ENVIRONMENTAL MANAGEMENT COMMISSION

COUNTY OF HAWAIʻI

MEETING MINUTES – VOLUME II

NOTE: For agenda items 1 through 9, and 11, see Volume I.

10. CONTESTED CASE HEARING

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.[1]

ADAMS: We are rearranging our agenda for the Environmental Management Commission meeting to put Item 10, the contested case hearing, in front of Item 6, New Business. So a little bit of background what we're doing. We're reconvening the contested case hearing that was continued from January 7, 2022. The contested case hearing is with Kai Ala Partners, LLC, appealing the Director's decision to bill two wastewater accounts for TMK Nos. (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 Hawaiʻi Revised Statutes and Parts III and VII of the Environmental Management Commission Rules of Practice and Procedure. The issue involved in this case is Kai Ala Partners, LLC's appeal of the Department of Environmental Management Director's decision to bill two wastewater accounts for TMK Nos. 7-5-019:018, and 7-5-019:026. This hearing was set pursuant to Kai Ala Partners appeal dated October 12, 2021. The contested case hearing started January 7, 2022. Both the Appellant and Appellee were provided opportunities to submit oral and written evidence in support of their positions. After the evidence portion of the hearing was conducted, the Commission entered the decision-making phase. However, the Commission was unable to issue a decision because there were not enough votes to find in favor of Appellant or Appellee. If the Commission has six or less members present, the Commission needs at least four votes to issue a decision, and there are only six today. Because the Commission was unable to issue a decision on January 7, the hearing was continued to today. So we have two new commissioners were not present at the January 7 hearing, and therefore, I need to ask them each if they have reviewed the evidence submitted by both parties. So, Elyse Robinson, have you had a chance to review the submissions and the video?

ROBINSON: Yes, I have.

ADAMS: And then Melissa Cardwell, have you had a chance to review the submissions and the video?

CARDWELL: Yes, I have.

[1] Agenda 10 – Appellant and Appellee briefs and exhibits – http://records.Hawai'icounty.gov/weblink/Browse.aspx?dbid=1&startid=115747

ADAMS: Okay, so we have six commissioners present. Elyse Robinson, Melissa Cardwell, Lee McIntosh, Dee Fulton, Rick Gaffney, and Georjean Adams. Also present is Cody -

FRENZ: Good morning, Deputy Corporation Counsel Cody Frenz appearing on behalf of Malia Kekai.

ADAMS: Okay, thank you. I see Tim Richards is there. We're going to do this contested case hearing. You might want to dive out and then come back. Or we could send you a note when we get back to our business items.

RICHARDS: That'd be fine. If you just send me a quick text, I'll log back on.

ADAMS: Okay. Thank you. All right, so we are going to reopen the evidentiary portion of the hearing to provide the parties an opportunity to submit any final written or oral evidence. After the parties have given an opportunity to submit, the Commission members will be given an opportunity to ask the parties any questions they may have. After the Commission has finished with any questions, the parties will be given an opportunity to present closing arguments. Also present here are …

RICHARD "RITCHIE" HENDERSON II: Richard Henderson II

RICHARD HENDERSON Sr.: Richard Henderson

DAVID HENDERSON: David Henderson

(NOTE: Unless otherwise designated, all statements attributed to "HENDERSON" are made by Richard "Ritchie" Henderson II.)

ADAMS: All the Hendersons. Well, welcome. We are recusing Jon Olson from the hearing decisions at his request. And we're missing John Burns from the Commission. As each person presents information or testimony, I will try to remember to swear you in so that you are telling the truth, but I will be fumbling through this. And so I will rely on Cody to make sure that I didn't skip a step. So just to go over what our standards of appeal are, and this is pursuant to EMC Rule 7-13, a decision appealed from (the director) 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 or capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion. Before we make our decision, we'll review that again with Corporation Counsel. So what I'm doing right now is to provide the Appellant opportunity to submit further evidence, if you have either written or oral evidence to provide.

HENDERSON: So we submitted yesterday our findings of facts, and I can read that into the record now, if you would like, Commissioner.

ADAMS: I would like counsel to pipe up here. The way I understand the process is that once the decision is made, whoever the decision favors gets to write that up. That may or may not be you. If we decide to affirm the Director's decision, he'd write that up. If we decide to remand or whatever, you would write that up. So, Cody, you say it in lawyer terms.

FRENZ: Let me defer actually to my co-counsel who actually represents this Commission, I think more appropriately, Mr. Salas-Ferguson.

SALAS-FERGUSON: Yeah. So, Georjean, I'm not co-counsel in this case, but we're coworkers, colleagues. So, yeah. Whoever prevails in this proceeding will be given an opportunity to submit written findings of facts, conclusions, law, a decision and order. The party that does not prevail will then be given an opportunity to submit objections to that proposed decision. So, Mr. Henderson, Georjean is giving you a chance right now to submit further oral testimony. So you can just state whatever you want to state right now on the record.

HENDERSON: I'd like to give the reasons that the Commission needs to reverse the Director's actions, and that is included in what I submitted.

SALAS-FERGUSON: So you can just go ahead and state that on the record.

HENDERSON: Okay. As further explained here in, this decision violates the established law of Hawaiʻi County Code and was clearly erroneous and/or arbitrary or capricious, or characterized by an abuse of discretion or clearly unwarranted exercise of discretion:

1. In violation of the code or other applicable law.
    a. The Director has misinterpreted Chapter 21 of the Hawaiʻi County Code by using the definition in Section 21-2 as the basis to charge a sewer fee instead of Section 21-31, which is the section that provides the authority to charge the fee for sewer services. The statutory structure of Section 21-31 clearly means that the unoccupied unit applies to the residential units listed in that section.
    b. The Director, in charging a single family residence for two sewer fees is in violation of the federal Environmental Protection Agency rules that “all users of the system pay their proportionate share based on the user's proportionate wastewater loading.” The Director's action in violation of the EPA rules can jeopardize future funding to the county by the federal government.
2. Clearly erroneous in view of reliable, probative, and substantial evidence on the whole record.
    a. In the cross examination of Director Mansour, he cited the definition of an “unoccupied unit” that stated that it gets a water bill. When asked if he has seen a water bill for the property at 75-5944 Aliʻi Drive, he said that if there was water there, there must be a water bill. It was then shown that there was no water bill

for the property at 75-5944 Ali'i Drive. Section 21-2 clearly states, "and receives a water bill." So the Director is clearly erroneous in confusing water service with a water bill.

b. Director Mansour is again clearly erroneous when he states in his testimony that Chapter 20, one's definition of a building under definition in Section 21-2 gives him the authority to charge a sewer fee to an annex building that is connected to a single-family residence. Director Mansour is only given the authority to charge a sewer fee in Section 21-31, and that section makes no mention of charging a sewer fee for an annex building.

c. Director Mansour in his testimony stated, "Every wye can be considered a separate connection." Again, Director Mansour is wrong as not every wye is a separate connection as the property has only one connection to the sewer system.

d. When architect Vladimir Ossipoff designed the residence, he realized that the stone walls of the original 1864 structure was a constraining factor. So he designed the "tank house" to contain not just the catchment water tank, but included in that structure the wash tub, washing machine, water heater and basin and toilet. All these items were an adjunct to the main residence. Director Mansour in his testimony stated, "So you have the same building mimicking the same plumbing fixtures as the resident house, and thus then you have two units. It's not attached, it's detached. It's about 40 feet away … plus or minus from your main residence. So it becomes a detached unit, detached structure, detached building, and it qualifies for a dwelling." Director Mansour is again wrong. Black's Law Dictionary defines a dwelling as, "dwelling house, 1) the house or other structure in which one or more people live, a residence or a boat, 2) real estate, the house and all buildings attached to it or connected with the house." Black's Law Dictionary also defines a quasi-dwelling house as "any outbuilding, such as a barn, that is (in) proximity to the building used as a residence." The building that contains a storage room, laundry, and bath is connected to the main residence by the freshwater catchment system when originally built, and the hot water system and the underground electrical conduit, which clearly meets the Black's Law Dictionary definition of being part of the main dwelling and not a dwelling on its own.

e. The County Wastewater Division employee who made the determination that the property contained two residences when the sewer service first provided was clearly mistaken. And that error is continuing to be made by Director Mansour.

3. Arbitrary or capricious or characterized by an abuse of discretion and clearly unwarranted exercise of discretion.

a. Director Mansour's refusal to see the rational connection between the facts found and the choices made was an arbitrary and capricious decision. The Commission must see that Director Mansour did not consider the relevant facts, that he has made a clear error of judgment in charging a sewer fee for an annex that is clearly a part of the main residence.

b. In Director Mansour's letter to Richard Henderson dated June 10, 2021, stating that, "If you wish not to be charged for a second unit, you can request a second inspection of your property, showing proof that the toilet, sink and shower are no longer connected to our sewer line. Upon proof, we can consider not assessing charge for this second unit moving forward." Such an ultimatum exceeds his statutory authority and is arbitrary and capricious. That, Commissioner, is our added testimony to today's meeting, and we'd be ready to answer any questions from the Commission.

ADAMS: And I just realized I did not swear you to tell the truth. So can I do that after the fact?

HENDERSON: I promise to tell the whole truth and nothing but the truth. And did tell.

SALAS-FERGUSON: Georjean, just ask that what he said was the truth and the whole truth.

ADAMS: Do you solemnly swear or affirm that the testimony you just gave and may give in the next few minutes or (are) about to provide is the truth, the whole truth, and nothing but the truth?

HENDERSON: I do swear. Sorry about that.

ADAMS: Thank you. It's my fault. Like I said, I knew I'd get things out of order. The next step would be whether Ms. Frenz has any cross examination of the witness.

FRENZ: I do, yes. Thank you. I note for the record first, and it's a little hard for me to see on this camera that I do know Ritchie Henderson II. I am the attorney for Board of Appeals. Mr. Ritchie, is that you?

HENDERSON: I believe that is correct.

FRENZ: Okay. Good morning, Ritchie. I do not have a conflict. I just wanted to put that on the record. So can I get some clarification? I have Richard Henderson and Richard Henderson II. Is that correct?

HENDERSON: Yes. I'm Richard Henderson II. And to my right is my father, Richard Henderson.

FRENZ: Okay, so let me start with you, Ritchie, or Mr. Henderson II. Oh, I have someone raising their hand. Should I stop a moment?

ADAMS: No, there's someone up on the screen. Toni, put your hand down.

FRENZ: Okay, going back. Sorry. So, Mr. Henderson II, what is your connection to Kai Ala Partners LLP?

HENDERSON: I am a managing director.

FRENZ: And what is your father's connection to Kai Ala Partners LLP, sir?

HENDERSON: He is also a managing director.

FRENZ: Anyone else a member of Kai Ala Partners LLP?

HENDERSON: Janet Hulick

FRENZ: No one else, sir?

HENDERSON: She's a managing director, too.

FRENZ: Okay. And that's it, sir?

HENDERSON: Yeah, she lives on Oʻahu.

FRENZ: What is the mailing address or the registered address for Kai Ala Partners LLP, sir?

HENDERSON: It is P.O. Box 655, Hilo Hawaiʻi, 96721.

FRENZ: Okay. And that's the mailing address that you use for Kai Ala Partners LLP solely. Is that correct, Mr. Henderson?

HENDERSON: That is correct.

FRENZ: Okay, great. Thank you, sir. Now, the address for the property in question, if I understand correctly, sir, is 75-5944 Aliʻi Drive in Kona, that correct, sir?

HENDERSON: That is correct.

FRENZ: And the companion property is 75-5946 Aliʻi Drive, sir.

HENDERSON: That is correct.

FRENZ: And as I understand it, the current real property value assessed for the property in question, 75-5944 Aliʻi Drive in Kailua-Kona. According to the County of Hawai'i, Real Property Tax is approximately $1.2 million. Would you agree, Mr. Henderson?

HENDERSON: Whatever is stated in the county's real property assessed value, yeah.

FRENZ: Okay. And with that in mind, Mr. Henderson, does your Kai Ala Partners LLP for the property in question seek a historic designation for real property tax purposes, sir?

HENDERSON: The state has determined it to be on the historical register. Yes.

FRENZ: And in light of that, Mr. Henderson, is it fair to say or is it accurate to say that because of your seeking that designation, the property taxes paid for the property in question is approximately $200 a year as opposed to what the assessed value is? Is that correct, sir?

HENDERSON: That is what the real property tax office allows for historical properties.

FRENZ: And that's a claim that you take advantage of. Is that correct, Mr. Henderson?

HENDERSON: Yes. We've made that option available to us.

FRENZ: Thank you, sir. Okay. Now, I have one more set of questions for you, Mr. Henderson, and then the rest. I'll just do arguments unless Director Mansour also needs to testify. So if there's a letter addressed to Kai Ala Partners, Mr. Henderson, and it's addressed to Richard Henderson, who is the intended recipient, just for some clarification, would that be you, Mr. Ritchie, as in Mr. Henderson II or your father, or both of you?

HENDERSON: That would be addressed to my father, Richard Henderson.

FRENZ: Okay. And yourself as well as your father and the other managing director, are all free to act on behalf of Kai Ala Partners, is that correct, sir?

HENDERSON: We act as managing directors with counsel and conferencing on what our decisions are.

FRENZ: Ms. Fulton, it looks like you are raising your hands. Let me stop a moment.

FULTON: Thank you. I just wanted to ask because I'm confused about this part, what is the relevance of asking about the taxation rate on the property to the code section that we're dealing with here? What, how is this relevant?

FRENZ: I'll be getting there with my arguments. Yes, I will be, I will tie it in. So, Mr. Henderson, is it fair to say then when you said that the three of you act together so what one of you does, the rest of the other two are in agreement? Is that fair to say, Mr. Henderson?

HENDERSON: Yes.

FRENZ: Thank you. Now, Mr. Henderson, on December 9, 2019, did either yourself or your father or Kai Ala Partners LLP receive a letter from the County of Hawai’i Planning Department approving your request to designate the property in question as a short-term vacation rental?

HENDERSON: Yes, we had to apply for that at the recommendation of our consultant because we use it as a family residence.

FRENZ: Well, so a short-term vacation rental is very different than a family residence. So what's your planning consultant's name, Mr. Henderson?

HENDERSON: Zendo Kern.

FRENZ: Okay. And that was during his previous time prior to being the Planning Department director, I take it. Right, sir?

HENDERSON: That is correct.

FRENZ: Okay. And part of your conditions of approval when you guys sought, when Kai Ala Partners LLP sought the Planning Department's permission to use the property in question as a short-term vacation rental, you were aware of the requirements for using such a designation, is that correct, sir?

HENDERSON: We had to apply for that because we used it for the family rentals staying there.

FRENZ: So you were receiving- Sorry. Go ahead, sir.

HENDERSON: And when I approached Zendo Kern as a consultant, he suggested that it would be prudent to apply for the short-term vacation rental nonconforming use permit in order to be in compliance with the short-term rental law that was being enacted at the time and had just been enacted.

FRENZ: And that's because you were receiving compensation for people staying at this property, is that correct, sir?

HENDERSON: Yeah. So we've always maintained the GET tax and the TAT certificate and paid those taxes on any of the rentals that happened there. And I might add that subsequently we received a letter from the Planning Department that says the property is now no longer underneath the nonconforming use certificate and does not need to refile for that on an annual basis.

FRENZ: Is that because you elected to remove that, sir?

HENDERSON: No, ma'am. That's because the property falls within the zoning requirements.

FRENZ: Of what?

HENDERSON: Short term vacation rental use.

FRENZ: I'm sorry, let me clarify when you say that it falls under those requirements, but you're no longer utilizing and having it designated as a short-term vacation rental. What was that decision based on, sir?

HENDERSON: What I said was that we no longer had to apply for the nonconforming use certificate required of a short-term vacation rental that is not located in a properly zoned district for short-term vacation rentals.

FRENZ: For nonconforming use. Is that correct, Mr. Henderson? If you know.

HENDERSON: At the onset of filing for the short-term vacation rental and registering it with the county, the property (was) required to have a nonconforming use certificate

FRENZ: And that's in order to rent it out, is that correct, sir?

HENDERSON: No. You can rent it out without a nonconforming use certificate. That just has to deal with the zoning.

FRENZ: So you are no longer using the nonconforming short term vacation rental designation, is that correct?

HENDERSON: I think you need to go back and read the regulations and understand what a nonconforming use certificate is and its application, and then understand what the short-term vacation rental statute says.

FRENZ: I'm very familiar with it, Mr. Henderson, but thank you. Ms. Fulton.

HENDERSON: Well, I don't understand your question then.

FULTON: Okay. Well, again, I just want to point out that at the previous meeting on January 7. We went on for hours about matters that were not pertinent to this claim, to this appeal. We went off on all kinds of tangents, and I don't see anything in the code section, Chapter 21, sewer, relating to whether or not a property is designated as a short-term rental. So if this ends up being relevant, I will be very surprised. But I would urge the County counsel, who is being paid, sorry for reminding, folks, but it's our taxpayers' dollars that are paying for your time right here, right now. And it's a waste of time to be creating smoke and mirror issues around this claim. And that's what I've seen the county do.

ADAMS: Dee, Dee, Dee. I think, I think-

FULTON: No, Georjean, let me finish. I would urge the Counsel to keep the arguments relevant. Thank you.

ADAMS: I believe that Ms. Frenz said she would be showing relevance. I think we need to give her a little bit more time to do that. I agree with you that it's been a long time doing this hearing, and it'd be nice to move it along, but I don't want to short anybody's opportunity to make their case.

FULTON: I am waiting with bated breath. Thank you. Let's proceed.

ADAMS: All right, keep bating it.

FRENZ: Thank you, Madam Chair. I think Ms. Cardwell was trying to signal. Am I wrong?

SALAS-FERGUSON: Yeah, Georjean, let's let Cody finish her cross, and then the board members will get their chance to answer any questions.

CARDWELL: I just need to say that I lost a Zoom connection for a minute, so I think I may have missed whatever happened the last minute or two. So if there's anything relevant there, then I would like to know. I mean, I caught what you said, Dee. I don't know if there's anything before that.

ADAMS: Well, I hope that Ms. Frenz will summarize her cross and information at some point soon. Thank you.

FRENZ: Well, much, to, I'm sure, Ms. Fulton's excitement, I was done with my line of questioning as to short term vacation rentals. I was eliciting necessary testimony from Appellants to address in my closing argument. So I have no further questions of the Appellant at this time.

ADAMS: Okay, then we are allowing the Commission members to ask if they have any questions of the testifier.

SALAS-FERGUSON: Sorry, Georjean. Mr. Henderson gets a quick redirect so he can just Make any quick comments he has regarding Cody's questioning. Mr. Henderson, do you have anything to add in response to Cody's questions? Anything brief?

HENDERSON: No, the Appellant has no further questions. I just would say that they didn't address the sewer issue in what they said.

SALAS-FERGUSON: And thank you for that. So now, Georjean, you can open up questions for the Commission members of Mr. Henderson.

ADAMS: Okay. Do any commissioners have questions of Mr. Henderson? Melissa Cardwell.

CARDWELL: Hi, Mr. Henderson. Yeah, I have a few questions. Actually, I have a very long list of questions, but I'm just going to ask one right now. So when I was figuring out how many sinks,

toilets, et cetera, you have. I just want to clarify. Between the two buildings, there's four sinks, three toilets, three showers and one washing machine, correct? There aren't separate laundry facilities in the annex building, right?

HENDERSON: The laundry facility is located in the annex building. There's no laundry facility located within the stone walls of the main residence.

CARDWELL: Okay. And so what I just said, the four sinks, three toilets, three showers, one washing machine between both. Is that correct?

HENDERSON: That would be correct.

CARDWELL: Okay. Thank you.

ADAMS: Elyse Robinson was the next.

ROBINSON: Thanks, Georjean. I have a question for Ritchie Henderson on Exhibit 1, the aerial photo of the property. I'm curious if you know where you can direct me where the lots, the TMK, 18 and 19, I believe I'm summarizing it, where the boundaries are.

HENDERSON: The dividing line is about, I would say 50 feet from the left hand side as you're facing the shore. It goes down to where that left hand lot has a short area on it, and then it's the lava rock to the ocean. So right about there is the intersection on it. You have a picture of the- Yeah. So you see the red dot marker for the main residence?

ROBINSON: I do.

HENDERSON: And then to the right of that is the tank house roof. That's there. And then down below that in the shade is another kind of little red roof. The property line is on the Keauhou side of the tank house and runs down to about where you see that white retaining wall come in. So that's approximately the dividing line for the two lots.

ROBINSON: I'm a little closer to the camera. Is it here going this way? (Holds up Exhibit 1 to the webcam and moves her finger on it from right to left).

HENDERSON: Yeah. Coming down to that little white wall down there that you see.

ROBINSON: Okay, so it's this way south of this building?

HENDERSON: Yes. It would be approximately 10 feet, which is a setback from the tank house. And then it would run perpendicular to the Aliʻi Drive that you see up there with the white car on the roadway there running down to the ocean.

ROBINSON: And in this picture, this shaded red roof. Can you identify that?

HENDERSON: Yeah, that's a boat storage house.

ROBINSON: Okay. Thank you. That's all the questions I had.

ADAMS: Any other commissioners have a question for Mr. Henderson? Melissa, another question.

CARDWELL: I have another question that came up for me when Cody Frenz was giving information about the short-term vacation rental. So when it was being used as a vacation rental, was the storage building being used as well? Was anyone staying in that storage building when it was being used as a vacation rental, or was everyone staying in the main house?

HENDERSON: Everyone stays in the main house. Where the tank house, where the water catchment tank was, is storage. It's got rods and reels. It's got boats, nets.

CARDWELL: Okay. So then I have another question. So what came up in the video when I watched the previous meeting in regards to this, someone at one point had mentioned that when there is a main house and then there's an ‘Ohana unit, meaning that the ‘Ohana has kitchen, bathroom, all of this, all of the things, then that person would be charged for two units. So in this case, because in my mind, basically it's a garage. It's a garage with laundry facilities. So is there ever a case - And I guess, actually, you know what? Maybe I need to wait to ask this question, because I don't think this is a question for Mr. Henderson. This is sort of a more of a code question. So I'll hold off on that, actually.

ADAMS: Dee Fulton has a question.

FULTON: Yeah. So just to confirm, I can. Can I ask Mr. Henderson a question at this point?

ADAMS: Yes.

FULTON: Okay. Mr. Henderson, are you an attorney.

HENDERSON: Commissioner Fulton, no, I am not an attorney.

FULTON: Okay. Well, I commend your interpretation of the law. I'm sure you had examined the code, Chapter 21.

HENDERSON: Yes, I've read Chapter 21.

FULTON: Right.

HENDERSON: I would hope that all of the commissioners would have read Chapter 21.

FULTON: Yes. Chapter 21 is actually very straightforward and simple. Chapter 21 --

SALAS-FERGUSON: Ms. Fulton, right now is your time to ask a question.

FULTON: Right. So my question is, even though you're not an attorney, Mr. Henderson, are you interpreting the law that the definition is subordinate to (Section) 21-31, which relates to assessing sewer fees on residential dwellings? Are you interpreting it that the definition cannot stand alone as a basis for assessing a sewer fee?

HENDERSON: Yes.

FULTON: So I hear your interpretation is that the unoccupied unit, which is then further defined in the code, subordinate to Section 21-31, although it doesn't state in black and white what the code says by definition is residential unoccupied units. Residential unoccupied units will be assessed a monthly maintenance fee because, as we know, the sewer fee is structured so that there is a flat rate every month based upon the size of the pipe, and then there's a volume fee. So clearly the intent of the law is that residential unoccupied units pay for a flat fee.

SALAS-FERGUSON: Ms. Fulton I’m sorry for interrupting but -

FULTON: I think that's the way Mr. Henderson is interpreting it. That's the way I hear from him. I just want to confirm my understanding of Mr. Henderson's interpretation.

HENDERSON: Well -

FULTON: So, basically, we have a definition which has been surgically excised from the code and being called upon as saying this is the law. It appears to me that it doesn't stand alone as law. It is subordinate to Section 21-31 and that this detached building is not a residence by any standard.

ADAMS: I don't believe this is the time for us to discuss each of our opinions on the case.

FULTON: When is that time?

HENDERSON: She's asking for my question on that.

FRENZ: I agree with you, Chair. I object.

FULTON: Chair, I apologize if I'm out of order in that regard. Is there a time at the end where we have a discussion?

ADAMS: We will have a discussion amongst the commissioners on how and why we make the vote we make. Now, it’s just to make sure we’re understanding the testimony or if there are

additional questions, particularly of the two commissioners who were not present at the January 7 meeting to get clarification.

FULTON: Okay. Thank you. My apologies for being out of order.

ADAMS: Okay, I have a question. I was looking back through your exhibits, Mr. Henderson. Exhibits 17 and 18. (Exhibit) 17 is the wastewater bill. And it has the address 75-5944 Aliʻi Drive, and then it ties to ties in TMK ending in 18. Exhibit 18 is a water bill from DWS. And it references address 75-5946.

HENDERSON: That is correct.

ADAMS: That is the water bill. Okay, which address has the house on it?

HENDERSON: 44.

ADAMS: So the water bill is being sent to an empty lot.

HENDERSON: That is correct.

ADAMS: Okay, I'm clarifying my puzzlement. Much like Elyse, I think, where is this stuff? Okay, they're two different addresses.

HENDERSON: I brought that up in my testimony to the director.

ADAMS: Okay. Are there any other questions from commissioners at this time? Seeing none. And we've done the redirect. Oh, Melissa has another question.

CARDWELL: Sorry. I'm just. I just need to make sure I'm absolutely crystal clear on this. So we've got one water bill, and then we've got one wastewater bill. But the wastewater bill has two units that it's charging for, correct?

HENDERSON: That is correct.

CARDWELL: Okay.

ADAMS: All right, so now it is, correct me if I'm wrong, attorney, Appellees' opportunity to submit further evidence. And do you have any written or oral evidence? And is there another witness I need to re-oath?

FRENZ: Yes. Thank you, Madam Chair. I see Director Mansour with his hand up. I'd like to call him as a witness, see what he would like to indicate for the record.

ADAMS: Okay. We don't see Ramzi.

MANSOUR: Yeah.

ADAMS: Okay. There he is. Hang on. I get to give you the oath. 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, Mr. Mansour?

MANSOUR: Yes I do.

FRENZ: Director Mansour. You have your hand up. What would you like to say, sir?

MANSOUR: Yeah, definitely. Thank you. I heard Mr. Henderson's testimony and I would like to just for the record, as I had submitted my written testimony in the prior submittals. This decision has been made for the last many years prior to too many directors. It's very simple. This existing building, Mr. Henderson himself testified that it's a standalone detached structure. Has sewer feasibility connection. If he wanted (it) to be a storage room, he wouldn't finish that structure to the level of the entire house. The final finish of that what he calls the storage room, which is stand-alone building with washer and dryer water heater, sink and toilet. It's fully equipped to allow for somebody to rent that unit just for the amount of the plumbing fixtures that he included within that unit. It's very simple, Mr. Henderson. Disconnect and we waive the fees. Currently, you are contributing to our sewer system. Every time somebody does the laundry, every time somebody flush the toilet, where do you think that is going? To our waste treatment. We treat it. We collect it. When you have a sewer clogging, you're going to pick up the phone. You have now two wyes. So if you have sewer clogging and sewer backup in that storage area, as you recall it, or detach unit, who's going to respond to that? Who's going to end up paying for our guys to go out there and get that sewer wye connection unclogged? So you technically have two possibilities. Sewer clogging, sewer backup. If you have one connection, one wye, we respond to your property one time. Now we have to respond to your property twice, because if you have sewer clog or sewer backup, either at the storage area or at the unit, the probability is doubled. It's very simple. The code says if unoccupied unit is accessible to plumbing fixtures. You have more than one plumbing fixtures. You have enough plumbing fixtures to call this unit as a standalone structure unit. And our guys, as we do this sewer maintenance on down Ali'i Drive, somehow, everybody connected. They have to pay the share equivalency of that sewer service. We got sewer backup. We got sewer issues. As our guys this morning has explained, with the sewer pipe televising, flushing the line, hydrojet the line. This compensation goes toward maintaining the service that you receive, period. You receive two services, one for the standalone structure that potentially could have sewer backup that potentially we can respond to when you have a sewer backup. Somebody is going to pay the fees for that. And you have the other house that also has its own sewer connection. When you have sewer backup, you're going to call us. Somebody's going to respond to that. So we're going to end up responding to your property to provide you the service that you are paying for. When you talk about enrichment. Mr. Henderson, you hammered me last time, and this time about the government tried to (be enriched) from you. You're the only one that's being enriched. The county is not being enriched at all. We do our sewer maintenance, we do our

sewer treatment, we do the operation, and we extend our service. And our guys are doing a great job to every house that we service, to every sewer lateral that we service. But if the code is the issue, the current code allows it. If you guys have problem with the code, we need to change the code, but you cannot penalize and get away from it because the current code allows it. It's the law. If the law allows it, you pay it. If you want to change the law, then that's a different step we need to take to change the law. But to me, it's very clear. You got two units, they have fixtures in the units. Two units have the possibility of sewer backup, sewer clogging, that our guys have to respond to. Thank you.

ADAMS: Thank you. Does the Appellee have other witnesses to provide written or oral testimony?

FRENZ: Not at this time, Madam Chair. Thank you.

SALAS-FERGUSON: Georjean, just one thing. Mr. Henderson will need an opportunity to cross Director Mansour.

ADAMS: Okay. I was doing that next. So do you have any cross exam of Mr. Mansour?

HENDERSON: Yes, Director Mansour. I didn't know that I would call the Wastewater Department to fix a plumbing problem on my property. I usually call a plumber to do that and a private business. So I'm a little confused as to –

SALAS-FERGUSON: Sorry, Mr. Henderson. Sorry to interrupt you, Mr. Henderson. So now is your opportunity to ask Mr. Mansour any questions you may have that are directly related to his testimony that he just gave. So if you have a question about what he said, please ask that now. Thank you.

HENDERSON: Yes. I understand that. And I was responding to one of the things that he asked or stated in that, that Wastewater had to come to my property to unclog the sewer. And along that line, I'd like to ask him, Director Mansour, do you think that this property has two connections to the sewer?

MANSOUR: You have two wyes. That property has two wyes.

HENDERSON: No, does the property have two connectors to the sewer?

MANSOUR: You could have more than two. The current code allows to have multiple homes in a subdivision into one.

HENDERSON: I'm asking, how many connections to the sewer does the property have?

FRENZ: Objection. I'm sorry, Madam Chair. Mr. Henderson, you need to let the witness finish his testimony before you interrupt and talk over him. Our record can only take one person at a time.

HENDERSON: Thank you.

MANSOUR: It's very simple. Our code is very simple. You could have one connection to a main that could provide a sewer to the entire subdivision. But each house within the subdivision have its own wye. So in your situation, your property had two wyes coming into one connection. It's very simple, Mr. Henderson. If you get sewer clogging in one wye that could potentially, when your plumber comes in, push it into our county lateral. Yeah, we're going to respond to that. When you call us, we'll be there because that part of that lateral (is) county owned. So in addition to that, I'm sure Dee Fulton is being the lead into getting into private laterals for smoke testing and what have you. So now we're going to have two tests for you, because you have two laterals, I mean, two wyes with two cleanouts. So just to put it in perspective, that means we get a monitoring report to clean out with two wyes possible for smoke detection, as Dee Fulton recommended, as our Department must do. So yes, we will go on to your property.

HENDERSON: I would then ask, could you please explain to me the definition of a single-family residence? In your understanding.

MANSOUR: Single-family residence, it's a dwelling. It's dwelling on it that has bedrooms. People can inhabit that single-family residence. In your situation, you have a separate structure. You have the dwelling itself, and you have an unoccupied unit. Based on our definition, let me be clear the code, current Chapter 21 code, allows for any unoccupied unit with accessibility to plumbing fixtures to be charged. If you don't like that code, then we need to change the code. But you cannot ask for a reimbursement for the last 23 years. It's the code. If the Commission wants to change the code, then that's the step they need to take. Commission members, you guys were all showing that you want to change the code. Change the code, then the fees go away. But you cannot take action on a current code that's being implemented for the last 23 years.

HENDERSON: Can you explain to me Section 21-31?

FRENZ: Is there a specific provision that you're seeking clarification or explanation on?

HENDERSON: Yes. I want to see where an unoccupied unit is to find.

FRENZ: It’s the last sentence, sir.

HENDERSON: And in statutory construction, what does that apply to?

FRENZ: Go look at Section 21-2, sir.

HENDERSON: I'm looking at the section that empowers the charge. It's 21-31. Unoccupied units are talking to those units that are directly above it.

FRENZ: Look at 21-2, sir, for the definition of an occupied unit, it's statutorily defined.

HENDERSON: Then what does the unoccupied unit there apply to?

FRENZ: The definition, sir.

MANSOUR: It goes back again. If you want to change the definition, you want to change the code, you go through code changes, and then you could ask the Commission to take it on, and we will be more than happy to change the code for you. But currently it's very clear to us. It's been clear to us for the last 23 years.

HENDERSON: Director Mansour, in your definition of a single-family residence, does that include a kitchen, cooking facilities-

FRENZ: I'm going to object. This personal opinion-

HENDERSON: I'm asking for the definition of a single-family residence.

FRENZ: Do you see it defined in 21-2, sir?

HENDERSON: I'm looking for the definition of a single-family dwelling over here. Residential customers.

MANSOUR: Mr. Henderson, we (are) here to challenge Chapter 21. Dee Fulton made it clear it's a code issue. Let's talk about the code. She wanted to talk about code, let's talk about the code. It's very clear. Unoccupied units. If you guys want to change the codes, then that's a totally different step, different methodology to go about it. And we've been talking about code changes since I started with the Department. And if you guys wanted to do (a) code change, we'll be more than happy to do it, but that's the process.

HENDERSON: All right. My final question to you is the wastewater loading. And you said that we're somehow putting in more wastewater than another unit. That would be one unit. And I just wanted to understand your rationale for that.

MANSOUR: Yeah, definitely. Let me tell you about the loading. There's two separate loading when it comes to wastewater, what we call is hydraulic loading and solid loading. I don't know if you're familiar with these terms, but the loading is based on the amount of total solids that you guys flush into our system, or the hydraulic loading based on the flow that comes to our treatment plant. So when you have a toilet, dishwasher, washer and dryer, a shower, that when it flushes through the wye connection you have for that unit, that adds loading to the system.

Without it, you subtract that loading every time you flush the toilet. That's what we call organic loading. We call it black water. So you flush it, that adds to the system. It comes through the wye to our treatment plant. If you don't have it, you are subtracting that load. It's definitely a standalone hydraulic and organic loading that you add into the system. It's very clear.

HENDERSON: So are you saying that I have two washing machines in the house?

MANSOUR: All I'm saying is you have a unit. Standalone unit, detached, has a toilet, has black water. That's what we call organic loading. When you flush it, it comes into the system.

HENDERSON.Thank you, Madam Chair.

ADAMS: Okay, we're done with redirect from Appellant. Correct? All right. Now we open it to commissioners and questions they may have. And I see that Melissa Cardboard has a question. For whom?

CARDWELL: I have a question for Mr. Henderson.

ADAMS: Can we go back to Henderson? Is that out of order?

CARDWELL: It's clarifying what Director Mansour just said. I just have a clarifying question.

ADAMS: I just check it with my attorney. Is it okay for her to go back?

SALAS-FERGUSON: Georjean, you can allow it if you want.

ADAMS: Okay, I allow. Go for it. Melissa.

CARDWELL: Okay. So I remember in the last video that this came up about the wye connection that Mr. Mansour said that there were two wyes, but I thought that there was only one wye connection. Is that correct?

HENDERSON: Yes. As far as I understand, there's the one that comes from the house and there's the one that comes from the annex. And that goes to one lateral out to the sewer collector line.

CARDWELL: Okay.

HENDERSON: All of that is on our property.

CARDWELL: Okay. And then my other question is, at one time, how many people can the house hold? Like, how many people can stay in that main house at a time?

HENDERSON: Well, we have, I believe there's eight beds on the sleeping porch and there's two bedrooms upstairs.

CARDWELL: Okay. So would you say that's, I don't know, what would that be? Twelve people at a time if two people slept in each bed?

HENDERSON: Well, I'd say that there are single beds on the sleeping porch. So you could say eight plus two plus two, 12.

CARDWELL: The 12, right. Okay, so 12 people at any one time could be staying in that main house.

HENDERSON: Well, that was the way that my grandparents envisioned it for the eight grandchildren.

CARDWELL: Okay. Okay. Thank you.

ADAMS: Are there other questions? I guess, for either party, by the commissioners? Lee McIntosh.

McINTOSH: I have a question for Mansour. From what I understood from our previous meetings, I thought the county's responsibility was only your main. I thought from the main to the house was the homeowner's responsibility. So I was wondering where the responsibility of the county begins and ends, or if that's only for if there is damage, but if it needs (to be) cleaned out, they would call the county.

MANSOUR: You're right, Lee. Our current code is from the main to the property line still our county responsibility. So we maintain his lateral to the right of way. So if either one of his line ends up causing the clogging within that lateral, it's our responsibility. Hopefully that becomes a code change. It should not be our responsibility, and that's where it should be the owner's responsibility from the main all the way to his house. But unfortunately, the current code, it is under our responsibility to the right of way, that lateral. So we go there. So let's say if you end up flushing anything within his either wye, and it makes it into that lateral before it makes it to the main, this is our responsibility. We have to go there and clean it. And if he doesn't want to pay for it, who's going to pay for it? And that's the big question. He got two wyes, has two possibilities of sewer clogging, sewer backup. Our guys would go out there in the middle of the night to get in and clear (it) for him. Somebody's going to pay for that service.

ADAMS: Does that address your question, Lee?

McINTOSH: Yes, it did.

ADAMS: Okay. Elyse, I see your hand up. Did you have questions?

ROBINSON: Yes, I do. This is for Director Mansour. Looking at exhibit I through K all of the increasing wastewater service rates with a single unit residential property. Is there a difference between the rate charged for, say, a one-bedroom home versus a five-bedroom home with multiple bathrooms?

MANSOUR: The fees are set for residential. it's on a monthly rate for condominiums, apartments, hotels, is based on some water usage rate. Mr. Henderson here stated there's possibly 12 people at one point. That's way more than five people within one structure. Department of Health, either or during the design process, we assume 2.8 capita per house. When we design these, we allow for the design of the flow based on 100 gallons per day per capita. So when he has 12 people, that's 1,200 gallons per day. He's talking about loading. That comes to our treatment. We have to treat it, we have to collect it. We have to maintain the shoreline. 1,200 gallon per day. We're not talking about your standard home with possible 500 gallons per day or 300 gallons per day. When you have 12 people that's per day, that's a lot of flow.

ROBINSON: So to clarify, there is no rate difference between a one-bedroom home, one bath versus a five bedroom three bath.

MANSOUR: No, it’s the same.

ADAMS: Okay. Dee Fulton.

FULTON: Thank you, Chair. This question is for Director Mansour. Director Mansour, please describe further the rate structure of the sewer system because I think it's in the code. My reading of the code shows that there is a flat rate fee based upon the size of the pipe servicing the structure. And then there is a volume fee. And that volume fee is intended to compensate for additional use of water for all those items that you mentioned. Laundry, washing. It's actually even adjusted that they only bill 80 percent of the water volume because 20 percent is assumed to be for irrigation. But what I'm pointing out by way of a question is that there is already compensation for equity built into the code for homes that might have 12 bedrooms versus homes that have two bedrooms. Do you agree with that, Director Mansour?

MANSOUR: No, I totally disagree. That's for commercial, condominiums apartments, you do it based (on) volume. If Robin (is) on this line she can -

FULTON: I think those units fall into a different part of the code. That would be multi residential units. Those aren’t -

MANSOUR: If you look at his sewer service it has always been (a) fixed charge. Look at his sewer bills as attached in the exhibit. It's a fixed charge per month. It doesn't go up and down. It's very clear, it's in the exhibit. So he's being charged at a fixed rate because apartment complex, commercial. Yes, you're right. Because of the occupancy, because of the volume. But his house

is being charged for fixed residential fees. Maybe we should charge it as commercial, it will be twice as much.

FULTON: Okay, yeah, I am confused about this because I thought the water meter was the basis for a volume part of the sewer fee.

MANSOUR: No, not for residential. It's fixed fees. You could see his bills. It's fixed fees. If you live in an apartment, you probably could be subject to that value. But his parcel is based on fixed monthly rate. That's why I'm saying is for 1,200 gallon per day, that's a lot of flow. You're right. It should be charged based on volume, based on commercial rates.

FULTON: So it sounds like it's your belief that the code should be amended to compensate for residents that have more bedrooms. Is that what I'm hearing from you?

FRENZ: Hold on. Let's, I want to just make sure, I'm going to object. I want to make sure we stay on point. If we're going to talk code amendments, we can do that separate and apart. That's not relevant to these proceedings, so I object to that.

FULTON: Well, there's been a lot of testimony delivered by our director on this subject -

SALAS-FERGUSON: Dee, Dee, Dee, Dee, Dee, Dee

FULTON: and he was not interrupted –

ADAMS: Dee! Dee.

SALAS-FERGUSON: When the party makes an objection, you can respond to that objection, and then Georjean can make a ruling whether or not to sustain that objection. So Cody made an objection that it's, Cody, what's your objection?

FRENZ: Relevance. As to code amendments.

SALAS-FERGUSON: So, Dee, you can respond to that objection.

FRENZ: My apologies, Madam Chair. I'm just trying to keep us on track.

MANSOUR: Well, I mentioned it earlier. Definitely, code changes are a separate topic -

FRENZ: Hang on. Director Mansour. Director. Director. You got to wait. There's an objection on the table. Please don't respond. Madam Chair.

ADAMS: I will guarantee you we will have a discussion on code changes after this hearing. Since we are holding the hearing before the rest of the agenda, maybe we can even talk about it today because that was one of the items on our agenda today, to talk about code changes to

Chapters 20 and 21. So, yes, I would like to defer discussion of that. We brought up some issues and we will come back to it. But right now, what we're dealing with is this particular appeal. I believe Director Mansour clarified the point that (single-family residences pay a fixed fee) and it's only $45 a month right now. And that's changing. That is a total separate issue for the EMC at a later time period. So if that's okay, Dee, going to chop you off and go to Melissa, has a question of Mr. Mansour.

CARDWELL: Yes. I'm just wondering what that fixed rate is based on, the $45 a month. How did the county come up with that number?

ADAMS: Again, I think that's a discussion for after this hearing. For the hearing's purpose, it has nothing to do with why the dollar value has added up, but it has nothing to do with the Director's decision, whether or not we want to change that decision. Correct? I think the point we're at is for a final rebuttal. Are we at that point at the agenda?

SALAS-FERGUSON: You can ask the Commission members if they have any final questions regarding the Director's decision to determine that that structure is an unoccupied unit per the code. If they don't give Mr. Henderson the final opportunity to say something, and then we'll move on to closing arguments.

ADAMS: Okay. Do any of the commissioners have question for Mr. Mansour? Could you guys put your hands down on your Zooms, Melissa and Dee, unless you had a question. All right. Seeing none, now I think we moved to allowing Mr. Henderson opportunity to put on a rebuttal case to the Appellee's case. And that would allow the Appellee counsel to examine the rebuttal witnesses and back and forth, back and forth. So I think you've got the ball.

(The Commissioners took a brief recess)

ADAMS: Okay. We're reconvening after our health break on the contested case hearing and blanking whether Appellants had any final rebuttals.

HENDERSON: Yes. Commissioner Adams, I would like to cover two matters. The one matter on the short-term vacation rental designation of the property that was undertaken in order to cover the maintenance costs of the property. And it was to be paid for by renting to family members at a cost of whatever the operations was. So it's minimal, like $70 a night to do that. And the second point that I want to address is if, in fact, this property was producing 1,200 gallons a day, then that would equate to a billing of 72,000 gallons per billing. And I would refer you to Exhibit 18, which is the water bill for the property. And you would see that it's substantially, substantially less than that. The only large amount is when there was a breakage in the irrigation line. And that breakage resulted in additional water being dumped on the ground and not into the sewer system. And that's all that I have. Thank you very much for the Commission. The numbers in the water bill are like, for two months, 4,000 gallons. Two months, 4,000 gallons. There was another 23,000. That was a water break in the irrigation. Then 5,000,

8,000, 5,000, 1,000, 10,000, 5,000, 17,000, 14,000, 41,000 and 10,000. Those were substantial breaks in the irrigation system that have since been repaired.

FRENZ: I would like to raise a record objection, Madam Chair. Apologies, Mr. Henderson. Record objection. I'm not sure why we're even talking about the water breaks. Water line breaks is water bill. Quite frankly, we don't have the Director of the Department of Water Supply here to address any of those matters at this time. So I'd like to keep us on track. I object as to relevance.

HENDERSON: The relevance is I am trying to counter what Director Mansour says, that this house uses a substantial more amount of water when in reality it does not.

FRENZ: It really has no bearing, sir. You're paying a flat rate. You're not paying for volume.

HENDERSON: I don't know why we brought it up in the first place, but I'm just commenting on what he made.

FRENZ: I renew my objection. Anything else?

HENDERSON: No. That's all, Commissioner.

ADAMS: Okay. Thank you very much. Appellee also has final rebuttal.

FRENZ: I'm ready for closing arguments, Madam Chair. I'll make all my arguments then. Thank you.

ADAMS: All right, so I closed the evidentiary portion of the hearing. I guess, should I ask commissioners one last shot to ask for evidentiary information, Sinclair?

SALAS-FERGUSON: You can ask if they have any final questions. Then you can close the evidentiary portion and move on to closing arguments.

ADAMS: Okay, so what I'm asking is if any commissioners need to try to solicit new testimonies by the questions. Otherwise, we will close the evidentiary portion of the hearing.

(The Commissioners took a brief recess)

ADAMS: Okay. We are all back on camera. There is a question from Melissa Cardwell.

CARDWELL: Thank you, Georjean. I remembered I had a question from much earlier in regards to county code. So my question is when a household has a detached garage with laundry facilities in it, I know most people do have that. Are they charged for two units of sewer usage?

MANSOUR: Well, if it has plumbing fixtures. I think, Toni, she does inspection to these facilities as (they) get constructed. So in particular, when she does her inspection. She used to work for us. Unfortunately, now she's with Public Works. Toni, you want to give us kind of brief description of the process when you do connection and designate a second connection or no? I see Cody's – irrelevant - I'm sorry. Okay. Sorry Melisa.

CARDWELL: It does seem relevant to me, though, because this is relevant. Because the fact of the matter is that the Hendersons don't have a laundry facility in their main house, so they have to have a laundry facility somewhere, and it happens to be in the detached building. And so my question is, are there people who have detached garages with laundry facilities, are they charged for two units of sewer? So that seems relevant to me, because there's something that's being established here, the precedent. So I just want to know if this is something that's done, if this is common practice.

MANSOUR: If it's during inspect - I'm sorry, Cody.

FRENZ: Could I, just to clarify, Director, sorry. My objection was going to be to Toni walking us through how she does inspections. That I don't think is relevant so much as how. So just to clarify, Melissa, how the code is applied to a structure. That is very relevant. That's the only clarification I wanted to make. So I guess the question, as I understand it, Melissa, is we go back to our definitions, as I understand it. Right. We look at our definitions. Do the structures have the necessary plumbing utilities for an unoccupied unit? Does that result in a charge? Is that the question, Melissa? So if you have a -

CARDWELL: That's the question. Would a detached garage with laundry facilities and just your regular household, you've got the house, you've got the garage with the laundry. Would that be considered a separate unit, that garage? Would that household be charged for two units of sewer usage? That's what I'm asking.

ADAMS: And Tony can provide be a witness and provide testimony. I just have to swear her in again. Right? Okay. It's too far away. Is it Toni Nakatani? Okay. Unmute yourself. 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: Yes.

ADAMS: Okay. Can you answer Melissa's question about a detached garage with a washing machine.

NAKATANI: A detached garage is, if it's designated as a garage, then it's not a unit. So no, it would not.

CARDWELL: Okay. Thank you.

ADAMS: Okay. Are we ready to close the evidentiary portion of our hearing? Okay. So declared. No more evidence. Now we are going to move on to closing arguments, and the Appellant Richard Henderson gets to go first.

HENDERSON: Thank you, Commissioner Adams. Chair Adams, in closing, even if you consider Director Mansour's unoccupied unit of a garage or a storage shed or our storage building annex on the property, his definition states "and currently receives a water bill." And I would direct you and your attention to Exhibit 18, which is the water bill, and that is not for that annex or residence. That bill is addressed to the adjoining lot. So we do not receive a water bill for the residents and the annex. So you cannot use that definition as proof that it deserves to be charged a wastewater fee. And again, there's only one connection on that property to the sewer system. And as the director said, they are responsible for the right of way, which is the driveway entrance to the property. And the owner is responsible for dealing with plumbing matters on the property. And we have done that in the past, taking care of everything that we need to take care of. So there's been no additional burden on the wastewater department. And finally, I would turn to Section 21-31, which gives you the charging authority in the code and state that statutory construction. What is talking about an unoccupied unit there is talking about those properties listed directly above that sentence, including the single-family dwellings, duplexes, housing projects, condominiums, townhouses apartments, and dormitories. And it shall be charged according to the schedule shown in 21-36.1, and where it says unoccupied units will be assessed a monthly maintenance fee equal to the current monthly sewer fee is obviously related to apartments, dormitories, condominiums that have unoccupied units in them. It's as plain as the nose on your face. We rest our case.

ADAMS: Thank you, Mr. Henderson. Now for the Appellee's closing argument.

FRENZ: Thank you, Madam Chair. All right. Good morning again, everyone. I know it's been a long time coming. While I wasn't present for the January 7, 2022, hearing, I know, as Dee mentioned, it was long. And I appreciate everyone's patience. I appreciate everyone's attentiveness. And I must say, I apologize, because what is a very simple matter appears to become quite confusing and unnecessarily complicated. So I want to bring it back and remind the Commission that there is only one controlling mattering issue before you. Can this Commission find that Director Mansour's decision falls under either of the three standards of review that you guys have. That's your job. That's your burden. That's the only issue before you today. What are those three things? The Madam Chair talked about them earlier. I'm going to remind you about them right now. First, did his decision violate any county code or other applicable law? Second, was his decision clearly erroneous in view of the reliable probative and substantial evidence that's been presented in the entire record from the last hearing and now? And finally, was his decision arbitrary or capricious, characterized by an abuse of discretion or clearly unwarranted exercise of discretion? If this Commission cannot find that his decision falls into either of these three categories, you only have one response. There is no other option. You must uphold his decision. And let me tell you exactly why his decision should not be overturned and why you have to uphold his decision. Let's take the first one. Did his decision violate any code, whether it's the county code or any other applicable law? You can't violate the code

when you're solely following it. I bring you right back to the definitions in the sewer code, 21-2, Definitions. There's been a lot of talk today about the definitions and what did I do? I kept bringing you right back and Mr. Henderson bringing you right back to those definitions. I respectfully disagree with Mr. Henderson. He just told you if you look at Section 21-30, that last sentence of unoccupied units applies to the sentence directly above it. No, it doesn't. Sir, it is clear as day. You need to go back to the definitions. Unfortunately, that's the way our laws are. You have to take them as they are written in its entirety. So what does unoccupied units mean? We go right back to that definition. A unit that is not occupied as he alleges the dwelling or the building is not, but has accessibility to a sewer, plumbing fixtures located on it and currently receives a water bill. Now, I'm going to address the water bill issue a little bit later on with you. But what did Director Mansour's decision to do? It followed the code. It doesn't violate the code. It follows it. If you don't like the code as we talked about repeatedly today, you have to change the code. Director Mansour's hands are tied. Frankly, this has been a decision, as he testified to earlier, that has been multiple directors before him, not just him. He is not creating new law. He's not creating a new position. He is not treating Mr. Henderson any differently. He's applying the code to the facts. It is quite that simple. Now, at one point, I know when Mr. Henderson was initially talking, he referred you all to the Black's Law Dictionary. That's not relevant. That doesn't control. The Black's Law Dictionary are not the definitions, unfortunately for Mr. Henderson, that you have to look to, that the director has to look to. To review and rely on definitions outside of the code? Now that, Commissioners, would be arbitrary and capricious. So if we take Mr. Henderson's, initially, he read in what were his proposed findings of facts and conclusions of law as to his arguments, additional arguments. He referred to the director not following federal law, and he has not proven anything whatsoever regarding that. I would ask that this Commission completely disregard that kind of last-minute effort. It would appear, in my opinion, to be to try to find something that indicates the law is not being followed. Our county code is what controls. The sewer code specifically is what controls. And that's exactly what's been followed. Now, frankly, when we talk about, Dee, you were asking me what relevance to my questions about his real property tax and historic designation have to do with anything. Let me tell you exactly the relevance of those questions. So Mr. Henderson is talking about how this decision violates federal law. He talked about the proportional shares. Frankly, Mr. Henderson or the Hendersons plural, Kai Ala Partners, they're not even coming close to providing a shred or, excuse me, close to providing their fair share of contribution like the rest of us taxpayers are having to do. They are reaping the benefits. They have a multi-million dollar property. Both properties that I asked them about are listed according to the Real Property Tax website, as I asked him, about, over $1 million. The property in question is valued at $1.2 million, but they pay $200 a year because of this historic designation that they're taking full advantage of. Why are they doing that? Because the law allows for it. What else does the law allow for? Designating a second sewer connection to require another maintenance fee. The law allows for that. So nothing so far, you have not been provided anything to indicate that the director's decision violated law. That's your first of three prongs. Does his decision violate any county code? It does not. Any other applicable law, it does not, nor has the Appellant, and it's his burden. Has the Appellant proven that any other applicable law has been violated? Now let's move on to number two. Was the director's decision totally erroneous in light of the probative reliable, substantial evidence? That's part of the record that you all have considered

and are reviewed and are listened to by the many exhibits and testimony that you've heard so far? Mr. Henderson's argument to this Commission is his beef, so to speak, with the definition of unoccupied units, and that he doesn't receive a water bill. So therefore, it's not applicable to him. We go back to the definition, whether you like the definition or not. We go back to the definition under 21-2, and it specifically says, has accessibility to a sewer, plumbing fixtures located on it, and currently receives a water bill. Now Mr. Henderson's argument about the water bill is, well, this property doesn't get a water bill. The water bill goes to the adjoining property, the other $1.2 some odd million-dollar property. And so now whose fault is that? It's the Water Supply's fault, right? It's everyone else's fault except the Hendersons and Kai Ala Partners. Now he's alleging that throughout the course of this that and I've read his pleadings, the Department of Water Supply is sending the bill to a different property. So not only do we have Department of Environmental Management billing issues, we have Department of Water Supply billing issues. One plus one still equals two in my book. And so you can punt the issue any which way you want to. At the end of the day, he has the connection. He has the connection, and that's what matters. There is zero washer and dryer, as we talked about in the home. Where is everyone - I believe it was Melissa - where is everyone going to wash their clothes unless they're driving to a laundromat somewhere else? It's just not realistic or logical. If a building meets the legal definition and requirements of a unit that requires a connection fee, as the definition lists out, the director has no discretion. The director has got to assess a charge, the maintenance fee. And that's what's listed specifically as we've been talking about in 21-36.1 that lists the wastewater service charge rate. He doesn't have the discretion. If you want the director to have discretion as a commission, then again, we go back to code amendments. You need to give that director the discretion. He doesn't have it right now, if you have an unoccupied unit with all of those attachments, then you're going to be paying a fee. Now, Mr. Henderson, even at one point in what he read into, talked about the architecture and the intent of the property. That has no bearing. Quite frankly, what one's intent is for a property or what you hope the property may become, doesn't have any relevance or bearing as to how it falls within a definition and legal category for billing purposes. It is quite that simple. So unfortunately, based on the information in front of you, we've got a description of the property. We know what the definition of an unoccupied unit is. We know that that property falls directly within that definition, leaving the (Director) with no discretion but to assess that fee. Again, it is what it is. So what's left? We look at whether or not the Director's decision was arbitrary, capricious, or characterized by an abuse of discretion or that he exercised clearly unwarranted in the exercise of discretion. Has he done that? No. There's absolutely nothing arbitrary and capricious about following the applicable code. I'm not going to beat a dead horse. I have talked about the definitions. You all know how the property is described. He's admitted to the description. It is what it is. Either the code applies or it doesn't. The code applies. Change the code. The remedy is not to say, Mr. Henderson, let's go ahead and forgive all of these bills that you never raised earlier, which I'll address later. Change the code. You don't like it, you change the code. You do not have the authority, respectfully, to make arbitrary and capricious decisions, to disregard the code and give Mr. Henderson what he wants. And again, I mean that respectfully. But aside from being a litigator and an attorney, I want to take a logical approach and a logical view to Mr. Henderson's arguments and remind you as to why they fail. So one of the things that struck me most in preparing for today's continued contested

hearing and closing arguments is Mr. Henderson, Mr. Hendersons, plural, respectfully, sir, you are 23 years too late. We're all homeowners, all of us either rent or own a home. And we're all bill payers taxpayers, I presume, and we all have a duty to inspect our invoices before paying them. You can't cry over spilt milk 23 years later. For Mr. Henderson to also now claim the Department of Water Supply billing is flawed, too. Again, it's everyone else's issue except theirs. We can't have multiple departmental failures or Mr. Henderson, Kai Ala Partners, need to take a little bit more responsibility in reviewing and paying their invoices, designating things appropriately, which I'll address shortly. One thing that also struck me was if you have a home, such as, let me give you an example. My uncle's home after he passed away, the water is shut off completely. But the water supply company sends us a bill for connection services. Even though we're not taking any water, we're connected to it. We have the ability to use it. That's a bill we pay, respectfully, to the Department of Water Supply because we are connected. That's a county benefit that we all reap and we enjoy. And you have to pay for that. It's not free. To overturn the Director's decision would reward bad behavior, quite frankly, and I mean that respectfully. This would open the floodgates to every single Hawai'i County citizen that fails to responsibly review and pay their bills for the last 23 years. Not one, not two, not three or four. Twenty-three years. We're talking decades that someone has had to review their bill, disagree, and so only now seek thousands of dollars in reimbursement for something that could have been addressed years ago. And a couple of more points. One thing that I found quite telling when I was reviewing this in preparation, and I even confirmed before I realized it, Mr. Henderson has been afforded the opportunity to just simply disconnect the other building, the building he claims isn't used, right. No one used the washer, the toilet, the water, none of the plumbing, none of it's being used. So disconnect it, right. It is that simple. You disconnect it, you alleviate the need for a second connection. One would think that that makes a lot of sense. But he is refusing such. Why? Because he either does use it or he wants to use it or he plans to use it, right? That's within his right to do as a homeowner. That's absolutely within their right. But you pay for having that luxury for that connection. It is not free. If he wasn't using or didn't intend to use it, then removing it and disconnecting it to have a legitimate one-unit sewer connection would be applicable and fine. That would resolve all of this. The Director cannot treat Mr. Henderson any differently than it would anyone else. If he or this Commission wants to forgive the second sewer connection because he refuses to disconnect these plumbing fixtures that he says he doesn't use, but refuses to disconnect them, that's unfair to the rest of us. That is unfair to everyone on this commission, to every other Hawai'i County taxpayer that uses or should be using or is supposed to be using the Director's services, the sewer services. You cannot have your cake and eat it too, is the best phrase that I can think of. Either disconnect the second unit or pay for it. It's really quite that simple. And last but not least, to tie in one more topic I was getting into and Dee was objecting. Interestingly enough, when we talk about, we look at credibility, right? Credibility is always relevant. Right? Mr. Henderson, both of them, Kai Ala Partners, they failed to ever divulge that they registered this property in question as a short-term vacation rental, and they got approval from the Planning Department on December 19, 2019, to do it. Only now, after this is happening, are we hearing it's only for family. It's only for family. Maybe their family's a little different. They want to charge their family members rent when they come to stay with their family. To each his own, quite frankly. Right. But you don't get to register your property as a short-term vacation rental and then claim

we're not using those fixtures, so we shouldn't have to pay a connection fee every month. That's all this is. So when you add in all of their arguments together now, it's not just Director Mansour's decision and billing error. It's also the Department of Water Supply, the Planning Department, because someone told them to apply for it when maybe they didn't need to. It's everyone else's fault. At the end of the day, the Planning Department doesn't make those designations on their own. They are asked for it, they did that, and they got it right. It would appear to me, and I asked this commission to consider, in my opinion, the Hendersons have been caught trying to finagle their way out of further responsibility. So I'm asking this Commission not reward their bad behavior. They don't use the building for that purpose and just disconnect the sewer connections. And it's done. It is done. If not, he can pay the connection fee like the rest of us. We have to treat him just like Director Mansour did. Like the rest of our county residents. You follow the code, you apply the code to the facts, the evidence presented, which gives you a definition that applies directly to the building in question, which requires two connection fees. Mr. Henderson, both sirs, respectfully, are already taking advantage of saving thousands of dollars a year by their historic building designation on a multimillion dollar property when the rest of us are paying thousands of dollars a year in real property taxes. Why? Because he legally can. I'm not saying it's illegal. He legally can because the law provides for it. And you know what else the law provides for? Charging that second sewer connection fee because he has the necessary fixtures, as the code requires. So again, I bring it back to, this was not an arbitrary and capricious decision. This was based on facts. This was based on evidence, inspections, multiple directors over the course of the last 23 years have all taken the same position. Because the law is what it is, whether you like it or not. It is what it is as we sit here today, if you want to change the law, you change the code. It is that simple. You cannot blend the two into making changes right now. You have to keep them separate whether you like it or not. I know, Dee, when you were talking earlier, you added in the word “residential” to “residential, unoccupied unit.” Ma'am, I'm sorry, but that is not the definition, and we are stuck with the definition as written. If it meets the statutory definition under 21-36.21. If it meets the statutory definition under 21-31, which refers you to what, an unoccupied unit, which has a definition, you follow it. That's unfortunately, all this Commission can do. That's unfortunately, all the Director can do unless and until you make changes to the code, and you cannot change a decision here until you change the code. So it is moot, in my opinion. Legally, it is moot. And I ask that this Commission remember that there are three prongs that you have to look at, and I've addressed them all, right? And the Chair will remind you yet again, does his decision violate the code or any applicable law? No, it does not. Is it clearly erroneous and I did the information that he had before you? No, it is not. And was it arbitrary and capricious? No, it was not. It followed the code. It cannot be wrong when you follow the code to a T. And that's exactly what the Director did. The only outcome here is to affirm the Director's decision and leave it to Mr. Henderson and his father, both Hendersons, and Kai Ala Partners, to reevaluate how they want to approach this. They're already saving thousands of dollars that aren't going to help the county in any fashion, and that's fine because they're legally allowed to do so. They can't reap the benefits over and over and over again in every way possible, because the law applies to them like it does for the rest of us. So all I'm asking that you do is follow the law, apply it to the facts in this case, which require that second connection fee, and it's nominal in the grand scheme of things. He has an avenue to address and get what

he wants, and that's the disconnect. If he refuses, that should be a red flag because he wants to be able to use that. It is quite that simple. And so, again, in summary, I just asked that you confirmed the Director's decision. You do not, respectfully, before you commissioners, have the necessary basis to overturn his decision. Thank you.

ADAMS: Thank you. We've now heard all the evidence and the closing arguments, and our next step is to have the Commission discuss and deliberate and vote on how we are going to find for this appeal. After we make a decision, assuming we have a decision in this case, we need four votes in favor of whatever motion gets made.

SALAS-FERGUSON: Chair, if there are seven people present, how many people do you have present? Six, okay, correct.

ADAMS: That's all right. So the party that we rule on behalf would write up findings and conclusions, and we would review that and approve it at the next meeting, and there'd be a chance for the other party to comment on those findings, write up. So we aren't done yet, but our next step is to go into discussion. Sinclair has recommended that we go into executive session, where he can again explain in more detail what the criteria, the standards are for whether we affirm or modify or remand the decision. So I would recommend we go ahead and do that, a relatively short executive session where we'd ask the other parties to leave, and we would go nonpublic, and then we would come back and have an open discussion of how we want to vote and then take a vote. Does that sound like something reasonable to you guys?

FRENZ: I apologize, and I'll leave this to Mr. Salas-Ferguson to address, because the Robert’s Rules of Order are going to require that you articulate the basis for going to executive session. So I'll just defer to you, Sinclair, to make sure that it's appropriate.

SALAS-FERGUSON: Yeah. So I suggest, and we have a script that Georjean will read into the record if they do decide, whoever decides to pose that motion. But I think right now is a good time to advise the board regarding their powers and duties as it relates to this specific contested case.

ADAMS: Rick, you've got your hand up.

GAFFNEY: Yeah, I was just going to ask whether or not there needs to be a motion on the floor to move forward, certainly with discussion by the Commission. I'm not opposed to going into executive session to hear from our corporation counsel with regard to where we need to go. But before we have discussions, there needs to be a motion on the floor, and I'm prepared to make one if we're going into discussion.

SALAS-FERGUSON: So somebody needs to make a motion to go into executive session, and it would be based on the person making that motion can read that. In this case, I think you can just make the motion and Rick can second it and we can take a vote.

ADAMS: All right. So just to make sure I'm reading all this right. As always, the Commission has the authority to enter into executive session to consult with Sinclair Salas-Ferguson, our counsel, pursuant to HRS 92.5(a)(4).

MOTION, SECOND, AND VOTE: Pursuant to HRS 92-5(a)(4), Chair Adams made a motion, to which Vice Chair Gaffney seconded, to enter into an executive session to consult with the Board or Commission's attorney on questions and issues pertaining to the board's powers, duties, privileges, immunities, and liabilities. Ayes 6 (Adams, Cardwell, Fulton, Gaffney, McIntosh, Robinson); Excused 1 (Olson); Absent 1 (Burns). Motion approved.

(The Commission entered a recess to hold a brief executive session.)

ADAMS: All right. We are back in session for the hearing on the appeal by Kai Ala Partners, and it is now time for the commissioners to discuss how they like to vote. And if anyone would like to make a motion on what this Commission should do.

GAFFNEY: I would like to make that motion.

ADAMS: Okay, Rick Gaffney makes motion. And what is your motion?

GAFFNEY: My motion is that we reverse the Director's decision.

FULTON: I second that motion. Dee Fulton.

ADAMS: Okay. Is that enough clarification of the motion, attorney?

SALAS-FERGUSON: Yeah, Rick, is your motion to reverse the Director's decision to determine that structure was an unoccupied unit?

GAFFNEY: There's a number of issues, but yes, the unoccupied unit, the definition clearly stating that the unoccupied unit currently receives a water bill, and also the assessment of the monthly fees. The definition of the assessment.

SALAS-FERGUSON: I think, Rick, the motion would be to reverse the Director's decision that that structure was an unoccupied unit. And then those things that you just listed about the - that would be in the discussion. That would be your reason for making the motion when we discuss it.

FRENZ: But I also ask Sinclair if they articulate which of the three bases the standard of review he's referring to, because I intend to appeal if this ends up being the final decision. So I want to make sure the record, because I'll be appealing based on that standard of review, right. So I just want to make sure our record is very clear. Thank you.

SALAS-FERGUSON: Yeah, thank you. Forgot about that. So you can also state whether your motion is to reverse the Director's decision to determine that it was an unoccupied unit based on whether it violates the law, it's clearly erroneous, or one of the items listed in C. Arbitrary capricious, abusive discretion, or unwarranted exercise.

GAFFNEY: Yes. In my opinion, the Director's decision was and is arbitrary, capricious and an unwarranted exercise of his discretion.

SALAS-FERGUSON: Okay.

ADAMS: Do you second that motion, or should we have, Peter?

SUR: It’s already been seconded.

ADAMS: It's kind of restating the motion. Can you read it? Write it down.

SALAS-FERGUSON: Do you want me to read the motion into the record? So my understanding and Rick, correct me if I'm wrong, is that Rick has made a motion to reverse the Director's decision to determine that the structure at issue in this appeal is an unoccupied unit because the Director's decision was arbitrary, capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion. Is that correct, Rick?

GAFFNEY: Yes. And I can present further arguments to why I came to that conclusion. And intend to do so during the discussion.

MOTION: Vice Chair Gaffney made a motion to reverse the Director's decision to determine that the structure at issue in this appeal is an unoccupied unit because the Director's decision was arbitrary, capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion.

SALAS-FERGUSON: Perfect. And is there a second, Dee?

FULTON: I'm a little perplexed here because we were given three criteria to determine whether this decision should be that we should vote to reverse it or not. And must every single Commissioner be in accord on the criteria or combination of criteria? Because not only do I find that I think the director’s decision is capricious, but I also think it's erroneous and it's in violation of the code.

SALAS-FERGUSON: So first, we deal with Rick's motion.

FULTON: Okay. So we'll start with capriciousness, and I would second that motion.

SECOND: Commissioner Fulton seconded the motion.

ADAMS: It sounds like you would make an additional motion or different motion, Dee, to add an additional –

FULTON: Which would be redundant and completely unnecessary if this Commission determines that it can be turned, that we vote to reverse the Director's decision based on the criteria of arbitrary and capricious.

ADAMS: Okay. So we'll vote on that motion to reverse on the application of unoccupied unit as being arbitrary and capricious, and then see what the vote is after discussion, and then see if we need a new motion that would add additional conditions or description of the motion. So if that's okay, that's what we're discussing right now, is why we should vote for or against this motion to reverse. And, Rick, you obviously have reasons, so why don't you go ahead first?

DISCUSSION:
GAFFNEY: Yeah. As I said, I believe that the director's decision was arbitrary, capricious and an unwarranted exercise of discretion, because in Section 21-31 of the county code, it suggests that a laundry room with storage and a bathroom does not meet the definition of an unoccupied unit under the section. Further, June 10th, in his letter from the DEM Director says that Section 21-2 states an unoccupied unit means a unit that is not occupied but has accessibility to a sewer, plumbing fixture is located on it, and, and the word "and" is very important here, and currently receives a water bill. In this case, the unoccupied unit does not receive a water bill, which the Director confirms in the next paragraph of his letter. So I believe that that statement reflects an unwarranted exercise of discretion by the Director because he argues in the letter that a double sewer fee is justified by a single water bill to the property, even though the unoccupied unit itself does not receive a water bill, a specific requirement of Section 21-2. Yeah. So that's my point, and that's why I made the motion to reverse the director's decision.

ADAMS: Would someone else like to further discuss. Dee?

FULTON: Yes. Thank you, Chair. Yes. The closing argument of Ms. Cody Frenz was very helpful to me in crystallizing my understanding of how the county arrived at a decision that is clearly grossly crassly a misinterpretation of the law. Because in the closing argument, Ms. Frenz very clearly is making an effort to paint Mr. Henderson as a bad actor. They make a point of pointing out to everybody, look at this guy. He's affluent. He's got this really valuable property, but he's getting a tax break. That's not right. And look at this guy. He's using the IRS code to his own betterment. He's taking advantage of it. Let's go get this guy. Okay. These people are not acting with proper approach and respect for the code. The code is deliberately being misinterpreted to try to right the wrongs that are outside their jurisdiction. It is not within the Department of (Environmental Management) to fix what's wrong with the IRS code or fix what's wrong with the property tax code. You can't raise the guy's sewer fee punitively because he's getting these other breaks elsewhere. And yet that was the big focus of the closing argument. So I have to come to a conclusion that these people are acting from a point of bias and accompanied with malice, and this is prejudicing them to arrive at a misinterpretation of the code, very clearly.

This code. We all agree on one thing. I agree. The director agrees. The counsel agrees. This code is crystal clear. And what we're talking about is Section 21-31, and the definition that it keeps perpetually being thrown in our faces is supporting Section 21-31. It has to deal with residences, and the detached unit that houses laundry facilities is not a residence. It never was a residence. It was never intended to be a residence. Even the County inspector testimony on page 21 of the written testimony, the county inspector, Nakatani I believe, said that today she would not find that unit to be taxable for a separate sewer fee. So they're trying to make it as it is a separate residence. And all this smokescreen of stuff has been thrown in our faces to try to confuse us. It's not relevant that the unit could be habitable, which is not. The shape of the sewer connection is not relevant. The amount of time that has elapsed is not relevant. I'm very happy that we have citizens' commissions because one of the important roles of citizens' commission is to act in the capacity of checking and balancing our government. And I feel that we have a responsibility as commissioners to protect citizens from arbitrary and capricious actions. So that's why I feel clearly, very strongly that with the Director's decision needs to be reversed.

ADAMS: Thank you, Dee. Other commissioners wish to comment.

ROBINSON: I will. So I've also come to the conclusion that the property of which the house and the building in question is not receiving a water bill. And it is unfortunate because it's probably due to human error that the service address on the statement reflects the other lot that has no access to plumbing or sewage. So I am in agreement with Rick that the sewer bill is incorrect.

ADAMS: Lee McIntosh.

McINTOSH: I don't think we can focus on the water bill, because if you did focus on the water bill, then DEM would not be allowed to bill them at all. So I don't see that as a valid argument.

ROBINSON: Because obviously it's not attached to the residential property. And for whatever reason, maybe it was easier to build it separately or to preserve the property is irrelevant. But the basis of the water bill is so that there can be a separate sewage charge for an unoccupied unit. But it is not getting a water bill. It is on the wrong property. There is no evidence here that that property has gotten a water bill. It's been paid, somebody's been paying it, but it doesn't match up for me.

ADAMS: Melissa, you had comments.

CARDWELL: Yeah, I'm in support of Rick's motion. Mainly the thing that stood out the most for me is when I asked a question about the detached garage and whether or not a person who has a detached garage with laundry facilities would be charged a separate sewer fee. And Inspector Nakatani said no, in fact, they wouldn't be charged a separate sewer fee. And so in my mind, I see this property as it's one household. And the Hendersons never said that they don't use the laundry facilities. They said that no one stays in that building, meaning nobody sleeps in there, nobody is occupying that space, nobody's living in that building. But they are using the laundry

facilities. I'm sure of it. But that's because they don't have laundry facilities in that main residential house. And probably like what Elyse said, they wanted to preserve that building as it is because it is a historical icon, whatever. So I see this as one space, essentially, just because the building is detached, it doesn't warrant a separate sewer user fee. I'll leave it at that.

ADAMS: I'll throw in my two cents. I think I'm the one left. Personally, I think the DEM decision is well within their discretion. It made sense from an administrative standpoint, having written regulations for EPA, the definition section is where the definitions are. And that's what you've got to work with, not filling in blanks or connecting ties to other places. And that it is reasonable for an agency to have gone and looked at, well, there are these two buildings. The impetus for even going there in the first place was they connected to the sewer as opposed to using the cesspool before. And so they looked at it. So that building over there has got a shower, it's got a sink, it's got a washing machine, it's got a toilet, it's got a lot of plumbing. And it's going to the sewer. That house over there has whatever it's got, it's going to the sewer. We have some basic single charge that we give, which now is $45, used to be $10 way back then, that we charge for a sewer hookup for residential property. And so they made that decision. They don't have the time or the connections to understand what the intent is of the owners of particular buildings are. And so they looked at it and went, yeah, it got plumbing, yeah, it got plumbing, going to the sewer, you've got two. So that makes sense. Could it have been more refined? Yeah. Do we need to rewrite some of that code to make it clearer? Yeah, but that's not our decision. So I don't see it as being any of the three categories that we have of being wrong from a legal standpoint or being arbitrary, certainly not intended to punish anybody or to do something stupid. It was basically the bureaucracy grinding through the data they've got. The water bill argument, I think is kind of funny. The house doesn't get where the people live with a 12 potential people, holy moly that has got to be crowded. But at any rate, the house isn't properly registered for getting a water bill either. So if they want to stop paying that, I guess you could, guys. So I don't care about that argument. I think it's more, eh, we've got this code. This is what the code says. It's a flat fee and it's buildings with sewer connections. Thank you very much. So I will not be voting in favor of the motion. Anybody else have comments? Questions? Well, I guess we can't do questions. No more testimony or clarification, except from our counsel. Rick, you had a comment.

GAFFNEY: Yeah. I just wanted to say one more thing. In my opinion, this matter is really simple. It's a single-family residence, happening to be two buildings, but it's a single-family residence. They have a single water line. There's a single water bill. There's a single lateral connecting to the county water line on Aliʻi Drive. So therefore there's no justification for charging two sewer fees. And the director's attempted justification of two sewer fees is an unwarranted exercise of his discretion.

ROBINSON: Thanks, Georjean. Looking at the code, Section 21-31, the first sentence states sewer user charges for residential customers shall be assessed to all lots accessible to public sewer or gang cesspools, whether connected or not. The key word being lots, not buildings, not unoccupied units, not separate structures. Sewer user charges for residential customers shall be assessed to all lots. Those two buildings, those two structures are also on one lot.

CARDWELL: I remember in the previous meeting it was mentioned part of the argument was that was about intention, that the detached building could be a studio. And then when Cody Frenz was giving her closing arguments, she was talking about how intention bears no wait. And so I think that's an important piece in this as well, that if intention bears no wait, that if they were to eventually make that building into a studio, which would then be considered in 'Ohana, and I know that 'Ohanas are charged their own separate sewer usage fee, then that would be the time to have another inspection and then to charge the separate sewer fee. So then there would be two sewer fees that were charged. But at this time, I would agree with what Elyse said, with what Rick says, that it's one household, it's one residential house, and so with one lateral. So it doesn't make sense to me to be charging two sewer fees.

McINTOSH: I think what she meant by intention was the fact that even though they're not using it, then they can't say that it doesn't count. So they're just saying, we see this here, we see this here. That's our designation. They're not saying, well, even though you don't use it, then they have to disconnect it. Just like your water. You have to pay your water bill even if you don't use it. If you don't want to pay that, then you have to have it disconnected and you don't have to pay anymore. I think that's what she was alluding to.

ADAMS: And I would agree with that. In fact, I think it's kind of extraordinary that the code says you can charge an unoccupied unit, and there is no way that DEM is going to be chasing down who's occupying what. They don't even do volume of water use, which I think is ridiculous. But other than that, are there more comments? Discussion? Are we ready for a vote?

ROBINSON: If you have one more comment. I'm not in agreement that the decision was capricious or forgot the second word in that definition or at the discretion of the Director. I do agree that it is in violation of the code. It is erroneous because of the water bill issue. The water bill is going to a different address. The property in question has not received the water bill. Therefore, it is incorrectly assessed the sewage fee, which unfortunately does also open to whether or not the water bill itself is correctly billed to you. So I don't necessarily agree that it was at the discretion with ill intent by the Director for his decision. But the first two I am in agreement with.

ADAMS: So any other comments or maybe you should ask counsel that what we're voting on, assuming we're ready to vote, is the motion as it was stated, which was reverse on the basis of the unoccupied unit application that was being declared as being arbitrary, capricious, characterized by abuse, or clearly an unawarded exercise of discretion. It's got those three components to it. So that's what we vote on. And if we don't get agreement on that, then we need another motion that would change the basis for reversal?

SALAS-FERGUSON: Correct.

ADAMS: Okay. So, I wish I had it written down so they could actually read it. We need to take a vote now on the motion as it was stated and seconded.

VOTE: Ayes 3 (Cardwell, Fulton, Gaffney); Nays 3 (McIntosh, Robinson, Adams); Excused 1 (Olson); Absent 1 (Burns). Motion fails.

ADAMS: Okay. That motion fails? Is that the right terminology for it? And would not result in a change to the Department's stance? I will accept a new motion to vote on? No? Sinclair, do we ask for a new motion that's a restated motion, or is that it?

SALAS-FERGUSON: You can take a motion on a different basis to vacate or reverse.

ADAMS: Elyse, do you want to make a new motion?

ROBINSON: Sure. I move that we reverse the director's decision. I'd like to use the same words that Rick used, the unoccupied, based on the unoccupied unit qualifications for his decision rendered in violation of the code and erroneous.

GAFFNEY: I'll second that.

MOTION AND SECOND: Commissioner Robinson made a motion, to which Vice Chair Gaffney seconded, to reverse the Director's decision that the structure at issue in this appeal is an unoccupied unit, on the grounds that the decision was rendered in violation of the code and clearly erroneous.

DISCUSSION:
ADAMS: Okay, so we have a new motion on the table and discussion on that motion, where the difference is the basis for reversal is that the decision was in violation of the code or other applicable law. And clearly erroneous. Dee.

FULTON: As mentioned prior, even the Inspector said that if she would go to the property today, she would not have classified that detached building as a property subject to a second sewer fee for all the reasons that have been enumerated and recapped in our prior discussion, in our prior motion. Mostly we come back to the definition. The definition is part of the law, and the definition says, it uses the word "and." So a property must not only have plumbing fixtures, but it also must have its own water bill. This property does not have its own water bill.

ADAMS: So you would recommend that the Hendersons put in to get their money back on the house bill.

FULTON: I'm sorry, I don't understand that question.

ADAMS: The house does not receive a water bill at their address either.

FULTON: They receive a water bill.

ADAMS: It goes to the wrong address.

FULTON: Well, they receive a water bill intended to be attached to the residence, do they not?

ADAMS: But the evidence we have on hand says the water bill is being sent to the other property that doesn't have these two buildings on it, the house and whatever you want to call that other building.

FULTON: No, it's not within the scope of this Commission to fix the second mistake, also. I think everybody can agree that's a mistake. Can we acknowledge that that billing to an empty lot is erroneous and that bill should be attached to the residence?

ADAMS: I would disagree. They get the water, they pay for the water. The water that is shot over to that property goes through the meter, and they pay the meter. It happens to be split between these two buildings. You probably has other spigots out there, too.

FULTON: Is it really relevant which lot, the meter is on, or which the billing goes two?

ADAMS: My argument is that there is no relevance to that water bill at all because it's just wrong. And so it isn't relevant either to either of those buildings. It's irrelevant. So the issue is really back to, is it an unoccupied unit, which is in the definition section and whatever it's 21-2. And that is the question of whether or not it is in violation of the code to bill that building. And you would argue, yes, it is in violation.

FULTON: That's not logical to me. What is logical to me is that the water bill that Kai Ala is receiving is for the residence, and that the detached building -

ADAMS: It is for all the water that goes anywhere on that property.

FULTON: Well, yeah, it's for that property, but there is one bill, just as Melissa Cardwell pointed out, if I have a detached garage and I have a washing machine in there, I still get one bill because I have one water meter. And that is not a separate residence.

ADAMS: The problem currently is the water meter is on the other property.

FULTON: So the point of it is there was an error made. That's what we're considering here. Is this ruling clearly erroneous in view of the evidence on the record? Now, let's be rational and logical. Look at the evidence. They get a water bill, one water bill. There are not two separate water bills, and the law is very clear. There's an “and” in there. Not only do they have just this unoccupied unit have to have plumbing, it has to have a water bill. There's no getting around that.

ADAMS: Does anybody else have any comment on this motion? Seeing none, we're ready for another vote. Peter?

SUR: The motion is to reverse decision on the basis of it being violation of code and erroneous. Is that correct?

(During the vote, the following discussion occurred)

FULTON: I want to clarify that we're voting here at the motion is limited to the second criteria, which that says that it's clearly erroneous. It doesn't have to do, we're not talking about the first criteria, which has the violation of the code. We're talking about simply whether or not there was an error made when, back in 1998, when there was a second billing for that unoccupied building. So, yeah, you said something about violation and code, and that's not relevant to this discussion. So I vote that, yes, there is an error was made.

SALAS-FERGUSON: All right. Sorry Dee and I think Elyse correct me if I'm wrong, and I just heard Peter read it, but the motion was that it was the violation of the code and clearly erroneous.

ROBINSON: Correct. That was my motion.

FULTON: I think there's a point of order here that we have to talk about. Because any one of these criteria, if there's a violation of any one of them, that is cause for reversing, modifying, remanding, and we stepped into it taking one at a time. Why are we changing tactics now?

SALAS-FERGUSON: Because somebody can make a motion to find two bases for reversing, and that's what Elyse did. So you can vote on the motion or not.

FULTON: Okay. So Elyse's motion was that it was erroneous and also in violation of the code.

ROBINSON: Yes.

(Voting then continued).

VOTE: Ayes 4 (Cardwell, Fulton, Gaffney, Robinson); Nays 2 (McIntosh, Adams); Excused 1 (Olson); Absent 1 (Burns). Motion carries.

ADAMS: Okay. The decision … Has been reversed by a vote of four out of six. Correct? The motion has passed with four votes? Correct? Because we have six commissioners voting.

SALAS-FERGUSON: According to your rules, 7-12. If there's six or less people present for an appeal, you need four votes to reverse the decision. And my understanding is that there were four votes based on Elyse's motion.

ADAMS: So, what we have is a decision by the Environmental Management Commission to reverse the Director's decision. Do we also or did I understand you to say that the Commission should not deal with the penalty or the request for funds reimbursement?

SALAS-FERGUSON: Yeah. So the motion was just to decide whether the Director's decision was in violation of law or erroneous, to determine that it was an unoccupied unit. So that's the sole decision that was made.

ADAMS: Now, it within our purview to decide on the reimbursement?

SALAS-FERGUSON: No.

ADAMS: Okay. We are done with that then. So the next step would be the proposed findings of fact and -

SALAS-FERGUSON: Sorry, Georjean, if you want me to put on the record why the Commission doesn't have the authority to decide. … So the Commission can hear decisions from the Director as long as the appeal is filed within 30 days. The prior decisions going back to whenever it was the late 1990s are all outside the purview of the Commission because those decisions were made more than 30 days at the time of the filing of this instant appeal. So the Commission doesn't have jurisdiction to decide those prior decisions, and that's why it's not being decided today.

ADAMS: Okay. So is the next step then, to go to the proposed findings?

SALAS-FERGUSON: Yes.

ADAMS: Okay. And you've already done it. You may want to do it again. The Hendersons, Kai Ala Partners, would prepare and submit proposed Findings of Fact, Conclusions of Law and Order, I guess, based on the motion that we have passed. So those two criteria of in violation of the code and erroneous, but not the arbitrary and capricious bit. So I think maybe you have to do some revision there. So you would make a proposed finding of fact, conclusions of law and order to the Commission, and then within 14 days of submission of that, the opposing party in this case, DEM, has 14 days after the close of the hearing or by close of business. Well, forget that date. I don't know. May 11, whether that works, to file any opposition. And then we would as a Commission, we would review those proposed findings at our May 25 meeting and make whatever changes or exception and then basically adopt a final conclusion document.

SALAS-FERGUSON: If I may check. Can I just repeat that for Mr. Henderson?

ADAMS: Sure.

SALAS-FERGUSON: So, Mr. Henderson, the decision was made in your favor based on those two standards, that it was a violation of the Code and that it was clearly erroneous, so you're to submit a finding of fact and conclusions of law that state that. And it's my understanding that finding of fact was that they don't receive a water bill. So send that to the Commission and also to the Department, and you have a deadline to send those in by May 11, 2022. And then the

Department will submit any objections they have to those findings of facts, conclusions of law and decision that you submit. And then at the next meeting, as Georjean said, then the Commission will decide whether to accept your proposed findings as they are, or with modifications based on the Department's objections. Thank you, Georjean. I just want to make that clear.

ADAMS: Thank you. And that doesn't mean that we get to change our decision at our next meeting. We're just talking about the written findings. That's all.

HENDERSON: Thank you, Sinclair, for the clarification on that. And Chair Adams, we'll get a copy of the minutes before that date so we can refer to that in the preparation of the findings.

ADAMS: I assume so.

SALAS-FERGUSON: I believe the video is also posted online, too. Peter.[2]

SUR: Correct.

HENDERSON: Okay. Thank you very much. We'll do that. Thank you, Chair. Thank you, Commissioners, Counsel, for hearing us today. I appreciate your time.

ADAMS: I hereby close the hearing or whatever I'm supposed to say officially. So that's the hearing portion, which was agenda 10 on our agenda.

(The Commission took a lunch recess and reconvened to review the next steps)

ADAMS: Sinclair, could you please run through again what the next steps are going to be for the EMC, for the contested (case) hearing.

SALAS-FERGUSON: Yeah. So as Georjean told the party, so the prevailing party will submit proposed findings of facts, conclusions of law, and then an order, and usually it's an attorney preparing them. So anticipate they're not going to be - Anyway, I'll leave my comment up for that. So he's going to submit those, and then DEM will submit in the meantime, after we receive those, their objections. And I assume it'll be like dueling proposed findings of facts, conclusions of law. And then at the next hearing, the board will decide to accept the proposed findings of facts, and you can also modify them as you decide, and then that'll be the final decision. So this Commission has to issue the finding of facts, conclusions of law, per the Hawai'i Revised Statutes, Section 92. It's not a final decision until we issue that, and then that becomes the appealable decision to the Circuit Court, if DEM wants to appeal that decision. Does that answer your question, Rick?

[2] Video recording of this meeting: https://youtu.be/9nYDlsHaZHg

GAFFNEY: Yeah, well, I want to bore down a little bit, if I may. So we're going to get the findings of fact from both sides, and then we have the opportunity, as the Commission, to state our opinion or take another vote, yea, or nay, whether we accept the findings? Just narrow it down in that one section.

SALAS-FERGUSON: You guys have already made your decision based on the record. And so the prevailing party, Mr. Henderson, is supposed to draft a decision and order, finding of facts, conclusions of law reflecting that. And then when you guys get that, I mean, if it reflects what your decision was made, you adopt it. If there's, like, corrections or something, you see, like, oh, this is not exactly what we decided. Cody pointed out what we decided. Then you can change that and then adopt that.

GAFFNEY: Okay. That was the part I was unclear about.

SALAS-FERGUSON: Yeah, it's pretty weird because, like, in a court situation, normally the sides would submit the proposed findings in a Word format, and then the judge would just accept them or edit it and then file it. But because it's a Commission, you guys have to vote on that decision. Any other questions, anyone? Rick?

GAFFNEY: No.

SALAS-FERGUSON: One more thing. I guess it'll only be the people that were there or had reviewed it to vote at the next hearing.

Respectfully submitted,

Peter Sur, Secretary