

BOARD OF APPEALS  
COUNTY OF HAWAII

HEARING TRANSCRIPT  
DECEMBER 14, 2007

A regularly advertised hearing on the appeal of **ROBERT C. & TERESA D. STONIER (BOA 07-000042)** was called to order at 10:20 a.m. in the County of Hawaii, Aupuni Center Conference Room, 101 Pauahi Street, Hilo, Hawai'i, with Chairman Valta A. Cook presiding.

PRESENT: Valta A. Cook                      ABSENT & EXCUSED: Kelly Ann Soo  
David Drury  
Peter Hendricks  
Joel Gimpel  
Diane Gentry  
Kim Tavares

Ivan Torigoe, Counsel to the Board  
Alice Kawaha, Staff to the Board

Attorney Damir Kouliev representing Appellant  
Robert C. Stonier, Appellant  
Amy Self representing the Planning Director

And two people from the public in attendance

**PETITIONERS: ROBERT C. & TERESA D. STONIER (BOA 07-000042)** - Appeal of Decision by the Planning Director dated February 6, 2007 Notice of Violation (ZCV06-048E), relating to the operation of a non-agricultural business within an Agricultural District. The property consists of approximately 3.0 acres and is located at the northwestern corner of Road 7 and Road F, Hawaiian Acres Subdivision, Puna, Hawai'i, TMK: (3) 1-6-41:1.

COOK:                      The last item on the agenda is Robert C. and Teresa D. Stonier, Board of Appeals 07-000042. Will the parties and their representatives please come forward. Okay, would the Appellant's attorney present himself, please, and introduce, it looks like you have one of your clients here, in any event.

KOULIEV:                      That is correct. Good morning, Chair Cook, Board. My name is Damir Kouliev. I'm with the office of Steve Strauss; and I'm here on behalf of our client Robert C. Stonier. And today we're appealing a notice of violation as to his subject property. And we believe there are numerous things -.

COOK: Well, before you make your argument I want to get the appearance of the Planning Director.

SELF: Deputy Corporation Counsel Amy Self representing the Planning Director and the Planning Department. To my immediate right is Robert Usagawa who is the zoning inspector for the Planning Department for the County of Hawaii.

COOK: Okay, the way we're going proceed this morning is that we're going to have a brief opening statement by the Appellant and the Planning Director, and then we will proceed with the contested case hearing. The appellant or petitioner, I guess it is in this case, will then present their testimony and any documentary evidence. And then with completion of that then the Planning Department will present any evidence or documents that they wish. Maybe after we complete the opening statements then we'll see if we can get a stipulation as to the exhibits.

KOULIEV: Fair enough.

COOK: Okay, counsel, you want to make your statement.

KOULIEV: Good morning. We're appealing a Notice of a Violation that's dated February 6, 2007; and we contend that there are numerous things that were incorrect with the Notice of Violation as characterized by this letter here dated February 6<sup>th</sup>.

First of all the business that is conducted by Mr. Stonier on his property is not at all similar to a manufacturing, processing and packaging business as discussed in Hawaii County Code Section 25-1-5.

Now it is important to understand the nature of Mr. Stonier's business, QUAMAGRA, to understand that the characterization as a manufacturing, processing and packaging business is erroneous. Now Mr. Stonier's business is limited to the moving, cutting and shaping of natural stone materials by hand tools exclusively. There's no large amounts of metal transfer. There are no significant mechanical or chemical processes. It's akin to a small scale artisan wood carving or minor construction activities associated with home construction that are otherwise permissible in this area. And it produces only limited amounts of dusts, less than in agriculture, and it produces limited waste products, which are natural.

The way the business is conducted, there is about one employee aside from the owners, Robert and Teresa Stonier. The operation is limited to daylight hours. There's no extended shift operations that characterize the 25-1-5 violation. The transport and installation all occurs off site. Operations cease at the time of transport and installation at the subject property. And finally it's not at all akin to the other examples listed in 25-1-5, which is a paper textile, woodmill, soap detergent manufacture, things associated with concrete. There are clear differences, just in terms of the way the business is conducted and the products that go into that.

With that said, if this is found to be in violation it's only a di minimus deviation from the Zoning Code. This is a rural mixed use area with poor soils that are not suitable for extensive agriculture. And, furthermore, subdivision residents in Hawaiian Acres have long operated businesses that deviate from the Code. And to single out Mr. Stonier for his own business suggests disparage treatment by the Planning Department and the violation of equal protection and due process in this situation.

Lastly, if this is not a di minimus deviation, it squarely fits in the description of a home occupation under Section 25-4-13. There's no outdoor manifestations of a business, like exterior signs, symbols, displays, or advertisements, things of that nature. One driving from the road would not be able to see that this is a granite countertop manufacturing business. None of the business is visible from public view. So this is squarely a definition of home occupation. And we maintain that the findings were clearly erroneous, and it was an arbitrary and capricious exercise of discretion to find our client in violation.

COOK: Thank you. Okay, Ms. Self for the Planning Director.

SELF: I'd like to point out that the Appellant is not denying that they violated the Code. They're not denying that they have a non-ag business going on on agricultural property. They place enormous amount of emphasis on the characterization of the violation, and that was a definition that was included in the Notice of Violation and Order. But if you look at the Notice of Violation and Order and you look at the Section of the Code, 25-2-35 which specifies what is required by the Code to be in the Notice of Violation, you'll see that everything that's required to be in the Notice of Violation was in the Notice of Violation, including the nature of the violation, which was the operation of a business or having a business in Agricultural zoned property which is not permitted under the Code. Under the Code if you look what the permitted uses of Agricultural zoning is, it does not include a countertop business.

Now all along they've said that they're going to file for a special permit, but as of today that has not happened. I checked with the Planning Department, that has never happened, even though that's a separate issue from the violation itself. You'll also notice that in addition to admitting that they're operating a business, they're saying it's a slight deviation, they're also admitting that it's a slight deviation from the Code. But they don't get to decide if they can deviate from the Code or not. The Code says what you can and can't do. That's the whole purpose behind having a Zoning Code. You live in the area for the use that you want to use your property for. So just because it may be an insignificant deviation to the appellant, this Board has to apply the law; and the law is the Zoning Code.

And, also, the other thing I wanted to point out is that in the Appellant's opening statement, he points out that somehow the Department is singling out this Appellant. But you'll hear from the Zoning Inspector himself testimony describing how they go about inspecting for violations, and you will see that there is no way that they could ever have

enough time to single out anybody. They don't have that kind of time with the number of violations, complaints that they have for violations. And I would also point out that the general rule for zoning violations is that the failure of zoning authorities to enforce the zoning regulations against others does not preclude the authority's right to enforce the ordinance against the violator.

So just because there may be others in that area or other areas in the whole Big Island of the County doesn't mean that whoever is violating the Zoning Code, does not mean that they cannot enforce the Zoning Code on someone. Think of how absurd that would be if that was the case. And with that, I'll close at this time. Thank you.

COOK: Thank you, Ms. Self. Okay, does the Appellant have any exhibits that he would like to have maybe stipulated in at this point?

KOULIEV: Nothing further at this time. We'll rely on our petition for appeal.

COOK: Well, we have a record on appeal here. Maybe the documents that are attached to the record on appeal, could we have those stipulated into evidence by both parties? Mr. Schlueter (sic), do you have any problems with that?

KOULIEV: No, I don't have any problems.

COOK: So you stipulate to that. And Ms. Self?

SELF: Yes, I would stipulate to that.

COOK: All right, then we'll proceed here with the Appellant's testimony. So you have any witnesses, Mr. Schlueter (sic)? How do you pronounce your last name again?

KOULIEV: I believe you're confusing me with our other associate, Christopher Schlueter.

COOK: Okay, Nobody caught your full name when you, and I apologize for not having it correct.

KOULIEV: I apologize for not being clear.

NOMURA: How do you spell your last name?

KOULIEV: Kouliev, "v" as in Victor.

COOK: Okay. Are you ready to have your witness testify?

KOULIEV: No, not at this time. We have no witnesses.

COOK: You have no witnesses?

KOULIEV: Yes.

COOK: Does the Planning Director have any witnesses?

SELF: Yes. I'd like to call Robert Usagawa, the Zoning Inspector for the County.

COOK: Good. Okay, would you raise your hand. Do you swear to tell the truth, the whole truth, and nothing but the truth?

USAGAWA: I do.

COOK: Okay, you may proceed to ask your questions, Ms. Self.

SELF: Could you please state your name and position with the County for the record, please.

USAGAWA: My name is Robert Usagawa. I'm the Zoning Inspector for the Planning Department.

SELF: Okay. And could you please briefly describe how you go about deciding to inspect a property for a zoning violation. Do you get a complaint first? Is that, could you just go through that whole, describe to the Board how you go about deciding to inspect the property.

USAGAWA: Normally people either walk into our office and file a formal complaint or they call us on the telephone and we kind of, we record what they say onto our complaint form to be filed for, by an input clerk for further investigation into possible zoning violations.

When I get sufficient or enough complaints in the area, I will go investigate whatever I can within the time limits that I have. Granted there are many violations of this type all over the East side of the island and I can't get to everyone right away. But that, my investigations are all based on complaints from the public. I mean I can't make my own complaints. I'm not allowed to do that. So the complaints come from the public. They are basically our eyes and they're complaining because it's affecting their life. That's why people complain. And that's basically how I do my investigations. If there are no trespassing signs on the properties I cannot go on the properties. I have to do my investigations on my observations from the roadway. OR if someone like the property owner comes out to greet me, I will inform them of who I am and what I'm there for, and then I'll discuss it from there.

SELF: Okay, so in this case, did you receive a complaint from a member of the public?

USAGAWA: Yes, Ma'am.

SELF: And so you did go out and inspect this property, correct?

USAGAWA: Yes, Ma'am.

SELF: And when you got there was there a no trespassing sign on the property?

USAGAWA: I think so, Ma'am.

SELF: And did you have any conversations with the property owner?

USAGAWA: Mr. Stonier came out to talk to me on the roadway on the Road 7 in Hawaiian Acres. Road 7, that's where he's located.

SELF: So you didn't go on the property. You were close to the property, within the vicinity of the property, is that correct?

USAGAWA: Yes, Ma'am.

SELF: And then he came over to you and started talking to you, is that correct?

USAGAWA: Yes, Ma'am.

SELF: And could you just inform the Board of what the gist of that conversation was?

USAGAWA: I told him that I was here for an investigation of a nonagricultural business on an agricultural property. And in our discussion he informed me that he was operating a business call QUAMAGRA which means quality, marble and granite. And I told him that it wasn't permitted in an agricultural area for his property without a special permit.

SELF: And he did say, he told you that he had this QUAMAGRA business on that property, is that correct?

USAGAWA: Yes, Ma'am. He gave me his business card.

SELF: Okay, and you have that business card here today?

USAGAWA: Yes, Ma'am.

SELF: And does it say the name of that business on that card?

USAGAWA: It says QUAMAGRA. It's hard to say. QUA is quality, Q-U-A. M-A is marble. And GRA is granite.

SELF: Okay. And finally Mr. Usagawa, have you ever cited people somewhere in this area for the same type of violation?

USAGAWA: Yes, Ma'am. We have many agricultural properties on the East side of the island. Most of Puna is agriculture; and there are a lot of people that do businesses that are nonagricultural businesses on ag properties where I go to investigate based on complaints.

SELF: And so you have received complaints similar to this one in those areas and you have gone out and some of them, the ones that you've inspected have been cited if it did amount to a violation, is that correct?

USAGAWA: That's correct.

SELF: Okay. And Mr. Usagawa, would you or have you ever singled out a property owner just to cause them problems, to go out and cite them just for the sake of singling them out?

USAGAWA: No, Ma'am.

SELF: Okay, thank you. That's all for now.

COOK: Okay, counsel, you have any questions for the witness?

KOULIEV: I certainly do. Thank you. Now Mr. Usagawa, am I pronouncing that correctly?

USAGAWA: That's right.

KOULIEV: Is it material, as to who made the complaint, is it someone that lived in the area at the time of the complaint or is it someone, do you know who made the complaint?

USAGAWA: I cannot give out that information.

KOULIEV: Okay, fair enough.

SELF: I'm going to object.

KOULIEV: Fair enough.

SELF: I'll explain why he can't give that information out, that is to protect people who report these. Because if the public did not report these violations, we'd have no way of knowing. And so that information is not disclosed to the public.

COOK: Yeah, that question is comes up before us all the time and we do not require that information.

KOULIEV: Okay, point taken, point taken. Now do you come across in your examining of violations with home occupations?

USAGAWA: Yes, sir.

KOULIEV: Now, when you were doing your inspection of our client's area, were there outdoor manifestations of a business being conducted?

USAGAWA: Can you explain in easier understandable words.

KOULIEV: Okay, what was the character and external appearance of our client's property?

USAGAWA: Gray tarp tents.

KOULIEV: Tents. Were all materials screened from public view?

USAGAWA: I don't know. I don't recall.

KOULIEV: Were there any exterior signs, symbols, display or advertisements?

USAGAWA: Just advertisements on a vehicle.

KOULIEV: Okay. Then there were no materials or supplies being stored outside the building?

USAGAWA: There was a shipping crate that I remember in front of the tarp tents, between the tents and the roadway.

KOULIEV: And did you see numerous vehicles being parked out front, or just the truck that you mentioned?

USAGAWA: There were numerous vehicles on the property, but I don't recall how many there were.

KOULIEV: Okay. And did you see any clients or frequent deliveries or pickups when you were there? How would you characterize the level of activity there at the subject property?

USAGAWA: Well, it was only myself and Mr. Stonier. There may have been other people on the property but I wasn't observing who they were.

KOULIEV: Fair enough. And was there any contactor's storage yard, repair fabrication of automobiles, anything of that nature?

SELF: I'm going to object to this line of questioning because the witness has already testified that the appellant himself indicated that he had a business going, a non-ag business going on on his property.

COOK: I think I'm going to allow it because I think one of their defenses here is that this was a home occupation, and I guess he's trying to introduce testimony relating to that issue. So I think I'm going to allow it.

SELF: It doesn't qualify as a home occupation under the Code.

COOK: Well, that's an argument, I think. That's one of the issues before us. You can proceed.

KOULIEV: Absolutely. I've no further questions at this time, thank you.

COOK: To my right here.

HENDRICKS: Mr. Chair, I have a question.

COOK: I see a question, that's right. Go ahead.

HENDRICKS: Just for clarification, I noticed on the original complaint form the tax map key is listed 1-6-41:001 and on the Planning Director's letter to Mr. and Mrs. Stonier the tax map key is listed 1-6-41:011. Which lot by TMK are we talking about?

COOK: I see the witness wants to try to answer that.

USAGAWA: Page 3 of the record on appeal, the TMK is 1-6-41:001.

HENDRICKS: Zero, zero, one, thank you.

COOK: Just to follow-up on that, what was the number? Was there a different number on the citation letter?

HENDRICKS: Citation letter lists the TMK as 1-6-041:011, which would be Lot 11.

SELF: In the subject line he has 1-6-41, as the TMK. Is this the one?

HENDRICKS: No, the actual lot number I'm questioning. The original complaint is 001, which would be Lot 1; and the letter of citation is 011, which would be Lot 11.

SELF: We can see in the subject line the correct TMK is listed. There is a typo evidently on paragraph 2.

HENDRICKS: Okay, thank you. I just needed that clarification.

COOK: All right. Any other questions? Mr. Gimpel?

GIMPEL: Yeah, I have just a couple of questions. Mr. Usagawa, what are your criteria if any for prioritizing your investigations?

USAGAWA: Prioritizing is based on the Planning Director giving us guidelines as to what is considered the most important, or the priority one, which is anything that is harmful to the environment, that's number one. Okay, number two would be anything involving destruction of archaeological sites and things of that nature; and then repeated violators; and then neighbor to neighbor disputes.

GIMPEL: Okay, and which criteria, which of those, would this investigation fall under?

USAGAWA: Probably below number one, but it could be a number four which is a neighbor to neighbor dispute, yes.

GIMPEL: Neighbor to neighbor, okay. All right, my second question would go to both attorneys. And I'd like to hear your interpretation of the Code provision regarding what constitutes a home occupation.

SELF: I'll answer that, under -.

GIMPEL: Well, because the Appellant's attorney is the one who is advancing that, I'd like to hear it from you first.

KOULIEV: Thank you, Mr. Gimpel. Section 25-4-13 that discusses home occupations, it says, "A home occupation shall be permitted as incidental and subordinate to the use of a dwelling in any district in which a dwelling is located, providing that the home occupation does not change the character and external appearance of the dwelling." I liken that section to someone having a home office, running their own office in their home, or running an artisan woodcarving business, something that really does not appear to be happening outside the dwelling, to the passerby and to the community at large. And this is precisely what Mr. Stonier is doing. Because he's an artisan and he's using his own home in a way that's not disruptive to the community at large; and that is a legitimate business. And in that regard it's subordinate to his actually living there because it doesn't change the nature of the residence to the passerbys and to the community. And, furthermore, as I mentioned previously there is hardly any

environmental or archaeological harm that is being done to the surrounding area or our client's lot. So with that said, we contend that Mr. Stonier's use of the property to shape natural materials by hand tools is squarely within the definition; and it bears noting that any client interactions that are being held are held offsite for any installation of materials or the materials that are prepared at the facility. Thank you.

COOK: Ms. Self.

SELF: In order to qualify as a home occupation, you have to have a dwelling on the property. And as you can, the inspector, well, you could ask him, when he went out there there's no dwelling on that property. And, furthermore, for home occupation you can't submit a declaration for a home occupation if it's designated as State Land Use Agricultural, State Land Use Rural or Agricultural districts. So if you want to have a home occupation for a building that's on a site on Ag property, you have to apply for a special permit. And, in this case, the special permit has never been applied for.

GIMPEL: Follow-up question is: Mr. Stonier, do you live on the property?

STONIER: Yes, I do.

GIMPEL: Where is your home?

STONIER: We have a bunch of tents, large canvas tents we live in. Everything is enclosed. I've got everything that you probably have in your home – big screen televisions, living rooms, bedrooms, kitchens -.

COOK: You know, just for the record here, I think what we need to do is we need, I think, Counsel, you should have your client testify. You've made certain representations as to what, you know, is going on on this property., but we don't have any evidence to that, other than the evidence that we have from Mr. Usagawa as to what he observed. It seems to me that you probably should have your client testify and then he could probably cover the areas that Mr. Gimpel is also asking. But I think just to have him talking over there without being under oath is not proper. So I know this is a little irregular, Ms. Self, but I think we should handle it that way. You want to swear your witness in then, if you're willing to have him testify?

KOULIEV: Thank you, Mr. Cook. Our client would like to do so at this time.

COOK: Mr. Stonier, would you raise your hand. Do you swear to tell the truth, the whole truth and nothing but the truth?

STONIER: Yes.

COOK: Okay, so we're going to go a little bit out of the usual order here. We'll reserve further examination of Mr. Usagawa until the plaintiff has testified. Okay,

would you proceed with your questioning of the witness. And Mr. Gimpel, of course, you'll have your questions later. Okay.

KOULIEV: Good morning, Mr. Stonier.

STONIER: Good morning.

KOULIEV: How would you, you touched on this briefly earlier, but how would you describe the structures on your property at this time?

STONIER: We have three large tents.

COOK: Some of us can't hear too well, so if you can talk into the microphone, and also she needs it to make a record. Thank you.

STONIER: I have three large tents, they're all enclosed. They are 10 by 20, 10 feet wide, 20-foot long. Two or them are bumped together so it's 40 feet long by 10 feet wide, completely enclosed. That's my living room, my dining room, my kitchen. I have another one that has a bedroom in it. I have a 12 x 16-foot walk-in refrigerator that is a structure. We have showers in there, washers, dryers. It's everything that you probably have in your home. My business is underneath a 20 x 40 awning. And what we do is we fabricate natural stone.

KOULIEV: Now how would you describe your workshop space? Is it also enclosed and hidden from public view?

STONIER: It's not enclosed but there is a black 75 percent screening around it. And it's doubled up so it's very difficult to see from the road.

KOULIEV: And do you keep any materials, supplies or products relating to the business outside of the enclosures?

STONIER: I have three A-frames outside which are hidden behind the screens. I do not carry an inventory. Somebody purchases the stone in Kona, I will go pick it up, I will bring it to my shop, put it on the A-frames, and I use it as the customer requests. And when the job is done, it's delivered out, installed and all their stone goes with the job, if anything is left over.

KOULIEV: Aside from the A-frames and the stone that you purchased in Kona for the specific clients, what other equipment or materials do you have in your workshop space?

STONIER: I have a 6-ton Army tow truck that I use to move the slabs around with. Other than that, everything is handtools, skill saws, carpenter saw with a diamond blade on it, 4-inch grinders with a little diamond blade on it, dry polishers which is just a

small grinder with a 4-inch head on it for polishing stone. Basically that's pretty much all the tools I have.

KOULIEV: And do you generate a large amount of waste in your operations?

STONIER: Other than dust, not a whole lot. I may have some small pieces maybe 18 inches by 5 or 6 inches that I have left over there. They're scraps. I break them up and I take them out and put them in the potholes in the dirt road. It's natural stone. That's what they bring in (it's gravel) and dump it in the holes anyway, so I'm just kind of helping out.

KOULIEV: And do you have any exterior signs or symbols or advertisements?

STONIER: The only signs is on the side of my truck; and because I live there and it's parked in my driveway I guess if you say I'm advertising, I'm advertising. But I don't think I am.

KOULIEV: Are your neighbors, how do they know about your business, if they do?

STONIER: Most of my neighbors I've done their homes for. I just finished one this morning.

COOK: I'm sorry. I didn't hear that. I'm sorry, I didn't hear that last response.

STONIER: I just finished one this morning.

COOK: No, the one before that I just finished one this morning. I didn't catch that.

KOULIEV: About if your neighbors are aware.

STONIER: Oh, oh, how my neighbors felt about it, I did most of their homes.

COOK: Oh, I see.

STONIER: And I just finished one this morning.

COOK: All right.

KOULIEV: And do you have clients visiting you at your home?

STONIER: I might have one or two maybe in a month's period; and they're usually there for 10 to 15 minutes.

KOULIEV: So would characterize it as frequent?

STONIER: I guess you could say frequent.

KOULIEV: Twice a month, I mean, it's a subjective term certainly. And how many employees do you have working at your home at the business?

STONIER: Right now there's three of us. There's just myself and I've got two girls that come in and do polishing. That's all there is.

KOULIEV: Including your wife?

STONIER: Well, my wife is on the mainland.

KOULIEV: Okay. Nothing further at this time.

COOK: Ms. Self, you have any cross-exam of the witness?

SELF: Mr. Stonier, do you have a permit for the tent structures or any of the other structures you mentioned that are on the property?

STONIER: No, I don't.

SELF: In your petition for appeal on page, I'll refer you to page 4. It says that you're preparing, and this was served on March 8, 2007, and it indicates that you're preparing a declaration for submission to the Planning Director for a home occupation and also you're preparing a special permit application. So was that ever done? Did you ever prepare a special permit application?

STONIER: As far as I know this is what we're doing.

KOULIEV: We're currently working on one as well. It's pending.

SELF: And that has been since, on March of this year?

KOULIEV: It'll be filed in the near future.

SELF: Mr. Stonier, does your business involve any kind of agricultural activities whatsoever?

STONIER: I would have to say no.

SELF: Okay, thank you. I rest.

COOK: Anyone on the Board have any questions? Mr. Gimpel?

GIMPEL: Just one. You described your residence as the three tents that are on your property. Is that correct?

STONIER: Correct.

GIMPEL: And this stone carving, so forth, operation is not conducted inside those three tents. Is that correct?

STONIER: Correct.

GIMPEL: Thank you.

COOK: Ms. Gentry.

GENTRY: Mr. Stonier, how long have you resided on the property?

STONIER: I believe I'm going on four years.

GENTRY: Okay.

COOK: Mr. Drury, you had a question?

DRURY: Yeah, I have a question relating to the TMK map. This is the County's, in the index to the record, page 2. And it shows for the record the lot in the northeast corner of the area, at the junction of the Road F and Road 7. And next to the lot there is a whole series of very, very small lots. I can't tell from the TMK map what those very small lots are. Are these very small residential lots?

STONIER: As far as I know. I believe the last owner had them subdivided into, I believe they're quarter acre lots, I believe. I don't know.

DRURY: Are these lots, are people living on these lots?

STONIER: At the end of my property there was a woman that was living on that very first one; and she has died recently of cancer.

DRURY: Okay. Because it shows there are 10 or 15 lots there. And where is your property in relation to this large number of small lots? Are you at the close end or at the far end?

STONIER: Your thumb is right on it. I'm on the corner of 7 and F.

DRURY: So you're on the corner.

STONIER: Yes.

DRURY: All right, so the farthest away. And last question, you're using hand tools to cut stone -?

STONIER: Yes.

DRURY: And it's under an awning, so there's essentially no sound barrier between your saw and the rest of the world, other than the piece of plastic.

STONIER: No, there isn't; and there's actually nobody within the 700 feet of me.

DRURY: Seven hundred. Okay, so there is nobody within this large number of lots, nobody is living there.

STONIER: There's nobody next door to me. The only one would be one at the far end of the property in that small, that very first small lot; and right now she's not even there.

DRURY: So across the road, it's all open?

STONIER: It's all open.

DRURY: It's all open.

STONIER: There's nobody around me.

COOK: All right. Final question, how many hours a day more or less do you spend with the cutting tools and the polishing tools?

STONIER: If I'm busy I'll start like 8:00-8:30 in the morning; and I knock off at 4:00-4:30. It's normal, you know, working hours. And we've got carpenters working in the neighborhood and they are up there before I am.

DRURY: Okay, thanks.

COOK: These tools that you use, what kind of noise do they generate, if any?

STONIER: The skill saw is a carpenter's operated handsaw. The grinders is not much louder than the saw, I mean, I think the loudest thing I've got is probably the skill saw; and that's a 7-inch hand-held power saw.

COOK: Okay. It's just I wasn't familiar with the tools. I'm, of course, familiar with a skill saw. Any other questions? Okay, that's about it, I guess. Okay, unless you have any redirect.

KOULIEV: Nothing further at this time.

COOK: Well, wait a minute. We're not through with, we're going to move then back, if you're through with this witness then I'm going to move back to Ms. Self and we'll finish up with Mr. Usagawa here. I've forgotten exactly where we were. I think the Board was asking Mr. Usagawa questions. Mr. Usagawa, your counsel indicated that if you were going to have a home occupation within the agricultural, if I understood it correctly, within the agriculturally-designated area there was some type of a permit or application you needed to get. Could you, are you familiar with that?

USAGAWA: Well, based on the Code anything non Ag requires a special permit in Ag.

COOK: And is there a specific section? I think your counsel, maybe she's showing it to you there.

USAGAWA: Under 25-4-13(d) -.

COOK: Could you read that to us, please.

USAGAWA: A special permit shall be obtained for any home occupation on a building site that is situated within either the State Land Use Rural or Agricultural District.

COOK: All right. Does anyone else have any questions of Mr. Usagawa.

GENTRY: I do.

COOK: Okay, Ms. Gentry.

GENTRY: I do. I know the Department receives complaints. Can you tell us what the nature of this complaint or complaints was? Was it noise, dust, lots of people?

USAGAWA: A non-agricultural business in the agricultural -.

GENTRY: Just the non-ag, okay. How many complaints did you receive?

USAGAWA: For this one?

GENTRY: For this case, yes.

USAGAWA: Several.

GENTRY: Several meaning three?

USAGAWA: Two.

GENTRY: Two, okay. Thank you.

COOK: Let me follow-up on that a little bit. Wasn't there included in the complaint something other than oh, they're doing something that's not agricultural? Wasn't I hear noise, or I smell dust, or was there anything specific?

USAGAWA: Well, whatever was written in the complaint that I put down there. No. 1 -.

SELF: The complaint is on Page 1 on the record on appeal.

COOK: Okay, all right.

SELF: And it has the complaint that's listed up there, someone conducting a countertop business in Ag, RS-7 and F under tarps, has sign posted QUAMAGRA, has at least six employees, trucks, saws, drilling.

COOK: Okay. You've had your cross-examination, I believe. Anything further of this witness?

KOULIEV: No, thank you.

COOK: Okay.

GENTRY: I -.

COOK: You have another?

GENTRY: I have one more question for Mr. Usagawa. Were those two complaints made like close together or were they like a complaint came in and like six months later another complaint came in?

USAGAWA: I don't know the exact time. One was a formal complaint in the form of a, I mean, a telephone, the initial one was a telephone call. The second one was a telephone call also. But I don't think I made a physical second complaint form. I'm not sure. I don't remember that well.

COOK: Okay. I have another question then. Okay, Peter.

HENDRICKS: Is it proper to ask if this complaint was from the same person or different people?

USAGAWA: I cannot give out that information.

HENDRICKS: Okay.

COOK: I'm sorry. I didn't hear the answer to that.

USAGAWA: I cannot give out the information. I cannot say who complained.

COOK: So it might have been the same person, you don't know?

HENDRICKS: My question was is -?

COOK: Go ahead.

HENDRICKS: And I want to know if this is proper.

COOK: Go ahead and clarify it, Peter.

HENDRICKS: Was the complaint from the same person twice or from different people?

SELF: From the same people?

USAGAWA: No, different people.

HENDRICKS: Thank you.

COOK: Okay, Ms. Self, you have any other witnesses?

SELF: No.

COOK: Do you have any rebuttal witnesses, counsel?

KOULIEV: No, thank you. But it slipped my mind that I do have a couple of exhibits. I'm not sure if the Board has before it declarations from Mr. Stonier and his wife.

COOK: I'm sorry, you have a declaration from -?

KOULIEV: Yeah, that I would like to enter into as exhibits.

COOK: All right. Have you given copies of that -?

SELF: No, I haven't received them. I would state an objection because that should have been done in the very beginning; and he has already testified so I don't see the point.

COOK: I'm sorry, can you speak a little louder for me please.

SELF: I don't see, he has already testified and nothing was submitted in the beginning. I don't see the point because he has already testified. If he wasn't present I could understand the declaration but he is present and he has already testified.

KOULIEV: I also have one from his wife, Teresa Stonier.

COOK: Well, we're usually petty loose here with our exhibits. I agree with the objections since Mr. Stonier has testified. But do you have a copy of that that you could give to the Board and to the opposing counsel?

KOULIEV: Unfortunately I only have one copy with me at this time.

COOK: Do we have facilities that we could have that copied? We could take a short break. I think we've been going an hour. I think we'll take a break at this point. If you could make copies of that in the interim, either through our staff if they're willing to do it, or otherwise, and then we'll reconvene in 10 minutes.

KOULIEV: Thanks so much, Chair Cook.

RECESSED The Chair called a short recess at 11:08 a.m.

RECONVENED The meeting reconvened at 11:22 a.m.

COOK: Okay, Board of Appeals will come to order again. Counsel, we have received what has been marked at, it hasn't been marked yet. So the next thing, actually we have no exhibits other than the record on appeal. So I'm going to make this as Appellant's Exhibit 1. We'll receive this into evidence.

KOULIEV: Thank you, Chair Cook.

COOK: Do you have any others, or do you rest your case at this point, counsel?

KOULIEV: I'd like to say a couple things further.

COOK: Well, we'll have final argument.

KOULIEV: Okay.

COOK: Do you have any further evidence you wish to introduce?

KOULIEV: Nothing at this time.

COOK: Ms. Self, do you have any further evidence?

SELF: No.

COOK: All right, at this point then the procedure will be that we will have final argument from each party. I think five minutes should be sufficient. And at that point after the final arguments then we'll give the Board a chance to ask counsel questions. Then after that we'll be open for a motion on the appeal. Okay, counsel for the Appellant, go ahead.

KOULIEV: Chair Cook, Board, we've explained our position in the opening argument. And we contend that based on the intent of Section 25-4-13, the Code section appears to intend to minimize any use of the home that would be disruptive to the community at large. And we believe that Mr. Stonier's use of the property as such, it comports with that intent of the section. And, furthermore, our clients are ready and willing to comply with any directives of the Board and of the Planning Department. He would like this business to be legitimate and lawful in every way and doesn't want to keep going through further disputes with the Planning Department in this regard. So a special permit application will be filed in the near future; and, furthermore, we contend that it will be found to be a home occupation. And this is our client's livelihood and he would like to continue conducting his business that is of high quality and of benefit to the community. Thank you.

COOK: Ms. Self.

SELF: First I'd like for the Board to keep in mind that Mr. Usagawa is the only zoning inspector for Hilo and he receives an enormous number of complaints. He can't be expected to remember every detail or every complaint that he receives. That's why it's documented in the record on appeal.

With regards to Appellant's argument there's no doubt that Appellants are not denying that they have a countertop business on their agricultural property. Mr. Usagawa testified that the Appellant told him that they have this business on-going on the property, even gave him a business card; and the Appellant today admitted it. So that's not even an issue, that has already been admitted.

Regardless of how the Zoning Inspector characterized the violation, the actual violation as stated in the notice of violation is having a non-ag business within an agricultural zoning district., which is not listed as a permitted use under Section 25-5-72 of the Zoning Code and is, therefore, not permitted pursuant to Section 25-4-4 of the Zoning Code. So that whole paragraph could have even been eliminated from the Notice of Violation. And the Notice of Violation still has everything in it that's required under the Code. So there's no flaw in that.

And the other thing is no matter how insignificant the Appellant thinks that his business is, the fact of the matter is that it is not a permitted use under the Zoning Code. The activities of his business do not constitute a permissible home occupation under Section 25-4-13 because there is no dwelling on the unit. And he contends that he complies with this section; but even if there were a dwelling on the property, he hasn't gotten the

permits that are required on Ag property. You don't just submit a declaration for a home occupation; and this is under State law too, you have to get a special permit to conduct a home occupation on agricultural property. You don't start the business and then some day say that you're going to apply for a special permit. The violation is going on right now and it has been going on since before March of this year. I can't remember the exact date of the citation. But, you know, he can apply for one, he hasn't done so yet. Even if he applies and gets one, that doesn't take away the violation. The violation is occurring right now. The other thing is that, like I said, the violation is separate and apart from the special permit process. So even if he did apply or received a special permit he still has to deal with the violation. And violations are not absolved by applying for a special permit. To say that you're going to apply for one in the future does not stop the violation. The order, he was ordered to cease and desist violating the Code. So that has to stop because it is a violation.

And the one last thing I wanted to point out is the decision and order does not violate due process equal protection rights, unless the Appellant can prove that the Director enforced the Zoning Code in an intentionally discriminatory manner. That wasn't proven. They didn't even offer evidence for that. The general rule is that failure of zoning authorities to enforce the zoning regulation against others does not preclude the authority's rights to enforce the ordinance against the violator. If you follow the reasoning that is contained in their petition for appeal, if that were true think how absurd that would be. Because, just because Mr. Usagawa can't be everywhere at one time getting all these violators -- going out and looking for violators is just like the police trying to go out and anticipate a crime -- that anyone that is violating the Code that happens to be in the same area they aren't allow to go and enforce that Code against that person? That would be absurd. So I'm just requesting that the Board please follow the Code, the Zoning Code, and apply it to the facts that you've heard today. Thank you.

COOK: Do you have any, I'm going to give you a chance to rebut if you have anything further, counsel.

KOULIEV: Nothing further at this time.

COOK: Anyone to my left have any questions of either counsel?

DRURY: Actually I have a quick question for our Corp. Counsel. Does a Notice of Violation, if there's a violation, does that in some way prejudice the application for a special permit process? Is there any relation between the two?

TORIGOE: If I may respond. It should not, it should not.

COOK: Anything further, Mr. Drury?

DRURY: No.

COOK: To my right? I just wanted to clarify, counsel, are you claiming that your appeal should be granted because this is in-home use and therefore it's not a violation? Is that your basic claim here?

KOULIEV: Yes.

COOK: All right. If that's your claim, then how do you venture the argument of the Planning Director that you need, if there is a home use in an agricultural area you need to get a special permit. Do you agree with that contention that she has made there?

KOULIEV: It appears to be what the Code provides, yes.

COOK: The Code does provide that?

KOULIEV: Yes.

COOK: And your position at this point is that you do plan to apply for that but you have not at this point?

KOULIEV: Yes, that's correct.

COOK: All right. Do we have any other questions? Okay, I think we're open now then for a motion either to deny the appeal or to grant the appeal.

GIMPEL: I'll move to deny the appeal, finding that the Director's Notice of Violation was (1) not in error; (2) not arbitrary or an abuse of discretion; and (3) not in violation of law.

COOK: Do I have a second to that?

DRURY: Second.

COOK: Mr. Drury has seconded, okay. Is there any discussion from the Board?

GIMPEL: Well, let me give you the foundation for that motion.

COOK: All right.

GIMPEL: I think that it's clear that the Appellant or the Petitioner has admitted that it is a business and it's clear that it's a non-agricultural business. The question whether it is a home occupation, I think that the Appellant failed to meet the burden of proving that it's a home occupation. Indeed the testimony was that the business was not being occupied within the "home" on the premises because it was not

within the three tents. So therefore I feel that, and, finally, the conduct of a home occupation on Ag land has to be permitted by a special permit which is absent now.

COOK: Okay, any further comments or arguments from the Board? Okay, then I would ask the clerk to call the roll on this motion.

KAWAHA: Mr. Gimpel?

GIMPEL: Aye.

KAWAHA: Mr. Drury?

DRURY: Aye.

KAWAHA: Ms. Gentry?

GENTRY: Aye.

KAWAHA: Mr. Hendricks?

HENDRICKS: Aye.

KAWAHA: Ms. Tavares?

TAVARES: Aye.

KAWAHA: Chair Cook?

COOK: Yes.

KAWAHA: Chair, there are six ayes. Motion is carried.

COOK: Okay. I would ask the Corp. Counsel, excuse me, I would ask Ms. Self, the attorney for the Planning Director, to submit proposed Findings of Fact, Conclusions of Law within 30 days and the Appellant has 15 days to respond. And then the Board will make, approve the Findings of Fact, Conclusions of Law and Decision at the next Hilo regular monthly meeting.

I want to say that, you know, we appreciate the problems that people have when they operate out of their homes or in that neighborhood. So, Mr. Stonier, I think you and your wife have to move forward; and you probably are doing that with your counsel to get, to apply for that special permit. But in the meantime, you are in violation and you have to deal with the Planning Director on that matter. Thank you very much.

The discussion ended at 11:36 a.m.

Respectfully submitted,

Sharon M. Nomura, Secretary