

KAI ALA PARTNERS LLC

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BEFORE THE ENVIRONMENTAL MANAGEMENT COMMISSION
COUNTY OF HAWAI'I
STATE OF HAWAI'I

KAI ALA PARTNERS LLC,

Applicant/Appellant.

vs.

RAMZI I. MANSOUR, DIRECTOR,
DEPARTMENT OF ENVIRONMENTAL
MANAGEMENT, COUNTY OF HAWAI'I

Appellee.

| EMC No. _____
|
| PRE-HEARING OPENING BRIEF
|
| EXHIBIT(S) 1 -19
|
| WRITTEN TESTIMONY
|
| CERTIFICATE OF SERVICE
| (Attachment A)
|

PRE-HEARING OPENING BRIEF

Petitioner/Applicant/Appellant Kai Ala Partners LLC (Petitioner), by and through its undersigned managers, hereby files its Pre-hearing Opening Brief for the Appeal of the Director of the Department of Environmental Management, Ramzi I. Mansour's decision letter denying consideration of applicable Hawaii County Code relevant to Petitioner's request to reduce the

sewer user connections from two (2) to one (1) and refund the overcharges to date as they apply to TMK: 3-7-5-019-018, a property located at 75-5944 Alii Drive, Kailua-Kona, Hawaii 96740. As further explained herein, this decision violates established law (Hawaii County Code), was clearly erroneous, and/or arbitrary or capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion.

1. **Description of Property Involved**

The Kai Ala Partners LLC (“KAPLLC”) property is located at 75-5944 Alii Drive, Kailua-Kona, Hawaii 96740. (*Exhibit 1*) The property, identified by TMK No. (3) 7-5-019-018, was acquired by Walter Irving Henderson and Jean Henderson in the late 1940’s. On the property was the remains of the old stone walls of a Catholic Church built in 1864. The Henderson’s hired architect Vladimir Ossipoff, FAIA, to design a beach house on the site incorporating the existing stone structure in the design. *Exhibit 1A* Ossipoff designed a two-story structure for the main building and a separate building to house the catchment water tank (converted to a storage room) *EXHIBIT 2A*, a laundry area and bathroom. The hot water heater, to supply hot water to the residence, was also housed in this building. *Exhibit 1B* (Note: At the August 2015 meeting of the State Historic Preservation Division (SHPD) the property (TMK’s 3-7-5-019-018) was listed on the Hawaii Register of Historic Places.) *Exhibit 2*

2. **Statement of Facts**

A. When the County Department of Water Supply installed a water line on Alii Drive, the water tank was removed, and the area was converted into a storage room. In 1998 the County installed a sewer line on Alii Drive and the property’s wastewater system was connected to the sewer line.

B. In July of 1998 KAPLLC received a bill from the Department of Public Works, Wastewater Division in the amount of \$100 which was paid on July 31, 1998. This was the beginning of the Wastewater Division’s double billing for sewer service to this single-family residence.

C. The double billing has continued for the past 23 + years and it was not until Petitioner received a notice of an increase in the sewer fee from \$40 to \$44 that it was realized that the residence was being billed for two sewer fees. Since 1998 KAPLLC has been over billed by the Wastewater Division in the amount of \$7,800. *Exhibit 3*

D. On June 2, 2021, Richard Henderson wrote a letter to Dora Beck, Division Chief, Wastewater Division, asking that the double billing be corrected and that the over charges for sewer service be refunded. *Exhibit 4*

E. On August 19, 2021, Petitioner received a copy by e-mail of Director Mansour’s response to the June 2, 2021, letter to Dora Beck dated June 10, 2021, which had been mailed to the street address of KAPLLC and not to the post office address that was on the letter header and where the Division mails the sewer bills. In his letter, Director

by photos that the property consisted of one residential two-story building and a separate unit with shower, sink, toilet, and laundry area. The Director then went on to say that the billing for the subject property was in accordance with existing Hawaii County Code (HCC), Chapter 21, Article 4, Section 21-31, Sewer user charges for residential customers and proceeded to quote Section 21-31 and Section 21-2 the definition for "Unoccupied units" which states: "*Unoccupied unit means a unit that is not occupied but has accessibility to sewer. Plumbing fixtures located on it, and currently receives a water bill.*" And further stated that if KAPLLC wished not to be charged it could ask for a second inspection of the property showing proof that the sink, toilet, and shower are no longer connected to the sewer line, and the Director would consider not charging for the second unit moving forward. **Exhibit 4A** Section 21-29 Sewer user charge for nonresidential customers include industrial, commercial, agricultural, governmental, and miscellaneous services users, hotels, and service stations. There is no mention of laundry, bath, and storage rooms in this section. The term "Unoccupied unit" appears in only three places in all of Chapter 21, namely, Section 21-2, Section 21-29, and Section 21-31. **Exhibit 5, 6, 7**

F. On August 23, 2021, Richard Henderson replied to Director Mansour, explaining that the delay in the response was due to the wrong mailing address in the Director's letter of June 10, 2021. After quoting Section 21-31, Henderson stated that 21-31 refers to Sewer user charges for residential customers and that "Unoccupied Units" in that Section refers to Single-family dwellings, duplexes, housing projects, condominiums, townhouses, apartments, and dormitories. Storage, utility room and bath are not one of the covered units and therefore KAPLLC is being improperly billed under Section 21-31. In addition, Henderson took exception that the storage, utility room and bath were receiving a water bill, as the only water bill was for the residence. Not mentioned in the letter was the fact that a computer search of Chapter 21 for "Unoccupied Units" produced only three results, in Section 21-2, Definitions: Section 21-29 Sewer user charges for nonresidential customers; and Section 21-31 Sewer user charges for residential customers. **Exhibit 8**

G. On September 23, 2021, Petitioner wrote to Director Mansour about the lack of response to its letter of August 23, 2021, and informed the Director that if no response was received by October 15, 2021, an appeal will be filed with the Environmental Management Commission. **Exhibit 10**

H. On September 28, 2021, Petitioner wrote a letter to Peter Sur, Secretary to the Commission asking when an appeal might be heard. **Exhibit 11**

I. On October 12, 2021, Petitioner wrote to the Environmental Management Commission Secretary, Peter Sur, filing the appeal of Director Mansour's decision refusing to change the billing to a single sewer user charge and refunding the over payments. **Exhibit 12**

J. On October 14, 2021, Peter Sur returned the KAPLLC appeal stating that it was not in compliance with Rule 7-6, the \$50 filing fee was missing (which was submitted, but was overlooked by the Secretary) and Rule 7-3 that requires all appeals to be filed “within 30 days after the decision” (of the Director). **Exhibit 13**

K. On October 19, 2021, Richard Henderson wrote to Peter Sur, enclosing a copy of the \$50 check that accompanied the letter of October 12, 2021, and that the Director had not responded to the letters of August 23, 2021, and September 23, 2021, and based on this KAPLLC was refiling the appeal with another check for \$50. **Exhibit 14**

L. On December 2, 2021, the Environmental Management Commission sent a letter to KAPLLC setting the date for the appeal to be heard at the meeting of the Commission on December 29, 2021. **Exhibit 15**

3. **Argument**

A. The Hawaii County Department of Public Works, Sewer Division has mistakenly and repeatedly charged KAPLLC for two sewer user service fees when they made the original billing in July of 1998.

B. KAPLLC receives only one water bill **Exhibit 18** and one sewer bill **Exhibit 17** with only one amount for the sewer user charge fee, so there is no way to learn from the bill that KAPLLC was being charged for two sewer user fees and was therefore unaware of the double charge.

C. The authority to charge Residential sewer users is provided by Section 21-31 of the Hawaii County Code, Article 4, Chapter 21 which states:

Section 21-31. Sewer user charges for residential customers.

*Sewer user charges for residential customers shall be assessed to all lots accessible to a public sewer or public gang cesspools, which include service for single-family dwellings, duplexes, housing projects, condominiums, townhouses, apartments, and dormitories shall be according to the schedule shown under section 21-36.1. Unoccupied units will be assessed a monthly fee equal to the current monthly user fee. **Exhibit 7***

It is obvious that the unoccupied units refer to the residential customers listed above, namely: single-family residences, duplexes, housing projects, condominiums, townhouses, apartments, and dormitories. There is no mention of a utility room, bathroom, and storage room. Furthermore, the definition of Unoccupied Unit set forth in Section 21-2 states:

*“Unoccupied unit” means a unit that is not occupied but has accessibility to a sewer, plumbing fixtures located on it, and currently receives a water bill. **Exhibit 5***

The structure that houses the utility room, storage room and bath is an annex of the residence and was part of the original construction to house the catchment water tank and provide a laundry area and the site for the hot water heater for the residence. This unoccupied unit **does not receive a water bill**, which is required by Section 21-2.

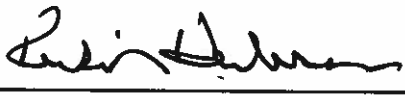
D. Section 21-31 refers to Residential Customers and specifically to single-family dwellings. Black's Law Dictionary defines a dwelling-house in 2. *Real Estate. The house and all buildings attached to or connected with the house.* The main house is connected with the laundry, bath, and storage building by water and electric lines and is an integral part of the residence.

E. Finally, County of Hawaii, State of Hawaii, Bill No. 595, Draft 3, Ordinance No. 92-77, Section 1 (paragraph three, last sentence): *"In essence, the Federal regulations require that the system (the County's sewer user charge system) must collect sufficient revenues to insure that the Federally-funded treatment works are properly maintained and operated **and that all users of the system shall pay their proportionate share based on the users' proportionate wastewater loading.**"* **Exhibit 19** The fact that the laundry, water heater and toilet are located in a storage unit (which contained the former water catchment tank and those architectural constraints imposed by the original stone wall foundation), rather than within the residence, is no different than any other single-family residence with the same items being inside and provides no additional wastewater loading requiring a second **disproportionate** sewer user charge.

4. **Conclusion**

Based on the above, KAPLLC asks the Environmental Management Commission to overturn the Director's decision denying the reduction in the sewer user fee to one service and to instruct the Director to refund the amount of the overpayments made by KAPLLC since July 31, 1998.

Dated: Hilo, Hawaii. December 17, 2021

By 
Richard Henderson
Manager for Petitioner KAI ALA PARTNERS LLC

By 
Richard Henderson II
Manager for Petitioner KAI ALA PARTNERS LLC

List of Exhibits

1. Aerial photo of property.
- 1A. Article from Sunset Magazine showing Ossipoff design specifications
- 1B. Picture of Water Heater Laundry area
2. Letter from the State Historic Preservation Division dated May 18, 2015, placing the property on the Hawaii Register of Historic Places.
- 2A. Picture of Storage Room
3. Print out of payments for Kai Ala Partners LLC sewer fees for the period July 31, 1998, to August 23, 2021. Since August 2021 Kai Ala Partners LLC has paid additional sewer fees of \$176 on October 27, 2021, so the double payment amounts to \$7,888.
4. Letter to Dora Beck dated June 2, 2021.
- 4A. Letter from Director Mansour dated June 10, 2021.
5. Hawaii County Code, Chapter 21, Section 2 Definitions.
6. Hawaii County Code, Chapter 21, Section 29, Sewer user charges for nonresidential customers.
7. Hawaii County Code, Chapter 21, Section 31, Sewer user charges for residential customers.
8. August 23, 2021, letter from Richard Henderson to Director Mansour.
9. No exhibit - Numbering error.
10. September 23, 2021, letter from Richard Henderson to Director Mansour.
11. September 28, 2021, letter from Richard Henderson to Peter Sur, Secretary, Environmental Management Commission
12. October 12, 2021, letter from Richard Henderson to Peter Sur, Secretary, Environmental Management Commission.
13. October 14, 2021, Peter Sur letter to Kai Ala Partners, LLC.
14. October 19, 2021, letter from Richard Henderson to Peter Sur.
15. December 2, 2021, letter from the Environmental Management Committee to Kai Ala Partners, LLC.
16. Affidavit of service by mail.
17. Copy of Wastewater Division Sewer bill to Kai Ala Partners LLC
18. Copy of Department of Water Supply bill to Kai Ala Partners LLC
19. County of Hawaii State of Hawaii - Ordinance No. 92-77 Pages 1 & 2