. We have an agreement with the Planning Director to continue this matter to address those concerns that he has. We may very well be withdrawing these appeals sometime in the future so this whole thing will be moot. So we think that the request is well taken.

FOX: Mr. Langenstein, you have a question?

LANGENSTEIN: Yes. Mr. Moore, I saw in your objection to the comments that you were working on the conditions of the Special Use Permit, and you say you're in the process. Would you elaborate on that?

MOORE: I believe that our client, and I can't be very specific on this, but they're in the process now of submitting the final plans that they needed to submit their construction plans. And I would think that they'll be able, they're going to be able to do that within the next few weeks and get all of the conditions complied with, except for the bus, that needs to be resolved. The Planning Director recommended that we file a request to amend the permit. The Planning Director felt comfortable with the use of the bus as long as the loading and unloading was done on-site; and that requires the construction of a parking area, other than the one that's already there. And, so, my client is in the process of preparing the construction plans to do that, to submit the request.

LANGENSTEIN: But I understand you're talking about the bus as the major stumbling block for this, meeting the special conditions of the Use Permit, right? And I'm talking about the other entities which were clearly defined ahead of time; and you've had, well, December, that's at least, that's a good lead time to do it. My curiosity is based on what they've done to meet the special conditions of the Use Permit beyond the large buses.

MOORE: As I understand it, they should be in full compliance, other than the bus issue, within the next few weeks.

VAN PERNIS: They haven't done a thing.

MOORE: I disagree with that.

LANGENSTEIN: Well, do you have anything that you can show us that they have done anything to meet -?

MOORE: I could provide the Board if they wish with that. I don't have anything with me right now. I wasn't prepared to address -.

LONGENSTEIN: My other question is are they continuing the tour operations with the large buses?

MOORE: Yes. They use, they're not unloading or off-loading at the site, though. They're using their farm down the road to unload off of Mamalahoa, and then they're shuttling the passengers by way of a small van to the property.

VAN PERNIS: By observation, I would differ with that. I live next door and I see them picking up the folks literally on the highway in front of the Doutor Coffee.

MOORE: I guess, there's a dispute of fact regarding that.

KRUEGER: Mr. Chairman. Mr. Langenstein, just for your information, the, you mentioned December of 2003, that the permit was approved in August of 2003, and it took between August and December for a citation to be issued. Actually, there was a citation issued in February of 2003 for the use of the large buses. That was before there was a determination by the Planning Commission on the Findings of Fact and Conclusions of Law. But those Findings which required them to stop operating and to meet the conditions of approval was issued in August of 2003; and the citation for them not doing that, after my client and a number of other people contacted the Planning Department, was finally issued in December. And, like I say, it still hasn't been done so -

LANGENSTEIN: Can we go into executive session for a minute?

FOX: If you want to make a motion, go ahead.

COOK: Can I ask another question?

FOX: Sure.

COOK: Mr. Moore, it does trouble me this long period of time. Can you give us some estimate of how long, and maybe we should be asking the Planning Department, I mean, Planning Commission, but how long do you anticipate before they make the decision at the Planning Commission?

MOORE: Well, if we filed it, again, you know, there'll probably be an objection by the Intervenors with respect to the jurisdiction of the Planning Commission. So, I mean, notwithstanding that issue, assuming that the Planning Commission does have jurisdiction, we would be filing, as soon as the construction plans are completed for the parking lot, we'll be filing our Petition. It goes on the agenda. Just like you have your matters filed before you, it gets on your agenda. I'm anticipating that there'll be an intervention, request for intervention, in Contested Case by Mr. Van Pernis and Mr. Yokoyama. So there will likely be a Contested Case on our request to amend the permit. And, so, in terms of how long that process will take, perhaps three, four, five, six months. I don't know. You know, Contested Cases can take a while; and then there'll

likely to be an appeal of that decision. Assuming that we get the amendment that we're asking for, there's likely to be appealed to the Circuit Court, just like there's a present appeal of the Special Permit itself. So I don't know if that answers your question. But I don't believe that Mr. Yokoyama or Mr. Van Pernis will ever be happy with the operations up there so, I mean, we're likely to be in litigation for quite a while.

VAN PERNIS: Let me put, I'm not in litigation with them, by the way. That's Mr. Yokoyama, not me.

Secondly, I was contacted before they applied for their Special Permit, as were other adjoining neighbors, by their representatives of Doutor and I made an agreement with Doutor, as that they would keep the fountain off at certain time, keep the noise levels certain, you know, that, there were certain conditions I agreed to. Therefore, I did not contest, you know, there was not a Contested Case proceeding, there was not -. This was contested by Mr. Yokoyama, but not me, 'cause I had an agreement with these folks.

Then they basically, how should I say this, they abandoned their agreement with me and sought a permit which violated some of the, and ignored some of the agreements they have with me, had with me. This was done after the time for me to instigate a Contested Case. Proceedings started -. So I was satisfied. All I wanted them to do was to keep to their agreement. They then abandoned that agreement and sought a permit without the reasonable requirements on hours and noise that I had worked out with the representatives of them. So that's why I'm here today, because as far as I'm concerned, they don't have any credibility. They told me, "We'll make this deal with you if you won't contest." I didn't contest, and then they abandoned that agreement. So, with all due respect, there's a lot of credibility here. I think the biggest lack of credibility is they have been conducting not only the bus situation and violation of applicable laws and regulation but all sorts of other commercial activity on the property. It's not something that they've been doing just from the, after the time that the permit was granted with conditions, but it was something that they did long before they even applied for the permit. So I have a credibility problem here. And I don't appreciate Mr. Moore saying that I'll never be satisfied because I was satisfied; and that was a live and let live situation; but they decided to ignore their agreement with me.

LANGENSTEIN: Mr. Seiter, was that a verbal or a written -?

VAN PERNIS: This is Mark Van Pernis.

LANGENSTEIN: Oh, I'm sorry, Mr. Van Pernis. Was that a verbal agreement you had with Doutor or -?

VAN PERNIS: It was a series of letters back-and-forth.

LANGENSTEIN: Was a series of letters.

VAN PERNIS: Yes, it was not a contract or a stipulation for a condition on permits. I trusted them and I made a mistake.

LANGENSTEIN: Right. No chance for confusion on the communication?

VAN PERNIS: I don't think so.

CHONG: Mr. Chairman, could I ask the counsel -?

FOX: Mr. Chong.

CHONG: What are the options we have now, today, for this appeals board decision-making? We either go along with your, the Director's feeling to continue, or what's the other option? I'd like to hear it.

FOX: Well, my inclination is that we go ahead and continue until the first, our meeting in May, and then -.

CHONG: What if we decide not to. What's the consequences here?

FOX: Well, we take up the case today.

CHONG: Okay.

FOX: Anybody else have any comments? Yes, sir?

HEIMAN: I will be very brief. My name is Steve Heiman, and I am also a neighbor that adjoins the property. I don't legally speak for my other neighbors like Mr. Van Pernis, but all of us feel the same way. And that is that we do live with -, now, let me phrase it in another way. What they are saying is that they are going to take care of all the things that are annoying the neighbors that will make them in compliance. Many of those things don't require them doing anything other than turning a fountain off, keeping music down below a certain level, and keeping noise level down. Those things don't require building a parking garage or doing anything. For over a year, they have been continuing to do the things that they've been told they can't do without ceasing and without and, basically, ignoring the fact that they have neighbors; and that what they are doing, and I am not a lawyer, but what they're doing is a Disneyland-type of commercial operation on agricultural land. We all bought large parcels, five-acre parcels of agricultural land, to have the peace and quiet that goes with agricultural land, not to have hundreds and hundreds of tourists eating and drinking, and listening to fountains and music, and having weddings, etc., right across from us. And that's all I have to say. Thank you.

FOX: Thank you. Does anybody have any more comments, from the Board?

COOK: Yeah, well, Mr. Chong did, I think, put it bluntly what our choices are. I'm, you know, I frankly have not gone back and read all of the materials. I did at one time and I was familiar with a lot of Mr. Van Pernis' comments, but it has been some months ago. And I felt that today we're going to be considering Mr. Van Pernis' motion to intervene and the request for continuance. So what I would suggest is that, you know, if the Board is not, you know, willing to continue the thing indefinitely that we, at least, wait until the next hearing before we have a Contested Hearing here today. That would be my suggestion.

FOX: Yeah, that was my inclination, would be to get it moving and say that for, May would be our first time that we could do this and properly noticed and have it over here for the convenience of the people who live here. Mr. Langenstein?

LANGENSTEIN: Yeah, Mr. Chairman, my concern is for the Doutor Coffee Company's refusal to abide by the difficulties here. I see this as a hazard. I'm not willing to wait for an accident to happen. And I think that if they had shown good faith with the citation and had ceased operations until this thing was resolved, I would be more apt to let them continue. However, I don't see that happening. I hear from the neighbors that this is not a difficult process to resolve most of the issues. So there could be, like Mr. Moore's comments, that there was only the bus as an issue. I don't see that happening here; and I would like to move that we do, that we hear this and we do not offer the continuance.

CHONG: I support that, Mr. Chairman, second it.

FOX: Is there a discussion?

COOK: We have a motion now to go ahead with the Contested -?

FOX: That we go ahead with the Contested Case Hearing, and I'm asking for comments. I understand where everybody is coming from in this thing. I think we ought to get on with this as quickly as we can, but I agree with Mr. Cook that we are probably not as well prepared to hear this case as we would have been had we not felt that this was going to be a continued. And it's the first time it's really come before this Board. We have not had an opportunity to listen to anything. And my comments would be that we should go until the May meeting and have time to understand exactly what the situation is, in order to be fair to everybody.

LANGENSTEIN: Okay. My comments, Mr. Chairman. I think the fact that this Special Use Permit was issued in August, I have recently re-read some of these papers and it's not that difficult, really. And, in principle, I would agree with the Special Use Permit, and to some extent some of the applications that they're using this property. However, it is not a commercial property in the event of food and beverage operation; and I think that those are the things that are going on, weddings and those types of things that exceed the use of coffee farm tours. And my concern is for the agricultural district that it's deluding to. Who's going to be next, the neighbor next door since he can't get

any satisfaction he wants to run the same kind of operation, and what happens to our agricultural belt?

And my concerns are for the fact that the, I don't believe that Doutor has even acknowledged, I mean, here we have an agreement with the neighbor who would have not been, been willing to contest anything, and they have not lived up to that. So I see it as a credible, as a credibility issue here. I don't see giving them more time is going to resolve the fact that they can observe their neighbors' concerns and will offer them the respect that they demand as well. I see this as an event that we have to be proactive to make the person, the company here, abide by what is they've said they were going to do. And if they do that then I think we can live with what, with more time and those types of things. I don't see that happening. I think they've evaded the issue and we've come to this crossroad here. We're, now we've got a serious health safety problems; and I'd sure hate to be, have a, happen to a detriment in this interim.

MOORE: Mr. Chair, just briefly. You know, I came to this hearing with the understanding with the Planning Director that we were going to continue this matter. Also, there was an intervention, a request for intervention filed. I'm not prepared to go forward with the Contested Case. I know there's going to be a lot of evidence, there's going to be a lot of testimony regarding this matter. And in the interest of due process and fairness, I wasn't expecting the opposition that we had to this continuance, and I'm not prepared to proceed today.

LANGENSTEIN: Could you be prepared to have your clients cease and desist at this moment?

MOORE: Mr. Langenstein, we are working with the Planning Director to resolve all of the issues relative to the Special Permit.

PUBLIC: It's a yes or no answer.

MOORE: We had meetings with the Planning Director and we are, we have an understanding with the Planning Director as a means to resolve all of the concerns of the Planning Director.

VAN PERNIS: How about the neighbors -?

MOORE: Keep in mind that this is -.

FOX: Excuse me, if you would let the counsel continue, please.

MOORE: Keep in mind that this was an order issued by the Planning Director, okay, and that's why we appealed. So now we are in discussions and negotiations and reaching an agreement with the Planning Director to address all of the concerns that he has that prompted him issuing that.

LANGENSTEIN: I understand your concerns with the Planning Director, but I understand that you applied for a Special Use Permit which had conditions attached.

MOORE: Yes.

LANGENSTEIN: And you have not complied with any of those conditions, from my -.

MOORE: That's not correct.

LANGENSTEIN: Okay. Well, the majority of them you're still not in compliance of, which is, as the neighbors have explained, not, they're not infrastructure demands, they're just courtesies.

MOORE: Well, there's -.

LANGENSTEIN: And in the many cases, just what I would like to see, what I would like to hear from you today is that if you would get this continuance, that you would cease and desist any operations on this level until this is resolved. If you will do that, I think we can go for a continuance. But if you continue to deal with this, as the Planning Director, and continue operations as normal, I will ask for this to proceed.

MOORE: Well, again, we are working with the Planning Director to address all of these concerns. This was -.

LANGENSTEIN: Can you cease and desist operations immediately?

MOORE: My client is not with me today and I cannot represent what he is or isn't willing to do, what the company's willing to do at this time. We have an agreement with the Planning Director in terms of how to resolve this matter.

LANGENSTEIN: That's not what I'm talking about, any agreement with the Planning Director. I'm talking about the Special Use Permit you have, and I'm talking about the operation which you continue to run which has not been resolved. And what I'm asking is that you cease and desist these operations until it's resolved. Can you say, suggest that?

MOORE: All I can say is that we're working with the Planning Director to resolve this matter.

LANGENSTEIN: Okay.

FOX: We have a motion before the Board. Mr. Langenstein, would you like to restate your motion?

LANGENSTEIN: Yes. Mr. Chairman, I would like to move that we move on this appeal at this moment.

CHONG: Second the motion, Mr. Chairman.

FOX: And Mr. Chong seconded the motion. Further discussion?

COOK: Yeah, I wanted to ask the, the Planning Director is not here today. What position are they taking on moving forward today?

LEITHEAD-TODD: I don't believe that the Department is ready to move forward today. And one of the things that I'm looking here and, I think the record here doesn't have the Special Permit -.

FOX: It does not.

LEITHEAD-TODD: In it and some of the issues that are going to be discussed here, what are the conditions of the Special Permit?

FOX: Mr. Chong?

CHONG: May I make a short comment.

FOX: Mr. Chong.

CHONG: Mr. Chairman, I remember we had a hearing on this whole issue, I think, was a year ago so that it's not fresh in our minds, but it's not like it's coming out of nowhere.

LANGENSTEIN: It was sent for continuance then.

CHONG: I just, you know, distinctly remember parties saying that they were going to do all these things; and I'm shocked that they haven't done anything in a year.

FOX: I must not have been in that meeting.

LANGENSTEIN: And I think, Mr. Chairman, what concerns me is that, you know, we've got some concerns here which can be readily resolved; and they're not willing to work with us. So, this is not a matter for the Planning Director's discussion. This is something that has been done, they've been cited for it, and they continue to do it and blatantly will refuse not to cease and desist. I find that thwarting any efforts with the Planning Director.

FOX: Any other comments before we go to vote?

COOK: Well, my concern was that I want to hear all sides of the issue. And if the Planning Director is not here to explain what the current situation is -. I've here from Mr. Moore, one set of facts, and apparently from the landowners another set of facts. I'd just like to have all the facts. And I can understand Mr. Langenstein's concern and I have some concerns, too, that's why I wanted to have an early resolution for it. But I don't believe, I'm not willing to move today; and I'll have to vote against the motion.

LANGENSTEIN: Mr. Cook, I think one of the issues that I feel here is that there is discussion ongoing with the Planning Director regarding this Special Use Permit and I don't see that changing if we move on this appeal at the moment. There's also, as you noted, there's a court proceeding revolving around it as well. And I think the issue here is continuance on this and whether or not -. You know, I think that if we get to a spot where we can, we're lacking evidence, I think that that may be something that we may have to move forward to. But, at this point, I think that it's up to Doutor to show their good faith that they're living up to what, where we are right now. And anything else that they're working on is irrelevant, because it's, there is a case history here of defiance to what has been asked to be in compliance. So until that's met, I don't see any continuance being useful because it's just a procrastination of -. You know, you can say whatever you want but if they don't do it then it's, it's another suit.

COOK: Well, I certainly understand your position, Mr. Langenstein.

FOX: Ms. Kawaha, would you call the roll, please? We're voting on the motion of Mr. Langenstein.

KAWAHA: Yes, to move on the appeal today. Mr. Langenstein?

LANGENSTEIN: Aye.

KAWAHA: Mr. Chong?

CHONG: Yes.

KAWAHA: Mr. Cook?

COOK: No.

KAWAHA: Chair Fox?

FOX: No.

KAWAHA: Chair, there are two ayes and two no votes. Motion does not carry.

FOX: I will continue this hearing until the first Board meeting in May, in due time to notice. And, Mr. Moore, I think that this gives you some impetus to move

really quickly because if we take this up and -. And I can guarantee you that if something hasn't been done, you're not going to get a favorable resolution from this.

MOORE: Thank you, Mr. Chair.

KAWAHA: Mr. Chair, if I can mention it, that it's the date, May 14th.

FOX: May 14th here in Kona.

KRUEGER: Would that be at 10 o'clock, Mr. Chair?

FOX: Yes, it will be.

COOK: Mr. Chairman, so it is scheduled for a Contested Case Hearing at that time?

FOX: At that time.

COOK: Okay.

MOORE: Thank you very much, Mr. Chairman.

FOX: Thank you all very much.

O'TOOLE: And that's for both violations?

FOX: That's for both violations.

MOORE: Yes.

The discussion ended at 11:55 a.m.

Respectfully submitted,

Sharon M. Nomura, Secretary