

MINUTES OF THE HENDERSON COUNTY
ZONING BOARD OF ADJUSTMENT

The Henderson County Zoning Board of Adjustment held its rescheduled December meeting, Wednesday, January 7, 2009, at 4:00 p.m. in the King Street Meeting Room, 100 N. King Street, Hendersonville, North Carolina. Those present were: Dean Bonessi, Chairman, Jim Phelps, Vice-chairman, Jim Crafton, Tony Engel, Ann Pouch, Alternate Board Member Janice Brown, Zoning Administrator Toby Linville, Associate County Attorney Sarah Zambon, and Zoning Board Secretary Karen Ann Antonucci.

Chairman Bonessi called the meeting to order at 4:03 PM. He introduced the board members to the parties present.

Chairman Bonessi: I'd like to ask for a motion for approval of the minutes for November 19, 2008 meeting.

JPhelps: So moved.

JCrafton: Second.

All board members were in favor of accepting the minutes as presented.

Chairman Bonessi: I would also like a motion on the approval on the order V-08-17, George Andrew Bennett.

JPhelps: So moved.

TEngel and APouch: Second.

All board members were in favor of accepting the order as written.

Chairman Bonessi reminded those present to sign up if they wanted to speak. He stated the hearing was quasi-judicial and the board would decide if they had standing. If they had standing they would be allowed to speak. He reminded them that the meeting was not a public input session. Each person needed to show they would be affected by the outcome of the case in order to speak. He said that redundant information was not going to be heard by the board.

Chairman Bonessi read the Opening Statement for Zoning Board of Adjustment:

The case we're about to hear is a quasi-judicial proceeding. It is much like a court proceeding where an individual's rights and interests are being decided under specific rules of procedure. Parties to this case have the right to present evidence and cross examine witnesses. The burden of proof in these cases typically lies with the Applicant. The extent to which the Rules of Evidence used in courts apply is up to the discretion of the Board

Quasi-judicial proceedings are different than other public hearings in that not everyone has the right to present evidence before this Board and to become a party to this proceeding. Only those who can demonstrate that they will be affected by the outcome of the hearing may become parties. After a description of the person's interest in this case, the Board will determine whether they will be allowed to present evidence as a party. Please note, you do not have to be a party to testify if someone who is a party calls you as a witness. All parties and witnesses who intend to present evidence or testify before this Board must be sworn in.

- Parties- for which case must give their name and address
- Witnesses- for which case must give their name and address
- Swear everyone for all hearings in

At this time we will begin our first hearing. Decisions of this Board are based upon the Henderson County Code. After we hear all the evidence, the Board will discuss the matter and may either vote on the case or continue the case to another date. The Board may direct staff to bring back a draft order for the Board to review at our next meeting. The Board's decision must be made in writing within 45 days of the conclusion of the hearing.

Chairman Bonessi: At this time I'd like to go ahead and open the case A-08-18, Joseph A Petree, **Heliport (Private Accessory)**, appeal of Notice of Violation for 264 Diamond Mine Lane, Hendersonville.

Associate County Attorney SZambon: Mr. Chairman, you need a vote to open the hearing. And then you can go over who has standing to be a party.

JPhelps: I move we open the hearing.

TEngel: I second.

All board members were in favor of opening the hearing.

Chairman Bonessi: Alright, I have, would everyone that has signed up please come forward to the podium.

BAlexander: Excluding the applicant or just the...

Chairman Bonessi: Excluding the applicant and his representation.

Associate County Attorney SZambon: Are we swearing them in now or are we just...

Chairman Bonessi: No, I just want the board to determine whether or not they have – once we say we have standing we will go ahead and swear them in.

Associate County Attorney SZambon: Ok. Karen Ann just jumped up and I just wanted her to sit down if she didn't have to.

Chairman Bonessi: I have Jason...

Associate County Attorney SZambon: Jason Patomson is the attorney for Mr. Petree.

Chairman Bonessi: Bill Alexander is the...

Associate County Attorney SZambon: He's also the attorney.

Chairman Bonessi: Sharon Tolles.

STolles: Here.

Chairman Bonessi: How do you have standing?

STolles: We live at 138 Saddle Club Lane. Our property abuts Mr. Petree's.

Associate County Attorney SZambon: Mr. Patomson may have an objection.

Attorney JPatomson: I don't doubt her property buttresses or adjoins one of Mr. Petree's properties but I don't believe it touches the subject property. And therefore we would indicate that she is not a property party to this proceeding. She should not be allowed to participate as such.

Chairman Bonessi: Which – we have a – I know we have it in our books – do we have something that we could get the folks to identify where they are with regards to the subject property?

Attorney JPatomson: We provided a GIS and the documents that are there. If you'd like to view those I think it gives the lot numbers on that subdivision that's next to the property.

JPhelps: And what is your address?

STolles: 138 Saddle Club Lane, Valley View Farms.

Attorney JPatomson: If you will note on that map it does touch one of Mr. Petree's properties but again, it does not touch the subject property that we are here to discuss today. His property is defined by the purple highlight. The red highlight is another piece of property that adjoins, but is not the subject property we are here to deal with today.

JPhelps: I don't think it actually has to abut or be attached to as long as it's in very close proximity.

STolles: It's next to. Our property is less than 400 yards from Mr. Petree's building.

JPhelps: Saddle Club...

STolles: Lane. It's the only house on there but you can probably see – you see where his ball field is?

JPhelps: Yes.

STolles: We're the house sitting right to the, I don't know.

JPhelps: Cross?

STolles: Yes.

Associate County Attorney SZambon: Why don't you have her point it out on the map? Ma'am can you point out which is your property on this map?

JCrafton: Right here in the top right hand corner.

STolles: I'm right here, number 138

Associate County Attorney SZambon: Number 138.

JPhelps: That's close enough for me.

JCrafton: Mr. Chairman, I'd be willing to accept that this lady has standing given the proximity that she has to the property in question.

Chairman Bonessi: All in favor.

All board members were in favor of allowing Ms. Tolles to have standing.

Chairman Bonessi: Now do you want her to say her name and address?

Associate County Attorney SZambon: Is it on the sheet? As long as we have it because Karen Ann and I – she does the minutes and I do the order.

Chairman Bonessi: Karen Krupa. Can you tell us how you might have standing?

KKrupa: My address is 60 Bear Rock Road. I am within – I can see his property. He uses my driveway as a flight path when he returns and lands his helicopter. It's very noisy. It's very disturbing, so...

Attorney JPatomson: We object to her talking to you now regarding the use of the heliport not have standing and be stricken and not considered by the board today. We also object to her having standing same as the prior witness.

Chairman Bonessi: Where in relation is your property?

JPhelps: Would you come and show us please? Could you show us how close to what is on there is it?

Associate County Attorney SZambon: Mr. Chairman, just to remind the board and to advise the public that aren't used to public hearings – quasi-judicial public hearings - even if they are not made a party they can be called as a party. So in the case of Ms. Krupa, if she was not made a party she could be called as a witness by one of the parties, if they so chose.

JPhelps: Do you understand that?

Chairman Bonessi: Toby's going to go ahead and get us a little larger map, but...

KKrupa: I'll be back here.

Chairman Bonessi: While he's doing that I guess let's move on to the next person I have on my list. And we'll get back...

JCrafton: Clarification on the future ones, let me ask a question, Sarah?

Associate County Attorney SZambon: Yes, sir.

JCrafton: We send out notices for zoning hearings and things of that nature, or when the county does, what perimeter of distance from an affected property are people typically notified? Is it 400 feet?

Associate County Attorney SZambon: Typically we only contact adjoining property owners. Ms. Krupa is not on the list of people who was contacted by the county who got a letter, if that provides the board any guidance.

JPhelps: But is there a sign posted in the area that there will be a hearing?

Associate County Attorney SZambon: Not for an appeal.

KKrupa: I did receive notice from Mr. Linville. I have it with me.

Zoning Board Secretary KAAntonucci: Where you one of the original people who called the office?

KKrupa: Yes.

Zoning Board Secretary KAAntonucci: Ok. That would be why – persistence.

Associate County Attorney SZambon: She was contacted not because – as part of our due diligence for who we contact as adjoining landowners – she was contacted because she had inquired about this case earlier.

Zoning Board Secretary KAAntonucci: And issued a complaint.

Associate County Attorney SZambon: And issued a complaint. Thank you.

Chairman Bonessi: So she's issued a complaint but doesn't necessarily make her a party, correct?

Associate County Attorney SZambon: Again, it's up to this board whether or not you think she or any party has standing above the interest of any normal person.

Chairman Bonessi: That's what I thought I just wanted to make sure. Ok. For right now 'till Toby comes back with that larger map let's see if we can go through - Chuck Sklenka.

CSklenka: I also live on Saddle Club Lane. 202.

JPatomson: We would object to this gentleman being a party on the same basis.

JPhelps: Could you come forward please? See if it's on this map or do we need the bigger one?

CSklenka: Saddle Club Lane is a cul-de-sac here that ends right here. It's two lots down from Mrs. Tolles'.

Chairman Bonessi: We'll get the map from Toby. We'll come back to you sir. Tony Gillilan.

TGillilan: Yes. My husband and I, this is Ed, my husband, and we own two properties on Saddle Club Lane, 190 and 203. And Saddle Club Lane adjoins Diamond Mine Road.

Attorney JPatomson: At the risk of being redundant.

JPhelps: Is that in that cul-de-sac as the previous gentleman?

TGillilan: Yes.

JCrafton: Mr. Chairman, as we evaluate these different parties and their standing, and we look at the cases that come before us in different situations – it's one thing to be considering an activity that occurs on a piece of property and how it affects the neighbors and therefore which neighbors might be affected. But I think any property that is owned by a heliport which is going to have overhead might cause us to look into a wider range of area that's affected. Because the affect does not occur only on the subject property, but the traffic is over other landowners in order to access that property is a wider area than just the – I just suggest we take that into consideration.

Chairman Bonessi: I understand that but by the same token we need to – somebody could argue that anybody that flies over the county would be a...

JCrafton: Yeah, I agree, but within reason.

Zoning Administrator TLinville: And I just did a rough measurement from Mr. Petree's building to Mrs. Krupa's here at 60 Bear Rock is 2,400 feet. (Mr. Linville pointed out to the board the properties in question).

Associate County Attorney SZambon: Mr. Patomson or Mr. Alexander do you want to see the map they are looking at?

Chairman Bonessi: I would suggest that Mr. Petree's representation will want to look at this. (to Mr. Patomson) This is what Toby gave us and essentially about 2,400 feet away. That line is where Ms. Krupa lives, about a half mile.

Associate County Attorney SZambon: And again this is not for evidence. This is just in terms of...

JPatomson: We continue the objection that almost a half mile is outside the scope of what party should be included in this proceeding.

Chairman Bonessi: Ok. This does give us a better view of Saddle Club as well. So in regards to the Gillilan's does the rest of the board want to look at this with respect to...

APouch: I think you said it was a half a mile.

Associate County Attorney SZambon: That was Ms. Krupa.

Chairman Bonessi: That was Ms. Krupa that was a half a mile.

JPhelps: A little bit less than half a mile.

APouch: Airplanes make noise.

TGillilan: But not at that low a level.

JPatomson: Once again, we'd object to anything that's said that doesn't relate to whether or not they're a party to this proceeding at this point.

Associate County Attorney SZambon: Yes. The board should keep in mind at this time we're only doing standing and not taking anything into evidence. And that would be for the people who are coming up to the mic too. Don't say anything for evidence. We're only trying to determine or not you will be allowed to speak.

Chairman Bonessi: Can we go ahead and decide with the Gillilans, in regards to the Gillilans as we get them here?

EGillilan: Might I add that we are also owners of seven lots that are not sold yet, which are in that same corner.

JPhelps: Of that same area?

EGillilan: Yes. They're really more close than any lots we've discussed so far.

Chairman Bonessi: Let's go ahead since we've got this map and it shows the whole Sunset, oh Saddle Club, let's go ahead and make a motion on the Gillilans. Do we want to make them a party to this case?

JCrafton: Are they on the part of Saddle Club – if you – the upper part of this drawing closes to the property or on the other side of the road further from the property?

Chairman Bonessi: Can you get them to come up here and point to where they are?

EGillilan: This is a lot that we've put a house on in the cul-de-sac and we own this lot and we have unsold lots which are these lots here.

APouch: Where do you live on there?

EGillilan: We have a spec house here that's been built, that's for sale.

APouch: So you don't live out there?

EGillilan: No I don't. We have a lot that we bought for our own later on in the future plus the lot that the spec house is built on. Plus seven lots that are still for sale.

Chairman Bonessi: Mr. Petree's property is right here in regard to that I believe. Do you want to look at what I'm pointing out; I just want to make sure we get the correct area.

EGillilan: This is Mr. Petree's.

Chairman Bonessi: That's kind of what I was thinking of right there. You're saying that this is Mr. Petree's property right here? And they've got property here. In regards to the Gillilans do we have a motion one way or another to make them a party or not?

JPhelps: I was just going to say it should be simple if we just said that if anybody that lives within less than half a mile would have standing. We've got several of them that are farther over here.

Associate County Attorney SZambon: Mr. Chairman, I think from a procedural standpoint it's sounder to go, you know whoever signed up on the list.

Chairman Bonessi: Yeah, and that's where I'm at.

JCrafton: I motion they would have standing give the proximity to the subject property.

TEngel: I second.

Chairman Bonessi: All in favor.

All board members were in favor of Mr. and Mrs. Gillilan having standing in the hearing.

Chairman Bonessi: Let's finish off this list here. Bobby Kornfeld.

BKornfeld: Yes, I represent the owners that live at 659 Crab Creek. And we're not attached to that property but the helicopter has attempted to land.

Chairman Bonessi: You live at that property?

BKornfeld: I do not. I'm the caretaker for it.

Chairman Bonessi: You don't own it?

BKornfeld: Right. The owners are out of town.

Chairman Bonessi: Do you have any documentation that says you're an authorized representative of the owners?

BKornfeld: I don't but I can have it.

Chairman Bonessi: Do you have it now?

BKornfeld: No. I don't.

Associate County Attorney SZambon: Mr. Chairman, again, as you know in a quasi-judicial hearing only the landowner or an attorney for the owner can be represented at these hearings.

JPhelps: But she can be called by one of the other people who want to fortify.

Associate County Attorney SZambon: As a witness. She can't represent the interests of anyone else.

JPhelps: Simply as a witness.

Chairman Bonessi: Alright, let's go back to Ms. Krupa. Do I have a – does everybody have an idea what Toby showed that Ms. Krupa is approximately a half a mile away from the property? Do we want to make a decision – I need a motion on either determining whether she has standing or not.

JPhelps: I move she has standing.

JCrafton: I second.

Chairman Bonessi: All in favor, her property is somewhere around in here. Ms Krupa is the one that is here.

JPhelps: 138?

Chairman Bonessi: No, no, no. Bear Rock Road.

Associate County Attorney SZambon: Ms. Tolles was 138.

Chairman Bonessi: That was the one that Toby got this map and it's not on this map.

APouch: I think it's too far. I don't think she has standing.

Chairman Bonessi: I'm in agreement.

Associate County Attorney SZambon: Mr. Chairman, can you call the vote?

Chairman Bonessi: Ok. That's fine. So we have a second. So all in favor that Ms. Krupa is a party with standing in this case raise their hand.

Jim Crafton – yes

Jim Phelps – yes

Chairman Bonessi: All opposed.

Ann Pouch – no

Tony Engel – no

Chairman Dean Bonessi – no

Associate County Attorney SZambon: Thank you.

Chairman Bonessi: And Mr. Sklenka which is 202 Saddle Club Lane. He was the one waiting on the map we didn't have. Mr. Sklenka could you point out on the map to where you are with regards to Mr. Petree's property?

CSklenka: Here we are way down here.

Chairman Bonessi: So do I have a motion as to his standing – whether or not he's a party or a witness in this case?

JCrafton: I move he have standing.

TEngel: I second.

Chairman Bonessi: All in favor.

All board members were in favor of allowing Mr. Sklenka to have standing.

Chairman Bonessi: At this time the people I have that have standing: Sharon Tolles, Chuck Sklenka, Toni and Edward Gillilan, and that's all I have at this time. The other two that were on this, Bobby Kornfeld and Karen Krupa the board found did not have standing but could be called as witnesses by the parties.

Parties:

Andy Petree – property owner

Jason Patomson – Mr. Petree's attorney

Bill Alexander – Mr. Petree's attorney

Sharon Tolles – nearby property owner

Chuck Sklenka – nearby property owner

Tony Gillilan – nearby property owner

Edward Gillilan – nearby property owner

Chairman Bonessi: So now at this time I would like to ask anyone that wishes to speak with regards to this case come up to the podium and be sworn in.

Associate County Attorney SZambon: Including anyone who may or may not be called as a witness by any party. So even if you weren't made a party in this last thing you may want to get sworn in just in case you are called in as a witness for a party. So everyone has to come up to the microphone so you can swear in on the Bible.

Zoning Administrator TLinville: Everyone who wishes to speak has to be sworn in.

Zoning Board Secretary KAAntonucci swore in all parties and witnesses.

Associate County Attorney SZambon: Mr. Chairman if I may I would like to make an opening statement on behalf of the staff. And then Mr. Alexander or Mr. Patomson can make an opening statement and any other parties that want to. Very, very briefly I just want to remind this board as we go forward with this hearing in terms of efficiency and for time's sake and in terms of the issue before this board – the only issue before you now is whether or not based on the language of the Land Development Code, Mr. Linville made the right decision regarding conforming and nonconforming uses regarding this heliport. The issue is not whether or not

it's a good idea to have that there. This is not the same as a special use permit hearing. It is only whether or not the decision of the Zoning Administrator, Mr. Linville, was correct in the interpretation of the Land Development Code. For those reasons I would request this board be cautious and restrict as much as it feels comfortable any testimony regarding how people feel about the heliport, you know, the impact it has on them because that is not the issue before this board right now. Depending on how things go today and depending on Mr. Petree's decisions if this came back before this board in terms of special use permit those would, may be factors but in this instance they are not. So I would ask this board to restrict any testimony to the issue before it.

Did any other parties have an opening statement or anything?

JPatomson: I do have an opening statement on Mr. Petree's behalf. The board, Mr. Linville, sir and I would like to thank you for the opportunity here today to speak on Mr. Petree's behalf. My name is Jason Patomson. I'm an attorney and appeared before this board before. Mr. Alexander and I will be assisting you today in the presentation of Mr. Petree's application. In echoing Ms. Zambon's comment to the board, I'd like to indicate to the board that the issue that is presented to you today is not whether Mr. Petree can utilize this location to take off. The issue is whether or not he can take off and land on his property as private use. The issue presented to you Mr. Petree and this board arose by a letter drafted by Mr. Linville on October 14, 2008 that indicated he could not land a helicopter at his property based on the Land Development Code. Now the letter indicates, and that letter is in the package that you have received and is before you that the R2-MH zoning classification prohibits Mr. Petree's use of the property in this fashion absent a special use permit to do so. The letter further indicates that Mr. Petree can obtain a special use permit by among other things complying with supplement requirement 3.9. We would indicate to this board and to echo Ms. Zambon's comments that we are not in a special use permit proceeding. And not only for that reason but others that I'll get to supplemental requirement 3.9 does not apply here. It's nothing for you to consider and no bearing on the impact on whether Mr. Petree can land and take off. Even if we were in a special use permit proceeding, there is no way for Mr. Petree or any other county resident to comply with the standard set out in supplemental requirement 3.9. That requirement puts a burden on a landowner to construct a heliport in accordance with FAA regulations, and to provide proof to this board or to the county of approval of that heliport. We have submitted and we would offer into evidence the comments to 14CFR 139 which we included with our application. And I would also have provided to Karen to present to the board today the actual statute 14 CFR 139 which indicates that the Federal Aviation does not regulate heliports. They don't approve them, disapprove them, decide whether they like them or not. They do not promulgate standards for construction that you have to abide by before they are approved. And that issued therefore is not properly before the board today. I'd also like to indicate that applicable zoning ordinance that the board should consider today is not the R2-MH zoning classification but is in fact 200A-267, which has also been provided to the board in the application package. That section deals with nonconforming uses and structures that were in existence prior to the passage of the Land Development Code. It is clear in this case that Mr. Petree owned his land and operated a business enterprise on his property prior to the implementation of the Land Development Code. And he operated and built on that property when it was an Open Use designation which clearly would have permitted the type of business that he operates there. As is stated in the affidavit that we will present as evidence when I bring Mr. Petree to the podium, he had this operation in existence prior to the Land Development Code and all we're doing and asking the board is to allow us to continue to do is to expand the use which he has made of that property which is clearly allowed by 200A-267. I would submit to the board the analogy you should consider is that if prior to the passage of the

Land Development Code Mr. Petree used a Toyota Prius to move his business and self on and off of that property, that even after the passage of the Land Development Code he could employ a fleet of eighteen-wheelers. For the sake of argument he could employ 100 eighteen-wheelers to move himself and his belongings on and off that property. In much the same vein we feel he should be able to use a helicopter to move himself on and off that property. There's nothing in the 200A-267 that prohibits him from expanding his use of transportation from a, for example, a Toyota Prius to a helicopter. And for that reason we feel like the appeal is justified and that Mr. Linville's decision was incorrect on this minor point. We would ask the board to give due consideration to this matter.

Attorney BAlexander: I will not repeat what Mr. Patomson said on behalf of our client, but would like to point out a couple of things about 200A-267. When Henderson County passed its new comprehensive Land Code it had to consider the issue of existing nonconforming uses. We rezoned the whole county. It was obvious there were going to be a lot of nonconforming uses. There's two different parts of the Land Code – the current Land Code that address the issue of nonconforming uses. We are not contending to you today that the use of this helicopter is a nonconforming use by virtue of use of a helicopter existing prior to the ordinance. Instead we are contending to you that we are taking a permissible expansion as a matter of right under the terms Jason mentioned, 200A-267. That statute is or that ordinance is unique in Land Codes. As it is the Commissioners made their own exception to the law of nonconforming uses. They said in that section that if a use, a commercial or industrial use, not residential, very specific change was made of a piece of property to the adoption of the new Comprehensive Code and if that piece of property at the time use was implemented was Open Use but everyone here stipulates is the case. Then that nonconforming use if it's commercial or industrial can be expanded, modified - it goes through a long litany. And it says very specifically – uses or structures. And the only requirements imposed by that ordinance is that the new expanded use meets the dimensional and setback requirements of the code. And I don't think there's anyone here that contends that we don't meet the dimensional and setback requirements of the code. So it's our contention to you that under the terms of that very special ordinance as applied to these facts that the use by Mr. Petree of the helicopter for his business is a not only a permitted use but a use nonconforming use is a matter of right and that evidence will concentrate on that. Thank you.

Zoning Administrator TLinville: If it pleases the board I'll read your packet into the record. You have before you the letter that I sent Mr. Petree after receiving complaints. And it states that a heliport in an R2-MH district requires a special use permit. Next you have the appeal packet from Mr. Alexander's office. You got the fax cover sheet, the letter stating their intent to appeal. Then you have the appeal notification form then a copy of my letter again in which they had called Exhibit A in their packet and their Exhibit B is an affidavit describing their appeal. Then the FAA language talking about heliports, and that's not really an important issue today because we're not talking about the supplemental requirements for a heliport. We're discussing whether or not the expansion is allowed or not, basically. And next is the Exhibit C for nonconformities from our Land Development Code. And as they've both discussed here I'll read to you the first sentence here; *Maintenance, improvement, alteration, expansion, remodeling, repair or reconstruction*, these are all allowed in the Open Use district for commercial / industrial uses that have been there. My interpretation and what I feel the Commissioners meant by this does not mean that adding a heliport is any of those things, an improvement, alteration, expansion. I feel like it's a new use and he's adding to that. And that's the decision that you all have to make today. And then at the end of your packet there is

a zoning map and an aerial photograph showing the property. I'll entertain any questions the board has.

Associate County Attorney SZambon: Mr. Chairman, if I may can I do some limited cross on Mr. Linville? Also, unless there's any objections I would like to enter all the information that Toby just, Mr. Linville just spoke about that was in your packets, partly from our department and partly from the applicant, into evidence, unless there's any objections.

Attorney JPatomson: We have no objection.

Zoning Administrator TLinville: If you would – I have one other item. Some of the complainants could not be here today. And I have two letters and you received copies of those before the meeting. One is from Sharon Tolles. She will represent herself. The other is Candice Greedy. She lives on Conger Drive which is across Crab Creek Road in the other subdivision.

APouch: We read these.

Attorney JPatomson: We would object to the interjection of those letters. Ms. Tolles is here and the best evidence is her testimony not the letter she has provided. And the letter from Ms. Greedy - we certainly have no ability to cross examine her. The letter is not sworn to or attested to. It doesn't bear any of the hallmarks and therefore object to its introduction.

Associate County Attorney SZambon: And also Mr. Chairman, it took 45 minutes to just debate who has standing in this and I don't want to get into a situation where people think they can just send letters.

Chairman Bonessi: I don't disagree. Do we need to do anything formally with these letters?

Associate County Attorney SZambon: If I can just get a statement from the board on record stating whether or not you're submitting letters into evidence.

JPhelps: Clarification – Ms. Tolles has standing, right?

Chairman Bonessi: She's here.

JPhelps: She's here. So she has the part of the reading of this letter into the record, right?

Associate County Attorney SZambon: Yes.

JPhelps: As a witness, so I would assume that she can do that, otherwise the other one's not here – we just won't... I make a motion we just ignore these letter until such time as they are properly entered into the proceedings.

Chairman Bonessi: Do I have a second?

APouch: I have a question. Are we just deciding – I thought we were here to decide on a special use permit.

Associate County Attorney SZambon: No.

APouch: To agree or disagree – I don't think it has anything to do with what Toby said.

Associate County Attorney SZambon: No.

APouch: So why bother?

Associate County Attorney SZambon: I agree. I am not suggesting in anyway that you should take these letters into account without, either speaking with Ms. Tolles. And the other one I think you should disregard completely. We are not doing a special use permit today. We are only debating the correctness of Mr. Linville's determination based on the language of the ordinance. So am I correct in that the – this board will not be considering the Greedy letter in its decision?

Chairman Bonessi: I think that's where we were headed.

JCrafton: Another question. I move we vote.

Chairman Bonessi: So we have a motion not to accept the letters. Do we have a second?

TEngel: Second.

Chairman Bonessi: All in favor not to accept these letters as evidence?

All board members were in favor.

Associate County Attorney SZambon: Mr. Linville, how did you first come to hear about Mr. Petree's heliport?

Zoning Administrator TLinville: I received complaints from Karen Krupa and Sharon Tolles.

Associate County Attorney SZambon: And when did you receive these complaints?

Zoning Administrator TLinville: Before the date of that letter. Before October 14th. Two or three days prior.

Associate County Attorney SZambon: October 14th of which year?

Zoning Administrator TLinville: 2008.

Associate County Attorney SZambon: 2008. Have you gone out to the property?

Zoning Administrator TLinville: Yes.

Associate County Attorney SZambon: Can you describe the property for us?

Zoning Administrator TLinville: There is a large commercial building on the property. There is a dirt area behind the building which is where is my understanding – I've not seen the helicopter land or take off but I've seen it stored there – it's my understanding it's been landing behind that commercial building.

Associate County Attorney SZambon: And to the best of your knowledge what is Mr. Petree's business?

Zoning Administrator TLinville: I really don't know. That was once a race shop. I don't think he owns a race team any more. There – some construction with racecars.

Associate County Attorney SZambon: How long have you been the Zoning Administrator for Henderson County?

Zoning Administrator TLinville: Three and a half years.

Associate County Attorney SZambon: Three and a half years as Zoning Administrator, or just with the County?

Zoning Administrator TLinville: With the County.

Associate County Attorney SZambon: Ok. Have you been the Zoning Administrator since the Land Development Code has taken place in its current incarnation? Were you present at the hearings by the Board of Commissioners and the discussions by the Board of Commissioners regarding the Land Development Code?

Zoning Administrator TLinville: Yes.

Associate County Attorney SZambon: And are you trained in zoning and zoning interpretations?

Zoning Administrator TLinville: Yes.

Associate County Attorney SZambon: So, upon receiving these complaints what was your next step?

Zoning Administrator TLinville: I investigated whether or not that was an allowed use and determined that it was not without a special use permit, and sent the letter.

Associate County Attorney SZambon: Why did you determine that it was not?

Zoning Administrator TLinville: Because it's my interpretation that a – as the code states in the table of permitted uses, a heliport in R2-MH requires a special use permit.

Associate County Attorney SZambon: The areas currently zoned are R2-MH?

Zoning Administrator TLinville: Correct.

Associate County Attorney SZambon: What was it previously zoned before the Land Development Code?

Zoning Administrator TLinville: Open Use.

Associate County Attorney SZambon: Open Use. Mr. Alexander in his opening discussed 200A-267, I believe.

Zoning Administrator TLinville: Yes.

Associate County Attorney SZambon: Regarding nonconforming commercial and industrial uses and structures -why did you think that this provision did not meet the instance of Mr. Petree?

Zoning Administrator TLinville: I feel that that's an expansion beyond the intent of the ordinance.

Associate County Attorney SZambon: Can you elaborate a little more? Do you consider it a different use?

Zoning Administrator TLinville: Yes.

Associate County Attorney SZambon: What do you consider an expansion in terms of this provision based on your training and listening to the Board of Commissioners?

Attorney BAlexander: Mr. Chairman, we object to him offering an opinion from any kind of expert witness testimony as it might affect interpretation of the ordinance. The ordinance speaks for itself on its face. What it says is what it says.

Attorney JPatomson: I think we'd also object to his discussions with the Commissioners as hearsay. The testimony's really not presentable here today.

Associate County Attorney SZambon: Mr. Chairman, in response to Mr. Patomson's objection. The conversations which I'm discussing were all in public hearing. They're all recorded. There are minutes from them. They have all been approved. That being said, I will rephrase the question. Mr. Linville, what does the expansion part of this provision mean?

Zoning Administrator TLinville: In my opinion and expansion is enlarging the building - adding on to it. And we have - I have permitted cases where a commercial building like this, was once commercial or industrial type use and it or changed or converted to another use and that's my understanding - my interpretation of that ordinance. I just don't feel that this is an expansion under this code.

Associate County Attorney SZambon: Mr. Patomson in his opening statement that it was analogous to if Mr. Petree was using Priuses before and now wanted to use some other alternate form of transportation, in the is case a helicopter. Why - is that true?

Zoning Administrator TLinville: That's truly his opinion. It's not my opinion. I feel that this is a - that's a leap to make that - that that's an expansion. I think that changing modes of transportation is a large use. If they suddenly wanted to fly their materials out with an airplane and they were going to add and airstrip I would make the same interpretation. If they were going to dig a canal and put in shipping yard I would make the same interpretation. That is a new use.

Associate County Attorney SZambon: What about a railroad? Or a spaceship?

Associate County Attorney SZambon: What about a Honda Civic?

Zoning Administrator TLinville: That's the same mode of transportation.

Associate County Attorney SZambon: What would you define as 'mode of transportation'?

Zoning Administrator TLinville: I'm talking automobiles vs. helicopters and airplanes.

Associate County Attorney SZambon: Does this heliport fall under *maintenance*?

Zoning Administrator TLinville: Not in my opinion. No.

Associate County Attorney SZambon: What about *improvement*?

Zoning Administrator TLinville: Not in my opinion.

Associate County Attorney SZambon: What about *alteration*?

Zoning Administrator TLinville: No.

Associate County Attorney SZambon: We covered *expansion*. What about *remodeling*?

Zoning Administrator TLinville: No.

Associate County Attorney SZambon: *Repair*?

Zoning Administrator TLinville: No.

Associate County Attorney SZambon: *Reconstruction*?

Zoning Administrator TLinville: No.

Associate County Attorney SZambon: Do you have any idea about the number of commercial / industrial businesses formal – in property that was formerly called the Open Use district? And again, this is just informally. These are not hard statistics.

Zoning Administrator TLinville: I would guess that there are hundreds. Between one and two hundred probably. There's not count out there.

Associate County Attorney SZambon: Mr. Chairman at this time I don't think I have any further questions but I may have some redirect. So if the board has any questions and then well let the parties ask him any questions.

Chairman Bonessi: Does anybody else have...

JCrafton: On the map Mr. Linville, what you referred to as the zoning map - most of it is in a dark yellow but the lower left hand corner is in white. Is that a different zoned area?

Zoning Administrator TLinville: That's R3.

JCrafton: R3. Is it more restrictive than the R2?

Zoning Administrator TLinville: It's just a more rural zoning district – a larger - not larger lot size – lesser density and it does not have – it does not allow as many uses as the R2-MH.

JCrafton: Thank you. Alright, no further questions.

Chairman Bonessi: Prior to the new Land Use Development Code would this have been an acceptable use?

Zoning Administrator TLinville: I don't remember how the old code defined a heliport or if it did. Without looking at it I couldn't...

JPhelps: Would the County Noise Ordinance come into play here at all?

Zoning Administrator TLinville: I do not know. The question would be: 'is this an excessive – does it create an excessive sound that a reasonable person would consider excessive'?

Chairman Bonessi: To your knowledge and I'll ask the applicant this, when did he start using this property...

Zoning Administrator TLinville: I received those complaints after October.

Chairman Bonessi: Anyone else have questions for Mr. Linville?

Attorney BAlexander: Mr. Chairman in our cross-examination would ya'll like me to speak from the podium?

JPhelps: Yes, please come up to the podium. We need to record these.

Attorney BAlexander: Mr. Linville, when you wrote your letter to Mr. Petree in October 2008 did you know what type of business was operated from these premises?

Zoning Administrator TLinville: Nothing other than what I've just stated. It's something to do with racing and it's a commercial type business.

Attorney BAlexander: So when you made your determination that this was not a permitted – nonconforming use or an expansion of a permitted nonconforming use, at that time you didn't know the nature of the business to which the nonconforming use related.

Zoning Administrator TLinville: Right. Other than I knew it was not a heliport.

Attorney BAlexander: Now referring for a moment – did you make any inquiry of Mr. Petree before sending your letter as to what type of business he operated?

Zoning Administrator TLinville: No.

Attorney BAlexander: Did you make an inquiry of anyone or did you have any knowledge when you wrote that letter as to what use was being made of the helicopter?

Zoning Administrator TLinville: No sir.

Attorney BAlexander: And so you didn't know at that time that the helicopter for instance was being used to transport parts for vehicles that were associated with Mr. Petree's business?

Zoning Administrator TLinville: No.

Attorney BAlexander: Now isn't it true sir that when you wrote your letter to Mr. Petree in October of 2008 that you really hadn't considered at that time whether or not Mr. Petree's use of the helicopter came under the permitted uses set forth as expansions under 200A-267?

Zoning Administrator TLinville: No. Well I didn't consider...

Attorney BAlexander: You really hadn't considered it.

Zoning Administrator TLinville: I didn't consider it because it didn't strike me as an expansion of that under the nonconforming section.

Attorney BAlexander: Ok. Now, sir you're familiar with 200A-267, correct?

Zoning Administrator TLinville: Absolutely.

Attorney BAlexander: And you're familiar with the fact that that ordinance doesn't just apply to structures? It's very specific in that it says: '*commercial and industrial uses established in former Open Use districts*'? And the use of the property for Mr. Petree's business, to your knowledge existed prior to the adoption of the new Land Development Ordinance – did it not?

Zoning Administrator TLinville: That's correct.

Attorney BAlexander: And you know because you checked – this property was in fact in the Open Use district under the prior ordinance.

Zoning Administrator TLinville: That is correct.

Attorney BAlexander: Now, there're the words in that ordinance Mr. Linville that says that: *the commercial / industrial uses legally established shall be allowed to be maintained, improved, altered, expanded, remodeled, repaired, or reconstructed*. You're familiar with that language?

Zoning Administrator TLinville: Absolutely.

Attorney BAlexander: And isn't it true that the only limitations placed on an expansion of use in that particular ordinance are that: the expanded use satisfy the dimensional requirements and setbacks of that district?

Zoning Administrator TLinville: That's correct.

Attorney BAlexander: And you don't have any knowledge today, sir, that this use violates and dimensional or setback requirements of the current district, do you?

Zoning Administrator TLinville: It would fall within the setbacks of the R2-MH district.

Attorney BAlexander: And so if you could sir, point me – assuming that the board accepts Mr. Petree's evidence, which admittedly you didn't know about at the time, that this helicopter is literally used in operation of his business on these premises, what part of 200A-267 do you contend as the Zoning Administrator is not permitted under this ordinance?

Zoning Administrator TLinville: As I've previously stated, my interpretation – and that's what I do for a living is interpret this ordinance - adding a heliport to an existing commercial business is not maintenance, remodeling, improvement, repair or reconstruction. It is adding a new use and it requires a special use permit.

Attorney BAlexander: Sir, if this property was being used as a trucking terminal, would an increase from 20 trucks to 100 trucks be a permissible expansion?

Zoning Administrator TLinville: Sure. It would be permissible expansion.

Attorney BAlexander: So it's your position that the method of transportation can't come within the definition of expansion?

Zoning Administrator TLinville: Correct.

Attorney BAlexander: Do you know other businesses in the county that use helicopters?

Zoning Administrator TLinville: None other than the hospitals.

Attorney BAlexander: Let's take Pardee Hospital for an example. Pardee Hospital has a helipad, does it not?

Zoning Administrator TLinville: It does.

Attorney BAlexander: Pardee Hospital's in the health business, correct? Prior to installing that helipad, Pardee Hospital transported patients in urgent situations by ambulance, correct?

Zoning Administrator TLinville: Correct.

Attorney BAlexander: Pardee Hospital apparently made the decision to add a heliport or a helipad, actually to their hospital for the purpose of transporting patient. Would it be your interpretation under the ordinance that that would not have been a permitted expansion?

Zoning Administrator TLinville: That's correct. If that expansion had happened under this ordinance in Henderson County instead of being in the City of Hendersonville, I would have required a special use permit.

Attorney BAlexander: But again, it was your admission that at the time you wrote the letter that's in question that's before the board today, you really didn't consider whether it came under the purview of this particular ordinance.

Zoning Administrator TLinville: I did.

Attorney BAlexander: You did do that?

Zoning Administrator TLinville: Yes. It didn't matter what the use of that business is, it's commercial, it could expand since it was Open Use, but I don't consider that expansion under this exemption.

Attorney BAlexander: What criteria did you apply in reaching that decision – that this was not an expansion of an existing business?

Zoning Administrator TLinville: Just my judgment.

Attorney BAlexander: Well, is your judgment supported by some type of reasoning process or criteria?

Zoning Administrator TLinville: Nothing that I can outline to you. Just that I don't feel that that's an expansion of this section.

Attorney BAlexander: So basically the application of your gut feeling to it as opposed to some fact.

Zoning Administrator TLinville: There's no scientific method to whether or not a use fits those criteria. It's all my gut feeling.

Attorney BAlexander: And would it be your testimony then sir, that no matter what use the helicopter is put to, that it would not be a permitted expansion under this ordinance?

Zoning Administrator TLinville: Yes. That's correct.

Attorney BAlexander: That's all the questions. Thank you.

Associate County Attorney SZambon: Mr. Chairman if I can ask some redirect on closing. Mr. Linville if there was an airport in Open Use and they added a heliport, would that be under 200A-267?

Zoning Administrator TLinville: I would consider that and allow expansion. I would.

Associate County Attorney SZambon: Why?

Zoning Administrator TLinville: Because it's the same mode of transportation. It's the same type of use.

Associate County Attorney SZambon: In the information submitted by Mr. Petree he stated that - I believe that he has a consulting business – ownership, maintenance, technical supervision, technical advice, consultation, negotiation, administration, contractual services, among other things – related to racing industry. If Mr. Petree wanted to open a motel or hotel on that property to house the people who he was consulting with, would he be allowed to do that?

Zoning Administrator TLinville: No.

Associate County Attorney SZambon: Why?

Zoning Administrator TLinville: Because that would be completely a different use as well

Associate County Attorney SZambon: What about if he wanted to open school to teach people about racing and race cars, could he do that?

Zoning Administrator TLinville: No.

Associate County Attorney SZambon: Why?

Zoning Administrator TLinville: There again, it's a completely different use.

Associate County Attorney SZambon: If he wanted to add an addition on the commercial structure that's on that property to add office space for consulting, can he do that?

Zoning Administrator TLinville: Yes.

Associate County Attorney SZambon: Why?

Zoning Administrator TLinville: Because that's an expansion of the building.

Associate County Attorney SZambon: What about if he wanted to add a racetrack on that property?

Zoning Administrator TLinville: No.

Associate County Attorney SZambon: Why can't he?

Zoning Administrator TLinville: Vastly different use.

Associate County Attorney SZambon: Even though he consults on racing. I don't think I have any further questions.

JPhelps: Mr. Linville, I have two just for clarification. The reference to the Pardee heliport – that pre-existed the adoption of the new Land Development Code and use ordinance, didn't it?

Zoning Administrator TLinville: That's never, you know, our ordinance has never pertained to that building. It's in the city.

JPhelps: Because it's in the city limits of the City of Hendersonville, is that not correct?

Zoning Administrator TLinville: That is correct.

JPhelps: So really it's irrelevant. Thank you.

Chairman Bonessi: Anything else?

Associate County Attorney SZambon: I don't have anything else. Do you have anything Mr. Alexander?

Attorney BAlexander: Not at this time.

Chairman Bonessi: Ok.

APouch: He could still ask for a special use permit for his property, couldn't he, to land his helicopter there. And we could give him that, right?

JPhelps: Yes.

Associate County Attorney SZambon: Though we could – just to be clear for the board – we couldn't give that to him today.

JPhelps: Correct.

APouch: Yes. I understand.

Chairman Bonessi: If that's all we have for Toby I'm going to ask Mr. Petree or one of his attorneys to come up and present their side of the case.

Attorney JPatomson: Mr. Petree can you state your name for the record please?

APetree: Joseph Andrew Petree, III.

Attorney JPatomson: And Mr. Petree can you give the board your address?

APetree: My home address?

Attorney JPatomson: Yes.

APetree: 2001 Mountain Ash Circle, Hendersonville, North Carolina.

Attorney JPatomson: Ok. And are you a citizen and resident of Hendersonville?

APetree: Yes, sir.

Attorney JPatomson: And is the land that is the subject of today's proceeding owned by the Petree trust?

APetree: Yes it is.

Attorney JPatomson: And are you a trustee of the trust?

APetree: Yes I am.

Attorney JPatomson: And are you familiar with the dealings of that trust as it relates to the land?

APetree: Yes, I think so.

Attorney JPatomson: And are you also an officer of Andy Petree Racing Incorporated?

APetree: Yes sir.

Attorney JPatomson: And also Andy Petree Incorporated?

APetree: Yes.

Attorney JPatomson: And are the two of those corporations - the businesses that are run on this...

APetree: There are two businesses that are run out of that facility.

Attorney JPatomson: Do you run other business out of that facility?

APetree: I have another company that's basically dormant. It's Petree Properties, but it just basically owns some different properties, that we operate out of there also.

Attorney JPatomson: Can you describe to the board what Andrew - Andy Petree Racing Incorporated – what are the functions of that business?

APetree: Andy Petree Racing Incorporated now is a - basically uses my consulting services for some rigs that we built for the racing industry. At one time we built them in that facility then we've moved that to Charlotte – the construction part of that, which is 100 miles away or more. So that's why, you know, we used to do all that in this facility. We also race on a limited basis out of that building. Not really as a – not like you would imagine when it was in the hey-day, but we do race some out of there. And also I run Andy Petree, Incorporated, which is a consulting company for my services for ESPN.

Attorney JPatomson: And in the operation of one or both of those corporations prior to the implementation of the Land Development Code do you move parts in and out of that building?

APetree: Yes.

Attorney JPatomson: And did you move people in and out of that building?

APetree: Oh yes.

Attorney JPatomson: What else did you move in and out of that building besides some parts and people? Did you move vehicles?

APetree: Not really, yeah, we moved vehicles in and out of there, yes. Racing vehicles. Frames.

Attorney JPatomson: Trucks, vehicles?

APetree: Yeah. Eighteen-wheelers. Motor homes still operate out of there.

Attorney JPatomson: So it's safe to say you move a wide variety of people and items out of that business?

APetree: Yes.

Attorney JPatomson: Now how long have you owned either individually or through the trust – how long have you owned that property?

APetree: I'd have to look back. I think it was 2004 when I acquired that particular piece of property where I'm operating out of.

Attorney JPatomson: And from the time you acquired that property until today's date you've operated those two businesses?

APetree: Yes.

Attorney JPatomson: And when you provide consulting to these NASCAR teams what type of consulting do you provide?

APetree: Well it's basically a system that we use to set up the cars. It's a hydraulically actuated, very sophisticated piece of equipment, that almost all of the NASCAR teams have now, we have sold to. And so we service and we also are installing more – new ones at different locations.

Attorney JPatomson: Where are some of the teams that you consult to, located?

APetree: Primarily they're all in the Charlotte, Concord area – Mooresville. Just in that – that's kind of the racing hub. And that's where most of them area. Now we do have some that are ones in Colorado. There's some outlying ones. But most of them are in that hub.

Attorney JPatomson: Is it safe to assume that from time to time you're required to meet with these teams that you consult for on a short time notice?

APetree: Yes. And if we're talking about the helicopter that's why I like to – it shortens up the time I'm away from home where I can do these things and still be back in reasonable amounts of time, yes.

Attorney JPatomson: And you can also get to your clients by use of helicopter, can't you?

APetree: Yes.

Attorney JPatomson: And there are times that you're required to be there on short notice?

APetree: Yes. But a helicopter gets you there much faster than a vehicle would.

Attorney JPatomson: Now you also perform – in addition to the rig setup – technical advice and supervision to these race teams?

APetree: Yes. On an ongoing basis.

Attorney JPatomson: Do you also provide services through the corporation to ESPN through that?

APetree: Yes.

Attorney JPatomson: And does ESPN require from time to time that you travel on short notice?

APetree: It's not necessarily short notice but it is on a – well sometimes it can be. I mean if we do a show in the Charlotte area, yes it could be but most of the time it is a scheduled travel. But it is, you know, all these are - being the races are out there.

Attorney JPatomson: And you did these things both prior to the implementation of the Land Development Code and after?

APetree: Yes.

Attorney JPatomson: Do you use the helicopter currently for the business purposes that we've already discussed?

APetree: I do and I'm training in it right now so I don't have to employ a pilot on an ongoing basis. I'm training in it at the time but, yes. It is used primarily for business.

Attorney JPatomson: And once you are certified to fly that helicopter without a pilot will your use of the helicopter decrease from...

APetree: Yes. Oh absolutely. I'm using it a lot right now to train and I can see that use going down extremely. When I get rated, which is soon, I'm close to being rated in it now.

Attorney JPatomson: And just to confirm once more, the helicopter is located at 64 Diamond Mine Lane?

APetree: 264.

Attorney JPatomson: 264. Have you constructed any new buildings for this helicopter?

APetree: No.

Attorney JPatomson: Have you laid down any new impervious surfaces for this helicopter?

APetree: No.

Attorney JPatomson: Is the asphalt or parking area that was in place when you built the building the same?

APetree: Yes.

Attorney JPatomson: Now as it was then?

APetree: Yes.

Attorney JPatomson: So you haven't expanded the physical facility at all?

APetree: Not at all.

Attorney JPatomson: You've only expanded the use of the property to include landing and taking off of the helicopter?

APetree: Exactly.

Attorney JPatomson: Is it your understanding that the Federal Aviation Administration doesn't regulate or certify private heliports?

APetree: Well I found that out after doing some research after I got a letter from Mr. Linville. I did investigate that and found that there is no certification process for heliport.

Attorney JPatomson: And it's your understanding that the business that you operate is a nonconforming use under the current code?

APetree: Yes. I do acknowledge that.

Attorney JPatomson: And have you made attempts to mitigate some of the complaints neighbors have brought?

APetree: Yes I have. I met a couple of times with Ms. Tolles which is one of the people that signed up to speak today. And I've talked to her a couple of times about it and I've actually changed procedures to try to help their concerns and not to fly over their house and that sort of thing. Yes, I have changed that.

Attorney JPatomson: And after you made that change did you discuss changes with Ms. Tolles?

APetree: Yes I did. I changed the procedure and then I asked her before hand if I could call her afterward and see if it was any better. I did it, flew it, called her and she said, "yes, it was much better".

Attorney JPatomson: And is it also your testimony today that your interpretation of the Land Development Code and the nonconforming use is that you're merely expanding your transportation mode?

APetree: I'm expanding the use of my facility, yes.

Attorney JPatomson: and just to be clear, this was a nonconforming use that was in existence prior to the passage of the Land Development Code, is that correct?

APetree: Yes.

Attorney JPatomson: And that this was an Open Use district prior to

APetree: It was that's why I bought it.

Attorney JPatomson: And you're clearly just expanding your transportation method.

APetree: That's right.

Attorney JPatomson: I have no further questions.

Attorney BAlexander: I've got some that I wanted to ask. Mr. Petree does your business own the helicopter?

APetree: Yes it does.

Attorney BAlexander: Does your business pay all the operating expenses of the helicopter?

APetree: Yes it does.

Attorney BAlexander: Does your business pay the maintenance of that helicopter?

APetree: Yes it does.

Attorney BAlexander: Does your business employ the pilot who's been flying the helicopter?

APetree: Yes it does.

Attorney BAlexander: Are you depreciating the helicopter on your business tax returns?

APetree: Yes.

Attorney BAlexander: Is the helicopter being used for anything other than the operation of your business or your training?

APetree: No.

Attorney BAlexander: That's all the questions I have.

Associate County Attorney SZambon: Mr. Chairman if I could just ask Mr. Petree some questions. Mr. Petree when did you get the helicopter?

APetree: It was – I knew that was going to come up – I think I didn't have the exact date but it is mid September to the best of my memory.

Associate County Attorney SZambon: Of what year?

APetree: Of this year, 08. I'm sorry.

Associate County Attorney SZambon: Of 08. So you did not have the helicopter September 07?

APetree: No.

Associate County Attorney SZambon: Did you have any helicopter September 07?

APetree: No.

Associate County Attorney SZambon: How many times did you take the helicopter out last week?

APetree: Last week – and this is what, Wednesday? We're talking last week?

Associate County Attorney SZambon: Um-hm. Or how about...

APetree: Not very many last week.

Associate County Attorney SZambon: Can you give me an estimate?

APetree: Maybe three times.

Associate County Attorney SZambon: And how many – would you say that's average?

APetree: About three times a week.

Associate County Attorney SZambon: You received the letter from Mr. Linville in October?

APetree: I did.

Associate County Attorney SZambon: And in the letter from Mr. Linville – you received it and you read it?

APetree: Yes, ma'am.

Associate County Attorney SZambon: It says at the bottom of the letter, *if you choose not to apply for a special use permit you will immediately stop the use of the helicopter*. So you haven't stopped the use of the helicopter?

APetree: No, ma'am. We filed an appeal.

Associate County Attorney SZambon: Ok. Your business is in consulting and providing equipment for race cars, correct? Do you consult or provide equipment for helicopters?

APetree: No.

Associate County Attorney SZambon: So your training on the helicopter is not part of your business?

APetree: My – yes it is because I'm going to fly the helicopter so I don't have to employ a pilot full time.

Associate County Attorney SZambon: But the actual subject of your business doesn't have to do with helicopters, it's just a mode of transportation?

APetree: Yes. Exactly.

Associate County Attorney SZambon: So under your interpretation of the Land Development Code and the nonconforming use clause, will you – are you planning on using a small Cessna Plane on your property any time soon?

APetree: No, because I can't land it on my current facility.

Associate County Attorney SZambon: But your interpretation of the Land Development Code would be that if your land was big enough you would be allowed to use a small plane.

Attorney JPatomson: We'd object to that question because it assumes a fact not in existence. And in addition that landing an airplane on his property would bring in FAA regulations that don't come into play with a heliport. And so it's not relevant to today's discussion.

Associate County Attorney SZambon: Mr. Chairman I'll withdrawal the question but I'm not debating FAA regulations at all today. FAA regulations only come in under the SR requirements under the special use permit and again, we're not talking about the special use

permit today. So I'm not dealing with FAA requirements at all. What kind of equipment do you provide people as part of your business?

APetree: I don't understand the question.

Associate County Attorney SZambon: You said that you provide people with equipment?

APetree: Yes.

Associate County Attorney SZambon: Is that correct?

APetree: Yes.

Associate County Attorney SZambon: What kind of equipment?

APetree: It is testing equipment for suspension development.

Associate County Attorney SZambon: And how much does that usually weigh?

APetree: Well, the rig itself weighs about 14,000 pounds but the components that go on it are computerized type components. They are sensors, software, there are, you know, all kinds of data acquisition pieces. It's a very sophisticated machine.

Associate County Attorney SZambon: So do you typically transport parts of this equipment on a helicopter?

APetree: When you say typically, I'm training in it now and I do intend to use it for that, yes.

Associate County Attorney SZambon: Ok. You testified before that part of the reason you have a helicopter is to shorten up the time to get home, is that true?

APetree: I've got two businesses that I run out of there and I'm one person. I'm trying to figure out a way to do it all and this is one way of doing that, yes.

Associate County Attorney SZambon: Are there other facilities in Henderson County that you would be able to land the helicopter?

APetree: Well, you can land it anywhere – based on what?

Associate County Attorney SZambon: Are there airfields that you can land on?

APetree: Yes, you can land on airports. You can land them anywhere, that's why I got it.

Associate County Attorney SZambon: How far are you from the Hendersonville Airport?

APetree: Oh, ten miles or so.

Associate County Attorney SZambon: Ten miles or so. In your business do you know other consultants?

APetree: Do I know other ones?

Associate County Attorney SZambon: Yeah, who do similar things to you?

APetree: No. Not really.

Associate County Attorney SZambon: There's no one else who does...

APetree: Well, I'm sure there are. I basically – this part of the industry I'm about the only one that does it.

Associate County Attorney SZambon: Ok. Are there other people who consult for ESPN?

APetree: Yeah.

Associate County Attorney SZambon: Across the country, not just in this area?

APetree: Yeah.

Associate County Attorney SZambon: How many of them – do you know of any of them that have helicopters?

APetree: I just know two of them that I work with closely and they have them?

Associate County Attorney SZambon: They have them?

APetree: Yes.

Associate County Attorney SZambon: When you're using the helicopter do you ever – have you ever used any part of anyone else's property to land it or take off?

APetree: Yes.

Associate County Attorney SZambon: You have?

APetree: Yes.

Attorney JPatomson: Could you clarify as to whether you're talking about this county?

APetree: Yeah, are you talking about an airport? I thought I was...

Associate County Attorney SZambon: I mean any of your surrounding adjacent property owners, I'm sorry.

APetree: Oh, no, no. I've never touched it on anybody's property but mine.

Associate County Attorney SZambon: Ok.

APetree: And never attempted to land on anybody's – any other person's property.

Associate County Attorney SZambon: And your testimony is that you typically go from here to the Charlotte / Concord area also?

APetree: That area and I'll also use it to go to the races that are within the range of the machine. To the events that are with in the range like Bristol, Charlotte, Martinsville, Richmond, Nashville, I can't think of them all right now.

Associate County Attorney SZambon: And there's a typical season for racing?

APetree: There is, yes.

Associate County Attorney SZambon: What is the season for racing?

APetree: It's from February to November. It's almost all year.

Associate County Attorney SZambon: Ok. That is a long time. And from February to November about how – you know, during the racing season when you're – I'm assuming --- is that fair to say?

APetree: Yes, I would say it is, yeah.

Associate County Attorney SZambon: Ok. About how many times will, you know, do you use the helicopter the busy season?

APetree: When you say use it – how many times will I go in and out of my facility?

Associate County Attorney SZambon: Yes.

APetree: Probably no more than three times a week. I mean, if I leave for an event – let's say I leave on a Thursday, Saturday or Sunday. During that time it's only up and back. There could be up to two maybe even three times a week that I would use it otherwise, depending on what other business I have.

Associate County Attorney SZambon: How long have you, I'm sorry and I can look it up, but how long have you had this property?

APetree: Since 2004.

Associate County Attorney SZambon: 2004, and have you been doing kind of the same business?

APetree: Yeah.

Associate County Attorney SZambon: But you only got the helicopter of September of this year.

APetree: Um-hm.

Associate County Attorney SZambon: So how did you transport you or your equipment?

APetree: By car.

Associate County Attorney SZambon: By car?

APetree: It's very time consuming, yes.

Associate County Attorney SZambon: Would it be fair to say that some of the equipment you can't transfer by helicopter?

APetree: Oh yeah, there's a lot of things that you can't.

Associate County Attorney SZambon: I don't think I have any further questions right now.

Attorney JPatomson: I just have one question for redirect. Mr. Petree from the time you fire up the rotors to the time you are two miles from your property with that helicopter, how long does that take?

APetree: Two minutes.

Attorney JPatomson: And when you come in?

APetree: Two minutes.

Attorney JPatomson: Approximately the same amount of time.

APetree: I've measured.

Attorney JPatomson: Ok. I have no further questions. Does the board have any questions?

JPhelps: Yeah, please Mr. Petree so you don't warm up the helicopter – you say two minutes?

APetree: Pardon?

JPhelps: Two minutes?

APetree: One minute warm up, spin it to 70%...

JPhelps: So one minute you start it and one minute you're gone?

APetree: You spin it up to 70%...

JPhelps: How many miles per hour? Air speed?

APetree: 80 knots maybe.

JPhelps: 80 knots. You are within 20 minutes of the Hendersonville Airport so basically what you're telling me is, you're asking for this just as a convenience? Because you could harbor this...

APetree: Yeah, there is no space to house this helicopter at the Hendersonville Airport, if that's what you're asking me.

JPhelps: No space?

APetree: No. There's no hanger space for a helicopter.

JPhelps: Nor anywhere else in Henderson County?

APetree: Not that I know of. Where else can you land one? I don't know. I don't know where.

JPhelps: Well I mean there is land available that could be created for one?

APetree: Yeah.

Chairman Bonessi: Anybody else have any questions? You say you're training now about three times a week, is that correct?

APetree: It's an average, yes. There's some weeks that it's more than that and some weeks that are less. I've flown it this week, let's see, but maybe once I think.

Chairman Bonessi: So when should your certification be complete?

APetree: I've got an appointment for the 14th of this month depending on the weather.

Chairman Bonessi: So you're still saying though, even after the training is complete, your estimate is three times a week is...

APetree: That's a fair estimate, yes.

Chairman Bonessi: I don't have any other questions as this time. I guess Sarah, do we need to, from a procedural standpoint – the folks that we say have standing, do we need to let them cross at this time, and again, keep them to only things pertinent? Or do we do that later?

Associate County Attorney SZambon: They can cross-examine him at this time. They cannot give any evidence or testimony. They can only ask questions.

Chairman Bonessi: Right. With regards to...

Associate County Attorney SZambon: With regards to the matter before this board. Not if they just don't like it.

Chairman Bonessi: Ann, I believe you had something.

APouch: My question is why do they have to speak if what we're determining today is if we agree or disagree with Toby. I mean I don't think their opinion...

Chairman Bonessi: There again, it's not opinion. It should be if they can bring something, I'm not sure exactly what that would be – that either upholds what Toby is saying or agrees with Mr. Petree. You know, it could go either way.

Associate County Attorney SZambon: For example, not an issue in this case, but if it was some kind of nonconforming use which would have been allowed by the ordinance that it was discontinued or abandoned so that it would no longer be allowed and the applicant was saying that it was – that they had never discontinued the use and it was never abandoned. Another party might have evidence that this time period they said they were using it they never did because I live next door –would be an example of a time that somebody might have to add. Does that help, Ann?

APouch: Sort of.

Associate County Attorney SZambon: Ok. But again, that is not the case here.

Chairman Bonessi: We'll still have to give him the opportunity. So I'm going to start down the list for – Mr. Petree, if you'll stay put – Ms. Tolles, you have the opportunity since you have standing in this case to ask Mr. Petree questions with regards to what he has said, but it's not, how am I going to figure out how to say this?

Associate County Attorney SZambon: You can only ask him questions. You can't – you'll have you time to present whatever you want. This is only your time to ask Mr. Petree questions and it is limited to the issue of whether or not Mr. Petree can do this under the current language of the Land Development Code. Does that kind of make sense? Do you have any questions for Mr. Petree?

STolles: Yes I do but I guess I'll be objected to if it's not the right answer.

Associate County Attorney SZambon: Probably. There's a good chance of that because there's like three lawyers in the room. Anything you say is up for grabs. I'm sorry we only have the one mic.

STolles: My name is Sharon Tolles. I told you I live at 138 Saddle Club Lane. Mr. Petree is correct, we have had more than one conversation via phone and...

Attorney JPatomson: Is there a question?

Associate County Attorney SZambon: Ma'am this is your time only to ask questions.

STolles: Ok. Mr. Petree when you were in our home talking with us did you or did you not tell my husband that the sole purpose of this helicopter was to get you to and from your races?

APetree: I said that would be a use of it, yes.

STolles: Did you ever tell us that it would be used for anything else?

APetree: No. I didn't discuss that with you, no.

STolles: And I'd not be privy to that but we are now finding out that you will be using it for things other than for taking off for a race and coming back and putting it down.

APetree: Yes.

STolles: Did you tell me you would and would not fly out at night?

APetree: Yes I did. And have I?

STolles: No you haven't and in your defense you did not. You did call me one time and ask to come in for the sole purpose of doing what?

APetree: Can't remember – training. It was training.

STolles: Testing night vision goggles?

APetree: Right. For night vision training, yes.

STolles: So if you are not going to land at night, the purpose of training with the night vision goggles at Crab Creek and Diamond Mine Lane would be...

Attorney JPatomson: I object in relevance to the...

STolles: What purpose?

Attorney JPatomson: To the code and what we're here to discuss today

STolles: Well, he's saying he's only going in and out a couple of times a week, he went in and out Monday twice.

APetree: No I didn't.

STolles: You didn't?

APetree: No ma'am. I went once.

Associate County Attorney SZambon: First of all we're getting in to a problem of he said, she said which is not, you know, I understand...

STolles: I understand, but Mr. Petree stood right here and said that he had talked to me on more than one occasion and you all allowed that. Is that correct?

Associate County Attorney SZambon: As long as it's limited. Again, the issue is whether or not Mr. Petree is a nonconforming or a conforming or if it's allowed by the ordinance. Not whether or not he can ride it at night.

STolles: Well how, ok but how do I know what the ordinance is?

Associate County Attorney SZambon: I can show it to you.

STolles: Please.

Associate County Attorney SZambon: It's a big ordinance. Do you have the copy of just that section that Mr. Patomson and Mr. Alexander provide? (to a board member). Here it is. And I'm just giving her the sections of the ordinance that you two provided.

Attorney JPatomson: Ok. You might give her 200A-267.

Associate County Attorney SZambon: If that is what you would like I don't have an objection to that. Does the board have an objection if I just give her the one provision?

JCrafton: I do. You should also give her the chart of permitted uses under the current code, which is what is precipitating Toby's action.

STolles: Excuse me, do I have time to read this? Or can she quickly give me a synopsis?

Attorney JPatomson: I certainly don't think she can give you a synopsis because she's not your attorney and she...

Associate County Attorney SZambon: Yeah, I'm not your attorney.

STolles: Then can I go sit down and read and then come back?

Attorney BAlexander: Mr. Chairman, before this digresses further into total confusion, I think maybe Sarah can clarify for everyone that because we're not here today seeking a special use permit we're only dealing with whether or not this is a expansion allowable under 200A-267 that might clarify it.

Chairman Bonessi: I think we've talked about that or we've mentioned that, if we need to restate that.

JBrown: (some comment about a special use)

Zoning Board Secretary KAAntonucci: I can't hear you. Can you talk louder?

JBrown: Well as an alternate I don't know if I should say anything or not but...

Associate County Attorney SZambon: You shouldn't.

JBrown: Ok, then I won't. I was just thinking that I didn't understand what you're saying.

STolles: Then can I ask a question? Then I can sit down.

Associate County Attorney SZambon: If it's – you can't ask the board a question. You can ask Mr. Petree a question.

STolles: Well he couldn't answer this question, so no. So I'll just take that and sit down.

Associate County Attorney SZambon: I'll give you the whole packet as given to us by Mr. Petree. But especially look at the provision Mr. Patomson mentioned.

Chairman Bonessi: So again we'll go ahead and we're going to discuss items with respect to the Henderson County Code that is in question. The next person I have on my list is Chuck Sklenka. And if he has any questions, ask Mr. Petree with regards to him, anything with respect to the code.

CSklenka: Ok. I just want to first say I have the highest respect for Mr. Petree. You couldn't meet a nicer gentleman. I really don't have any further questions at this time. Sharon pretty much brought up most of the points so that's all I have.

Chairman Bonessi: Thank you. Mr. and Mrs. Gillilan, again the same thing with respect to the code because that's what we're talking about here. He's not asking for a permit. We're just trying to decide at this time if Mr. Linville acted appropriately with respect to the code and if you have any questions for Mr. Petree with respect to what he said.

EGillilan: I'm Ed Gillilan and my wife Toni. Andy, have you checked with Transylvania Airport as far as availability of hanger space?

Attorney JPatomson: Once again I'd object to the relevance of...

Chairman Bonessi: Yeah. We're talking about is...

EGillilan: I understand but we did get afield talking about going to the different racetracks and so forth which has nothing to do with the code to my mind.

Attorney JPatomson: I think that if he had an opportunity to object while I was questioning he missed that opportunity. And we would further state the Mr. Petree's use of the helicopter for racing is clearly relevant in light of the disagreement between Mr. Linville and Mr. Petree as to expansion of use and whether or not it's what's going on here today.

Associate County Attorney SZambon: The County doesn't have any objection to the question.

Chairman Bonessi: I think we need to stay consistent. We are talking about the code and so forth and the question is whether this is a use for expansion of Mr. Petree's business. I mean I...

EGillilan: I understand. Can I ask a general question about the concept behind the code? And I'm guessing that most of what you do here is to assure the residence of the county the expectations of quiet enjoyment of their land...

Attorney JPatomson: Once again, if he has a question for Mr. Petree we'd be happy to entertain it, but...

Chairman Bonessi: You'll have a chance to speak. This is...

Associate County Attorney SZambon: However when you do have a change to speak you can't ask the board questions. They can ask you questions, you can't ask the board questions. I know it seems unfair.

EGillilan: I understand. I have nothing further.

TGillilan: We feel that Mr. Petree is definitely in violation...

Attorney JPatomson: Once again I'd like to object. Is there a question associated with this?

TGillilan: Mr. Petree, do you feel like as if you're in violation of...

APetree: No ma'am, I do not.

TGillilan: And the reason for that is?

APetree: Because it was Open Use when I bought it and I'm just expanding my use that I'm entitled to.

TGillilan: Are you loading a Prius onto your helicopter? Your ground operation onto your helicopter? Do you travel any ground transportation to Charlotte, or...

APetree: Yes, if I'm taking a car. In the helicopter?

TGillilan: Um-hm.

APetree: No.

TGillilan: Oh, so are you – is it just more convenient for you to fly a helicopter for personal reasons or faster mode of transportation? It's just easier for you to take...

APetree: It is quicker, yes.

TGillilan: Rather than drive?

APetree: It is a lot faster. Just as it is to drive a car than to walk to town.

TGillilan: And when you get to Charlotte or Concord how long would it take you after you land on...

APetree: I land at their facilities typically.

TGillilan: Ok. At the racetrack?

APetree: No. At the racetracks and at the racing facilities, that are in the Charlotte area.

TGillilan: Are you aware that your neighbors who were there before your helicopter came into existence or you bought it are very disturbed? Are you aware?

Attorney JPatomson: Once again I object to the relevance to the code and its expansion of the use.

TGillilan: Well, I believe it addresses the code because that's why we're here.

APetree: The question – no, you have not said anything to me.

Attorney JPatomson: Don't answer the question.

Chairman Bonessi: That's fine. I mean with respect to the code is this, I mean is this an expansion of his business? Is this part or – again, is it relative to his business? I realize there's a lot of emotion around it and everything like that but at this time we're not to that point and this is not the hearing for that. That hearing may come later if this board sides with Mr. Linville, but at this time we're talking about the code and how his business is relative to the code and how it might be an expansion or not be an expansion.

TGillilan: Absolutely. However, we as layman, we don't know the full code. We can't maybe interpret it as well as Mr. Linville can or an attorney or – we'd have to read it and re-read it and this is why we hire people like Mr. Linville. To interpret the...

Attorney JPatomson: Once again I object. If she wants to present this during her direct testimony then I – clearly something to talk about later. But if she has a question for Mr. Petree I think we need to move the process along.

TGillilan: Alright. My last question is, is it just a matter of convenience for you to have a helicopter?

APetree: It is not just a matter of convenience. It's a matter of time.

TGillilan: Ok. But not for transportation purposes?

APetree: It is for transportation purposes.

TGillilan: For parts and...

APetree: And people and me.

TGillilan: Alright. That's all I have.

Chairman Bonessi: Thank you. Moving right along, do we have any other questions or any other cause for redirect or anything like that for Mr. Petree while he's up there? Ok. Thank you, sir. So now at this time and again I'm going to call the witnesses up or the people we feel have standing up one more time and again we're going to be talking with respect to the code. This is your time to present evidence to us regarding the code and Mr. Petree's representation will have the right to cross-examine you. So Ms. Tolles, once again if you would like to come up here.

STolles: Do you want me up there?

Chairman Bonessi: If you have anything to present to this board with regards to the code and how Mr. Petree may or may not be in violation of the code or what your feelings are in respect to that code violation, yes, I would like for you to come up here.

STolles: When Mr. Petree bought this property in 2004 was that Open Use, is that correct? Then I think it was two years ago he took a job with ESPN and now he is saying that even though the zoning has been changed he should be allowed to have a helicopter there. If the helicopter had been there in 2004 it would be grandfathered in. The helicopter wasn't there so as far as I'm concerned he's in violation by having that helicopter there if nothing for noise the fact that it wasn't grandfathered in 2002. That's all I have to say.

Chairman Bonessi: Stay right there. The board's going to ask you some questions and I'm sure Mr. Petree's representation might have some question. Anybody have any questions for Mrs. Tolles, Ms. Tolles?

APouch: I have a – do you think Mr. Petree has a right to expand his company and be more successful?

STolles: Absolutely.

APouch: And since time is money, that he could save time getting different places?

STolles: I guess it would be determined for my purpose is this time for his business or his personal job?

APouch: He said business.

Chairman Bonessi: It's the same thing though, isn't it?

STolles: Well his personal job, I mean to me is working for an announcer for ESPN. And his business is the business that is located at Crab Creek and Diamond Mine Road. And from what I've heard today he uses – he is going to sometime in the future, use this helicopter to transport things to and from this business. But he is also going to use his helicopter to go to and from the races, which is his personal job. Now, he's expanding for his personal job but he's having a helicopter to transport something that he transported before via four wheels. That's the best I can answer that question.

APouch: It's still business.

STolles: Well, what makes it more important other than time to transport it by air other than by vehicle that he's been doing since 2004?

APouch: That's my question.

Chairman Bonessi: Do any other board members have any questions for Ms. Tolles? Mr. Petree, do you have any questions or your...

Attorney JPatomson: We have no questions.

Associate County Attorney SZambon: I don't have any questions.

STolles: Thank you.

Chairman Bonessi: Thank you. Once again Mr. Sklenka.

CSklenka: Just like to say I do agree with Mr. Linville on his decision to decipher the code. And the only two issues I have is the safety issue and noise issue. That's it.

Chairman Bonessi: Any questions? (there were no questions from the board)

Attorney JPatomson: No questions.

CSklenka: Thank you.

Chairman Bonessi: Mr. and Mrs. Gillilan.

TGillilan: I'll go first because I'm the lady.

Chairman Bonessi: And like I say once again, we're talking about the code and with respect to the code and his business.

TGillilan: Well, once again we don't have privy, which we will attain a copy of the code to read it and to savor what we can from it. But in the mean time this is critical to our well-being and all the neighbors in the area which is now residential. And I don't know – Mr. Petree can have all the lawyers he can afford but I don't know how you can compare a Prius with a helicopter. How you compare ground transportation with air, noisy air. And I don't think this is an expansion of his business as he contends. I think it's just a toy and to help him to get to Charlotte and Concord faster and quicker. We believe he's in violation of the code and therefore we are asking for a cease and desist until this matter is worked out. One more thing, no one's brought up the noise ordinance of Henderson County. We do have one. I just want to bring that to your attention.

Chairman Bonessi: At this time there's a lot of other factors and right now this hearing is limited to what's been brought before us and so forth and that's...

EGillilan: I think the code is probably written on expectations of what normal businesses do and the comparison to a Prius to semis – these are all vehicles that have mufflers on them. They are all licensed. They arrive by designed state roads and so forth. There's a lot of regulation there. And to take to an extreme what the County attorney said a while ago in humor about a spaceship – if it was determined in the next few years that a guided missile would be faster to get to Charlotte than a helicopter then maybe that's ok too. That's all I have.

Chairman Bonessi: Just a second. Does anybody else have any questions for the Gillilan's from this board?

APouch: I have a question. You're developing property there, aren't you?

EGillilan: Yes. We have.

APouch: So that's your business?

EGillilan: Yes.

APouch: Ok. I wanted to make that clear. Thank you.

Chairman Bonessi: Do you have any questions?

Associate County Attorney SZambon: I don't have any questions.

Chairman Bonessi: Alright. I guess at this time do we have any final statements, before we discuss this as a board, from any of the parties?

Associate County Attorney SZambon: I have a final statement and I believe Mr. Patomson has a final statement.

Attorney JPatomson: Mr. Alexander and I will present a closing statement as we presented the opening statement. The board has heard quite a bit of testimony from Mr. Petree today and certainly some statements from interested neighbors regarding this helicopter and his use of the helicopter. We think the testimony has been very clear to you today that Mr. Petree merely uses this helicopter as an alternate mode of transportation and that we view this as an expansion of an existing business use on this property. It's clear from the testimony that's presented to you today that Mr. Petree's better able to operate both of his businesses and to complete the obligations of his responsibilities as a consultant and or commentator for ESPN by use of this helicopter. In the event that he'd be forced to drive from here to Charlotte to one of these race teams, you're looking at a minimum of a two hour drive back and forth. That's time he could be spending with clients at their race facilities. It's time that he could spend in his shop improving the dynamics of the machine that he uses to assist these racing teams. All this time is important. It's important for all of us and if this helicopter allows Mr. Petree to utilize his time in a effective and a more business productive fashion then we feel that that's a clear expansion of the use of the property that has already been designated to him, be grandfathered in, if you want to use that as a term under the former Open Use district and under the nonconformance guidelines contained in 200A-267. I will leave the discussion to Mr. Alexander to go through the particulars of that statute and how it affects of this matter applied to it. And we feel that the board should clearly rule in Mr. Petree's favor and grant the appeal that's been presented to you today.

Attorney BAlexander: Ladies and gentlemen of the board, thank you for your patience in hearing this matter today. I don't want anyone here today to take from the fact that we appeal Mr. Linville's decision any lack of respect of Mr. Linville or his capacity as Zoning Administrator. Having dealt with the zoning office here many times I know that in general they do a fine job. The issue here though is a little more complex than just, you know, my gut feeling is that it went beyond the terms of expansion meant by the ordinance. You have to look at 200A-267 from the perspective that it creates an exception to the rule. The prior

nonconforming use ordinance or the provisions in the, previously in the statute which were under 200A-266, which gives you your definitions etc., they're very specific as to what constitutes abandon and what constitutes a nonconforming use, etc., etc. But then our Commissioners chose to make an exception with 200A-267 and it's a very specific exception. The exception applies first only to uses that were legally established in the former Open Use district. Now I think that obviously is a recognition by our Commissioners that there were a lot of businesses in the Open Use district. In the statute, or the ordinance on its face says that it applies only to commercial and industrial uses within the district. And then it just goes on to say that in those uses, those commercial / nonconforming / industrial uses that were established during the period the property was Open Use shall be allowed to be maintained, improved, altered, expanded, remodeled, repaired or reconstructed in adherence with the dimensional requirements and setbacks of the current applicable district. Mr. Linville has told you that there are no violations here to the dimensional requirements and setbacks of the current applicable district. And so the only question that really rises – is this an expansion of the business? In a quasi-judicial proceeding the burden is on the applicant initially, the burden on us bringing this matter before you to a prima-facie case of entitlement to the relief we seek. We contend to you that we've done that. We presented to you un-contradicted evidence, un-contradicted evidence that prior to the establishment of the adoption of the new comprehensive land use code that Mr. Petree maintained his racing business, his equipment consulting business on these premises that that was a nonconforming use at the time the new code was adopted. We have established to you by un-contradicted competent evidence that this helicopter is being used by Mr. Petree in the scope and course of that business. It's owned by his business. It's paid for by his business. It's used to transport him, parts and other personnel for the business. And you know we can all get on the slippery slope and make examples of things that are outlandish trying to make our points, it's hyperbole. But in this particular case we believe that this is absolutely a lawful expansion of the existing business. Now the case law in the area of quasi-judicial proceedings says that you, in making your decision, have to depend upon the competent, relevant and material evidence put before you. And you are not to depend on speculation or as one case states, and I say this with no offence to anyone in the room, the whims or desires of the neighbors. There are cases where our court of appeals has held that you have to limit your review of this to competent, substantial material evidence. And I know that that puts you as a board in a hard position because folks come here and they have a desire that's opposite to ours and they're looking to you to protect them from what they perceive as a problem. But your role is not legislative, you know, your role here, one, is appellate and secondly is quasi-judicial. The legislative decisions get left to the Commissioners and God help them and bless them for taking on that role. But in looking at the competent evidence before you today there is no contradictory evidence that would indicate that this helicopter is not being used for lawful expansion of the business. And we contend to you that under the provisions of 200A-267 this use is entitled to be had on this property and that with all due respect to Mr. Linville that his letter was in error. Again Toby, and I'm not trying to offend anyone, at the time this decision was made by Mr. Linville he didn't know what kind of business we had, by his own admission. He didn't know what kind of use the helicopter was being put to. And when you add those facts, the competent facts then it illustrates to you that the decision was not correct and that this use should be allowed to continue. Thank you.

Associate County Attorney SZambon: This is unlike many cases before this board in that in this instance the County is not saying that Mr. Petree cannot do this at all. They are just saying that he needs a special use permit for it. The reason we're here today is because of the process. Toby received a complaint. Toby investigated and sent out a letter, asked Mr. Petree

to stop and Mr. Petree appealed it. What the County is asking for is just that this board abide by the process laid out in the Land Development Code. Mr. Petree did not have the helicopter in 2007, September when the Land Development Code went into affect. Mr. Alexander talked to you about hyperbole, but to a certain extent those analogies are not necessarily false. It is not necessarily false that under their rational Mr. Petree could fly a small aircraft out there and land it, absent FAA regulations. The analogy that a Toyota Prius is akin to a helicopter is false. FAA which Mr. Alexander has brought up several times does not regulate Toyota Priuses, it only regulates helicopters and other aircraft. Mr. Petree is a respected member of our community. The County does not want to stifle his business in any way. We just want him to follow the correct channels. Everyone here understands that time is money but the exception in the nonconforming provision 200A-267 that Mr. Alexander spoke about does not give commercial / industrial businesses in the Open Use, former Open Use district cart blanch. Just because there are faster ways of transportation does not mean that anyone in the – who has a commercial business in the Open Use district, former Open Use district can start flying helicopters. There would be many other things that Mr. – under that argument Mr. Petree could do to expand his business that were not the intension of this provision. For example like I brought up before, he could open a hotel. If he opened a hotel his clients would already be there. That would save them transportation time to and from wherever they stayed in Henderson County. He could open up a racetrack on the property. Then he wouldn't have to fly anywhere to the races because he'd already be there. Now I understand these are examples of hyperbole but one thing that is not an example of hyperbole is if you had a bookstore in the Open Use district, former Open Use district that wanted to expand to be an adult bookstore. That would under our ordinance require a special use ordinance. I think under Mr. Linville's interpretation, without putting words in his mouth, he would say that that was not an expansion of a nonconforming use but it was a different use. And that is the heart of the argument here. Mr. Petree is arguing that this is just an expansion of a continuing nonconforming use. And Mr. Linville's position is that this is a different use all together. And the provision does not say just because it's part of your business, just because you could make more money this way that anything would be an expansion, alteration, improvement on your business. As I said, you know, this is all part of the process. Mr. Linville did his job in interpreting it as he saw fit, according to his experience. Now it comes to all of you for your job to interpret it. You are the judicial branch of the County. Mr. Alexander said that you are not the legislative branch, and you're not. You are the interpretive judicial branch. And your job is to interpret, based on the evidence before you, based on the ordinance, whether or not what Mr. Petree has done with his heliport was the intent of the provision before you. Mr. Alexander and Mr. Patomson would tell you that the language is clear and that this is clearly an expansion of use and I would heartfully disagree with that. So from the County's standpoint, from Mr. Linville's interpretation, we would ask you to uphold Mr. Linville's interpretation of the ordinance so that Mr. Petree cannot run a heliport on that property. And also that this board would ask Mr. Petree to cease and desist using that helicopter until at such point that he would have a special use permit. That's all I have to say.

Chairman Bonessi: Ok. Any questions before we go ahead and go into board discussion? Ok, at this time I would like to close the hearing and discuss this as a board.

JCrafton: You need a motion. I move we close the public portion of the hearing.

TEngel: I second.

Chairman Bonessi: All in favor.

All board members were in favor of closing the public portion of the hearing.

Chairman Bonessi: Ok. We usually start with Ann but I'll start with Jan this time.

JCrafton: Ok, it's, having been in business it's clear that the use of a helicopter and the nature of Mr. Petree's business is a distinct advantage. But I don't think that's the question before us today. The question before us is: Is he in compliance with County ordinances in operating a heliport? Irregardless of whether it's beneficial or not beneficial to him. He did not own a helicopter prior to the adoption of the new County ordinance. The new County ordinance, in the chart of permitted uses lists heliport under R2-MH zoning area as being allowed only under special use permit. That suggests to me that the County clearly had in mind that the operation of a heliport was a separate and distinct use for a piece of property as opposed to being an added operation to a piece of property. The definition of a heliport in the definition section of our code says; *a facility or structure that is used for the landing and takeoff of rotary winged aircraft*. But it excludes maintenance if that's what you're doing there. Clearly the issue before us represents a heliport operation. A place that is used for the landing and takeoff of a helicopter. And so from hearing all of the evidence, while I appreciate the benefit of a helicopter in Mr. Petree's business operation and his use of it, my position would be that it is not in compliance with the code. It is not a reasonable expansion of his operation. And therefore that the citation issued by Mr. Linville was appropriate.

Chairman Bonessi: Tony?

TEngel: I'm totally in agreement with what he said very eloquently and nice.

Chairman Bonessi: Ann?

APouch: I think he should have asked for a special use permit. And I agree with Tony – Toby, excuse me. I've been on Tony tonight. I'm looking at you and saying that.

JPhelps: I agree with Jim also. I think that clearly that the intent of the code if you're going to have a heliport here that you need a special use permit. I don't think in any way not having a helicopter there restricts or detracts from the ability to conduct a business or earn a living. Grant it, it may take 20 minutes longer to go drive to an airport but that doesn't affect that business as far as any restriction of earning a profit. There's also some question the way it was configured. It's used for personal use in a lot of ways here and he said it's under a corporate charter, under corporate business. So it becomes a commercial aircraft, perhaps.

APouch: Well not necessarily.

JPhelps: Perhaps. But that's something for the IRS to look into. I don't think that - I think the best compliance with the ordinance and the way we're reading them and has been presented and the testimony here is the route should be a special use permit. I think Toby should be upheld.

APouch: I think we'll get more and more requests for helicopters.

JPhelps: If you did you'd set precedence and anybody – well I'm going to fly a helicopter here. I think we've got to realize we're living in the 21st century, the 19th or the 20th even and the density of this county is much greater than now than years ago.

APouch: People land helicopters at Camp Greystone, at the lake, in and out all summer.

JPhelps: Considered a resort area and people can...

Chairman Bonessi: That doesn't make a difference, I mean...

APouch: It's just private property and like I said you can land them anywhere.

Chairman Bonessi: I guess the big issue I have here, I understand what you all are saying but, you know if I were wanting to, I guess buy a piece of property in an Open Use zone, Open Use, or in a former Open Use zone and start doing something new, but when Mr. Petree bought this it was Open Use and he could do anything he wanted. And that was one of the reasons he purchased the property.

JPhelps: But he would have had an opportunity during that process, either had an exception or make some kind of arrangements to have the heliport grandfathered as one.

Chairman Bonessi: He wouldn't have needed it then.

JPhelps: He had that opportunity.

Chairman Bonessi: He wouldn't have needed it at that time.

APouch: Well your business grows larger.

JPhelps: He could have anticipated...

APouch: As your business gets bigger you might – maybe he couldn't afford it when he started his business.

JPhelps: But then we have a provision for that in a special use permit.

APouch: I agree.

Chairman Bonessi: All right. Well I guess at this time I'm going to ask for a motion from somebody.

JCrafton: I will move that the Zoning Board of Adjustment uphold the – what do I want to say – ruling, citation – what's the right word Sarah?

Associate County Attorney SZambon: Decision.

Zoning Administrator TLinville: Interpretation or decision.

JCrafton: Well I want to represent the action that Mr. Linville took. What was the action he took? Did he issue a citation?

Associate County Attorney SZambon: Noted a violation. He didn't issue a citation.

JCrafton: Alright. My motion then is that the Zoning Board of Adjustment uphold Mr. Linville's notice of violation to Mr. Petree in regard to the operation of a heliport at the subject property that we have been discussing this evening.

TEngel: I'll second.

Chairman Bonessi: I guess in that case, all in favor of Mr. Crafton raise your hand.

Jim Crafton – in favor of upholding notice of violation

Tony Engel – in favor of upholding notice of violation

Ann Pouch – in favor of upholding notice of violation

Jim Phelps - in favor of upholding notice of violation

Chairman Bonessi: Opposed?

Chairman Dean Bonessi – opposed to upholding notice of violation

Chairman Bonessi: Well, I'm sorry Mr. Petree, the board has sided with Mr. Linville. You do have options as far as pursuing a special use permit.

Attorney BAlexander: Could we inquire Mr. Chairman if – the attorney can probably answer this, are you going to reflect this in a final order from the board for purposes of calculating appeal.

Associate County Attorney SZambon: Yes. I'm going to draft up an order which I can send to you if you want to look it over and which will be presented to this board on the January 28th meeting because that's the only way we could do it within the 45 days.

Attorney BAlexander: And Mr. Chairman, your decisions are not appealable until they are final and so I'd ask to note if you would on tonight's record that your decision is not final until entry of that order on January 28th.

Zoning Board Secretary KAAntonucci: Could you come to the podium and say that?

Attorney BAlexander: I'm sorry. Mr. Chairman I just simply ask that you enter on the record tonight, and I think Sarah will support this, that your decision is not final until entry of a final order on January 28th. It's important to us for calculating appeal periods.

Chairman Bonessi: Ok. We can do that. It should have been – we said it in the opening statement but we can restate that.

Zoning Administrator TLinville: More importantly, does that allow him to continue to use the property until the appeal is...

Attorney BAlexander: I don't believe that issue is before them.

Associate County Attorney SZambon: The board, when they voted, did not say whether or not he could use the heliport so definitely until there's a final order he can and probably after the final order is done because that's not going to be part of the final order. That would be something we'd have to do with regards to this board.

JPhelps: You're saying as part of the final order, then that would create a cease and desist? Or do we need another motion now to say cease and desist?

Attorney BAlexander: It's our position that your administrator would have to issue a citation.

Associate County Attorney SZambon: Yes, I agree. Toby would have to issue a citation in which case if Mr. Petree did not comply with the citation then we would have to follow it up through either criminal or civil penalties as we do with other things.

Zoning Administrator TLinville: And I'm asking for the board, if you want to allow him to continue that use until either the appeal – either the order is approved or he applies for special use permit or what date – I need to know what I need to do.

Associate County Attorney SZambon: Yes. Just to clarify that would just be in terms of providing Toby with some guidance. Otherwise we'll just approach it the way we approach everything.

Attorney BAlexander: Is that a Board of Adjustment, a Board of Adjustment role with Toby?

Associate County Attorney SZambon: They can provide advice but it's not binding. But I think depending on what they say I think it would probably be helpful to you also to know.

Chairman Bonessi: So where are we at?

TEngel: So one by one?

Associate County Attorney SZambon: It's up to this board.

Attorney BAlexander: Mr. Chairman we'd like to enter on the record that we think that is not an issue that is before the board today. It's not on your agenda. It's never been cited. My client's never been served with a citation relative to use of the helicopter and we think that it is outside the current scope of, not that it's outside of your future scope but outside the current scope of your role of Board of Adjustment.

JPhelps: Tell me here, Sarah, from a legal interpretation as I understand it, this was an appeal of the ruling.

Associate County Attorney SZambon: It's an appeal of the ruling. All that Mr. Petree has received at this point is a notice of violation not a citation.

JPhelps: The appeal was denied which means at this point you should cease and desist; you have no authority, right?

JCrafton: No. As I understand it Mr. Linville only issued a notice of violation. He said; *you are in violation of the ordinance*. And we have upheld Toby in that his notice was correctly based. He has not issued any ruling or citation to Mr. Petree to say; *you must cease and desist by order of the County because you are in violation*. He's only told him; *you're in violation*. But he hasn't told him; *you can't do it anymore*. I would only recommend then that if in his jurisdiction Toby deems that's the appropriate thing to do, he'd do so but I don't know we as a board could issue any direction of what he ought to do other than follow the rules that are available to him.

Attorney BAlexander: That is correct.

JPhelps: I'd bring your attention to the letter dated October 14th, 2008 from Toby to Mr. Petree. Last paragraph; *if you choose not to apply for a special use permit you will need to immediately stop the use of the helicopter on the property as you are in violation of the*

Henderson County Land Development Code. So he has been notified and it was part of this hearing.

Attorney BAlexander: With all due respect Mr. Phelps the conditional aspect of that instruction I think causes it to not be a citation.

JPhelps: Oh wait, I'm not - if it's contingent - I'm not saying - but one way or the other - I mean I think we have the right to say one way or the other that until the final order or to further appeal or cease and desist. I mean, you know I think that's an option that's available to us.

Chairman Bonessi: I think personally if, I mean until the final order, because it's not official until we have a final order signed, correct?

APouch: Um-hm.

Chairman Bonessi: And then if he does not - if he applies for the special use permit, as outlined in there, he's probably ok until the special use permit...

Associate County Attorney SZambon: Or if the court of appeals makes a determination. Also kind of against what Toby's saying, I would prefer this board not make any statements regarding whether - at what time or whether or not there should be a cease and desist movement, action, and leave that to staff.

Chairman Bonessi: Ok.

Associate County Attorney SZambon: And our discretion in terms of, you know just like we do everything else.

Chairman Bonessi: So what do we need to do here as a board to clear everything up and make sure there's no questions?

Associate County Attorney SZambon: You need to close the hearing and then you need to adjourn unless there's other business.

Chairman Bonessi: At this time I'd like a motion to close this hearing.

JPhelps: I move we close the hearing.

TEngel and APouch: I second.

Chairman Bonessi: All in favor.

All board members were in favor of closing the hearing.

Chairman Bonessi: I need a motion to adjourn.

JPhelps: So moved.

Chairman Bonessi: All in favor.

All board members were in favor of adjourning the meeting at 6:21 p.m.

Chairman Dean Bonessi

Karen Ann Antonucci, Secretary