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MANAGEMENT, COUNTY OF HAWAI'I

BEFORE THE ENVIROMENTAL MANAGEMENT COMMISSION

COUNTY OF HAWAI'I

In the Matter of the Appeal of

Kai Ala Partners LLC

Appellant,

and

Ramzi Mansour, Director, Department of
Environmental Management, County of
Hawai'i

Appellee.

DIRECTOR OF THE DEPARTMENT OF
ENVIROMENTAL MANAGEMENT,
COUNTY OF HAWAII'S PRE-HEARING
BRIEF; CERTIFICATE OF SERVICE

Hearing:

Date: December 29, 2021

Time: 10:00 a.m.

**DIRECTOR OF THE DEPARTMENT OF ENVIROMENTAL MANAGEMENT,
COUNTY OF HAWAII'S PRE-HEARING BRIEF**

COMES NOW, Appellee, DIRECTOR OF THE DEPARTMENT OF
ENVIRONMENTAL MANAGEMENT, COUNTY OF HAWAI'I ("Director"), by and through
his undersigned counsel, hereby respectfully submits his Pre-hearing Brief.

I. INTRODUCTION

Appellant Kai Ala Partners LLC (“Appellant”) appeals the Director’s decision to uphold the 1998 determination that the property located at 75-5944 Ali‘i Drive, Kailua-Kona, Hawai‘i 96740, Tax Map Key (3) 7-5-019:018 (the “Property”), should be billed as two (2) units. The facts show that the Director acted within the authority granted to him by the Hawaii County Code (hereinafter “HCC”) and correctly exercised his discretion in interpreting HCC Chapter 21. **(Exhibit A)**. Additionally, the facts will show that Appellant was provided at least sixteen (16) years of notice¹ that the Property was being billed for two (2) units and year after year for twenty-three (23) years Appellant has failed to bring a timely claim. **(Exhibits H, I, J, K, L, M)**. Thus, the Director’s decision should be affirmed.

II. STATEMENT OF FACTS

1. On May 6, 1998, the County of Hawai‘i Department of Public Works (“DPW”) completed the Sewer Account Update and determined that the Property should be billed for two (2) units. **(Exhibit C)**.
2. On May 7, 1998, DPW confirmed that the Property was connected to sewer. **(Exhibit C)**.
3. On July 31, 1998, Appellant paid his first DPW Wastewater Division bill for \$100.00. **(Exhibit 3, Appellant’s Brief, page 2)**. This first bill included charges for two units. At no time in July of 1998 did Appellant contest being billed for two units.
4. From July 31, 1998 to the present, Appellant wrote a check every other month for twenty-three (23) years to pay his Wastewater Bills. A total of one-hundred forty-one (141) checks. **(Exhibit 3)**.

¹ The Department of Environmental Management converted to a new billing system in 2005 and does not have copies of bills prior. However, that does not mean Appellants previous bills did not indicate two (2) units.

5. On December 16, 2000, the amount due on Appellant's Wastewater bill increased to \$104.00 for two units. **(Exhibit 3)**. At no time in December of 2000, or thereafter did Appellant contest the increase in his bi-monthly bill (for two units).
6. On May 10, 2002, the Department of Environmental Management ("DEM") officially took over management of the Wastewater Division from DPW. **(Exhibit 5, Page 3)**.
7. On December 17, 2002, the amount due on Appellant's Wastewater Bill increased to \$108.00. **(Exhibit 3)**. At no time following this increase did Appellant contest the increase in his bi-monthly bill (for two units).
8. From at least October 12, 2005 to present, Appellant's Wastewater Bills all very clearly indicated that the Property was being charged for two (2) units. **(Exhibit H)**.
9. On April 15, 2019, Appellant was sent a Notice of Wastewater Service Charge New Rates ("Notice"), dated March 15, 2019, which was included with Appellant's April 15, 2019 bill. The Notice indicated that the new per unit rate would be \$35.00 per unit effective April 1, 2019. The Notice also included HCC Section 21-36.1, which showed that the Wastewater Service Charge Rate would be increasing every April for the next five (5) years. **(Exhibit I)**.
10. On June 14, 2019, the Amount Due on Appellant's Wastewater Bill increased to \$140.00 for two units. **(Exhibit M, P)**. Still Appellant did not contest the increase in his bill.
11. On April 24, 2020, Appellant was sent a Notice of Wastewater Service Charge New Rates, dated April 15, 2020, which was included with Appellant's April 24, 2019 bill. The Notice indicated that the new per unit rate would be \$40.00 per unit effective April 1, 2019. **(Exhibit J)**.

12. On June 16, 2020, the amount due on Appellant's Wastewater Bill increased to \$160.00 for two units. **(Exhibit M)**.
13. On April 15, 2021, Appellant was sent a Notice of Wastewater Service Charge New Rates, dated April 15, 2021, which was included with Appellant's April 15, 2021 bill. The Notice indicated that the new per unit rate would be \$44.00 per unit effective April 1, 2019. **(Exhibit K)**.
14. On May 12, 2021, DEM Inspector Antoinette Nakatani ("Inspector Nakatani") inspected the Property and took photos of the one residential two-story building and an accessory building #1 ("Accessory Building"). **(Exhibit E)**.
15. The Accessory Building is approximately 264 square feet and has the following plumbing fixtures: toilet, sink, shower, and laundry area (washer). **(Exhibit F)**.
16. On June 2, 2021, Appellant sent DEM Wastewater Division's Chief Dora Beck a letter explaining that the Property had been incorrectly charged for two (2) units since 1998 and requested a refund of the over charged amount and demanded that the Property be charged for only one (1) unit going forward. **(Exhibit 4)**.
17. On June 10, 2021, after reviewing the available information and HCC Sections 21-31 and 21-2. Director Mansour sent Appellant a letter explaining that the Accessory Building met the definition of an unoccupied unit under HCC Section 21-2 and based on that billing Appellant for two units was both fair and appropriate. Director Mansour informed Appellant that should he want to avoid being charged for two (2) units he would need to remove the plumbing fixtures affixed in the Accessory Building, which included the toilet, sink, and shower which are currently connected to the County's sewer line. **(Exhibit F, 4A)**.

18. On June 15, 2021, the amount due on Appellant's Wastewater Bill again increased to \$176.00 for two (2) units. (**Exhibit M**).
19. On August 23, 2021, Appellant sent another letter to Director Mansour attempting to apply definitions that are not applicable to interpretation of Chapter 21 and claimed that the "service room" (Accessory Building) does not meet the definition of "unoccupied unit." Appellant again asked for a refund and that the billing to be corrected to one unit. (**Exhibit 8**).
20. On October 12, 2021, Appellant filed an appeal with the Environmental Management Commission (hereinafter "Commission") requesting his bill be changed to a single user fee and that Appellant be refunded \$7,800.00. However, this appeal was not filed contemporaneously with the required filing fee attached. (**Exhibit 12**).
21. On October 14, 2021, Appellant's Appeal was returned to Appellant due to defective filing (his failure to include the required filing fee). (**Exhibit 13**).
22. On October 19, 2021, Appellant re-filed the present appeal with the Commission with the appropriate filing fee. (**Exhibit 14**).

III. STANDARD OF REVIEW

Pursuant to Commission Rule 7-13, a director's decision may be reversed, modified, or remanded **only** if the Commission finds that the decision is:

- 1) In violation of the Code [HCC] or other applicable law; or
- 2) Clearly erroneous in view of reliable, probative, and substantial evidence on the whole record; or
- 3) Arbitrary, or capricious, or characterized by an abuse of discretion or clearly unwarranted exercise of discretion.

Emphasis added.

If the Commission does not find that the Director’s decision violated the law, was clearly erroneous, was arbitrary or capricious, or abused his discretion, then the Commission must affirm the Director’s decision. (**Commission Rule 7-12, 7-13**).

IV. **ARGUMENT**

A. **The Director’s Decision Does Not Violate The Hawai’i County Code Or Other Applicable Law.**

The Director’s decision did not violate the Hawaii County Code because his interpretation is not contrary to the definition of “Unoccupied Unit” or the requirements of HCC Chapter 21. “Unoccupied Unit” is defined as “a unit that is not occupied but has accessibility to a sewer, plumbing fixtures located on it, and currently receives a water bill.” (**HCC § 21-2, Exhibit A**). In his June 10, 2021 letter, Director Mansour states, “[t]he basis for the sewer bill for the second unit is being serviced with potable water as the property receives a water bill. It is receiving sewer service as the public sewer system is receiving wastewater from the sink, toilet, shower, and washer.” (Emphasis added). (**Exhibit F**). Appellant’s Accessory Building meets all unoccupied unit requirements as follows:

- 1) being accessible to the sewer - the sewer connection was confirmed by DPW in 1998 as evidenced by the Sewer Connection Card; and
- 2) having plumbing fixtures – Appellant has admitted and provided pictures to confirm the accessory building has a sink, toilet, shower, and washer; and
- 3) receiving a water bill – the Property is receiving a Water Bill from the County of Hawai’i Department of Water Supply. (**Exhibit C, E, 18**).

Appellant argues the Accessory Building does meet the definition of unoccupied unit because the property only receives one water bill. (**Exhibit 8**). However, Appellant is incorrect,

an unoccupied unit itself does not have to receive its own separate water bill, the only requirement is that the Property must receive a water bill. (**Exhibit F**).

Appellant is being billed for two (2) units because his property contains an “unoccupied unit,” which does not violate federal law. Appellant argues that the Director’s decision violates federal regulations because charging two (2) units is more than Appellant’s proportional share. (**Appellant’s Brief, Page 5**). Appellant provides the first two (2) pages of County of Hawai‘i ordinance 92-77 adopted on June 25, 1992. (**Exhibit 19**). Ironically, this is the same ordinance that amended HCC Chapter 21 to include the term “unoccupied unit,” with the purpose of ensuring owners of properties that had multiple units paid a per unit sewer service charge. Also, adopted in Ordinance 92-77 was a residential per unit fee of \$14.00 for 1992 and going up to \$18.00 in 1993. (**Attached Exhibit N, Ordinance 92-77**). Frankly, Appellant’s location and use of this twenty-nine (29) year old statute, clearly shows that Appellant has the wherewithal and ability to read and locate the per unit fee on his bi-monthly bill that was in effect when he connected in 1998, which was \$25 per unit. Consequently, Appellant then should have known when he received his \$100 Wastewater bill that he was being billed for two months of sewer service charges for two (2) units.

The Director’s Decision did not violate the Hawai‘i County Code or federal law. Thus, his decision should be affirmed.

B. Director Mansour’s Decision Was Not Clearly Erroneous As His Decision Is Supported By Substantial Evidence

Director Mansour’s Decision is not clearly erroneous because substantial evidence exists that justify the Director’s decision. A Director’s action would be clearly erroneous if not supported by substantial evidence or when the Commission is “left with the definite and firm conviction that a mistake has been made.” *In re Water Use Permit Applications*, 94 Hawai‘i 97,

119, 9 P.3d 409, 431 (2000). The Supreme Court of Hawai‘i defines Substantial evidence as “credible evidence which is of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion.” *Id.*

To ensure a fair and just decision was made, the Director reviewed Inspector Nakatani’s findings and conferred with Inspector Nakatani and Business Manager Robin Bauman, who have a combined 46 years of experience at the County. Director Mansour reviewed HCC Chapter 21 and specifically focused on how the term “unoccupied unit” had been previously applied. Considering everything Director Mansour reviewed, he decided to keep the designation of two (2) units for the Property. Thus, Director Mansour’s decision was and is supported by substantial credible evidence and his decision should be affirmed.

C. **The Director’s Decision Was Not Arbitrary, Capricious, Or Characterized By An Abuse Of Discretion, Nor Was It Clearly An Unwarranted Exercise Of Discretion.**

The Director’s decision was legally just, sound, and reasonable given the applicable facts and HCC law. The Director’s decision did not disregard rules, laws, or prior practice. Generally, an abuse of discretion occurs when a director clearly exceeds the bounds of reason or disregards rules, or principles of law, or practice to the substantial detriment of the Appellant. *Paul’s Elec. Serv., Inc. v. Befitel*, 104 Hawai‘i 412, 419, 91 P.3d 494, 501 (2004).

As mentioned in Section A above, Director Mansour’s decision was not contrary to law. Further, the Director’s decision did not disregard prior or current practice. In fact, Director Mansour’s interpretation of the definition of “unoccupied unit” is consistent with the interpretation made by DPW’s Wastewater Division in 1998 and as applied throughout the years by DEM Inspectors and former DEM Directors to all County of Hawai‘i sewer users (**Exhibit C**,

D, L). The Director’s decision is a sound and reasonable application of the Hawai‘i County Code and does not disregard rules, laws, or practice. Thus, the Director’s decision should be affirmed.

D. Appellant Is Not Entitled To a Refund Based On His Failure To Timely File A Claim

Appellant’s lack of attention to detail does not entitle Appellant to a refund. From July 31, 1998 to August 23, 2021, Appellant wrote one-hundred forty-one (141) checks paying for two units surely, he looked over his bill and yet still failed to raise a timely complaint. (**Exhibit 3**). Appellant argues that “there is no way to learn from the bill that KAPLLC was being charged for two sewer user fees and was therefore a double charge,” that Appellant is entitled to a \$7,800 refund. (Appellant’s Brief, Page 4). Appellant completely misstates the facts. According to Department records, every bill the Appellant received from (at least) October 12, 2005 till present, very clearly states the number 2 under the Units heading on Appellant’s Wastewater Bills. (**Exhibit H, M**). Further, Appellant’s bi-monthly billed amount changed five (5) times in the last twenty-one (21) years and Appellant still failed to review the charges and raise timely complaints. (**Exhibit 3**). Appellant also received a notice in 2019 and again in 2020 of the new rate changes effective April 1st of those respective years and yet Appellant still failed to bring a claim until now. (**Exhibit I, J, K**).

Hawaii contract law gives parties either two (2) or six (6) years to bring a claim. Creditors are allowed six (6) years to collect a debt. The Appellant was provided, at a minimum, 16 years of notice, that the Property was being charged for two (2) units. The time to file a claim has long passed and expired. Appellant is not entitled to the requested refund of \$7,800 as Appellant’s claim is extremely untimely. Awarding such to Appellant would open the flood gates to any sewer user that fails to properly pay attention to their bi-monthly statements before making payments, let alone for those consumers who do so for twenty (20) plus years.

V. **CONCLUSION**

Based on the foregoing, the Director's decision should be **affirmed** because his decision was not contrary to law, clearly erroneous, arbitrary, or capricious or an abuse of discretion.

DATED: Hilo, Hawaii, December 23, 2021.

Director Department of Environmental
Management, Appellee

By /s/ Malia A. Kekai
MALIA A. KEKAI
Deputy Corporation Counsel
Attorney for Appellee

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.

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I hereby certify that a copy of the *APPELLEE'S PRE-HEARING BRIEF* was served upon the following parties via email on December 23, 2021.

Ritchie Henderson & Richard Henderson, Managing Members:

Richard.henderson@rinvest.com

Ritchie.henderson@rinvest.com

Representatives for Applicant/Appellant
KAI ALA PARTNERS LLC

Dated: Hilo, Hawai'i, December 23, 2021.

/s/ Malia A. Kekai _____

MALIA A. KEKAI

Deputy Corporation Counsel

Attorney for Appellee

ELIZABETH STRANCE 4715
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Attorney for Appellee DIRECTOR OF THE DEPARTMENT OF ENVIRONMENTAL
MANAGEMENT, COUNTY OF HAWAI'I

BEFORE THE ENVIRONMENTAL MANAGEMENT COMMISSION

COUNTY OF HAWAI'I

In the Matter of the Appeal of

Kai Ala Partners LLC

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Appellee.

APPELLEE'S WITNESS AND EXHIBIT LIST;
CERTIFICATE OF SERVICE

Hearing:

Date: December 29, 2021

Time: 10:00 a.m.

APPELLEE'S WITNESS AND EXHIBIT LIST

Comes now the DIRECTOR OF THE DEPARTMENT OF ENVIRONMENTAL
MANAGEMENT, COUNTY OF HAWAI'I, ("Appellee"), by and through his attorney, MALIA
A. KEKAI, Deputy Corporation Counsel, and hereby submits the Witness and Exhibit List in the
above-captioned matter.

I. WITNESSES

Appellee intends to call the following witnesses:

1. Ramzi Mansour, Director, Department of Environmental Management
2. Toni Nakatani, Former Inspector, Department of Environmental Management Wastewater Division
3. Robin Bauman, Business Management Department of Environmental Management

II. EXHIBIT LIST

EXHIBIT INDEX

| <u>EXHIBIT</u> | <u>DATE</u> | <u>DESCRIPTION</u> | <u>PAGES</u> |
|-----------------------|--------------------|--|---------------------|
| A | | Relevant Hawai'i County Code Sections | 1 |
| B | | Hawai'i County Code Section 21-36.1, showing sewer rate changes for the last 3 years | 1 |
| C | 05/06/1998 | Sewer Connection Card | 1 |
| D | 12/20/2021 | Inspector Toni Nakatani Direct Testimony | |
| E | 05/12/2021 | Pictures of structures on Subject Property taken by Inspector Nakatani | 1 |
| F | 06/10/2021 | Letter from Director Mansour to Richard Henderson | 2 |
| G | 12/20/2021 | Director Ramzi Mansour Direct Testimony | |
| H | 10/12/2005 | Bill Reprint showing 2 units, which is the first bill that went out after DEM converted to a new billing system. | 1 |
| I | 03/15/2019 | Notice of Residential Sewer Rate Change | 1 |
| J | 04/01/2020 | Notice of Residential Sewer Rate Change | 1 |

| | | | |
|---|-----------------|--|----|
| K | 04/15/2021 | Notice of Residential Sewer Rate Change | 1 |
| L | 12/20/2021 | Business Manager Robin Bauman Direct Testimony | |
| M | 2019 to Present | Bill Reprints from 2019 to Present | 15 |

Appellee reserves the right to amend this Witness and Exhibit List to include additional witnesses and exhibits, including rebuttal witnesses and exhibits, and issues that may be identified in further discovery at the Environmental Management Commission hearing.

DATED: Hilo, Hawaii, December 20, 2021.

Ramzi Mansour, Director Department of
Environmental Management, Appellee

By /s/ Malia A. Kekai
MALIA A. KEKAI
Deputy Corporation Counsel
Attorney for Appellee

BEFORE THE ENVIRONMENTAL MANAGEMENT COMMISSION

COUNTY OF HAWAI'I

In the Matter of the Appeal of
Kai Ala Partners LLC

Appellant,

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Ramzi Mansour, Director, Department of
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Hawai'i

Appellee.

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the *APPELLEE'S WITNESS AND EXHIBIT LIST* was served upon the parties below via email on December 20, 2021:

Ritchie Henderson & Richard Henderson, Managing Members:

Richard.henderson@rinvest.com

Ritchie.henderson@rinvest.com

Representatives for Applicant/Appellant
KAI ALA PARTNERS LLC

Keyra K. Wong

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Deputy Corporation Counsel:

Attorney for the Appellee

ENVIRONMENTAL MANAGEMENT COMMISSION

Peter Sur

Peter.Sur@hawaiicounty.gov

Secretary for Environmental Management Commission:

Dated: Hilo, Hawai'i, December 20, 2021.

/s/ Malia A. Kekai

MALIA A. KEKAI

Deputy Corporation Counsel

Attorney for Appellee

RAMZI I. MANSOUR, DIRECTOR OF
THE DEPARTMENT OF
ENVIRONMENTAL MANAGEMENT