

William P. Kenoi
Mayor



Duane Kanuha
Director

Bobby Command
Deputy Director

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74-5044 Ane Keohokalole Hwy
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County of Hawai'i
PLANNING DEPARTMENT

East Hawai'i Office
101 Pauahi Street, Suite 3
Hilo, Hawai'i 96720
Phone (808) 961-8288
Fax (808) 961-8742

September 17, 2013

Mr. Randy Andrews
Ms. Elisa Andrews
Kona Eco Adventures LLC
P.O. Box 1665
Kapa'au, HI 96755

Dear Mr. and Ms. Andrews:

SUBJECT: Notice of Violation and Order
File No. 2013-29W, COR 13-084702W
TMK: 8-2-012:001, Por. Of Kealakekua & Waipunaula, South Kona, Hawai'i

This will acknowledge receipt of your letter dated August 23, 2013 and attachments thereto

Your discussion of why you believe the Notice of Violation and Order to be erroneous is noted but the State Land Use Commission (LUC) has recently been raising questions regarding the commercial aspects of "open area recreational uses and facilities" as permitted uses within the State Land Use (SLU) Agricultural District. The County Zoning Code currently addresses and permits open area recreational facilities, such as zip line structures and operations, but is silent with respect to open area recreation uses. The County codes can be more restrictive than State land use law but cannot be more permissive.

We are in consultation with the State for consistency in the determination of what is or is not permitted in the SLU Agricultural District and the County Agricultural zoned Districts, as these inconsistencies impact decision making on the County level.

The above issues notwithstanding, I note that you have included as an attachment an approval document between Kealakekua Heritage Ranch (KHR), Kona Eco Adventures LLC (KEA), and the State of Hawai'i Department of Land and Natural Resources (DLNR) dated December 13, 2012 and accepted December 18, 2012. This approval on a portion of the KHR Conservation Easement was conditionally granted for the purpose of permitting commercial eco tours utilizing low-speed all terrain vehicles (ATVs) to access the conservation easement area to incorporate the Pauahi cowboy camp, different ecotypes on the property; discuss the purpose of the conservation easement; and provide an adequate tour length. An important consideration relative to the granting of this approval was that the proposed recreational use will not have a significant negative impact or degrade the Conservation Values.

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Attachments: Ltr Dated May 7, 2013 from Planning to Andrews
Ltr Dated August 23, 2013 from Kona Eco Adventures, LLC to Planning
Ltr Dated December 13, 2013 from DLNR to Hendrickson
Deed of Conservation Easement & Restriction of Development Rights
Conservation Easement

cc West Hawai'i Planning:
Bennett Mark
Horace Yanagi
Randy Lovato
Bobby Command, Deputy Planning Director

Bill Brilhante, Corporation Counsel

Gregory Hendrickson
Kealakekua Heritage Ranch LLC
PO Box 2240
Kealekekua, Hawai'i 96750

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- a. Agriculture districts shall include activities of uses characterized by the cultivation of crops, orchards, forage, and forestry; farming activities or uses related to animal husbandry, aquaculture, and game and fish propagation; It does not include ATV tours activities or uses, nor does it include the storage of Zip line Tour Business equipment (such as harness, helmets and other related equipment) on the above referenced property..
2. HRS 205-4.5, Permitted uses within the State Agriculture District.
 - a. HRS 205-4.5(a) does not list the operation of a Zip Line Business (the storing of its equipment such as harness, helmets and other related equipment) as a permitted use in the State Agriculture District.
 - b. HRS 205-4.5(a) does not list the operation of an ATV Tour Business and storage of the ATV vehicles as a permitted use in the State Agriculture District.
3. Hawai'i County Code ("HCC") Section 25-5-72. Permitted uses in the Agriculture ("A") district.
 - a. Section 25-5-72(a) does not list the operation of a Zip Line Business by storing of its equipment (such as harness, helmets and other related equipment) as a permitted use in the agriculture zoned district as a permitted use.
 - b. Section 25-5-72(a) does not list the operation of a ATV Tour Business and the storage of the ATV vehicles and related equipment in the agriculture zoned district as a permitted use.
4. HCC, Section 25-4-4 Prohibited Uses: any use not listed among the permitted uses in a zoning district is a prohibited use within that district, except as otherwise provided in this chapter.

ORDER

You are hereby ordered to complete the following corrective action(s) at your own expense by the "**Deadline Date**" of **June 15, 2013** unless otherwise noted:

1. Immediately cease **all use** and vacate the unpermitted dwelling structure on the subject property. Do not resume any use of the dwelling structure until you receive approval in writing by the Planning Department.
2. Immediately move all of the equipment that is being as part of the Zip Line Tour Business (such as harness, helmets and other related equipment) to where the Business is being conducted from.
3. Immediately cease the storage (parking) of the Pinzgauer vehicle that is used to transport the guest's from the staging area to the start of the Zip Line Tour and move it to where the business is being conducted from.
4. Immediately cease the ATV Tour Business and move all of the ATV's that is being used in the operation of the ATV Tour Business from the above referenced property until such

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This matter may be referred to the Office of Corporation Counsel for civil remedy and/or the Prosecuting Attorney's Office for criminal prosecution.

Can you get an extension to have more time to correct the violation?

Yes. If you do not complete all of the corrective action by the "**Deadline Date**", you may want to submit before the "**Deadline Date**" a "request for a time extension." The request must include the following:

1. Describe in detail what corrective actions you **have completed** prior to requesting this time extension.
2. Submit a detailed schedule of each activity and the amount of additional time necessary to complete each activity and the date in which you expect the violation to be fully corrected.
3. A time extension **will not** be granted if you do not provide in detail what corrective actions have been completed prior to the deadline date.
4. The mere submission of a time extension request will not guarantee the approval for the request nor does it extend your right to appeal.

What happens if you do not correct the violation?

A violation that is not corrected by the "**Deadline Date**" is assessed daily fines starting at **\$100 per day beginning the day after the "Deadline Date"** unless it is a recurring violation (see table below). After 3 months the fine increases to \$200 per day, after 6 months to \$300 per day, after 9 months to \$500 per day until the case is resolved. It is in your best interest to correct this problem before or on the "**Deadline Date**" as indicated above

Daily Fines: According to County of Hawaii Planning Department Rules of Practice and Procedure Rule 9-5(d): When a violation is not corrected by the **deadline** set by the order, the Director may assess additional fines to a maximum of \$500 for each day that the violation remains uncorrected in accordance with the following schedule:

DAILY FINES FOR VIOLATION	FIRST 3 MOS.	AFTER 3RD MO.	AFTER 6TH MO.	AFTER 9TH MO.
Initial violation	\$100	\$200	\$300	\$500
First Recurrence	\$200	\$300	\$400	\$500
Second Recurrence	\$300	\$400	\$500	
Third Recurrence	\$400	\$500		

Fourth and subsequent recurrences will be assessed \$500 per day of additional daily fines from the date that the violation was to cease as set forth in the order.

Payment of Fines: Pay all fines due to this office to:

County of Hawaii
Planning Department
74-5044 Ane Keohokalole Hwy
Kailua-Kona, Hawai'i 96740

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Kealakekua Heritage Ranch LLC
C/O Mr. Tom Pace (member/manager)
P.O. Box 2240
Kealakekua Kona, Hawai'i 96750

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Ms. Elisa Andrews
May 7, 2013

Exhibit A.

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- c. **Permitted Uses:** According to Section 25-5-72(a) Permitted uses in the Agricultural District, Hawaii County Code, an “ATV tours is not listed as a permitted use.
3. A review of County of Hawai'i records revealed the following:
 - a. Records do not indicate that a Special Permit was issued to operate a Zip Line Tour Business and ATV Tour Business or portions thereof on the above referenced property.
 - b. Record indicates that a new “as-built” Building Permit application has been submitted to the Department of Public Works Building Division for a dwelling. However, this structure is being used to store the Zip Line tour business equipment.
 - i. Also, the site plan does not show/identify the dwelling known as “Pauahi” on the above referenced property. Real Property Tax Record indicates that the dwelling was established on or about 1956.
 - ii. Real Property Tax records indicate that building permit number 02408 was issued 5-5-77 for a green house. The complaint alleges that there is an unpermitted dwelling in the vicinity of the green house.
 - c. Records do not indicate that an additional farm dwelling agreement was approved for a second or third dwelling on the above referenced property.
 4. A review of Kona Eco Tour Adventures web site confirms the following:
 - a. That portion of Kona Eco Tour Adventures businesses are being stored and conducted on the above referenced property.
 - i. People / clients check in at Keauhou Shopping Center where the business is being operated from. They are than shuttled to the zip line site with a passenger van (with no evidence of a Public Utilities Commission Number typically seen on taxi's and other public transportation vehicles) where they are harnessed with the equipment that is being stored in the unpermitted dwelling structure and where they receive a briefing of what to expect and go over the safety signs, and safety procedures.
 - b. That the ATV tour business is being operated on the above referenced property. The ATV's are being parked / stored at and or within the unpermitted dwelling structure area.
 - c. There is a photo that resembles a Kahu blessing the unpermitted dwelling structure that is being used as part of the zip line and atv tour businesses.

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Exhibit B

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APPEAL

Can you appeal this Notice of Violation?

Yes. If you feel that you are not in violation you can appeal in accordance with Section 25- 2-20 of the Hawaii County Code, you may appeal the director's decision as follows:

1. Any person aggrieved by the decision of the director in the administration or application of this chapter, may, within thirty (30) calendar days from the date of receipt of this Notice of Violation and Order, appeal the decision to the Board of Appeals.
2. A person is aggrieved by a decision of the director if:
 - a. The person has interest in the subject matter of the decision that is so directly and immediately affected, that the person's interest is clearly distinguishable from that of the general public; and
 - b. The person is or will be adversely affected by the decision.
3. An appeal shall be in writing, in the form prescribed by the Board of Appeals and shall specify the person's interest in the subject matter of the appeal and the grounds of the appeal. A filing fee of \$250 shall accompany any such appeal. The person appealing a decision of the director shall provide a copy of the appeal to the director and to the owners of the affected property and shall provide the Board of Appeals with the proof of service.
4. The appellant and the director shall be parties to an appeal. Other persons may be admitted as parties to an appeal, as permitted by the Board of Appeals.

According to Section 25-2-23, Hawaii County Code, the Board of Appeals may affirm the decision of the director, or it may reverse or modify the decision or remand the decision with appropriate instructions if based upon the preponderance of evidence the board finds that:

1. The director erred in its decision; or
2. The decision violated this chapter or other applicable law; or
3. The decision was arbitrary or capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion.

For your convenience, we have enclosed the "County of Hawaii Board of Appeals General Petition for Appeal of Decisions by Planning Director" form.

KONA ECO ADVENTURES, LLC
P.O. Box 1665, Kapaau, HI 96755

August 23, 2013

Planning Director
County of Hawaii Planning Department
101 Pauahi St, Suite 3
Hilo, HI 96720

Re: Request for Meeting in regards to
Notice of Violation and Order
File Number 2013-29W COR 13-084702W
TMK: (3) 8-2-012:001, Portion of Kealakekua and Waipunaula, South

Dear Mr Kanuha,

We being Randy and Elisa Andrews are in receipt of the above mentioned Notice of Violation date May 7th, 2013. In regards that the running of our ATV tour on Ag land is in violation of HRS 205-2(d), HRS 205-4.5(a) and HCC Section 25-5-7772, we disagree. We are requesting a meeting with you to discuss this issue and that we may have a chance to present what we learned through our research and what has been told to us by both the Kona and the Hilo Planning departments and the former planning director BJ Leithead Todd and to show how our ATV tour is a transitory tour not to be associated with personal uses of ATV's.

The year leading up to creating out ATV tour Randy Andrews had multiple talks with personnel from the Kona and the Hilo planning department. In particular, Jeff Darrow and Keola Childs, who assured us that ATV tours fall under the public recreational activity on Ag zoned lands which is a permitted use. Not only was a lot of research put into creating this ATV tour but also a large monetary investment. We would not have put all this time and money into it if we were not absolutely sure that an ATV tour is a permitted activity on Ag zoned land in the State of Hawaii. Back in 2009 when we were creating our first zipline, we had multiple conversation with Norman Hyashi, Jeff Darrow and the then planning director BY Leithead Todd. She was aware that as we were working on a a zipline we were also interested in doing an ATV tour. We were told an ATV tour was a permitted use (we ended up not doing one at that time) and she came to a decision that ziplines were also a permitted use on Ag zoned land. So you can imagine my shock when I receive a letter 4 years later signed by BJ Leithead Todd saying the ATV tour we created was in violation as it was not a permitted use on Ag zoned land. Especially, it should be noted, that there are 5 other companies on the Big Island that run ATV tours on Ag land, with some being in business for over 15 years. Again, we were confident we were aligned properly with the state and county codes when we opened our ATV tour for business.

The statutes and codes that are stated in the Notice of Violation are the same ones we researched and found to be in our favor and also thus told by the aforementioned planning department employees. Both the statutes and codes only state the first part, the additional numbering after wards (below in bold) pinpoints what exactly is permitted and shows that a public recreational activity, which the ATV tour is, is a permitted use on Ag zoned lands.

HRS 205-4.5 (a) part (6) states:

- (6) **Public and private open area types of recreational uses, including day camps, picnic grounds, parks and riding stables but not including drag-strips, airports, drive-in theaters, golf courses, golf driving ranges, country clubs, and overnight camps:**

Part (10) allows for the storage of equipment and vehicles in relation to the recreational use

- (10) **Buildings and uses, including but not limited to mills, storage, and processing facilities, maintenance facilities and vehicle and equipment storage areas that are normally considered directly accessory to the above mentioned uses and are permitted under section 205-2(d)**

NEI AHIKUKI
KŪKŪHOUA HAWAII



**STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES**

POST OFFICE BOX 621
HONOLULU, HAWAII 96809

WILLIAM J. AILA, JR.
COMMISSIONER
BOARD OF LAND AND NATURAL RESOURCES
CONSERVATION WATER RESOURCES MANAGEMENT

ESTHER KIA'AINA
FIRST DEPUTY

WILLIAM M. TARI
DEPUTY COMMISSIONER

AQUATIC RESOURCES
BIRTHING AND CLEAN PRESERVATION
BUREAU OF CONSERVATION
COMMISSIONER FOR WATER RESOURCES MANAGEMENT
CONSERVATION AND CULTURAL LANDS
CONSERVATION AND RECREATION DEVELOPMENT
LANDS
MANAGEMENT AND UTILIZATION
RESOURCES PRESERVATION
LANDS
STATE PARKS

December 13, 2012

Mr. Gregory Hendrickson
Kealakekua Heritage Ranch
Post Office Box 2240
Kealakekua, Hawaii 96750

ATV Tours on Kealakekua Heritage Ranch

Dear Mr. Hendrickson,

This letter is in response to your request on October 29, 2012 to utilize a limited portion of the Kealakekua Heritage Ranch Forest Legacy conservation easement area for commercial eco-tours, specifically low-speed all terrain vehicle (ATV) tours. We understand your interest to allow the tours access to the conservation easement area to incorporate the Pauahi cowboy camp; different ecotypes on the property; discuss the purpose of the conservation easement; and provide an adequate tour length. Per the Department's review of the Deed of Conservation Easement and Restriction of Development Rights recorded June 27, 2011 (Conservation Easement) in relation to the proposed activities, Kealakekua Heritage Ranch, LLC (KHR) must consult and seek approval of the Department (DLNR) before this type of recreational use is allowed on the conservation easement area, and that use shall be subject to terms and conditions established by KHR in consultation with DLNR to protect the Conservation Values.

The Department is generally supportive of the request and approves of the proposed activities as detailed in the October 29, 2012 request under the following conditions:

APPROVAL OF ATV TOURS ON A PORTION OF KEALAKEKUA HERITAGE RANCH CONSERVATION EASEMENT IS GRANTED SUBJECT TO THE FOLLOWING TERMS AND CONDITIONS:

1. KHR and KONA ECO ADVENTURES shall provide a fire prevention and response plan for the ATV tours.
2. All ATV and motor vehicles associated with the tours shall be used only on existing roadways.
3. The speed of the ATVs shall be limited through mechanical alterations on the vehicles, and all tours shall maintain control of the vehicles all at times to prevent crashes, fires and off-road damages.

Missing?
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