

ORIGINAL

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Kauai ATV, LLC

2017 SEP 19 A 8:48  
LAND USE COMMISSION

BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAII

In the Matter of the Petition	)	LUC DOCKET NO. SP05-399
	)	
of	)	KAUAI ATV, LLC'S WRITTEN
	)	TESTIMONY WITH RESPECT
KAUAI ATV, LLC, for a Special Permit	)	TO ORDER TO SHOW CAUSE;
for recreational activities within the	)	CERTIFICATE OF SERVICE
Agricultural District at Koloa, Island and	)	
County of Kauai, State of Hawaii, on	)	
parcels identified as Kauai Tax Map Keys:	)	
2-9-001: por. 01; 2-9-002: por. 01;	)	
3-4-06: por. 01; and 3-4-01: por. 01.	)	
_____	)	

KAUAI ATV, LLC'S WRITTEN TESTIMONY  
WITH RESPECT TO ORDER TO SHOW CAUSE

Comes now MARLENY COTRIM, and submits the following as testimony on behalf of KAUAI ATV, LLC, in the above referenced matter:

My name is Marleny Cotrim, and I am a Manager of Kauai ATV, LLC. I am presenting this testimony on behalf of Kauai ATV, LLC, rather than my father, Olegario Rivera, due to possible misinterpretation or misunderstanding because of his language situation.

I am also presenting this testimony in advance to reduce the time and effort that the Land Use Commission will need on this matter.

This Order to Show Cause is centered around the building of stairs down to a waterfall in the vicinity of Halfway Bridge.

Unfortunately, at the last hearing of the Land Use Commission on July 12, 2007, there were many unfounded criticisms and allegations made against Kauai ATV, LLC, on other matters which may have left an impression that we are not caring of the environment. This testimony will necessarily respond to those criticisms and allegations.

To begin, and as was stated in the Statement of Position which was previously submitted by our attorney, we admit that we did construct a stairway down to the waterfall. This was to provide a safe means by which our riders could view the waterfall and pond. We also admit that the stairway was constructed without obtain any approvals or permits from the Land Use Commission or the County of Kauai.

But we proceeded on the belief that the construction was approved under Special Permit SP-05-399, as part of our permitted activities. We were also unaware that a building permit might have been required, for we were doing it ourselves. The actions of Kauai ATV, LLC, were done out of a good faith but mistaken belief, and not by intentional disregard of the permitting requirements. Had we known that the staircase would have resulted in this proceeding and jeopardized the livelihood of over forty of our employees and their families, we would not have built the staircase.

In building the staircase, we went through great lengths to design it around the existing landscape and did not move, destroy or significantly alter any of the natural

environment. Nor did we do any grading or grubbing to accommodate the staircase, and all improvements were done on existing grade.

Even though we took these steps to work within the existing environment, we are now painfully aware of our shortcomings in not acquiring necessary permits, and accept responsibility for them.

In view of our learning that the staircase was done without necessary permits, we had the stairs removed. The stairs were not removed until a check was made with the State Historic Preservation Division, and it could be confirmed that the removal process would not be violating any other law. By letter of June 18, 2007, which was received as Exhibit "F", Nancy McMahon of the State Historic Preservation Division, confirmed that no historic properties would be affected.

A site visit was held on August 6, 2007, and the removal of the staircase can be confirmed by your Executive Officer and Commissioners in attendance.

The staircase involved substantial materials, including long pieces of lumber which can be reused for other construction. We also needed a safe passage for our employees during the removal of the lumber. As can be attested to by those Commissioners and staff members who attended the site visit, the terrain is very steep and was difficult to safely remove the staircase.

There was an existing trail which led down to the waterfall. We decided to create temporary steps on the lower, steeper portions of this existing trail, so that the trail could be used to carry out the pieces of lumber. The temporary steps consisted of minimally cutting steps into the steep soil and placing pieces of wood to retain the soil and grade of

the steps. At the time of the site inspection on August 6, 2007, a few of the pieces of lumber to retain the soil on the steps were still present, and can be better described by the staff and Commissioners who were present as to their insignificance to the environment of the area. These have since been removed.

As the existing trail was also very narrow, it became necessary to chip away the sides of the hill in two places to widen the trail to provide enough width for a person to safely carry out the lumber. The hillside was chipped less than a foot in depth and less than eight square feet in area in each case to provide the appropriate widening for safety purposes. The photograph which was marked as our Exhibit "C" shows the narrowness of the trail and the extent of the chipping to safely widen the trail. These actions did not result in any significant or adverse effects on the surrounding environment.

Testimony was presented at your July 12 meeting that we deliberately put buffalo grass and other vegetation on top of the trail and steps to hide them, with an intention to remove them and continue a permanent use of the trail for our customers after the Commission and County inspected the site. This is not true.

A limited amount of vegetative clippings were placed on the trail at the recommendation of the State Department of Health during a site inspection to minimize erosion and provide better traction as workers were going up and down the trail in the removal of the staircase lumber. There is no intention of continuing use of the trail to access the waterfall, as we no longer include that waterfall as part of the ATV tours and have no need to further access the base of the waterfall.



It was alleged that the trail was not previously existing, and that we created the new trail when we began to access the waterfall. This is not true. The trail existed previously, and we cleaned it to provide a safer means of using it to remove the lumber from the staircase. Our exhibits clearly show by the vegetative growth and weathering of the rocks and soil on the hillside that there was no fresh or recent cutting of the hillside.

It was complained that we caused sedimentation of the stream by our action. But ask any unbiased person who attended the site visit: the former location of the staircase and of the trail used to remove the lumber is away from the waterfall and the stream. Any disturbance of the ground to make the trail safer was so far away from the stream that there was no chance of the soil being pushed or washed into the stream.

We have been accused of creating new roads to cross the Huleia Stream under the Halfway Bridge. Again, these accusations are without merit.

First, we do not cross Huleia Stream on our tours. Although we come close the stream in the vicinity of Halfway Bridge, the stream is never crossed by us. The photographs presented by Mr. Whatmore clearly show that his allegations of our using an unpermitted road in the streambed is false. The road was a pre-existing route and is not within the streambed.

Secondly, we use existing roads and trails for our ATV tours. Mr. Whatmore's allegations that we created a new road is untrue. The photographs he submitted of the alleged new road depict a relatively wide road that is hard packed and well traveled, with evidence of old vegetative growth on the sides of the bank. This is indicative of an older, well established and well used route, used by vehicles much larger than the our all

terrain vehicles. This trail system was also identified during the county and state special permit process and is indicated on our trail maps. From the inception of our business we have been limited to pre-existing cane haul roads. At no point in our company's history did we create new trails systems for our tours.

My father's credibility was questioned when he previously testified that no trees were cut for the construction of the stairs. He was not lying; it is a question of understanding the question. This is one of the reasons why I am testifying today on behalf of Kauai ATV, LLC: to reduce the likelihood of misunderstanding the question and response.

A dead tree was removed for safety during the placement of the stairway of which a portion can still be viewed along the trail. Careful analysis of this trunk will show that the tree was dead and rotten longer than the stairway has been in existence. Brush was also cleared for safety. We take issue of whether there was a mass clearing of trees, and the answer is clearly no, as can be testified to by anyone who made the visit to the site, where existing trees still form a canopy over the area

We have been accused of causing increased sedimentation in Huleia Stream. This again is untrue. We do not go into the stream nor do we cross the stream. Any sedimentation found in Huleia Stream is the result of natural runoff of water into the stream according to the natural drainage patterns. Our use of the area for our ATV tours has not caused any increase or significant change in the patterns and amounts of drainage into the stream.

We have been accused of having a practice of doing something first, and then getting an after-the-fact permit. Again, this is without merit.

As was explained to the Kauai Planning Commission when we went in for the first Special Permit, we started the ATV rides as an experiment to see if it was feasible. Once that feasibility was established, we applied for the Special Permit which was granted. We abided by the conditions of that permit.

When the business grew and we saw the need for expanding the ATV tour routes as well as branching into other recreational activities such as the paint ball parks and the Waita Reservoir activities, we made application to this Commission and the County for an amendment to the Special Permit. We did not start the new activities prior to getting the Special Permit.

Unfortunately, my father misunderstood what was permitted when he built the staircase. We were given permission by our landlords to build the structure. We never truly understood or realized that permits were necessary for what we believed to be such a minor improvement that was hidden from public view, and on private land. We were also aware of similar structures on other private property that too were not permitted and thus did not think twice about moving forward with the project. This conclusion was admittedly presumptuous and erroneous on our part and for this we apologize. It was not done with the intention that we would build it, and come in for an after-the-fact permit. As soon as our attorney explained our misunderstanding of the permitting requirements, we voluntarily removed the same in recognition of our error.

It would not be an overstatement to say that this has been a learning process of great impact and magnitude. We again are paving the way for other similar businesses to understand the complexities of permitting non-traditional structures on privately owned land. We have learned of the potential liability and the importance of seeking guidance from as many knowledgeable people as possible prior to the development and construction of any structure. We have also learned about the tenuous nature of our special permit and in no way wish to jeopardize our standing with the Land Use Commission and the County as a consequence of this oversight.

We would like to again apologize for not pursuing the correct process for constructing the staircase. We do not think that our unfortunate building of the staircase under the circumstances justify any revocation or suspension of our Special Permit. We made a mistake, which has cost us in terms of time, effort, and expense. We hope that the steps we have taken will rectify the issue so that we may continue to provide services to the public, provide employment to over forty families, and continue charitable contributions to the community. We also look forward to expanding our operations to include more self-propelled activities as well as culturally intensive tours in cooperation with our landlord.

We appreciate the opportunity to share with the Land Use Commission our initial intentions for the staircase, our efforts to comply with county and state regulations and our willingness to restore the area in question to its natural state. Kauai ATV, LLC, apologizes to the Land Use Commission, the County of Kauai, and other parties for the



necessity of these proceedings. And we ask that no further sanctions be issued on this Order to Show Cause.

Thank you for your time and consideration.

Dated: Kauai, Hawaii, Sept. 16, 2007.

Respectfully submitted,



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Marleny Cotrim

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing were served upon the following by either hand delivery or depositing the same in the United States U.S. Postal Service, postage prepaid, on this date:

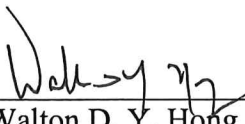
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Dated: Lihue, Hawaii, this 17<sup>th</sup> day of September, 2007.

  
\_\_\_\_\_  
Walton D. Y. Hong  
Attorney for Kauai ATV, LLC

2007 SEP 18 A 8:48  
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September 17, 2007

Anthony J. H. Ching, Executive Director  
Land Use Commission of the  
State of Hawaii  
P. O. Box 2359  
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2007 SEP 18 A 8:47  
LAND USE COMMISSION  
HONOLULU

Re: Docket No. SP05-399  
Order to Show Cause  
Kauai ATV, LLC

Dear Mr. Ching:

On behalf of Kauai ATV, LLC, enclosed herewith are the original and 15 copies of the following in the above-referenced matter:

- (a) Kauai ATV, LLC's Written Testimony With Respect To Order To Show Cause, presented by Marleny Cotrim;
- (b) Letter by Sa'le and Ruth Potts of the Koloa Hawaiian Outrigger Canoe Club, in support of Kauai ATV, LLC.

I apologize for the delay in transmitting the enclosed to your office, I will also have extra copies at the hearing on the 20<sup>th</sup> to give to the Commissioners and parties in the event you are not able to distribute the same prior to the hearing.

Thank you for your understanding and consideration.

Yours very truly,



Walton D. Y. Hong

WDYH:wh  
Encls.  
cc: Parties