

ENVIRONMENTAL MANAGEMENT COMMISSION

COUNTY OF HAWAII

SPECIAL MEETING MINUTES

Friday, January 7, 2022

9:04 a.m. to 1:21 p.m.

Zoom

Commissioners present:

Georjean Adams, Chair
Rick Gaffney, Vice Chair
John Burns
Dee Fulton
Lee McIntosh

Others present:

Richard Henderson (Henderson I), Kai Ala Partners/Appellant
Ritchie Henderson (Henderson II), Kai Ala Partners/Appellant

Ramzi Mansour, Director/Appellee
Robin Bauman, Witness for the Appellee
Toni Nakatani, Witness for the Appellee
Malia Kekai, Deputy Corporation Counsel for the Appellee

Keyra Wong, Deputy Corporation Counsel for the Commission
Peter Sur, Secretary for the Commission

Nancy Cook Lauer
Dean Au
Charmaine Felipe
Amy Miwa
Clifford Victorine

1. CALL TO ORDER

ADAMS: Good morning. Good morning. This is Georjean Adams, the chair of the Environmental Management Commission. I'm calling this meeting to order at 9:04. This is a continued special meeting of the Environmental Management Commission being held both in person at the Hawai'i County Office of Aging at Hilo, Hawai'i and online via Zoom. This meeting is being held by interactive conference technology Zoom and shall be automatically recessed for up to 30 minutes to restore communication when an audio visual communication cannot be maintained with all members participating in the meeting or with the in-person location identified in today's agenda, the meeting may reconvene when either audio visual communication is

restored or audio only communication is established after an unsuccessful attempt to restore audio visual communication. If it's not possible to reconvene the meeting as provided within 30 minutes after an interruption to communication, the meeting will be in recess and we'll attempt to reconvene at 1:00 in the afternoon using the same meeting IDs listed in the agenda. If at that time a quorum or remote members and the in-person members are unable to establish and maintain at least an audio only connection by 1:15, then the meeting shall be automatically terminated. All the commissioners definitely need to be showing their presence, but we may have to ask guests to cut their camera.

I would like to introduce the commissioners that we have. I don't know if everybody sees the same line up on their screen that I do, but I'll start in the corner with our in-person Commissioner Lee Macintosh. He represents District 6. I am Georjean Adams. I represent District 9. I'm also the chair of the Commission. Next to me is Keyra Wong, our Deputy Corporation Counsel for the EMC, the Environmental Management Commission. Then we have Dee Fulton, Commissioner for District 7. Our vice chair, Commissioner Rick Gaffney, is in the second row, and then the third row we have John Burns, who is Commissioner for District 1. And did I miss anybody? That's the Commission and we have quorum with five of us to be able to do this hearing. And we'll work through some of the requirements as we move through. Just a reminder, everybody turn off your cell phones.

2. PUBLIC STATEMENTS ON ITEMS ON THE AGENDA

ADAMS: Next up is public testimony. We received no written testimony that I'm aware of, but if any of the public present on this call would like to give testimony on the agenda, which is the single item of the contested case hearing, please identify yourself now.

Seeing no one wishing to give public testimony, I will close the public testimony.

3. NEW BUSINESS

Kai Ala Partners LLC appeal of the Director's decision to bill two wastewater accounts for TMK (3) 7-5-019:018 and (3) 7-5-019:026.

ADAMS: Next will be the agenda for the meeting, which is contested case hearing of Kai Ala Partners LLC appeal of the Director of Environmental Management's decision to bill two wastewater accounts for TMK (3) 7-5-019:018 and (3) 7-5-019:026. This contested case hearing is being held in accordance with Chapter 91 of the Hawai'i Revised Statutes and Part 3 and 7 of the Environmental Management Commission Rules of Practice and Procedure. The issues involved in this case will be Kai Ala Partners LLC's appeal of the Department of Environmental Management Director's decision to bill two wastewater accounts for those TMK numbers. This hearing was set pursuant to Kai Ala Partners LLC appeal dated October 12, 2021.

The Commission anticipates that we may convene an executive meeting regarding this contested case hearing matter pursuant to Hawai'i Revised Statutes, Section 92-5, for the purpose of consulting with its attorney, Keyra Wong on the Commission's powers, duties, privileges, immunities and liabilities. That would require a two-thirds vote of the commissioners present at this meeting. I would like at this time to have each party and/or their legal

representative state their name for the record. If we could have the Kai Ala Partners identify themselves for the record.

HENDERSON¹: Good morning, Commissioners. This is Ritchie Henderson, representing Kai Ala Partners LLC. With me today is my father, Richard Henderson, and our guest iPad for Rich Peterson.

KEKAI: Good morning, Commissioners. I am Deputy Corporation Counsel Malia Kekai, representing the Department of Environment Management, actually, the Director, Ramzi Mansour, who is also here. We also have the other witnesses, Antoinette or Toni Nakatani, the inspector of the property and Robin Bauman, Business Manager.

ADAMS: Okay, I guess I don't know if I should ask now or maybe later whether Mr. Peterson will be testifying or participating in this meeting as a representative.

HENDERSON: No, Commissioner, he is observing.

ADAMS: Okay, thank you. Got some housekeeping matters to go through. One thing is I will make some noise, maybe on my phone. Although I tried to make it quiet, we are going to take an early lunch break at 11:00 a.m. So we'll see where we are in the hearing of that and we will break for lunch from 11:00 to 12:15 and then resume the meeting. So if everybody helps me make sure that we get that timing right, Rick Gaffney needs to leave the hearing at that point. I'd like to now announce the standard of appeal. With respect to the EMC's decision today, EMC Rule 7-13 applies, wherein a decision appealed from may be reversed or modified or remanded only if the Commission finds that the Director's decision is 1) in violation of the code or other applicable law or 2) clearly erroneous in view of the reliable probative and substantial evidence on the whole record or 3) arbitrary capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion. Moving now to announcements about the exhibits and prepared testimony. The Commission is in receipt of Appellant's exhibits 1 through 19, with Exhibit 9 being created in error. There's nothing there. And we are also in receipt of Appellant's Exhibits A through N. I'd like to ask the DEM parties whether they have gotten their copies of those Appellant exhibits.

NAKATANI: I have received mine.

MANSOUR: This is Ramzi Mansour, I did receive mine as well.

BAUMAN: This is Robin Bauman. I have received mine as well.

ADAMS: Okay. So, Robin Bauman, you're also a participant, and we missed you when we were recording who was here. So the commissioners, have you all received the full extent of the Appellants' exhibits?

¹ Unless otherwise noted, "HENDERSON" means Richard "Ritchie" Henderson II

GAFFNEY: Rick Gaffney, yes, I have.

ADAMS: Yeah, I don't know that we need a roll call, but just to make sure. In the interest of time and efficiency, I have authorized as chair that in lieu of taking direct testimony, the parties have submitted prepared testimony pursuant to EMC Rule 3-13(e). The prepared testimony is subject to cross examination of the witness on matters contained in the prepared testimony. So we'll start with the Appellant. The Appellant has prepared testimony that is submitted with its pre-hearing brief on December 17, 2021. And here I need to ask if everybody got a copy of that. Since it's not labeled as an exhibit, we would like to designate it as Appellant Exhibit 20. Are there any objections to that?

WONG: I'm sorry, Madam Chair, if I may interject, I think just for clarity, what the chair is saying, that Appellant submitted prepared testimony. It wasn't labeled as an exhibit, but we want it to become a part of the record. So we would like to label that Exhibit 20 if the parties don't have an objection to that. Do you have an objection, Ms. Kekai? Ritchie or Richard? Okay. Thank you. I'll label it as Exhibit 20. Thank you, Chair.

ADAMS: This is my first run through as a hearing officer. So Keyra is keeping me straight. Regarding Appellees, the DEM prepared testimony. Appellee has submitted on December 20 and 21st the prepared testimony of Inspector Toni Nakatani, that's Exhibit D, and prepared testimony of Director Mansour, Exhibit G, and prepared testimony of Robin Bauman, Exhibit L. Did everyone get copies of that? The Richards? Commissioners?

(All agree)

ADAMS: And I'll assume DEM has their copies. this one, I may ask Keyra to step in and explain if you don't follow it. Are the parties willing to stipulate to the submission of any exhibits or all exhibits and which exhibits are stipulated to.

KEKAI: Director Mansour is fine with stipulating to all exhibits from both Appellants and, of course, our own.

HENDERSON: We're in agreement with all of the exhibits.

WONG: For the record. I will on behalf of the Commission receive all Appellant Exhibits 1 through 20, with the exception of 9, and Appellee's Exhibits A through N. Thank you.

ADAMS: Thank you very much. Now we will start the contested case hearing with opening statements. If you would like to make them, I would please ask you to keep them to about five minutes and Appellant can go first. Who is going to be speaking on behalf of Kai Ala --

HENDERSON: Chair Adams, I will be speaking on behalf of Kai Ala Partners. This is Ritchie Henderson in the same office as my father, Richard Henderson, and I would like to address the

Chair and Members of the Commission to say that we are here today to ask for your favorable consideration of Kai Ala Partners LLC's appeal from the decision and Director Ramzi Mansour's letter dated June 10, 2021, denying our request that the billing for the property at 75-5944 Ali'i Drive, Kailua-Kona, be changed from two service charges for sewer service to a single sewer service charge, and that the amount illegally overcharged by the sewers division since July of 1998 be refunded. In the course of our testimony further on today, we'll go into the Section 21-31 that explains the Code and the chargeability of the county's Wastewater Department and what can happen. Finally, the Environmental Management Department sewer division has for the past 23 years collected a double charge for sewer user fees from Kai Ala Partners and therefore has unjustly enriched itself. Supreme Court Justice Nakamura has described unjust enrichment as a claim for unjust enrichment requires only that the plaintiff prove that she or he conferred a benefit upon the opposing party and that the retention would be unjust. And that is *Durette v. Aloha Plastic Recycling Inc.* 105 Hawai'i 490, 501 100 P. 3d 60, 71, 2004. Thank you for your favorable consideration of our evidence and of our petition request to change the sewer user fee to one charge, and that the amount of unjust enrichment of \$7,888 be refunded to Kai Ala Partners. Thank you very much.

ADAMS: Thank you. Appellee, do you have opening statements and who will be making those?

KEKAI: Yes. Thank you. Malia Kekai for the Director. Good morning, commissioners. I kind of want to keep this real simple. This is not about unjust enrichment. This is about a decision was made by a Director back in 1998, and that decision was correct. And what's being appealed now today is the decision of this Director, not the director back in 1998. So what the Commission will be looking at is, did this Director violate the law, abuse his discretion, or was his decision clearly erroneous? And I think the answer to that, and I think the facts show it clearly is no, it wasn't. And so I don't think the Commission has the evidence to overturn his decision at this point. As I laid out on my brief, the Appellants had years and years of notice and knew that they were being billed for two units. Had they come for it earlier, back in 1990 or even in 2000, when the first change was made to their bill, then this would all have been avoided if the decision was incorrect, and that's what we're here – we're not here to decide whether the decision is correct or not. You're here to decide whether it was an abusive of discretion, clearly erroneous, or a violation of the law. So thank you very much.

ADAMS: Thank you. Now it's time for the Appellant to put on its case. The Appellant has an opportunity to present its case on the appeal pursuant to HRS 91-10.5. Appellant has the burden of proof, including the burden of producing evidence as well as the burden of persuasion. The degree or quantum of proof shall be the preponderance of evidence. To prove something by the preponderance of the evidence means to prove that something is more likely so than not so. It means to prove by evidence which, in your opinion, convinces you that something is more probably true than not true. It does not mean that a greater number of witnesses or a greater number of exhibits must be produced. Appellant's Exhibit 20 includes the written testimony of the managing partners and representatives of Appellant Kai Ala Partners, LLC. I will now swear in Ritchie Henderson. Do you, Ritchie Henderson, solemnly swear or affirm

that the testimony you are about to provide is the truth, the whole truth, and nothing but the truth?

HENDERSON: I do, thank you.

ADAMS: Since Richard Henderson is not intending to provide testimony, do I need to swear him in too, Keyra?

WONG: I would share just in case commissioners or Ms. Kekai have questions and Mr. Richard Henderson wants to provide answers, I would ask that you swear him in. Thank you.

ADAMS: All right, then. Mr. Richard Henderson, do you solemnly swear or affirm that the testimony you're about to provide is the truth, the whole truth and nothing but the truth?

RICHARD HENDERSON I: I do.

ADAMS: Thank you. Is there anything else in addition to the Exhibit 20 that either Ritchie or Richard Henderson would like to add?

HENDERSON: Chair, I think that we have presented our case pretty succinctly in what we've provided the Commission already. I would like to reiterate the fact that a definition does not give you authority to make a charge. The authority is contained in the Code under Section 21-31, which we provided you, and that stated sewer user charges for residential customers shall be billed as follows, and the sewer user charges for residential customers shall be assessed to all lots accessible to a public sewer or public gang cesspool, whether connected or not, under charges for sewer service to residential customers, which include service for single family dwellings, duplexes, housing projects, condominiums, townhouses, apartments, and dormitories shall be according to the schedule shown under 21-36.1. Unoccupied units will be assessed a monthly fee equal to the current monthly service fee. It is clearly stated that the unoccupied unit, as defined previously, is applying to those units listed above, namely single-family dwellings, duplexes, housing projects, condominiums, townhouses, apartments, and dormitories. It can't be any simpler than that. Again, you cannot use definitions to charge as authority. So I would say that in essence, our case rests on the proper interpretation of the code, and I would add in light of counsel's opening statement, and the 143 billings that have been provided to Kai Ala Partners over the past year, that we were not provided the sewer user card that is contained in their files, which states that we were being charged from the outset two sewer user fees. And clearly, as our evidence is presented, there is no difference in wastewater loading between a single-family residence that contains within it a laundry facility, and a single family residence that has an out-structure that contains the laundry service there. Given the same amount of water consumption, there is no unproportionate wastewater loading. So we stand on the law that says that right now the Wastewater Division is in violation of federal regulations in charging two sewer user fees to Kai Ala Partners. And if the sewer department is looking for their funding from the EPA and being in violation of their mandated change in how they apply sewer charges, that this Commission should take a look at what's

going on in this case and make the right decision. We'll have further evidence as we cross-examine the witnesses of the DEM. Thank you.

ADAMS: Thank you. Do any of the commissioners need more time to read the testimony? If not, we'll move to cross examination, Ms. Kekai, cross examination of Ritchie Henderson. And I suppose also, Richard Henderson, if you wish to.

KEKAI: Chair Adams, we have no questions at this time. We are confident in our case.

ADAMS: Do any of the commissioners have a question of the Henderson?

McINTOSH: This is Commissioner McIntosh. I was a little confused that I don't know if I should ask the question now. But earlier they said that they didn't receive the billing printing we've gotten. So I was wondering what they did receive or if that's pertinent or not. I don't know.

WONG: I think that's a question for either of the Henderson.

HENDERSON: I'm sorry, but whoever was speaking their volume was so low, we couldn't hear the question.

McINTOSH: All right. What I was asking was that you stated that you did not receive these Billings that are in the printouts that we've been given. So I was wondering what they actually sent you, if it was included in what we've been given or not.

HENDERSON: In answer to your question, what we were not provided with was Exhibit C, which is their sewer wastewater card that somewhere on there shows that there's going to be 12 hookups – I don't know. That's what we didn't receive. We received a bill from the beginning. But as any person that gets a bill from the county thinking that it's correct, just opens it up, writes out the amount, puts it in the mail and sends it in. And we've done that for 143 billings.

ADAMS: Did that answer your question, Commissioner McIntosh?

McINTOSH: Yes.

ADAMS: I had a question. This is Georjean Adams, is this outbuilding laundry building, however you are characterizing it, is the wastewater from that shower, toilet, sink and washing machine connected to the public sewer directly or does it go to the house and then the house's connection to the public sewer?

HENDERSON; There is a wye connection that brings in that sewer to the house sewer and then a single connection to the lateral, to the sewer collector line in Ali'i Drive.

ADAMS: Thank you. Are there any other questions? Make sure I follow this right, Ms. Kekai. Do you have any follow up questions? Redirect?

KEKAI: No, chair.

ADAMS: Okay. Next we're on to redirect examination. Does either representative of the Appellant have any additional testimony to give based on the questions that we have asked? If none, does the Appellant have any additional witnesses today?

HENDERSON: This is Ritchie Henderson. No, we don't.

CHAIR: Okay, thank you. So the parties did stipulate to the exhibits, so I don't need to do that piece. And so it sounds like we are now closing the Appellant's case in chief, and we have received the exhibits into the record.

WONG: Sorry, Madam Chair, if I may interject briefly. This is kind of an odd setting. So sorry for interjecting, but I guess I would give the commissioners one last opportunity to ask any questions of the Appellant, and this could be related to any of the exhibits, any of their testimony that they gave today or any questions that you have of the Appellant. This is the time for the Appellant to prove its case. And so I want to make sure that the commissioners have the opportunity to ask any questions that they might have.

ADAMS: Okay. Thank you for that, clarification. So any questions you have of what has been said by the Appellants or any of their exhibits.

GAFFNEY: This is Commissioner Gaffney. I have a couple of questions. I'm curious what other facilities in the main residence are connected to the sewer? In other words, is there a kitchen? Is there another bathroom? What else is connected to the sewer?

HENDERSON: This is Ritchie Henderson. Commissioner Gaffney, In response to your question, there is a kitchen sink. There is an upstairs toilet, sink and shower. And there is an outside shower, sink, and toilet right at the front door. The house was built on the original 1864 stone wall foundation and Ossipoff, the architect that designed it, did not include within the structure any laundry facilities. And that was put on the outside, where a 20,000 gallon catchment tank needed to be installed and enclosed because Kona did not have municipal water at the time. And in that outside catchment tank, storage shed area, he housed the laundry area, bath and toilet.

GAFFNEY: Thank you. And I have one other question. Obviously, before the sewer system was put in, there was a cesspool on the property. And how much use does this house get?

HENDERSON: In my lifetime, the house was finished, I guess, in 1953, the year I was born. Growing up here in Hawai'i, we spent our summer vacations over there for two, three months a

year. And then more recently, the house has maybe a weekend a month or two or three weeks a month, depending on family usage of it, vacations and stuff like that.

GAFFNEY: So all the use is by the family. It's not a rental unit.

HENDERSON. Family and family friends, close friends.

GAFFNEY: Thank you.

CHAIR: Are there any other questions from the commissioners, or having heard that, from Appellee?

KEKAI: No questions.

ADAMS: Okay. Seeing none. We'll move on to the Appellee's case. Ms. Kekai, which exhibits and witnesses are you calling?

KEKAI: First witness is Director Ramzi Mansour.

ADAMS: Okay. Ramzi Mansour, do you solemnly swear or affirm that the testimony you are about to provide is the truth, the whole truth and nothing but the truth?

MANSOUR: I do.

ADAMS: Thank you. Is Exhibit G your written testimony?

MANSOUR: That's correct.

ADAMS: Do the commissioners need any time to read through Exhibit G? All right. Is everybody okay? Moving on, then. Do you have anything to add Mr. Mansour? Director Mansour, to your written direct testimony?

MANSOUR: Just as I was listening to Mr. Henderson's comments about the wye connection to the sewer. Every wye can be considered as a separate connection. So you pretty much have two connections tied into the main sewer line. You don't have that standalone building, you don't need the wye connection unless you only have one connection, which is one unit. In his own definition of describing the property, he is stating in page 2, the main building and separate building. The definition for a building within our chapter is very clear. It says building a house or sewer means that portion of the sewer line extending from a building to the public sewer. And he just stated he had a wye connection to that sewer, so that by itself gives the impression it is two separate buildings, two separate connections. In addition to that, I just state it is, when I first took on that request, and it's not an easy decision that was made. I had to speak to my staff. I had to do research, and the code is very clear. When the code was written, it went through public hearings. Mr. Henderson, could easily have attended these

public hearings and he could have voiced his objection during the public hearing for the current establishment. That's all I have.

ADAMS: Okay. Do the Appellants have any cross examination of Mr. Mansour?

HENDERSON: Chair, this is Ritchie Henderson. Yes, we do.

ADAMS: Go ahead.

HENDERSON: In your direct testimony, item No. 10, you stated that the tank house building qualified as an unoccupied unit as currently defined. Director Mansour, do you know where the term unoccupied unit is used in Chapter 21?

MANSOUR: Yes, I did drive by the property, but I did just to satisfy my own curiosity, it is from an engineering point of view, it is a structure, it is a building that stands detached. So for me to imply that the permission, it was clear to me that the definition implies that building. It may have been back, I cannot speak what went on back in the old days, if it was water catchment. I'm sure it was modified. It has windows, it has doors, as you have stated and testified, it has a toilet, has a water heater. All those plumbing fixtures fit the definition of the code, and there is a building (unintelligible).

HENDERSON: Director Mansour, the term unoccupied unit is found in only three places in all of Chapter 21: In the definition as Section 21-2, in Section 21-29, sewer user charges for nonresidential customers, and Section 21-31, sewer user charges for residential customers. Director Mansour, are you familiar with Section 21-31 of the Hawai'i County Code, which gives the Department the authority to charge a sewer user fee for residential customers?

MANSOUR: Yes.

HENDERSON: That section is made up of three sentences: 1) Sewer user charges for residential customers shall be assessed to all lots accessible to a public sewer or public gang cesspool, whether connected or not. 2) User charges for sewer service to residential customers, which include service for single family dwellings, duplexes, housing projects, condominiums, townhouses, apartments and dormitories, shall be assessed according to the schedule shown under Section 21 36.1. 3) Unoccupied units will be assessed a monthly maintenance fee equal to the current user fee. In your understanding of Section 21-31, does the last sentence refer to types of residential units listed in the second sentence?

MANSOUR: It's defining these units and the building that you have defined under dwelling unit means any habitable room or roof space. So even if your building is outside the detached, it has the possibility of lights, and I cannot speak in the past, but it definitely had the front end fixtures to qualify. Therefore, it falls under the same definition of unoccupied.

HENDERSON: Director Mansour, is there any language in Section 21-31 that gives the director the authority to charge a sewer user fee for a storage room, utility room, and bath?

MANSOUR: It's not qualified as storage units or utility. In your own definition, you define it as a building, and even our own chapter defines it as a building. So it is a detached building, a storage room. Most of the storage room(s) doesn't have a toilet, doesn't have a water heater, it doesn't have all these plumbing fixtures. Storing room is for storage. (Unintelligible) You have stated earlier that the resident itself has the plumbing fixtures to qualify it as a building. So you have the same building, mimicking the same plumbing fixture as the resident house, and thus then you have two units. It's not attached, it's detached. It's about 40 feet away from last year, plus or minus from your main residence. So it becomes a detached unit, detached structure, detached building, and it qualifies for a dwelling. And you have a wye connection to it.

HENDERSON: So in the code, you're saying that the code allows you to charge for a storage building?

MANSOUR: I think that's where the disagreement, you call it a storage building. I call it a building with a detached accessory.

HENDERSON: Director Mansour, are you familiar with the Hawai'i County Ordinance 92-77, (Bill No. 595, as amended to Draft 3), the purpose of which was to revise the sewer billing system to comply with the 1972 Federal Water Pollution Control Act, PL 92-500?

MANSOUR: Not in detail. I was reading what I was supplied.

HENDERSON: This important ordinance was passed so that the county could receive grants through the Environmental Protection Agency. Are you familiar with the federal regulation that required that the system must collect sufficient revenue to ensure that the federal funded treatment works are properly maintained and operated, and that all users of the system pay their proportionate share based on the user's proportionate wastewater loading?

MANSOUR: Yes.

HENDERSON: Director Mansour, does a residential dwelling that has a laundry and bath area located in an annex building create a larger wastewater loading than a dwelling that those facilities are located within the dwelling? They both have the same water consumption?

MANSOUR: No, it does not because it has two separate wyes. So now that additional building with the wye connection to it adds additional loading, because it is a standalone attached structure. If you don't have that structure, you don't have the wye that connects to the sewer, you only have one wye. Now your lot has two separate wyes connected.

HENDERSON: The comparison, Mansour, was to a laundry facility located within a single-family residence and a laundry facility located outside of the single family residence. Does that have a disproportionate share of wastewater loading, given the same water consumption?

MANSOUR: If it's the same water consumption, it's the same (unintelligible). But you have two different laundries and potentially the probability you can have two different uses. So the water consumption, unless, like, say that thing one of the commissioners asked about the water consumption (unintelligible). So I don't have access to your water consumption. But this has been looked at as a connection to the sewer. When you have two wyes, two connections, that is going to be two possible (unintelligible) to the sewer.

HENDERSON: Well, as a correction, there's only one wye. There's not two wyes. Director Mansour, in your testimony, you stated that you were familiar with the term unoccupied unit. Section 21-2, the definition of unoccupied unit ends with the wording and currently receives a water bill. Do you know if that unoccupied unit receives a water bill from the Department of Water Supply?

MANSOUR: It receives a water bill through your property. I'm sure when you turn the faucet on, you have water, correct? So that water is being billed through the Water Department. So that unit receives water unless it receives a water bill. If it's (unintelligible) the resident still receives the water bill. Otherwise you won't have water to the plumbing fixtures. So common sense, you turn the water on, you got water out. Somebody is going to pay for the water, automatically you are getting a water bill.

HENDERSON: If there was no water bill for the residence at 75-5944 Ali'i Drive, Kailua-Kona, would you change your decision regarding the charging of the tank house a separate sewer user fee?

MANSOUR: As I stated in my prior letter to you, Mr. Henderson, the code is very clear about having plumbing fixtures. We ask, if you don't want to be billed, for us to change our mind, these fixtures in the detached structures need to be disconnected to qualify it, especially when you have a toilet. That's black water. That's going to the sewer. It needs to be disconnected to qualify for us to change our (unintelligible).

HENDERSON: Director Mansour, in your direct testimony, you said that the subject property receives a water bill as shown by the bills included. There was no water bill in the exhibits accompanying your testimony. Only wastewater bills. Was this because there is no water bill for the property located at 75-5944 Ali'i Drive, Kailua-Kona?

MANSOUR: The water bills are issued by a different department.

HENDERSON: Your testimony stated that you included water bills in the exhibits and they were not there.

MANSOUR: I refer that to our Counsel. I think some of these exhibits were put together or we could refer it to my (unintelligible).

HENDERSON: Director Mansour, based on your testimony, Item No. 11, if there is no water bill, should the Department, the Department should not have charged Kai Ala Partners a sewer service fee for the unoccupied unit for the past 23 years.

KEKAI: Sorry, clarification needed. You are referencing No. 11. Where in there does it say that Director Mansour said that the bill was included? I think that there needs to be a clarification. He means –

HENDERSON: No. 11. In his testimony, states as currently defined, 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. The subject unit is accessible to sewer as shown by the sewer connection card, has plumbing fixtures connected to it, as shown by the pictures of the laundry, sink, and water heater. And the subject property receives a water bill as shown by the bills included.

KEKAI: Okay. And then I'll clarify that his testimony was the bills included with your exhibits.

ADAMS: I need to step in. Ramzi, you're coming across a little garbled. I don't know if there's anything you can do to get closer, enunciate. I'm not sure where the problem is coming from.

MANSOUR: I think I have construction. We just moved to the new building and I have construction across the street so I cannot go out and tell them to stop construction like you have mentioned you could tell the gardener to stop, but I do apologize for that. So I'm trying to control the mic (unintelligible).

ADAMS: Thank you. Excuse me. Do you have any more questions?

HENDERSON: Yes, I can continue. Director Mansour, if the inspector who authorizes the charging of two sewer user fees for the residence and tank house at 75-5944 Ali'i Drive, made a determination (unintelligible) Kai Ala Partners has paid a total of over \$7,888 in charges to the Department, would this constitute a situation where the Department was unjustly enriched?

MANSOUR: In my opinion, it does not. If the inspector made a mistake and you were aware of it early on, it could be resolved as mentioned earlier. If it were challenged earlier, maybe it could be looked at and looked at again. But I don't believe so.

HENDERSON: Under Hawai'i law, the term unjust enrichment has been described by Justice Nakamura of the Hawai'i Supreme Court as quote, claim for unjust enrichment requires only

that the plaintiff prove that he or she conferred a benefit upon the opposing party, and that the retention of the benefit would be unjust, cited from *Durette v. Aloha Plastic Recycling, Inc.* 105 Hawaii 490 504, 100 P. 3d 60, 74, 2004. Do you agree with Justice Nakamura's description of unjust enrichment?

MANSOUR: If an inspector made a mistake, the intention, it's a mistake. It's not for the purpose of purposely enriching the Department. I'm not familiar with the cited case that we have been cited in this conversation, but if intentionally, it was shown with disregard to the code, that's different. But if an inspector, I'm saying a hypothetical, as if a mistake was made, it was not intentional. But in this situation, the inspector did the right thing based on the code, and the definition of the (unintelligible).

HENDERSON: In the case of Kai Ala Partners LLC, since 1998, it has conferred a benefit to the county's Environmental Management Department in the sum of \$7,888 in erroneous sewer charge fees, that the county's retention of these fees and that the county's retention of these fees is unjust. The remedy for unjust enrichment is restitution the return of \$7,888 to Kai Ala Partners. Based on the above and what we reviewed, do you agree that these funds should be returned to Kai Ala Partners by the Environmental Management Department sewer division?

MANSOUR: I don't think so. I still believe the inspector did the right thing based on what was given in the code. It's a county code. He was doing the job or her job. And as far as the interpretation is good and doing their job, I think they did it. They did it right.

HENDERSON: No further questions, Chair, of this witness.

ADAMS: Thank you. Okay. I understand. Ms. Kekai, do you have redirect examination of this witness?

KEKAI: Not at this time, Chair. I will allow the commissioners to ask their questions.

ADAMS: Okay. Do the commissioners have question for Director Mansour?

McINTOSH: This is Commissioner McIntosh. I had a question regarding the wye connection for the director. So if the building didn't have a wye connection, it went to the main building or the house, Would it still be considered an unoccupied unit? I was just trying to figure out when buildings are charged twice, or how that works.

MANSOUR: If it doesn't have a wye connection, then it won't be serving, it won't be distributing to add wastewater into the sewage system, so it won't be considered as unoccupied because it's not connected to the sewer. So I would imagine the fixture units within that building would be contributing to a sewer system, the public sewer system.

ADAMS: Are there any other questions from commissioners. Dee Fulton, what are your questions?

FULTON: I'm almost embarrassed to have to ask this question or to phrase it this way, but I'm looking at the code that has been quoted here many times and it starts out, "sewer user charges for residential customers shall be assessed," and then it goes on to say "unoccupied units." So I guess my rather silly question but needs to be asked is, has this unit ever been used as a residence? Was it ever intended as a residence?

ADAMS: I don't know that that's a question --

HENDERSON: No. The answer to your question, this is Ritchie Henderson, it housed a 20,000 gallon storage water storage catchment tank. And when that was removed, it was turned into storage. So it was either storing water or it was storing items as the pictures that were provided show.

FULTON: So just to recap, that unit, which does not have its own connection to the lateral, does not have an independent connection to the sewer system, it is not a residential customer, because nobody has ever resided in it. Okay. And it has never received an independent water bill. I just want to make sure all those points are straight with me. Has it ever received an independent water bill?

HENDERSON: That unit that we're talking about, that detached building does not have an individual address. It is included in the address at 75-5944. That unit does not have a cooking kitchen facility in it. It does not have a dining area.

KEKAI: Sorry Keyra, the Appellant has had their chance to present their case. And we're supposed to be questioning Director Mansour.

ADAMS: Thank you. Yeah. I think we're looking for questions that Ramzi Mansour can answer. And if we go back and reopen Appellant's part of the case, then you could ask all those questions.

HENDERSON: I apologize. I thought she was asking me for clarification.

ADAMS: I think we can get there. And it's fine that you've given the information, but I think just to follow the order, Now it's not the time. The time, now, if other commissioners have no more questions for Director Mansour, we moved to your second witness, if you have one.

GAFFNEY: I have an additional question. Please. Director Mansour, can you describe the decision that was made in 1998 by your predecessor please?

MANSOUR: I cannot. I don't know. I would imagine they utilize the same code I'm using today, but I don't know what went through their minds. The only common thing between us and them is the code.

GAFFNEY: So Corporation Counsel Kekai mentioned this 1998 decision. Can you describe it for us, or should we do that at another time?

KEKAI: If you have questions about 1998, I think they would be better for Inspector Nakatani. She would have more be able to answer questions about the process that was followed back then, if that's what you needed.

GAFFNEY: Okay, I'll hold that question.

ADAMS: Okay. Thank you. Any other questions from the commissioners for the director?

McINTOSH: This is Commissioner McIntosh, I have one more question. Is there a statute of limitations that they can request renumeration? I kind of thought, you know, the government has set the law how far back they could ask to be reimbursed if a mistake was made for this?

MANSOUR: I think Malia, our Corporation Counsel, has shown the statute, it's two years to six years I believe. It's stated in the document before you.

ADAMS: Do you remember which exhibit, Malia, you have that information in?

KEKAI: That was provided in my brief on page – the basic law is that if this were deemed the claim you have two years. If it was deemed the contract, you have six years. You have six years. It is on page 9 of my brief, the last paragraph.

ADAMS: Did that answer your question, Lee?

McINTOSH: Yes, it did.

GAFFNEY: I have a follow up question. As I read the brief, it was my understanding that that was state law. Is there anything in the ordinances relevant to the sewer charges or in county law that specifies the statute of limitations?

MANSOUR: I refer that question to our counsel.

KEKAI: There's nothing in the sewer chapter that addresses residential, only non-residential. Residential customers have one year to bring claims.

GAFFNEY: Does County law a have specific statutes of limitations, or do they defer to state law?

KEKAI: Usually when we go to court raising state statutes.

ADAMS: Anything else from the commissioners? Seeing none, I ask Malia Kekai whether you have other witnesses?

KEKAI: Yes. Thank you. We would now like to call Inspector Antoinette Nakatani.

ADAMS: I need to swear you in. Do you solemnly swear or affirm that the testimony you're about to provide is the truth, the whole truth and nothing but the truth?

NAKATANI: I do.

ADAMS: And is Exhibit D your written testimony?

NAKATANI: Yes.

KEKAI: Sorry, Chair. Just one clarification for the record. I realized that the second half of her answer for No. 11, the written testimony was cut off, so I just would like to add it here. So it should actually state: "Yes. Looking at the connection card on file at DEM Wastewater Division, the determination of two units is correct," but that got cut out. So I just wanted to add that for the record. Again, it should read "Yes, looking at the connection card on file at DEM Wastewater Division, the determination of two units is correct."

WONG: Okay. Can you email myself and the parties and Peter a copy of that to complete the record to properly show Exhibit D, and then you can have Ms. Nakatani testify further to what you stated.

ADAMS: Do Appellants have any cross examination of this witness?

WONG: I'm sorry, Chair. Did we swear in Ms. Nakatani?

ADAMS: Yes, I did.

WONG: Okay. And does Ms. Nakatani have anything in addition to her written testimony to offer?

ADAMS: Well, maybe that's the way to read in what you should have had written and answered to No. 11, in your testimony.

NAKATANI: Are you asking me a question?

ADAMS: Yeah, I think. Why don't you just read the full answer to No. 11 in your written testimony? That way it will be on the record.

NAKATANI: Malia, you have that paper, yeah? I only have the older one. Hang on. Sorry about that, guys.

ADAMS: Or perhaps just answer the question now, was that a correct determination?

NAKATANI: I would say that looking at the connection card that was at our office on Railroad Avenue, that two units were there at that time in 1998, and billed accordingly.

ADAMS: Ms. Kekai, if you have any more questions for your witness?

KEKAI: No.

ADAMS: Okay. Mr. Henderson, do you have cross examination of Ms. Nakatani?

HENDERSON: Yes, chair. I do have questions for Ms. Nakatani.

ADAMS: Go ahead.

HENDERSON: Good morning, Ms. Nakatani. When did you leave your position at the Department of Environmental Management?

NAKATANI: December 1, 2021.

HENDERSON: Thank you. Ms. Nakatani, during your 28 years with the Department of Environmental Management, were you familiar with Ordinance 92-77 that changed the county's user charge system to comply with federal guidelines?

NAKATANI: I am aware of that. Yes.

HENDERSON: You are familiar with the ordinance.

NAKATANI: I am somewhat familiar. I knew it happened, but, yeah.

HENDERSON: Ms. Nakatani, is it true that those guidelines require that the system must collect sufficient revenue to ensure 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 user's proportionate wastewater loading.

NAKATANI: I've heard of those statements before. Yes, sir.

HENDERSON: So you say in the affirmative, it is true. Ms. Nakatani, in your inspection of properties, if laundry facilities are located outside of the main residence compared to residences with laundry facilities within the residence, is there a difference in wastewater

loading between the two residences, given they had similar water bills from the Department of Water Supply?

NAKATANI: That I wouldn't be able to answer.

HENDERSON: Do you need me to repeat the question?

NAKATANI: No, I'm sorry, sir. I don't have knowledge of what the loading would be coming out of that separate building. So I wouldn't have knowledge of the additional loading added. Sorry.

HENDERSON: Well, the question stated that they both received the same water bill.

NAKATANI: Correct.

HENDERSON: Would there be a difference if the laundry was located outside of the main residence rather than within the residence?

NAKATANI: I'm not sure, sir.

HENDERSON: In 2021, when you inspected the property at 75-5944 Ali'i Drive, did you have access to the residence and the storage accessory building? And did you observe laundry facilities located in that structure in the separate unit?

NAKATANI: In the separate unit, yes. In the smaller unit, yes.

HENDERSON: So you did not see any laundry facilities in the main residence?

NAKATANI: No, I did not, sir.

HENDERSON: In your testimony, you stated that in 1998, when an inspector inspected a property, they considered that if it was habitable and had plumbing fixtures, then it was considered a unit. And you agreed with that determination?

NAKATANI: Yes, sir.

HENDERSON: Are you familiar with Section 21-2 that contains the definitions?

NAKATANI: Yes, sir.

HENDERSON: Are you familiar with Section 21-31 of the Hawai'i County Code?

NAKATANI: Yes, sir.

HENDERSON: Is the term habitable unit used anywhere in Section 21-31?

NAKATANI: No, sir.

HENDERSON: Isn't it true that it is only in Section 21-31 where the Department is given the authority to charge single family residences a sewer user fee?

NAKATANI: I'm not sure if it's the only part of the Hawai'i County Code that states that.

HENDERSON: That the County can charge us a sewer user fee. You think it might be in the building code?

NAKATANI: That's the only location.

HENDERSON: Okay. Isn't it true that in Section 21-31, the term unoccupied unit is referring to various structures listed earlier in that section?

NAKATANI: That would be my interpretation. Yes.

HENDERSON: Ms. Nakatani, isn't it true that in Section 21-31, there was no mention of a detached storage, accessory room, laundry area, or bath as one of the structures?

NAKATANI: You're correct. It doesn't state that.

HENDERSON: Ms. Nakatani, based on the language of Section 21-31 and your inspection of the property, do you agree that the inspector was in error when charging two sewer user fees to the single family residence at 75-5944 Ali'i Drive as set in 1998?

NAKATANI: I'm sorry, I can't agree with your statement. I would have to say at that time there were two units. Reading this document and my experience in the wastewater division, I would say there were two units at that time.

HENDERSON: You were saying that there were two single family residences located on the property?

NAKATANI: There were two. Yes, two units.

HENDERSON: Two single-family residences?

NAKATANI: Yes, sir.

HENDERSON: Complete with kitchen, cooking facilities, dining area, et cetera. Okay. Ms. Nakatani, do you agree that the sewer division, by charging the property of 75-5944 Ali'i Drive

for two sewer user fees is a violation of the federal regulations about proportionate wastewater loading share?

NAKATANI: I'm not sure about that, sir.

HENDERSON: Do you agree that based on your current understanding of Section 21-31 and the federal regulations, if you were asked today to set the sewer user fee for the property at 75-5944 Ali'i Drive, you would recommend a single sewer user charge for the property?

NAKATANI: Today sir? When I went out, I would say that it is a storage building at this time. Yes. Because that's what is being used as now. But that doesn't mean that it could (sic) be cleaned out and returned to another habitable space.

HENDERSON: I think we already went over the definition of habitable not being in the code, Ms. Nakatani. So your answer is today you would recommend a single user fee for that property.

NAKATANI: Yes.

HENDERSON: Thank you. That's all the questions I have. Chair.

ADAMS: Thank you. Any redirect examination, Ms. Kekai?

NAKATANI: I'd like to just make one more clarification if I could go ahead. That unit also has plumbing fixtures, which under the county code, would qualify it to be billed as a separate unit.

ADAMS: So are you changing the answer that you gave previously?

NAKATANI: I'm just making a clarification that it does have plumbing fixtures on it. And that's part of the code, right?

ADAMS: So you had been asked whether you would bill for two units for that location, and I believe you said no. You would bill for one.

NAKATANI: Not at this point, but it could be billed for two, because of the plumbing fixtures, right?

ADAMS: Okay.

NAKATANI: Am I confusing everyone?

ADAMS: I think so. I mean, the issue is, I'll use this as the Commissioner is asking questions. So I'm asking questions as Georjean Adams, the building has a toilet and other things. So it is discharging or has a capability of discharging to the sewer. It's connected up through a wye connection, but it can contribute sewage from that unit, and therefore it gets a charge for a

sewer fee, as does the house, which also has plumbing, a toilet or two. And so that there are two charges going for that wider double property. Is that appropriate or not?

NAKATANI: I would say, try that again. I'm sorry, Ms. Adams.

ADAMS: That's okay. It is confusing. I'm trying to figure out how to answer the question simply. There are two units that have the capability of sending sewage to the sewer, public sewer? Yes or no?

NAKATANI: Yes.

ADAMS: And therefore there would be two sewer usage bills.

NAKATANI: Yes. In the field, we would consider it two units.

ADAMS: Whether or not anybody ever flushes the toilet.

NAKATANI: Whether or not anybody flushes the toilet because there are plumbing fixtures and there's water.

ADAMS: Thank you. That's my question. Any other commissioners have a question for Ms. Nakatani? No? Seeing none. Ms. Kekai, any follow up?

KEKAI: Sure. Just one quick one. Inspector Nakatani, or I think you have a new title now. So I'll just say, Ms. Nakatani, when you spoke about habitable, you used the term habitable because the definition of an occupied unit -- tell me why you use the term habitable.

NAKATANI: Habitable for inspection, sewer inspection, would mean an area where you could potentially lay your head and would have the basic roof, walls, things like that. That's what I would consider habitable.

KEKAI: So this unit that you inspected could possibly use as a studio.

NAKATANI: That's what I would, yes, it could.

KEKAI: Thank you. No further questions.

ADAMS: Okay. Are we ready to move to your next witness? I see a hand waving from Ritchie Henderson.

HENDERSON: Yes, Chair. I would like to further address Ms. Nakatani's testimony that she recently provided.

WONG: Do you have a question for Ms. Nakatani, Mr. Henderson? A follow up?

HENDERSON: I do.

WONG: Okay. Go ahead.

HENDERSON: Ms. Nakatani, if a property had a detached carport/garage that had laundry facilities located in it and a half bath, and you could actually lay your head down in the garage, are you charging two sewer user connections for that property?

NAKATANI: I don't think we would charge for a garage.

HENDERSON: But yet I could sleep in the garage. Is that not so?

NAKATANI: Correct, but it's a little bit more than just laying your head. I mean, in this situation, a garage –

HENDERSON: You could just lay your head down. That would be good. Just have a roof and some walls.

NAKATANI: Correct. That's part of it. Yes, but also a garage would be designated, right? I mean, you would –

HENDERSON: No further questions, Ms. Chair.

ADAMS: Okay. Anything again from Ms. Kekai?

KEKAI: I think Commissioner Gaffney has a question.

ADAMS: I see your hand. Rick Gaffney has a question.

GAFFNEY: Yes. I'd like to ask Ms. Nakatani, in your experience working for the Department, how common was it for a single-family residence to be charged more than one sewer fee?

NAKATANI: Further back when they permitted 'ohana housing it was pretty common, where you would have two separate units or dwellings charged sewer fees. So I'm not sure what it is now, but it is common.

GAFFNEY: Thank you.

ADAMS: Any other questions from the commissioners? Are we ready to move to your next witness, Ms. Kekai?

KEKAI: Yes. Thank you, Ms. Nakatani, the director would now like to call business Manager Bauman.

BAUMAN: Good morning. I'm calling in and watching you on my small iPhone.

ADAMS: Okay, that's just fine. I need to swear you in. Do you solemnly square or affirm that the testimony you are about to provide is the truth, the whole truth and nothing but the truth?

BAUMAN: I do.

ADAMS: Is your written testimony, Exhibit L?

BAUMAN: Yes, it is.

ADAMS: Everybody's got L and has a chance to look at it. Wait a minute. I got to do this right. Do the Appellants have any cross examination of this witness?

WONG: Sorry, Madam chair. Ms. Bauman, in addition to your written testimony and Exhibit L, do you have any additional direct testimony to offer?

BAUMAN: No, not at this time.

WONG: And, Ms. Kekai, do you have additional questions of Ms. Bauman?

KEKAI: I do not. Thank you.

WONG: Okay. Thank you, Chair. Cross examination, Mr. Henderson.

HENDERSON: Thank you. I understand that she was sworn in?

ADAMS: Yes.

HENDERSON: Thank you. Good morning, Ms. Bauman. Are you familiar with the property located at 75-5944 Ali'i Drive, Kailua-Kona, that has the residence and a separate building containing a storage, laundry area and bath?

BAUMAN: I am familiar with the sewer account.

HENDERSON: Is this the address that is on the wastewater bill, namely 75-5944 Ali'i Drive?

BAUMAN: Could you repeat that address again?

HENDERSON: 75-5944 Ali'i Drive, Kailua-Kona Hawai'i? I assume you said yes. That is the address on the wastewater bill. Ms. Bauman, in your direct testimony, you stated that approximately 143 bills for sewer service fees had been sent to Kai Ala Partners since 1998. When a person looks at the bill, how did they learn if it is for more than a single user fee?

BAUMAN: They would look at the number of units.

HENDERSON: Ms. Bauman, the sewer bill has language that states wastewater residential and then has just one amount for the two user fee charges. Is this making full disclosure and clearly showing the charging for two fees for a single-family residence?

BAUMAN: Prior to that total dollar amount, there is the number of units listed as two.

HENDERSON: clearly identified.

BAUMAN: Yes.

HENDERSON: Ms. Bauman, if you were the owner of a single-family residence and you got a sewer bill with just one amount on it for sewer services, would you not conclude that that was the charge for a single service?

BAUMAN: Looking at the wastewater bill, I would conclude that I was being billed for two units.

HENDERSON: That is because you're familiar with the design of the wastewater bill. But if you're just an average consumer looking at it with only one charge, and not clearly defining that this was two units on that line, would you assume that it was for just one charge?

KEKAI: Sorry. Witness can't answer an average person and she's a business manager for DEM.

HENDERSON: Ms. Bauman, are you familiar with Hawai'i Ordinance 92-77, Bill No. 595, the purpose of which was to revise the sewer billing system to comply with the 1972 Federal Water Pollution Control Act, PL 92-500?

BAUMAN: I am aware of the ordinance. Yes.

HENDERSON: Is it true this ordinance was passed so the county could receive grants through the Environmental Protection Agency?

BAUMAN: That would be my understanding based on how the ordinance was written.

HENDERSON: Are you familiar with the federal regulations that require that the system must collect sufficient revenue to ensure that the federally funded treatment works are properly maintained and operated, and that all users of the system pay their proportionate share based on the users proportionate wastewater loading?

BAUMAN: Yes, somewhat.

HENDERSON: Ms. Bauman, does a residential dwelling that has a laundry and bath area located in an annex building create a larger wastewater loading than a dwelling that has those facilities located within the dwelling given the same water consumption?

BAUMAN: I can't answer that. That's not in my area of expertise.

HENDERSON: Do you agree that the inspector's assessing and the sewer division's billing for two sewer user fees for a single-family residence's single wastewater loading is a violation of the federal regulations about proportionate share?

BAUMAN: Sorry. Could you repeat that?

HENDERSON: Do you agree that the inspector's assessing and the sewer division's billing for two sewer user fees for a single-family residence's single wastewater loading is a violation of the federal regulations about proportionate share?

BAUMAN: No, I can't say that I agree.

HENDERSON: You do not agree with that. Yeah, that's right. Ms. Bauman, in your testimony, item No. 11, you stated that you were familiar with the term unoccupied unit. The Section 21-2 definition of unoccupied unit ends with the wording "and currently receives a water bill." Do you know if that unoccupied unit receives a water bill from the Department of Water Supply?

BAUMAN: That unoccupied unit is, my understanding, is receiving water, the water turns on, and the property does receive a water bill. So I would say yes, it does receive it.

BAUMAN: Ms. Bauman, have you inspected the water bill that was submitted as Exhibit 18 in our opening brief?

BAUMAN: Not in detail.

HENDERSON: Ms. Bauman, is the address on the bill from the Department of Water Supply 75-5946 Ali'i Drive, Kailua-Kona, Hawai'i?

BAUMAN: I do not have a copy of that in front of me.

HENDERSON: That is the address for the vacant lot that is associated with the property. Ms. Bauman, And is it true that there is no water bill from the Department of Water Supply for the property at 75-5944 Ali'i Drive, Kailua-Kona, Hawai'i?

BAUMAN: If the property is receiving water, then there would be a water bill regardless of which address the water meter is on.

HENDERSON: In my previous question, Section 21-2, definition of unoccupied unit ends with the wording "and currently receives a water bill." It does not say whether or not it receives water, or whether or not there is a meter there, it says "and currently receives a water bill." Do you know if the unoccupied unit receives a water bill from the Department of Water Supply?

BAUMAN: I would have to say if it's receiving water, it does.

HENDERSON: Are you familiar with Section 21-31 of the county code?

BAUMAN: Yes.

HENDERSON: That section is made up of three sentences. 1) Sewer user charges for residential customers shall be assessed to all lots accessible to a public sewer or gang cesspool, whether connected or not. 2) User charges for sewer services to residential customers, which include service for single family dwellings, duplexes, housing projects, condominiums, townhouses, apartments, and dormitories, shall be assessed according to the schedule shown under section 21-36.1. 3) Unoccupied units will be assessed a monthly maintenance fee equal to the current user fee. Is it true that in the reading of Section 21-31, the last sentence refers to the types of residential units listed in the second sentence?

BAUMAN: Yes.

HENDERSON: Ms. Bauman, isn't it true that there is no language in Section 21-31 that gives the Director of the authority to charge a sewer user fee for a storage room, utility room and bath?

BAUMAN: Not described as such.

HENDERSON: So I take your answer is yes. There is no language in section 21-31 to charge for the description of a storage room, utility room and bath. That's all the questions I have for this witness.

ADAMS: Okay. Does Ms. Kekai have any questions for her testifier?

KEKAI: Not at this time, Chair.

ADAMS: Okay. Do the commissioners have a question for her? Rick Gaffney?

GAFFNEY: Yes. I have a question about the relationship between the DEM business office and the Water Department business office. How closely do you work together? What are the responsibilities for DEM's billings in relationship to the billings by the Water Department?

BAUMAN: So we do work closely with the Department of Water Supply for our commercial customers. Those accounts are billed based on consumption, so we do get water supply meter readings from them. We are notified when a customer opens a water account in a sewer area so that we know we have to begin billing. So we do work closely with the Department of Water Supply.

GAFFNEY: When the Department of Water Supply informs you that there is a new account, how do they describe that account? Do they tell you something like single family residence, apartment building? What kind of detail do they give you that you use to make your decision with regard to billing of sewer fees?

BAUMAN: No, I apologize, I don't have a copy of the water application right in front of me. We do get a copy of the water application, and if it's not gated directly on the water application, we would look at the real property tax, what type of property that is.

GAFFNEY: Okay, thank you.

ADAMS: Are there questions from any other commissioners?

McINTOSH: This is Commissioner McIntosh, I had a question, but I'm not sure when I should bring it up. It was brought up that the water bill is for a different property than what the house is sitting on that the sewer bill is referring to. They're two different – so are they running water across the TMK to the other lot? Is that what they're doing? I was confused when that was brought up.

BAUMAN: That's what it sounds like to me, that it's possible that the meter is on the other TMK and serving both properties. I don't have that information in front of.

ADAMS: Georjean Adams, asking a question. I understand that the DEM is taking the position that because, call that building, whatever you want to call it, does receive water, that water is metered and charged for to (Kai Ala) Partners. Is that your understanding?

BAUMAN: Yes. The water account could be charged to another person or another entity for sewer. We bill the property owner, but yes, if it's receiving water, the property is being billed. Someone is being billed for that water.

ADAMS: I don't think you're the right person to ask this, but I want to figure out how to get it on the record anyway. There have been repeated citations of Section 21-31, the definition of residential customers, which include, and then there's a list. It doesn't say only includes. It doesn't say also, for example, including, it's somewhat ambiguous. The way I read the sentence, it would say here's an example or list of things that would be included in service to residential customers. Would you interpret that language the same way?

BAUMAN: Yes, I would.

ADAMS: Thank you. Any other questions?

KEKAI: If I may just ask one more question, Ms. Bauman, our sewer fees to pay for our wastewater system comes from two different things. Correct? Two different pots, I mean, of money, basically.

BAUMAN: I'm sorry. Could you repeat that question?

KEKAI: The money that we use at the Department of Environmental Management for Wastewater Division. It comes from two different accounts, correct?

BAUMAN: What do you mean by two different accounts?

KEKAI: Okay, so we have the General Fund, right. Which receives property taxes and then the fees that we collect through user fee charges.

BAUMAN: Correct.

KEKAI: Okay. So basically, every homeowner not only pays for the ones that are connected, pay through fees, but also the property taxes covers a portion of what pays for the Wastewater Division to pay for the cost –

BAUMAN: Yes. The wastewater currently receives some General Fund subsidy.

KEKAI: Okay. Thank you. So everything is not based on fees, and therefore, if this property is only paying \$200 worth of property taxes, then technically it's not paying its fair share of wastewater operation and maintenance costs.

BAUMAN: Yeah. I mean, we're trying to get the fund to be self-sufficient.

KEKAI: Okay. No further questions.

ADAMS: In ten minutes, now, nine minutes, we will be taking a recess. I'm trying to figure out if we're at a point of a natural break coming up or if we can proceed to additional things.

WONG: Chair Adams, it sounded like Ritchie had a follow up question based on Ms. Bauman's answer. So I think if we can get that in so that it's still fresh, and then we can take a recess because I don't think we're going to be closing the evidentiary portion before 11:00.

ADAMS: Okay. So, Mr. Henderson, you had a question for Ms. Bauman?

HENDERSON: Yeah. I had two points of clarification, and the first one was Ms. Bauman, isn't it the inspector's job to locate where the water meter is and to make sure that it is on the property TMK that it is servicing.

BAUMAN: I don't believe there's any requirement for the water meter to be located on the same TMK as the property that is being serviced.

HENDERSON: And Chair Adams, in your description of Section 21-31 and the listing of the units that sewer charges apply to, I believe the law is inclusive, meaning that it contains what it is addressing. It is not, for example, we can charge the doghouse over here a fee. It's specific. That's what it's referring to.

ADAMS: We all have our opinions. I asked Ms. Bauman what she thought, and she answered me. And we can address those issues later in the hearing. I think we're okay in terms of, or did you have additional questions of this witness?

HENDERSON: No, not at this time.

ADAMS: Okay. We do not have any additional exhibits except for a corrected version of Ms. Nakatani's testimony, written testimony, I believe. Anything else that would be added to the exhibits? Is that the way I'm supposed to put it?

KEKAI: Chair I would say that we will withdraw the request to amend the exhibit and just go with her testimony that she gave.

HENDERSON: We will agree to that. And we have no further exhibits.

WONG: Do the commissioners have any other questions of Ms. Bauman at this time? And, Ms. Kekai, you don't have any other witnesses. So you're resting your case?

KEKAI: Yes.

WONG: Okay, then. Chair, what I would suggest is we take a recess right now, and when we come back, Appellant has the opportunity to present its rebuttal case. I think you stated earlier to come back at 12:15, come back on the same Zoom call, use the same information. And then just for purposes of the commissioners, I just do want to make one announcement that since we're still in the contested case hearing portion, the evidentiary portion has not closed. I just want to make sure that the commissioners understand that they're not allowed to go and do

their independent digging of information. They're not allowed to talk to each other. Everything has to be in the open meeting, and that's for the purposes of Sunshine Law. So I just want to put that reminder out there. Thank you.

ADAMS: Good. Therefore, we will recess now at 10:55 and resume at 12:15. See you then.

Meeting recessed at 10:55 a.m. and reconvened at 12:15 p.m.

ADAMS: We have commissioners Lee McIntosh, Georjean Adams, Dee Fulton, Rick Gaffney, and John Burns. And those are the commissioners, and I saw him, but I don't see him now. Ritchie Henderson for the appellant. We'll wait till he shows up because he's on deck. Next, we have both attorneys, Keyra Wong and Malia Kekai. There you are, Ritchie Henderson. So the next part of the hearing is the Appellant's rebuttal case. And this is where I asked the Appellant if they would like to provide additional testimony in response to the Appellee's case.

Brief recess to bring Appellant online

HENDERSON: Chair Adams, we would like to put on our closing argument, if that is okay with you.

WONG: This is Keyra Wong, Deputy Corporation Counsel. Mr. Henderson, we are going to go to closing arguments, but right now, if you have additional testimony or witnesses that you would like to put on to rebut DEM's case, you can do that right now. If you're just going to do closing arguments, then I ask that first, the Chair has to close the evidentiary portion of the hearing.

HENDERSON: Okay. We have no witnesses that we're going to put on, and we've already cross examined the witnesses from the DEM. So I think at that point, we're done with putting in any further evidence.

ADAMS: Okay, then I formally close the evidentiary portion.

KEKAI: One second, do I have an opportunity now to ask questions of Mr. Henderson, or has that opportunity passed?

WONG: Let's say, Chair, I would allow for leeway. We can allow Ms. Kekai to ask questions of Mr. Henderson, either Mr. Henderson. And then the commissioners will have an opportunity to ask further questions based on the answers that Mr. Henderson provides, if they have additional questions, and then we can do one overall last time. If the commissioners have any other questions, then they can do that before we close evidentiary questions.

ADAMS: Okay. I withdraw my formal closure. We're back to allowing some questions. So, Malia Kekai, can you ask your questions of the Henderson?

KEKAI: Yes. Thank you, Chair, for the latitude. It's just a couple of clarifying questions. Mr. Henderson, so the water bill that you guys provided as Exhibit 18, is there any structure on that address that is receiving water?

HENDERSON: There is none.

KEKAI: Okay. So basically, the water that is being billed does go to the residential property. Okay. Thank you.

HENDERSON: So the meter is in front of the residential TMK address, and that's the property that has water on it.

KEKAI: Okay. Perfect. Thank you. And also, Mr. Henderson, what do you do as, what is your occupation?

HENDERSON: I am a broker in real estate at RSM Inc. And my license is RB 17688, which is displayed in my name on the Zoom meeting there.

KEKAI: Okay. And how long have you been a broker?

HENDERSON: For over 35 years practicing real estate.

KEKAI: Does your occupation also include property management?

HENDERSON: Yes, it does.

KEKAI: Do the properties that you manage have wastewater bills or sewer fee charges charged to those properties?

HENDERSON: Yes. We received wastewater bills from the Department.

KEKAI: And you guys review and pay those bills for customers?

HENDERSON: Yes. If the owner has asked us to do that, sometimes owners maintain the water bill in their own name and don't turn it over to us to pay. But if they do, we do.

KEKAI: Okay. And so are these all multi units, or do they have just one residence on them?

HENDERSON: Most are single family units. We do have one apartment building that my property manager manages in the Lodge.

KEKAI: Okay. Thank you. No further questions, Chair.

ADAMS: Do the commissioners have any additional questions for the Hendersons? Hearing and seeing none, now I will close the evidentiary portion of the hearing and we will move to closing arguments. Is that right Keyra? Okay. Appellant gets to go first in making your closing argument. Mr. Henderson.

HENDERSON: Okay. Thank you, Chair, for the opportunity to present our findings of fact and be able to address this problem that we discovered ... Our case before the Commission today is a case that is based on the sewer code as provided in 21-31, also based on the federal regulation, and that was found in Ordinance 92-77, and our case rests on the code contained in the sewer billing and not in the Building Department code or any other code. It rests solely in the sewer department's chapter for residential customers, non-commercial. So having said that, I want to reiterate that federal funding is based on the users of the system paying their proportionate share based on the user's proportionate wastewater loading. And I believe we have shown that there is no difference between a single-family residence with a laundry inside of it compared to a laundry, be it in a detached garage or detached storage shed, given the same amount of water consumption. It is based on the proportionate wastewater loading and what that means is the amount of loading or the amount of water put into the sewer system. I also want to iterate that the code in 21-31 provides specific charging authority there. It does not provide charging authority in the definition. It does not provide charging authority anywhere else, but there in 21-31 for single family residential units, is what we're dealing with. And I think we really have to understand the definition of an unoccupied unit as it is used in the sewer code. And an unoccupied unit is specifically relating to those units enumerated above. And it makes sense that if a single-family resident was connected to the water, was nobody living in it, unoccupied, it would be an unoccupied unit. And I think we have to understand that Black's Legal Dictionary defines dwelling, a house, into real estate, the house, and all buildings attached to or connected with the house. And really clearly, the property at 75-5944 Ali'i Drive, consists of a main residential building and an outbuilding that originally housed the freshwater catchment tank that are converted to a storage room. And that's where the architect put the hot water heater for the house from its inception, the laundry facility and bathroom, and it should be considered as one dwelling in accordance with the legal definition of a dwelling. Finally, I would say that this is a case that deals with fees charged from the get-go. And when you look at wastewater sewer card, I really don't understand, and it's not provided to the owner. It's an internal document of who the inspector was, what their qualifications were for determining, and whether or not they understood what the code is. And it's apparent from my questioning that the inspectors, the business manager, and the director, are not totally familiar with the code. And as a consequence, Kai Ala Partners has suffered an injury of \$7,888 in being overcharged for two single family residential units on one lot for 23 years. Now there are two TMKs there that make up that property. But the laundry and the tank house and the main residential building are on one TMK parcel ending in 018. And it's been that way from the beginning, and even when there was a cesspool there, the laundry facility and the house tied into the cesspool, and it was only a matter of filling in the cesspool and extending that to the county's lateral and one connection. It was a single-family residence, and it even states that in the card there. So I would say that this really is a case of unjust enrichment and that the Commission needs to really address the interpretation of the code found in 21-31, and

understanding the circumstances of not following the federal guidelines and looking for federal funding, and not providing a proportionate wastewater loading for our property at 75-5944. And we've already explained that there is no water bill designated for that property. The water bill goes to the adjoining property. Why that is, I don't know. Maybe it was a mistake, an error, just like the original error, and the County not really understanding what they're doing, and using a definition as the means of justifying a billing. Oh, it's unoccupied. Well, the doghouse is unoccupied, and I have a water tap to the doghouse. Does that mean that that doghouse gets a separate user fee charged? It doesn't make sense. The law is specifically clear as it relates to charging sewer fees. And we've paid \$7,888 more than we should have, and we just want it back and we want our changed sewer user fee set at one. That's as simple as this is the purpose of the code there is to allow for the billing of sewer user charges, and it's found in 21-31. The authority is not in the definitions. And with that, I would beg that the Commission consider our evidence, consider our cross examination of the witnesses and their unfamiliarity with the code and what is supposed to happen, and find in favor of Kai Ala Partners, and return the monies and change the sewer fee. Thank you very much Chair and Commissioners.

ADAMS: Thank you very much for your closing statement. Appellee, make your closing argument.

KEKAI: Thank you, Chair. Thank you, Commissioners, for your time today. This is not a case – this is not a garage or carport. In fact, there's a garage on the other property, but this is a building that has a shower, a toilet, a laundry facility, and could be used for a studio. It could be inhabited. And that's basically how this was interpreted by the director, by the Inspector. This case is also about accountability. We all have a responsibility to review our bill thoroughly. We all have a responsibility to know. And I would also say that these are not your lay people that have one property. They have multiple properties. You just heard him testify that he is a property manager of multiple properties that have one unit and multiple units. And therefore he had noticed of how much one unit costs, right? They created an LLC. They even got this property registered as historical property. And if anybody has worked with SHPD, they know that's not an easy task. They've reviewed bills for not just themselves but other people. If they believe that there was a mistake made, they should have brought this up in 1998, or 2000, or any of the last 24 years that have passed. This case is also about discretion. The director has the authority and the discretion to decide and interpret the code, and that's what he did. He looked at the evidence available to him and he decided that this unit meets the definition of an unoccupied unit. It's connected to the sewer. It receives a water bill, even if it's the adjacent property, and it has plumbing fixtures. So in the end, there's been a lot of talk of definitions and technicalities of storage. Building isn't contained, and this and that and all the other thing. But the real issue that the Commission is deciding today is, did the director violate the law? And I would say no. He looked at the code and went with the strict destination of the code. Two, was his decision clearly erroneous? Again, no, it was not clearly erroneous. It has substantial evidence to support it. And three, was it an abuse of discretion? And again, the answer is no. It wasn't an abuse of discretion. He acted within his authority. He looked at all the facts available to him, and he made his decision. So I don't think that the Appellant has met their burden today. I don't think that they've proved that there was a violation of law, that it was clearly

erroneous or an abuse of discretion. Therefore, the only thing the Commission can find today is that the director's decision should be affirmed. Thank you very much.

ADAMS: Thank you. Now we move to Commission discussion and deliberation. I would like a commissioner – maybe I'll tap Vice Chair Rick Gaffney if you would, to make a motion on whether or not we should affirm the decision of the director of the Department of Environmental Management or whether we should reverse, modify or remand the director's decision. Can I get that motion? Or pick a motion, which action do you want to take?

Motion and second: Vice Chair Gaffney made a motion, to which Commissioner Fulton seconded, to modify the Director's decision.

Discussion:

ADAMS: I'll reiterate a little bit of what has been said by our attorneys. According to EMC Rule 7-13, the standard of appeal decision appealed from may be reversed or modified, and the motion is to modify only if the Commission finds that the decision is 1) in violation of the code or other applicable law; 2) clearly erroneous in view of the 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. We also have the opportunity if you wish to go into executive session, with our corporation counsel, but we don't have to. Are we ready for an open discussion on the motion to modify? Okay. I guess I'd like to know what the motioners were thinking in terms of the modification.

GAFFNEY: I'll start because I was asked to make the motion. I think that there's two questions facing us here. One is whether or not the decision to charge two sewer fees for this property was correct. And then the second decision is whether or not the \$7,888, I think, was the figure that was potentially overcharged based on that decision should be returned to the Appellant. And so I personally would like to break the question and modification of the decision into those two pieces.

ADAMS: And then would you explain to us what decision you would make on both of those?

GAFFNEY: Yeah, I'm not sure about the secondary one. And I do want to ask our attorney a quick question, the legal definition of arbitrary. I think I know what arbitrary and capricious means, but I'd like to hear the legal definition of arbitrary and capricious before we proceed with that question.

WONG: Sure, I can give a general definition. So a decision is arbitrary or capricious if the decision does not articulate a rational connection between the facts found and the conclusions made, that's generally what it is.

ADAMS: Dee Fulton, comment?

FULTON: Yes. Thank you, Georjean. I think it's important to note, and I want to confirm this with our counsel that we are given three items, and it appears that if any one of these items is applicable, then we should modify or reverse it. So there are “ors” between those things. It's not a combination, the way I'm reading it,

WONG: That's correct.

FULTON: The decision is in violation of the code or applicable law, or clearly erroneous in view of the evidence, or arbitrary or capricious. Any one of those three are grounds for reversing or modifying

WONG: That's correct. Any one of those three, or even a combination thereof.

FULTON: Thank you.

ADAMS: Did you have an opinion on which way to go and why?

FULTON: Well, to continue, I don't have to think beyond the second one. Clearly erroneous. It's pretty clear that an error was made in assessing a fee on the unoccupied unit. I think it's very clear that the unoccupied unit is not a residential unit addressed in our oft-quoted (Section) 21-31. So I think a mistake was made, and did the inspector made the mistake? Was there a clerical mistake? I don't know, but it very clearly looks like an error, and it looks unjust. As Mr. Henderson pointed out, he's paying more than his fair share. Simply put, more than his fair share. I don't think that the argument that this was ignored for 20-some years is relevant. For me, it's a matter of justice. Thank you.

ADAMS: Other comments, discussion from other commissioners, John or Lee? Lee McIntosh.

McINTOSH: This is Commissioner McIntosh, this is kind of confusing. All the definitions and everything that they're putting out and trying to – from my understanding, laws complement each other, they don't have to necessarily all be contained in one point or spot. Then you also have layers, County, State, Federal. But from what I can see in the closing arguments of the Appellant, according to what he's saying for the storage building that he's calling it, technically, he wouldn't have to pay a sewer bill, period, because that property doesn't have a water meter. It's the property next to it, although for whatever reason. So I understand now why the DEM just says in the rules that (it) has to receive a water bill or in their case, they open the tap and water comes out. That means that they are paying a water bill and they have sewer fixtures. So my reading and understanding that this building would be indeed considered an unoccupied unit because it doesn't necessarily say that someone has to be able to live in it, it just needs to have accessibility to the sewer, have plumbing fixtures, and then it receives a water bill. So it has water from the County coming in and it meets those requirements. It doesn't say someone has to be able to live there, it has to have a bed. That doesn't matter. And the other thing is that by law, we couldn't return all the money if we wanted to refund it, because as our lawyer has stated, they can only seek up to maybe two years back pay. That just brought up concern

why they wanted the whole amount. But anyways, me personally, I would have to, wading through all this information, I would have to say that I would support the Director's decision based on what has been presented and all the evidence and stuff, and whatever I feel personally about, it doesn't matter. I have to decide based on the evidence, and that would be my decision.

ADAMS: Thank you. Commissioner McIntosh. Commissioner Burns, do you have comments?

BURNS: Yeah. I mean, I concur with what Lee just stated. I mean, just going off the evidence of what I read, through all the papers we were given. I don't see anything presented that shows anything to really clearly show that there shouldn't have been that designation, considering that as far as I can see, the unit is in those properties receiving water, and then you have a dwelling with fixtures that are draining to the sewer. So yeah, I can't see, it's just not clear to me that there was a blatant mistake made and that there should be anything to overturn it, the decision.

ADAMS: Thank you. I'll put in my two cent, Georjean Adams. I, too, feel that the interpretation and application of the two units is a reasonable interpretation, and within the discretion of the Department. It is a long time interpretation of the requirements that you got a toilet in there and it can be used. Whether it is used or not, it is hooked up to the sewer. So I think it is a reasonable application. And as I understand it, the Department has offered the solution is, don't have those facilities in that storage room. So I too, would affirm the Director's decision, and insofar as Rick was talking about splitting the two, the fact that traditionally, sewer engineers consider a wye connection to be a separate connection to the sewer is a legitimate one. If it had run straight into the house and then it was the house going to the lateral, I could see an argument for why it's not a separate unit. And the fact that the charges have been there for years is also not a compelling argument in my mind. So that would be my decision to affirm as well. We appear not to have consensus. I don't know if we want to take a vote, a roll call vote.

WONG: Sorry, Chair, if I may. I believe Commissioner Gaffney wanted to say something and then Commissioner Fulton.

ADAMS: Rick, you had more comments?

GAFFNEY: Yeah, well, the one other comment that I would make with regard to this case, and I'll probably make this in the future at Environmental Management Commission meetings. One of my big takeaways from reading all of the documents that were provided to us in this case is that the County laws are really, really poorly written, and part of the reason for my belief that the decision the director made is erroneous, is that the County also shows that they have been picking and choosing the language from various parts of the county code that they use to support their case without looking at what's logical, and clearly logic was not part of the writing of the ordinances, or the rules originally, because in my mind, this is clearly a single family dwelling and per that part of the definitions, I believe that it's erroneous to charge them for

two sewer fees when it's clearly a single family residence. The fact that at some point in time it could be converted, the second building could conceivably be converted into some kind of a dwelling doesn't recognize what it is, which is an outbuilding, a reclaimed outbuilding. So anyway, that's my take. I think that the language of the county, both with regard to this particular question and also with regard to possible reimbursement, is lacking and needs to be fixed. So that's the only other point I would want to make. But I stand by my opinion that I share with Commissioner Fulton, which is that the decision by the director was erroneous because in my mind, based on reading everything and hearing the testimony today, this is clearly a single family residence, and I don't believe that it's correct for it to be charged for two sewer fees, particularly when it only has a single water source, and it's not used for – the two buildings on the property are not used as multiple occupied, under the definitions in the ordinances, dwellings.

ADAMS: Dee Fulton, did you want to comment?

FULTON: Yes. Thank you, Chair Georjean. A number of points, and I want to start out by saying if somebody has an 'ohana (dwelling) in their home and it is rented out to a whole separate family, but it shares the plumbing, I don't really know the answer. So maybe I shouldn't ask the question. I'm not being a good attorney here, but wouldn't they just get one sewer bill if there's one meter, one water meter? No, I see head shaking. Okay. I want to go back to the beginning of this structure. It was designated a historical structure. And in order to preserve that designation, I think the architect was limited. And so while additional facilities were needed, they couldn't fit within the footprint of that historical structure. Thus, the necessity in creating a separate outbuilding to house facilities that typically would have been within the confines of the original building. So that's one point is that basically you have an extension of a single-family dwelling. Secondly, with all due respect, Chair, the shape of the plumbing, whether it's a wye or a tee, achieves the same effect. So I think that's kind of a silly thing to be using as a rationale. I apologize there. But really, I don't want Mr. Henderson to have to go and dig up the plumbing and change it so that the sewage line from the outbuilding is connected to the residents. That could be done, but it's going to have the same outcome, right? The same stuff goes into the same pipe at the same point. Okay. So I guess I feel very strongly sympathetic to Mr. Henderson and the situation we have. And this is one more point. And that is back to this wonderful rule, the point about the definition of an occupied unit, which was the primary rationale, I believe, for why Mr. Henderson was getting a second billing. An 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. That unit separately does not receive its own separate water bill. They are combined. There is one water bill because that outbuilding is simply an extension of a single-family residence. I think that's all I have to say for right now. Thank you.

ADAMS: Thank you, Dee. John Burns.

BURNS: Yeah. I was just going to weigh in, and I don't disagree with what Rick and Dee are talking about in the assessment of the logic of it being a single dwelling. But I do think that our task for this specific case is to judge that designation that was made. So each time a designation

is made in regards to a unit being an additional dwelling or not, there's a lot that you could argue, right. I mean, on any property. If you decided to make a second unit and you decide to plumb it and you decide to have wastewater and you permit it, a designation is going to be made. In this case, the designation has been made. So I just don't know if it's appropriate to argue the logic of that designation so much as the fact that it was made, there are those plumbing fixtures there. Whether or not it's used as a dwelling isn't relevant to that designation. And so I think if we just look at it specifically in the context of that and whether or not it should be overturned, that's where I don't think I can see anything, at least in what's been presented, that there's hard evidence to say that that designation is erroneous or should never been made, right? At that time, it seemed reasonable there were the fixtures. It is having existing plumbing that drains out. It's just like if I made an 'ohana unit, and I wanted to argue that it shouldn't be a second dwelling at some point if a designation is made, that's what I have to go with. So I just don't know how productive it'll be to argue the logic of what was made versus whether or not there's something to say it should be overturned. And I can't see anything to show that. So anyway, that's just to clarify my thoughts on it.

ADAMS: This is Georjean Adams, I would agree with Commissioner Burns that it's reasonable given the construction, the fact that we do charge for unoccupied buildings, and it's basically the fact that you're generating wastewater or have the potential for wastewater, and the County has to maintain the connection and treat the waste that comes through it. Lee, did you have any other comments?

McINTOSH: No, just that the reason I said what I felt personally didn't matter is because I didn't want to muddle everything. But since everybody's sharing, then I don't necessarily agree with the designation. To me, one TMK should receive a sewer bill, and that should be it, and based on water usage. But that's not what we're here to decide. We're here to decide about the decision the director made, and it makes sense to me. But I guess my only concern is that the motion was to split it into two, and I really don't see, I'm kind of confused how we're going to proceed.

WONG: I think the motion was to modify the director's decision on appeal. Commissioner Gaffney, in his explaining of his position on the motion, in his thought process, and you can correct me if I'm wrong. Mr. Gaffney, was he separated sort of two issues with respect to how he analyzed it. So that wasn't a part of the motion. The motion is still to modify the director's decision.

McINTOSH: Oh, I see. So we just are modifying it. We're not ruling in favor or against?

WONG: So that was just the motion. So ultimately, the result is how you vote on it, right? So if you agree to modify the decision, you would vote for that. If you disagree, you would vote against that. So it doesn't necessarily matter what the motion is. It depends on how you vote in the end.

McINTOSH: Okay. Do we have to designate specifically how we're going to modify it before we vote on it? Or will that come after we decide to vote to modify it?

WONG: So I would say to make it easier. It sounds like there's not enough votes to carry the motion, but for formality purposes, I would ask Peter to do a roll call, vote on the motion to reverse, or excuse me, on the motion to modify the director's decision. And if it doesn't pass, then someone can propose another motion. There is a Commission rule that if there are, you need four votes today, either way for the motion or against the motion. If there are not four votes, then the chairperson has the discretion to continue it through the next meeting, where we will have other commissioners who will then have the responsibility, prior to attending that meeting to go through the record, read the transcript, go through the evidence, and hear everything, essentially catch up to what was heard today, and they would have an opportunity at that meeting to be a part of voting on the motion, whatever motion that is at that time. But in order to get there the motion, basically, it has to be fewer than four votes. And I don't know if, is that confusing?

McINTOSH: I think it made sense. I got it.

ADAMS: So of the commissioners who are here, we're going to take a vote. We'll ask Peter Sur, our Secretary, to take a roll call vote, and if we do not have four, a majority, well, it's a super majority, two thirds of the votes to modify, then we will need to take this up again at our January 26, I think, meeting, and include the opinions and votes of other commissioners. Did I say that right.

WONG: That's correct. And just for everyone's information, this is EMC Rule 7-12, where it states a decision appealed may only be reversed, modified or remanded upon five affirmative votes of the Commission. If fewer than seven members of the Commission vote upon an appeal, and there are fewer than four affirmative votes to reverse, modify or remand the decision appealed, the chairperson may defer the petition until a future meeting of the Commission for a second and final vote to be taken on the appeal.

ADAMS: And we would not be collecting any more additional information, it would just be on the record that we have already created.

WONG: Right. So essentially, what would happen if that's the case is the other commissioners not present here, but who will be involved with the next meeting, They will have to affirm on the record that they've reviewed the transcript or watched the recording, reviewed all the evidence, and they can attest that they can participate in the vote of the motion at that time. But we would not be taking on additional evidence. I suppose if the Commissioner who is not present today has questions later on, we might consider reopening the evidentiary portion just so that they might ask clarifying questions of the parties. And I think that's fair for both parties and also fair for the commissioners who are not present today. So we can take a look at, if it gets to that point, reopening just for the purposes of them to ask their questions or get clarification.

ADAMS: Okay, Peter, why don't you move on then, to doing a roll call vote on a motion to modify the director's decision.

SUR: Keyra, I have a question. If this motion passes, do we continue discussion as to what the modification would be if it has five volts or four?

WONG: Yeah, because we would have to say so. I guess I was trying to make it easier, but maybe that's not easy. If Commissioners Gaffney and Fulton, if you would so put on the record to what you would propose modifying the decision to be, I think that would make it easier and all-encompassing of the motion.

GAFFNEY: Well, I did say earlier that I wanted this discussion to be split into the two parts. One was whether or not the decision was erroneous, and then secondarily, to talk about the question about reimbursement, because I think that's a separate issue that is defined separately in the law and needs to be considered separately for that reason. So the first question is modification. And what I would propose as a modification would be that the original erroneous decision to charge for two dwellings, effectively, two occupied dwellings, be reversed so that in the future, Kai Ala Partners is only billed as a single residence. So that would be the modification that I would propose.

ADAMS: So you basically are changing or withdrawing your original motion and substituting this one that says to –

GAFFNEY: No. I am not substituting a new motion. I am just refining; the question that was asked by Corporation Counsel was, what was the modification that I would propose? So that's what I just stated. That's the modification that I would propose if we voted to modify.

ADAMS: Okay. It sounds like we're going to work on two separate motions. First, one, do we have enough votes to modify, and the second will be a more specific motion on what that modification should be if it passes.

GAFFNEY: That's correct.

ADAMS: Okay. Let's do the first motion then, which would be to modify the director's decision.

Vote: Motion fails. 2 ayes (Fulton, Gaffney); 3 Noes (Adams, Burns, McIntosh); 3 Absent (Cardwell, Hoopii, Robinson); 1 Excused (Olson).

ADAMS: So as I understand it, what we'll need to do then is go to another meeting, hopefully the next meeting of the Environmental Management Commission. I don't know if we should try and see if we could get another meeting before that.

WONG: When is the next meeting, Peter?

ADAMS: The 26th, I think.

SUR: The 26th is our next regular meeting.

WONG: I think that's fine if we plan for the 26th.

ADAMS: And then we'll get the larger Commission members, hopefully, to weigh in. And if they have clarification questions, I don't know if it's something that we need to make sure that the Hendersons can attend or if we could get those questions in writing to them.

WONG: Yeah, I guess we could ask the parties now. Mr. Henderson, are you and your father available? When is it? January 26 at 9 a.m..

HENDERSON: Hold on and let us check our schedules. I'm open. So, we're both open for the 26th of January, Wednesday, 9 a.m.

WONG: Thank you. Ms. Kekai?

KEKAI: I'm also available, thank you.

WONG: And also, can you see if your witnesses or I guess Director Mansour, are you available at that time?

MANSOUR: I believe so. I'm going to be driving to Hilo, but yes, I'll be able.

WONG: Thank you, Ms. Nakatani.

NAKATANI: I will be available on the 26th at 9:00.

WONG: Thank you. And Ms. Bauman.

ADAMS: She's still on the line.

WONG: Yeah. You're on mute. Robin, if you're trying to talk, or at any rate, I guess we can ask Ms. Kekai to follow up with Ms. Bauman, just in case the other commissioners have questions of the witnesses of the next meeting.

ADAMS: And that meeting is going to be a Zoom as well, so people can call in, and Ramzi. I guess you can tell us when you're going to be safely set so that you can participate in the meeting.

SUR: Chair, after 10 would be good, because he has a brief appointment in the morning on the Kona side. He has to drive over.

WONG: Chair if I can help, the regular Commission meeting starts at 9. We can put this on the agenda at the end, and if we happen to finish before 10:00, then we'll wait until the director is available at 10. So I guess for the parties' purposes, if you folks can just make sure to appear at 10 a.m. on the 26th.

ADAMS: I can almost guarantee our meeting will go beyond 10 o'clock for our regular EMC meeting, so that won't be an issue. Okay, so just FYI for the future. What we still need to do then is to get a vote and see whether or not we are affirming or reversing, modifying, et cetera, the decision of the director, and then after that decision, if it is to make, well I guess it doesn't matter. Whatever our decision is, there's a proposed finding of fact, conclusions of law, decision and order that the prevailing party prepares, and then a series of timeframes to write that up, get comments on it, and then the EMC as a whole would adopt that finding for the record. Is that right? Got that. Okay. So I think we're at the point of adjourning this hearing and continuing it to January 26, and we will send out notices for when and where to connect so that we do this again and to get the full package to the other commissioners. Do I just declare adjournment or do we need motion?

WONG: You can do motion to adjourn because we're going to re-agendize it at the regular meeting. So it's not going to be considered a special meeting. It'll be on the regular agenda.

ADAMS: And then we're not supposed to talk to each other about or do additional research or any of that stuff about this particular contested case hearing, correct? Until the next, the 26th meeting.

WONG: Correct.

ADAMS: Thank you everyone for attending and for voicing your opinions, and we'll see what we can do next time.

HENDERSON: Thank you Chair Adams and commissioners.

4. ADJOURNMENT

Motion, second, and vote: Commissioner Fulton made a motion, to which Vice Chair Gaffney seconded, to adjourn. Motion approved: 5 ayes (Adams, Burns, Fulton, Gaffney, McIntosh); 3 absent (Cardwell, Hoopii, Robinson); 1 excused (Olson). Meeting adjourned at 1:21 p.m.