

STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
Division of Boating and Ocean Recreation  
Honolulu, Hawai'i 96819

May 24, 2019

Chairperson and Members  
Board of Land and Natural Resources  
State of Hawai'i  
Honolulu, Hawai'i

Land Board Members:

SUBJECT: DENIAL OF ADMINISTRATIVE HEARING REQUESTED BY  
KAMA'AINA CARE, INC.  
RE: NON-RENEWAL OF KĀNE'OHE BAY WATERS COMMERCIAL  
USE PERMIT NO. CO038251

SUMMARY:

Kama'aina Care, Inc. (KCI) requests an administrative hearing, pursuant to HAR § 13-256-73.10(f), concerning expiration and non-renewal of Kāne'ohe Bay Waters commercial use permit (CUP) number CO038251. After consultation with the Department of the Attorney General, Land and Transportation Division, Division of Boating and Ocean Recreation (DOBOR) staff recommend that the Board of Land and Natural Resources (Board) deny KCI's request.

BACKGROUND:

**February 6, 2019:** DOBOR staff and KCI staff met because KCI's CUP (number CO038251; attached hereto as **Exhibit A**) included a condition that for tours conducted under the CUP, "the price for the tour shall not exceed direct operating costs which include only labor and fuel" and the prices KCI advertised online were greater than direct operating costs. DOBOR staff notified KCI that failure to address the pricing issue could result in permit revocation or non-renewal.

**February 27, 2019:** Seeing that KCI had not addressed the pricing issue, DOBOR notified KCI by mail that KCI's CUP, which was set to expire on February 28, 2019, would not be renewed because KCI's tour prices were in violation of the terms of the CUP. **Exhibit B.**

**March 11, 2019:** Ray Sanborn, KCI CEO, sent a response to DOBOR staff disagreeing with DOBOR's decision not to renew KCI's CUP. **Exhibit C.**

**March 29, 2019:** KCI, through its legal counsel, Gregory W. Kugle and Loren A. Seehase, requested an administrative hearing pursuant to Hawaii Administrative Rules (HAR) § 13-256-73.10(f). **Exhibit D.**

DISCUSSION:

**A. Legal authority**

An "agency hearing" is defined by Hawaii Revised Statutes (HRS) § 91-1 as "such hearing held by an agency immediately prior to a judicial review of a contested case as provided in section 91-14."<sup>1</sup>

Property rights are protected by the federal and state Constitutions. They are not, however, "created by the [federal] Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law - rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *In re Robert's Tours & Transp., Inc.*, 104 Hawai'i 98, 106, 85 P.3d 623, 631 (2004) (quoting *Board of Regents*).

**1. Standing**

The question of whether a particular person has standing involves a three-part test:

(1) whether the person "has suffered an actual or threatened injury as a result of the defendant's wrongful conduct," (2) whether "the injury is fairly traceable to the defendant's actions," and (3) whether "a favorable decision would likely provide relief for [the person's] injury."

*E & J Lounge Operating Co., Inc. v. Liquor Com'n of City & County of Honolulu*, 118 Hawai'i 320, 346, 189 P.3d 432, 458 (2008). *See also* HAR § 13-1-31(b).

Obviously, whether a particular person has standing can overlap with whether an administrative hearing is required. When a hearing is required by due process, a person with a protectable property interest will have standing.

**2. When an administrative hearing is required by HAR § 13-256-73.10(f)**

KCI cites HAR § 13-256-73.10(f) as a basis for being entitled to an administrative hearing on the issue of DOBOR's non-renewal of KCI's CUP. HAR § 13-256-73.10(f) provides in relevant part:

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<sup>1</sup>The Board's sunshine meeting is not an "agency hearing" as that term is used in these definitions. *Simpson v. Dep't of Land & Natural Res., State of Hawai'i*, 8 Haw.App. 16, 25, 791 P.2d 1267, 1273 (1990), overruled on other grounds, *Kaniakapupu v. Land Use Com'n*, 111 Haw. 124, 139 P.3d 712 (2006) and *Pele Defense Fund v. Puna Geothermal Venture*, 77 Hawai'i 64, 69, 881 P.2d 1210, 1215 (1994) (holding that a Board sunshine meeting is "a public hearing required by law" but not "a contested case hearing").

In the event an application for the issuance of a new permit is denied, the applicant will be afforded the opportunity for a hearing in accordance with section 13-231-31 and section 13-231-32 for the sole purpose of allowing the applicant to contest the basis of the denial.

A person may be entitled to an administrative hearing under the language of HAR § 13-256-73.10(f) only if the person applied for a Kāne'ōhe Bay Waters CUP and had their application denied by DOBOR staff.

## **B. Application of the law to KCI's request for an administrative hearing**

### **1. KCI is not entitled to an administrative hearing by law**

There is a question of whether constitutional due process requires an administrative hearing. *Bush v. Hawaiian Homes Com'n*, 76 Hawai'i 128, 135, 870 P.2d 1272, 1279 (1994). To establish a due process right to an administrative hearing, the claimant must first show that "the particular interest which claimant seeks to protect by a hearing [is] 'property' within the meaning of the due process clauses of the federal and state constitutions[.]" *Sandy Beach Def. Fund v. City Council of Honolulu*, 70 Haw. 361, 376, 773 P.2d 250, 260 (1989).

KCI's CUP expired by its own terms at the end of February 2019. KCI did not submit an application for renewal of the CUP. KCI has no property interest in the CUP because it expired by its own terms. HAR § 13-231-5(a) states in relevant part:

The department may issue or reissue a use permit of all types, including but not limited to commercial use permits, catamaran registration certificates, and mooring permits, for any period up to, but not exceeding one year. **Upon expiration of the period stated therein, the use permit and all rights of the permittee thereunder shall automatically terminate.**

Emphasis added.

Case law also makes clear that no property right is at issue here. In *Cassidy v. State of Hawaii, Dep't of Transp., Harbors Div.*, 915 F.2d 528 (9th Cir. 1990) the Ninth Circuit specifically rejected a claimed property interest in **renewal** of a permit. Cassidy held a regular mooring permit, under applicable rules, that "*automatically* expires if the permit-holder leaves his slip for more than fourteen days." 915 F.2d at 530 (emphasis in original). Cassidy was absent for more than fourteen days. His permit therefore automatically expired. He sued, claiming a property interest in his continued use of the slip and renewal of the permit, which property interest could be terminated only after due process.

For the reasons discussed above, the court noted the threshold issue was whether Cassidy had a property interest at all. In order to prove a due process violation, Cassidy must have first demonstrated that he had a protected property interest in the mooring permit. Property interests "are created and their dimensions are defined by existing rules or understandings that stem from

an independent source such as state law...." 915 F.2d at 530 (citing *Board of Regents*, 408 U.S. at 577).

The court rejected Cassidy's claim because (like KCI's CUP) Cassidy's permit had automatically terminated pursuant to state law. Cassidy had no remaining right in the terminated permit and had no right to renew the already expired permit. Hence, he had no property interest entitled to due process. "Cassidy's permit, and thus his property interest, expired when he left his slip for more than fourteen days." *Id.* at 530.<sup>2</sup> *Cf. Federal Lands Legal Consortium ex rel. Robart Estate v. U.S.*, 195 F.3d 1190, 1199-1200 (10th Cir. 1999) ("Regardless, 'in the absence of a statutory or contractual right to renewal, a person ... can claim no property interest in the indefinite renewal of his or her contract.>"). *And see Fielder v. Gehring*, 110 F.Supp.2d 1312, 1319 (D.Haw. 2000) (Mollway J.) ("before Fielder can claim that he had such a property interest [in a claimed mooring permit], he must demonstrate that he was entitled to the mooring permit under Hawai'i law.").

In the absence of any protected interest, there is no due process requirement to provide an administrative hearing to KCI.<sup>3</sup>

## **2. KCI is not entitled to an administrative hearing pursuant to HAR § 13-256-73.10(f)**

Specifically for Kāne'ōhe Bay Waters CUPs, a person who applied for a CUP and had their application denied may be entitled to an administrative hearing on the subject of the denial, pursuant to HAR § 13-256-73.10(f).<sup>4</sup> Therefore, to be afforded an administrative hearing pursuant to HAR § 13-256-73.10(f), KCI must have, at minimum, submitted an application for a CUP before its CUP expired on February 28, 2019. DOBOR staff did not receive an application from KCI for CUP renewal before its expiration date. Therefore, KCI is not entitled to an administrative hearing pursuant to HAR § 13-256-73.10(f) because no CUP application was denied.

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<sup>2</sup> The court rejected Cassidy's assertion that the State "generally renews permits under section 19-62-11, and that this custom created an understanding that would justify a legal entitlement to have his permit renewed." Not all customs create a property right, however. "A constitutional entitlement cannot 'be created-as if by estoppel-merely because a wholly and expressly discretionary state privilege has been granted generously in the past.'" *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, 465, 101 S.Ct. 2460, 2465, 69 L.Ed.2d 158 (1981) (emphasis in original), quoting *Leis v. Flynt*, 439 U.S. 438, 444 n. 5, 99 S.Ct. 698, n. 5, 58 L.Ed.2d 717 (1979) (per curiam); see also *Punikaia v. Clark*, 720 F.2d 564, 570 (9th Cir.1983) (state's continuous provision of care at nursing home for 30 years did not create a property right in continued care for residents), *cert. denied*, 469 U.S. 816, 105 S.Ct. 83, 83 L.Ed.2d 30 (1984). The state expressly disavowed any intention to create such a right to renewal and Cassidy has shown no more than a unilateral expectation of renewal. 915 F.2d at 531.


<sup>3</sup> We do not discuss standing other than to note that if KCI had a property interest, then standing would not be an issue.

<sup>4</sup> There is a question as to whether HAR § 13-256-73.10(f) applies to KCI, since it is not an original permit holder under the Kāne'ōhe Master Plan. Since KCI failed to even apply for a permit, it is not entitled to an administrative hearing under this rule on its face.

RECOMMENDATION:

That the Board deny KCI's request for an administrative hearing.

Respectfully submitted,



Edward R. Underwood  
Administrator

APPROVED FOR SUBMITTAL:



Suzanne D. Case  
Chairperson

Attachments:

- A. Commercial Use Permit No. CO038251
- B. Notice of non-renewal to Kama'aina Care, Inc.
- C. Response from Ray Sanborn, Kama'aina Care, Inc. CEO
- D. Request for administrative hearing from Kama'aina Care, Inc.



## DIVISION OF BOATING AND OCEAN RECREATION

Department of Land and Natural Resources, State of Hawaii

Oahu District

4 Sand Island Road, Honolulu, HI 96819

Phone: (808) 832-3520 • Fax: (808) 587-1977



Permit Number:

CO038251

Account Number:

00019793

# COMMERCIAL USE

## Kaneohe Bay, Oahu

Permittee: KAMA'AINA CARE, INC. DBA KAMA'AINA KIDS

Effective Date:

03/14/2018

Business Name: KAMA'AINA CARE, INC. DBA KAMA'AINA KIDS

Permit Expiration Date:

02/28/2019

Location: Kaneohe Bay Ocean Waters (Originating and ending at Heeia State Park)

Activities: After school, summer programs and families conducting kayaking, snorkeling, canoeing, sailing, swimming instruction and water safety classes

### Restrictions:

- The department shall only issue 67 ORMA decals in compliance with the approval from the Kaneohe Bay Regional Council on July 5, 2006.
- Activities associated with Holokai Kayak & Snorkel Adventure shall be limited to 16 seats per day and the price for the tour shall not exceed direct operating costs which includes only labor and fuel. This passenger count is included in the 67 ORMA decals.

APPROVED:  
STATE OF HAWAII  
DEPARTMENT OF LAND & NATURAL RESOURCES  
DIVISION OF BOATING AND OCEAN RECREATION

Meghan L. Statts  
OAHU DISTRICT MANAGER

Ph: (808) 832-3520

Fx: (808) 587-1977

Permittee Signature

Exhibit A

STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
DIVISION OF BOATING AND OCEAN RECREATION

**COMMERCIAL USE PERMIT**

Date: 03/14/18 Permit No.: CO038251 Account No.: 19793

This permit authorizes Kama'aina Care, Inc. dba Kama'aina Kids (hereinafter referred to as the Permittee) to conduct (describe commercial activities) See restrictions for activities on the ocean waters of the State of Hawaii located on the island of Oahu, in the Kaneohe Bay Ocean Waters (see restrictions for sites) Ocean recreation management area or non-designated management area, to commence on 03/14/2018 and expires on 02/28/19 unless terminated for cause.

Copies of the following exhibits are submitted for review and the record (if applicable):

- Vessel Documentation and/or Vessel Registration
- Vessel Inspection or Approved Marine Surveyor
- General Excise Tax License
- DCCA Certificate of Good Standing
- Certificate of commercial insurance policy naming the State of Hawaii as an additional insured, containing sufficient coverage limits and meeting all other requirements as outlined in Hawaii Administrative Rules § 13-231-65
- Partnership, Joint Venture, Corporate Exhibits
- PUC for vehicle(s), if applicable
- Certificate of Inspection for any vessels used in your commercial operation, if applicable.

1. The Permittee agrees to abide by all applicable Federal, State, and County laws and all boating and shore water rules promulgated by the Department of Land and Natural Resources (referred to as the Department). In addition to any fines or penalties a court of law may impose, any violation(s) of the provisions of the aforementioned laws or rules may cause this permit to be terminated by the Department of Land and Natural Resources Division of Boating and Ocean Recreation (the "Department") by written order of its Representative, and the vessel or operation shall immediately cease commercial activity. Issuance of a commercial use permit from DOBOR does not grant you transit rights to access the shoreline or conduct commercial activities on shore.
2. The Permittee agrees to operate the vessel or equipment described in this permit in accordance with all applicable rules and regulations regarding passenger-carrying capacity and commercial vessel activities.
3. When applicable, the Permittee agrees to present proof, upon request, of Coast Guard certification for the vessel(s) registered with the Department.
4. The fee for this commercial use permit will be as follows:
  - a. Commercial permittees operating from state land: The cost for a commercial use permit shall be \$200.00 per month or 3% of your gross receipts, whichever is greater.
  - b. Commercial permittees operating from a private or county facility or land and said operation does not involve the use of state fast land or land within a shoreline area: \$200.00 per month due and payable by the first day of each month.**
  - c. Commercial permittees possessing a harbor commercial use permit and a commercial use permit for state ocean waters or a navigable stream or a catamaran registration certificate, who are paying 3 per cent of gross receipts per month under the harbor commercial use permit, shall not be required to pay an additional 3 per cent of gross receipts per

month under the commercial use permit for state ocean waters or a navigable stream or a catamaran registration certificate, provided that the payment made to the department is based on the total of gross receipts acquired under the harbor commercial use permit and the commercial use permit for state ocean waters or a navigable stream or a catamaran registration certificate.

The foregoing fees are subject to change based upon amendments made to Hawaii Revised Statutes and/or Hawaii Administrative Rules.

5. The fees stated above are due and payable to DOBOR in advance of the first day of the month. Not later than 30 days following the end of the month, the Permittee shall submit to the Division a report of gross receipts for the month plus payment of any additional amount required by the percentage of the gross receipts specified in paragraph 4. Failure to submit the report of gross receipts as required shall be cause for termination of the commercial use permit.
6. During scheduled events pursuant to a marine event permit or other official permission and authorized by the State or U.S. Coast Guard, vessel(s) or operations issued commercial use permits may be required to adjust their schedules or temporarily cease activity as directed by the Department.
7. The Permittee agrees to notify the Department in writing of any changes concerning ownership, address, vessel inventory or operator(s) of a vessel(s) within 7 days of the date of change. Failure to promptly notify the Department of any changes may cause this permit to be terminated by the Department.
8. The Permittee shall at all time use due care for public safety and shall defend, hold harmless and indemnify the State of Hawaii, its officers, agents and employees from and against all claims or demands, including claims for property damage, personal injury or death arising out of or incident to the operation of said vessel or operation.
9. The permit charges are for the privilege of operating a commercial vessel or operation in state navigable waters in the manner stated above. Any other use of harbor/ramp facilities or services must be requested and approved separately.
10. The duration of this commercial operating area use permit shall not exceed the period of 1 year from the date of commencement.
11. The Department may immediately revoke a commercial use permit without a hearing for activity that endangers or may endanger the health or safety of passengers or the public, and may suspend or revoke a commercial use permit for violation of any rules of the Department, if the activity or offense is not corrected following seventy-two (72) hours notice by the Department of the violation. The permit holder shall have ten (10) days from receipt of the notice of suspension or revocation to request in writing an administrative hearing. The administrative hearing is solely for the purpose of allowing the permit holder to contest the basis for suspension or revocation of the permit.
12. This commercial use permit shall be kept in the immediate possession of the Permittee or its agent(s), or at a place of safekeeping in the immediate vicinity of the permitted activity at all times when operating under this commercial use permit and Permittee or its agent(s) shall display the same upon the demand of a Federal, State, or County Enforcement Officer, or representative of the Department.
13. Gross Receipts Defined: Gross receipts shall include all receipts, whether by coin or currency, on account, by check or credit card, derived or received by the Permittee as a result of its operation herein granted and shall include the sales prices received or billed by the Permittee from the sale or rental of its equipment/or services of see above. The Permittee shall not be credited with, nor allowed to have any reduction in the amount of the gross receipts, as hereinabove defined, which results from any arrangements for illegal rebates or kickbacks or hidden credits given or allowed to customers.
14. Business Practices and Records: In connection with the obligations of the Permittee, the Permittee hereby agrees to:
  - a. Prepare and keep for a period of not less than three (3) years following the end of each permit year adequate records which shall show daily receipts from all sales and other transactions by the Permittee. The Permittee shall record at the time of sale, in the presence of the customer, all receipts from sales or other transactions, whether for cash or credit. The Permittee shall issue to each customer a receipt or sales slip for each transaction, and must be recorded on serially-numbered receipts or sales slips. The Permittee further agrees to keep in storage for at least one (1) year following the termination, suspension, or revocation of the permit, all pertinent original sales records, serially-



numbered sales slips and such other sales records, as would normally be examined by an independent accountant pursuant to accepted auditing standards in performing an audit of the Permittee's sales and gross receipts.

- b. Submit to the Department on or before the 30th day of each and every month following each permit month (including the 30th day of the month following the end of the term) at the place fixed for payment of permit fees, a written statement using forms prescribed by the Chairperson of the Department of Land and Natural Resources to be certified as correct by the Permittee or by a person duly authorized by the Permittee to so certify showing in accurate detail, the amount of gross receipts for the preceding month and shall further submit to the Department on or before the 60th day following the end of each permit year at the place fixed for payment of fees, a written statement certified as correct by the Permittee or by a person duly authorized by the Permittee to so certify showing in accurate detail the amount of gross receipts during the preceding year duly verified by an independent Certified Public Accountant. The statements referred to herein shall be in such a form and style and contain such detail and breakdowns as the Department may require. Without any prejudice to any remedies herein provided for such default, if the Permittee shall fail to promptly furnish any such monthly report or Certified Public Accountants Annual Verification report, the Department may have such report prepared on the Permittee's behalf by an accountant to be selected by the Department, at the expense of the Permittee. The Permittee shall furnish to such accountant all records requested for the purpose of preparing such reports, and the Permittee shall pay to the Department all expenses incurred by the Permittee in securing such reports. Furthermore, the Department may make assessments upon the Permittee by recourse to such procedures selected by the Department which would produce reasonable gross receipts expectation upon which percentage charges may be computed.

In the event that records have not been prepared and kept in accordance with the provisions set forth herein, the Department shall, in addition to all other payments required herein, be entitled to demand and receive an additional payment of ten percent (10%) of the applicable fee if the Permittee is paying fees based on percentage for the period or periods involved. Permittee shall grant unto the Department at all reasonable times access to all books, accounts, records and reports, including gross income tax reports, showing daily sales and at any reasonable times on twenty-four (24) hours notice will permit a complete audit to be made by the Department's Account or by a Certified Public Accountant of the Permittee's entire business affairs and records relating to the business authorized by this permit for the term of this permit.

The Permittee will cooperate fully in the making of any inspection, examination or audit. Should such audit by the Department's Accountant or by a Certified Public Accountant disclose that rental has been underpaid by two percent (2%) or more for any period under examination, the Department shall, in addition to the remedies provided in the above, be entitled to reimbursement of the reasonable cost of any such audit in addition to the deficiency. If such audit by the Department's Accountant or by a Certified Public Account shall disclose that rent has been underpaid by five percent (5%) or more for the period under examination, the Department shall have the right, upon ten (10) days written notice to terminate this permit.

15. Time of Payment: The minimum monthly guaranteed fee required herein, shall be paid monthly, in advance, without notice, on the first day of each and every month of each and every year of the term hereof.
16. This permit does not grant any property rights or exclusive privileges.
17. The Department reserves the right to impose further restrictions.
18. Restrictions:
- Sites: Kaneohe Bay Ocean Waters (Originating and ending at Heeia State Park)
  - Permitted Activities: After school, summer programs and families conducting kayaking, snorkeling, canoeing, sailing, swimming instruction and water safety classes
  - The department shall only issue 67 ORMA decals in compliance with the approval from the Kaneohe Bay Regional Council on July 5, 2006.
  - Activities associated with Holokai Kayak & Snorkel Adventure shall be limited to 16 seats per day and the price for the tour shall not exceed direct operating costs which includes only labor and fuel. This passenger count is included in the 67 ORMA decals.

I AGREE TO THE TERMS, CONDITIONS AND CHARGES:

Address 156 Hama Kua Dr

City/State/Zip Kaneohe Hi 96744

Business Phone 808 252-4538 Email Address Ray@KamaamaKids.com

Cellular Phone 808 478-5308 Fax Number \_\_\_\_\_

Signed by (Authorized Representative) [Signature]

Print Name Raymond C Sawber Date Signed: 3/22/19

STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
DIVISION OF BOATING AND OCEAN RECREATION

BY: [Signature]

DATE: 3/22/18

DAVID Y. IGE  
GOVERNOR OF HAWAII



SUZANNE D. CASE  
CHAIRPERSON  
BOARD OF LAND AND NATURAL RESOURCES  
COMMISSION ON WATER RESOURCE MANAGEMENT

ROBERT K. MASUDA  
FIRST DEPUTY

M. KALEO MANUEL  
DEPUTY DIRECTOR - WATER

EDWARD R. UNDERWOOD  
ADMINISTRATOR  
BOATING AND OCEAN RECREATION

**STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
DIVISION OF BOATING AND OCEAN RECREATION**

4 SAND ISLAND ACCESS ROAD  
HONOLULU, HAWAII 96819

February 27, 2019

BOR-001.02.19

**Regular & Certified Return Receipt Mail**

Mr. Ray Sanborn  
Kama'aina Care, Inc.  
156 Hamakua Drive, Suite C  
Kailua, Hawaii 96734

Re: Commercial Use Permit for Kama'aina Care, Inc. DBA Kama'aina Kids  
Permit No. CO038251

Dear Mr. Sanborn:

This is regarding Kama'aina Care, Inc.'s (KAC) commercial permit for activities in Kaneohe Bay. Please be advised that KAC has violated the terms of the permit together with the rules and requirements for use of Kaneohe Bay. DOBOR will not be renewing the commercial permit which expires on February 28, 2019.

Although KAC is a non-profit corporation under HRS §501(c)(3), Holokai Adventures is a service mark of KAC which conspicuously advertises and operates commercial tours for adult and minor visitors. We have spoken to you numerous times regarding this issue. Despite this, Holokai Adventures continues to advertise and to operate its commercial tours at commercial for-profit market rates, and thus by definition in excess of the charges allowed under the Permit. This is also in conflict with the limitations of the Kaneohe Bay Master Plan and is not allowed with a commercial permit.

Under HAR §13-256-73(q), a commercial permit is required in order for KAC to operate within Kaneohe Bay. In order to comply with Hawaii Administrative Rules and the intent and requirements under the Kaneohe Master Plan, and the current commercial permit, charges for the commercial tours are limited to **direct operating costs for the tour**. KAC has continued to circumnavigate the rules by separating the price for its tours between land and sea activities. This is not a legitimate pricing scheme. The total costs for KAC's commercial activities still exceed the allowable charges for labor and fuel.

Exhibit B

KAC's commercial activity violates the terms of the commercial permit and does not comply with the permit's limitations, or the rules or regulations for the use of Kaneohe Bay.

Sincerely,

Ed Underwood  
 Administrator of the Department of Boating  
 and Recreation

Cc: Chair Suzanne Case,  
 Ms. Meghan Statts  
 DAG Amanda Weston

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U.S. Postal Service™ CERTIFIED MAIL® RECEIPT Domestic Mail Only	
For delivery information, visit our website at <a href="http://www.usps.com">www.usps.com</a> ®.	
<b>OFFICIAL USE</b>	
Certified Mail Fee \$ <b>3.50</b>	
Extra Services & Fees (check box, add fees as appropriate)	
<input checked="" type="checkbox"/> Return Receipt (hardcopy) \$ <b>2.80</b>	
<input type="checkbox"/> Return Receipt (electronic) \$ _____	
<input type="checkbox"/> Certified Mail Restricted Delivery \$ _____	
<input type="checkbox"/> Adult Signature Required \$ _____	
<input type="checkbox"/> Adult Signature Restricted Delivery \$ _____	
Postage \$ <b>.50</b>	
Total Postage and Fees \$ <b>6.80</b>	
Sent To <b>Ray Sanborn</b> <b>Kama'aina Care, Inc.</b> <b>156 Hamakua Drive, Suite C</b> <b>Kailua, Hawaii 96734</b>	
PS Form 3800, April 2015 PSN 7530-02-000-9047 See Reverse for Instructions	

SENDER: COMPLETE THIS SECTION	COMPLETE THIS SECTION ON DELIVERY
<ul style="list-style-type: none"> <li>Complete items 1, 2, and 3.</li> <li>Print your name and address on the reverse so that we can return the card to you.</li> <li>Attach this card to the back of the mailpiece, or on the front if space permits.</li> </ul>	A. Signature <input checked="" type="checkbox"/> <input checked="" type="checkbox"/> Agent <input type="checkbox"/> Addressee
1. Article Addressed to: <div style="border: 1px solid black; padding: 5px; width: fit-content; margin: 10px auto;">             Ray Sanborn              Kama'aina Care, Inc.              156 Hamakua Drive, Suite C              Kailua, Hawaii 96734           </div>	B. Received by (Printed Name) <b>CLAIRE DYE</b>
	C. Date of Delivery <b>2/28/19</b>
	D. Is delivery address different from item 1? <input type="checkbox"/> Yes If YES, enter delivery address below: <input checked="" type="checkbox"/> No
2. Article Number (Transfer from service label) <b>7016 0910 0002 1791 5775</b>	3. Service Type <input type="checkbox"/> Adult Signature <input type="checkbox"/> Adult Signature Restricted Delivery <input checked="" type="checkbox"/> Certified Mail® <input type="checkbox"/> Certified Mail Restricted Delivery <input type="checkbox"/> Collect on Delivery <input type="checkbox"/> Collect on Delivery Restricted Delivery <input type="checkbox"/> Priority Mail Express® <input type="checkbox"/> Registered Mail™ <input type="checkbox"/> Registered Mail Restricted Delivery <input type="checkbox"/> Return Receipt for Merchandise <input type="checkbox"/> Signature Confirmation™ <input type="checkbox"/> Signature Confirmation Restricted Delivery
PS Form 3811, July 2015 PSN 7530-02-000-9053	Domestic Return Receipt



Hawaii's Enrichment & Education Professionals  
A Non-Profit Organization

March 11, 2019

MAR19'19PM 2:36BOR ADM

Mr. Ed Underwood  
DLNR – Division of Boating and Ocean Recreation  
4 Sand Island Access Road  
Honolulu, HI 96819

RE: Commercial Use Permit for Kama`aina Care, Inc. DBA Kama`aina Kids Permit #C0038251

Dear Mr. Underwood,

As you are aware, Kama`aina Care, Inc. (KCI) has been operating water safety and marine education programs in Kaneohe Bay for over 25 years. We are disappointed to learn that our permit is not being renewed as of February 28, 2019, and adamantly disagree with the reasoning provided by DOBOR.

In your letter you state *"We have spoken to you numerous times regarding this issue. Despite this, Holokai Adventures continues to advertise and to operate its commercial tours at commercial for-profit rates."* We adamantly disagree. We have, on multiple occasions met with you, received letters from you and discussed over the phone with you, how to structure this environmental educational program so that it complies with the permit requirements. At the last meeting you asked us to restructure the rate so that we only charge for the actual staffing and expenses that relate to the tour. Paragraph three of your letter states *"charges for the commercial tours are limited to direct operating costs for the tour."* We did just that and placed on our web-site the fee of \$40. If people want to stay for lunch and tour the park that was an additional fee. It was through your guidance that this rate was created and validated. At that point you issued the permits needed for us to continue to do business. Now almost a year later we receive a letter stating that we are not in compliance and that permits will not be issued.

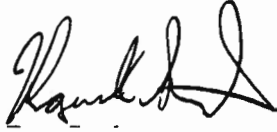
We are at a loss. We believe we have done all that you have asked of us and that is listed in our RFP award. This is unfair treatment and we need resolution. We are requesting a meeting to establish what needs to be done to put this matter at rest so we can operate and move forward. I would like to schedule a meeting as soon as possible.

I request and would appreciate your help and support in this matter. We remain committed to the role that we play in the management of He`eia St. Park and want this to work, but we cannot provide a quality program and the proper management of the operations when the rules are subject to constant change.

Exhibit C

Thank you in advance for your help in the matter.

In Service to Youth,

A handwritten signature in black ink, appearing to read "Ray Sanborn". The signature is fluid and cursive, with a large initial "R" and "S".

Ray Sanborn  
Kama'aina Care, Inc.  
President & C.E.O

CC  
Ms. Suzanne Case, Chairperson  
Department of Land and Natural Resources  
State of Hawaii  
1151 Punchbowl Street  
Honolulu, HI 96813

DAMON KEY LEONG KUPCHAK HASTERT  
A LAW CORPORATION

March 29, 2019

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**VIA E-MAIL & U.S. MAIL:**

Mr. Ed Underwood  
Department of Land and Natural Resources  
Division of Boating and Ocean Recreation  
4 Sand Island Access Road  
Honolulu, Hawai'i 96819  
[Ed.R.Underwood@hawaii.gov](mailto:Ed.R.Underwood@hawaii.gov)

APR 11 19PM 3:05BOR AWT

Re: Request for Administrative Hearing on Denial of Renewal of  
Kaneohe Bay Commercial Use Permit No. CO038251

Dear Mr. Underwood:

We represent Kama'aina Care, Inc. ("Kama'aina Kids") and are writing to you to request an administrative hearing regarding the Department of Land and Natural Resources' ("DLNR"), Division of Boating and Ocean Recreation's ("DOBOR") denial of renewal of Kama'aina Kids Kaneohe Bay Commercial Use Permit ("CUP") in your letter dated February 27, 2019 ("Denial Letter").

**I. KAMA'AINA KIDS IS ENTITLED TO A CONTESTED CASE HEARING**

Kama'aina Kids is legally entitled to an administrative hearing on the denial of renewal of its CUP under Hawai'i Administrative Rules ("HAR"). "In the event an application for the issuance of a new permit is denied, the applicant will be afforded the opportunity for a hearing in accordance with section 13-231-31 and section 13-231-32 for the sole purpose of allowing the applicant to contest the basis of the denial..." Haw. Admin. R. § 13-256-73.10(f) (HAR chapter 13-256, subchapter 5 is titled Windward Oahu Recreation Management Area). "The procedures under this section shall be used for any administrative hearing conducted by the division of boating and ocean recreation as required by law." Haw. Admin. R. § 13-231-31(a). "All parties shall be afforded an opportunity to present evidence and argument on all relevant issues involved." *Id.* at (c). The administrative hearing includes the submission of oral and documentary evidence, and the right to

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cross-examination. Haw. Admin. R. § 13-231-32. Any decision by the hearings officer is appealable as a contested case under Hawaii's Administrative Procedure Act, Hawai'i Revised Statutes ("HRS"), chapter 91. Haw. Admin. R. § 13-231-31(f) (authorizing statute HRS § 91-9); Haw. Rev. Stat. § 91-9 (titled "Contested cases; notice; hearing; records.").

**II. KAMA'AINA KIDS INTEREST IS ADVERSELY AFFECTED, AND AN ADMINISTRATIVE HEARING WOULD SERVE THE PUBLIC INTEREST**

All of Kama'aina Kids' ocean activities could potentially cease all together if it is not granted a CUP. Because Kama'aina Kids serves thousands of Hawaii's keiki every day in after school programs and the upcoming summer programs they could all potentially be adversely affected by DOBOR's decision.

Kama'aina Care, Inc. is a Hawaii not-for-profit 501(c)(3) organization, registered with the Internal Revenue Service, doing business as "Kama'aina Kids." It is undisputed that Kama'aina Kids is, and always has been a 501(c)(3) tax exempt educational organization, which undergoes rigorous auditing and reporting requirements with independent auditors and the Internal Revenue Service ("IRS"). For-profit commercial operators are not required to file public IRS 990 forms and are allowed to engage in business for profit for the benefit of their owners. Despite the blatant lies being told by a few commercial operators to the DLNR that Kama'aina Kids is a for-profit corporation, the organization is not and never has been a for-profit corporation. More importantly, Kama'aina Kids is and always has had its 501(c)(3) status in good standing with the IRS (the only agency with jurisdiction over that status).

For nearly thirty (30) years, Kama'aina Kids' mission has been to serve children, families and our communities by providing ongoing quality educational and enrichment programs to help build a sense of Self, Community and Environment. Twenty-nine (29) years ago, Kama'aina Kids opened its first waterfront camp program at He'eia State Park. Approximately eight (8) years later, some of these operations were moved to Kokokahi YWCA. Most recently, as of 2010, with the approval of the He'eia State Park lease by the Board of Land and Natural Resources ("BLNR"), Kama'aina Kids has expanded its role at He'eia State Park. Thus, since the 1980's, Kama'aina Kids has provided land-based ocean activities in Kaneohe Bay.



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Kama'aina Kids offers a multitude of activities and programs for the benefit of the keiki, the returning veterans, and the environment, and as a non-profit one hundred percent (100%) of the revenue received funds these programs and goes back into all of Kama'aina Kids' programs. The Kama'aina Kids Summer Camp is a land and ocean-based marine education program, including Junior Guard, with sailing, kayaking and canoeing activities teaching ocean and boating safety, with 6,500 participants per year. The Warrior Adventure Quest provides eco-tours and boating for soldiers returning from overseas deployment, with 500 participants per year. Kama'aina Kids' Holokai Kayak and Snorkeling Adventures<sup>1</sup> provides educational eco-experiences promoting stewardship, conservation, ecological and cultural history and ocean/boating safety, with 6,100 participants per year engage in low-impact kayaking, sailing, outrigger canoeing, stand-up paddling and snorkeling, supervised by lifeguard-certified, trained instructors. Kama'aina Kids' Community Boating Access program involves 2,500 public participants per year, accessing the Bay with their own equipment. And the Keiki O Ka Aina Family Learning Center at He'eia State Park has 1,000 participants per year.

Kama'aina Kids is uniquely suited to provide the ocean educational programs. All of the staff are Lifeguard, CPR, and First Aid certified. Kama'aina Kids is certified by the DLNR to instruct the Hawai'i State boating safety course. Kama'aina Kids is certified by The National Association of State Boating Law Administrators ("NASBLA"), and has the only certified instructors in the State of Hawai'i for the Spirit of America safe boating course. Its sailing instructors are also US Sailing Certified Sailing Instructors. Kama'aina Kids' additional credentials include: (1) Certified Sustainable Eco-Tour Operator by the Hawaii Ecotourism Association; (2) Hawaii Eco-tour Guide of the Year for 2013; (3) NASBLA Certified State of Hawaii Boating Safety Course; (4) Hawaii Ocean Safety Management Course Completion; (5) National Oceanic and Atmospheric Administration ("NOAA") Ocean Awareness Training Completion; and (6) ACA Certified Ocean Kayak and Stand-up Paddle Board Instructors.

Kama'aina Kids partners with many organizations to: provide marine environment educational programs, protect and restore the environment, and provide Hawaiian culture educational programs. The many partnerships include: (1)

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<sup>1</sup> "Holokai Kayak and Snorkeling Adventures" is a registered service mark of Kama'aina Care, Inc. Holokai Kayak and Snorkeling Adventures is not a separate or for-profit corporation.

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the Nature Conservancy; (2) the Eagle Scouts; (3) Paepae o He'eia Fishpond; (4) Marimed Foundation; (5) Spirit of America: Safe Boating program; (6) DOCARE; (7) Hui o Ko'olaupoko Watershed Restoration; (8) The Puakea Foundation; and (9) He'eia National Estuarine Research Reserve System ("NERRS") Committee. The Nature Conservancy partners and coordinates with Kama'aina Kids to utilize He'eia Park as the base of operations for the restoration and protection of Kane'ohe Bay. Kama'aina Kids and the Nature Conservancy provide keiki and community participation in its efforts to eradicate invasive algae and restore the sea urchin population. The Eagle Scouts, in addition to removing invasive algae, have completed several other service projects restoring and/or beautifying different areas of the Park and/or Bay. The Marimed Foundation is a watermen program for troubled or at-risk teens. Kama'aina Kids provides access to the Paepae o He'eia Fishpond. The Spirit of America program is an ocean and boating safety course provided free of charge to Hawaii's keiki. Kama'aina Kids works in coordination with DOCARE officers to protect and preserve He'eia State Park and Kane'ohe Bay. Kama'aina Kids' partnership with Hui o Ko'olaupoko Watershed Restoration works to improve water quality through ecosystem restoration and storm water management from mauka to makai. The Puakea Foundation utilizes He'eia State Park as its base of operations for the purpose of learning and passing on the art of canoe building. And, Kama'aina Kids is part of the He'eia NERRS committee that works with NOAA, as one of the local partners in the He'eia Ahupua'a, in the stewardship of He'eia State Park. All of these partnerships provide an example of community leadership and provide the tools for Hawai'i's keiki to respect and care for the environment and the Hawaiian culture.

One of the most valuable partnerships is with the Warrior Adventure Quest that through Kama'aina Kids provides eco-tours and boating for soldiers returning from overseas deployment. The Warrior Adventure Quest is a training tool designed to introduce soldiers to activities that serve as alternatives to aberrant behavior often associated with recently re-deployed soldiers. The introduction of high adventure outdoor activities presents outlets for the soldiers to help them realize a new level of normal after deployment. Kama'aina Kids provides this program for about 500 participants per year. All of these programs are done without exceeding the permitted and stickered equipment. In other words, the number of people on the Bay remains unchanged.

In addition to the continual programs and partnerships, Kama'aina Kids has organized and managed many other community activities that benefit

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He'eia State Park, Kane'ohē Bay, and the people of Hawai'i. Kama'aina Kids has facilitated invasive flora removal, haole koa removal, construction of access roads and walking paths, volunteer service projects for sustainable travel, provided ten (10) new picnic tables, renovation of the hale, and Kane'ohē Bay water quality testing.

For more than two decades since the adoption of the rules, Kama'aina Care has obtained the "approval" of KRBC when adding seats to its educational kayak and boat fleet, and its current fleet was approved in 2006 (152 seats). Similarly, every year until 2016, DLNR has issued decals for the approved seats. Kama'aina Kids is the only organization that is teaching the keiki the marine biology of the Bay, ocean safety, respect for the environment, and the importance of Hawaiian culture and practice. Kama'aina Kids is the only organization providing a safe and exciting activity for returning military to facilitate their repatriation and recovery. Kama'aina Kids is the only childcare provider offering infant care for as young as six weeks old. Kama'aina Kids has beautified, cleaned, restored and maintains He'eia State Park for the benefit of all of Hawai'i. All of these activities are subsidized or completely funded, and are only possible, because of the eco-tours offered to tourists and locals. In fact, even with the revenue brought in by the eco-tours it is not sufficient to cover all the expenses associated with the maintenance and improvement of He'eia State Park. Despite the intrinsic and economic benefits provided to the State by Kama'aina Kids, DOBOR has taken an aggressive stance to halt Kama'aina Kids' activities.

### III. ISSUES ON APPEAL

On February 27, 2019, DOBOR issued a letter to Kama'aina Kids stating that "DOBOR will not be renewing the commercial permit which expires on February 28, 2019." Denial Letter (emphasis in original). DOBOR contends that Kama'aina Kids:

...advertise[s] and operate[s] its commercial tours at commercial for-profit market rates, and thus by definition in excess of the charges allowed under the Permit. This is in conflict with the limitation of the Kaneohe Bay Master Plan and is not allowed with a commercial permit.

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... In order to comply with Hawaii Administrative Rules and the intent and requirements under the Kaneohe Master Plan, and the current commercial permit, charges for the commercial tours are limited to **direct operating costs for the tour**. KAC has continued to circumnavigate the rules by separating the price for its tours between land and sea activities. This is not a legitimate pricing scheme. The total costs for KAC commercial activities still exceed the allowable charges for labor and fuel.

KAC's commercial activity violates the terms of the commercial permit and does not comply with the permit's limitations, or the rules or regulations for the use of Kaneohe Bay.

Denial Letter (emphasis in original). There are several issues with DOBOR's denial of renewal that warrant administrative review under HRS chapter 91.

First, it incorrectly assumes the Kaneohe Bay Master Plan ("KBMP") has the force and effect of law, rather than being a planning document that was superseded more than 20 years ago by Hawaii Administrative Rules ("HAR") Ch. 13-256-73, which was adopted pursuant to the rule-making provisions of Haw. Rev. Stat. Ch. 91. Provisions of the KBMP that were not promulgated through the rule-making process are not administrative rules, are not enforceable against Kama'aina Kids, and cannot be used as a basis for denial of its CUP.

Second, it incorrectly imposes pricing restrictions that are not supported by the law. Nothing in the statutes or the administrative rules pertains to, states, let alone limits a commercial use permit holder's prices to "direct operating costs", "labor and fuel", or "for-profit market rates". Neither DOBOR nor the DLNR has any statutory or regulatory authority to dictate any pricing structure for any commercial use permit holder. As such, denial of the CUP, and any provisions of the CUP, relying on such statements is improper and cannot be legally enforced. Additionally, to treat one permit holder different than all other permit holders violates Kama'aina Kids equal protection rights under both the U.S. and State of Hawai'i Constitutions.

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Third, for more than two decades since the adoption of the rules, Kama'aina Care has obtained the "approval" of KRBC when adding seats to its educational kayak and boat fleet, and its current fleet was approved in 2006 (152 seats). Similarly, every year until 2016, DLNR has issued decals for the approved seats. Conversely, DLNR has never, until 2016, taken the position that Kama'aina Care must have a commercial permit for its educational programs. The very permit on appeal is the first and only commercial use permit that Kama'aina Kids has obtained in the nearly thirty (30) years of operating as a non-profit in Kaneohe Bay. This is because for decades DOBOR interpreted that the administrative rules do not impose price restrictions on 501(c)(3) organizations, but in fact the rules specifically exempt such organizations from the scope of the rules: The operative exemption is at HAR § 13-256-73(p) & (q):

**(p)** No increase in the level of commercial ocean use activities existing on July 1, 1993 will be permitted within Kaneohe Bay waters.

**(q)** Activities conducted by a bona-fide educational institution or an organization which is registered with the State and classified by the Internal Revenue Service as a not-for-profit (section 501(c)(3)) organization shall not be subject to the restrictions of subsection (p), but shall operate only in accordance with a permit issued by the department pursuant to chapter 13-231 or chapter 13-256 or both.

Lastly, DOBOR does not have the authority, nor the expertise, to determine whether Kama'aina Care is a 501(c)(3) organization or a for-profit corporation. Such a determination is solely with the Internal Revenue Service. It is uncontested that Kama'aina Kids is a valid non-profit 501(c)(3) organization. More importantly, Kama'aina Kids is and always has had its 501(c)(3) status in good standing with the IRS (the only agency with jurisdiction over that status).

Kama'aina Kids reserves the right to bring any additional arguments or rebuttals in its pleadings and during the course of the administrative hearing.

**IV. RELIEF REQUESTED**

Kama'aina Kids requests that it be afforded an administrative hearing on DOBOR's illegal denial of renewal of its CUP. That DOBOR's denial of

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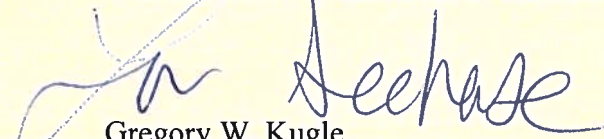
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renewal of the CUP be declared illegal and as such reversed. And that Kama'aina Kids be permitted to renew its CUP.

Thank you for your prompt attention and consideration of this matter. We anticipate a prompt appointment of a hearings officer, scheduling of pre-hearing deadlines, and scheduling of an administrative hearing.

Very truly yours,

DAMON KEY LEONG KUPCHAK HASTERT



Gregory W. Kugle  
Loren A. Seehase

GWK/LAS:rp  
431547

cc: Suzanne Case, Chairperson