

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

The Staff of the Missouri Public Service
Commission,)

Complainant,)

v.)

Case No. SC-2010-

Box Canyon Watershed Association, Inc.,)

Dream Builders, LLC, Horse Trading, LLC,)

Canyon Treatment Facility, LLC, Super)

Market Merchandising & Supply, Inc.,)

Kandis Davis, Thomas Davis, David)

Sanford, Curtis Butrick, and Kevin Knasel)

Respondents.)

COMPLAINT

COMES NOW the Staff of the Missouri Public Service Commission (Staff), by and through the Staff Counsel's Office and pursuant to Section 386.390 RSMo 2000, for its *Complaint* respectfully states as follows:

Introduction

1. This Complaint arises from the Respondents' unlawful provision of sewer service to the public for gain, without certification or other authority from the Missouri Public Service Commission (Commission).

Complainant

2. The Staff acts through delegated authority of the Commission's General Counsel. As such, the Staff is authorized by Section 386.390.1 RSMo (2000) and Commission Rule 4 CSR 240-2.070(1) to file this Complaint. Section 386.390.1 provides that a "[c]omplaint may be made....in writing, setting forth any act or thing done or omitted to be done by any

corporation, person or public utility, . . . in violation, or claimed to be in violation, of any provision of law, or of any rule or order or decision of the commission . . ."

Respondents

3. Box Canyon Watershed Association, Inc. (Association) is a Missouri Mutual Benefit Corporation organized

....to establish, maintain and operate a water and sanitary sewer system and all appurtenances thereto, not for profit, solely for the mutual advantages to be derived; to present a unified effort to the owners of the property and protecting the value of the property of the owners, and to engage in such other activities as may be to the mutual benefit of the owners of property within the Box Canyon Watershed Association, Inc.

4. The Association's principal place of business is 1655 S. Enterprise, Suite B-4, Springfield, Missouri 65804 and the registered agent is Kandis Davis who may be served at the same address.

5. Dream Builders, LLC (Dream Builders) is a Missouri Limited Liability Corporation organized to engage in construction work, including sewers and water purification works, and to own, manage, operate, buy, mortgage, lease, hold and sell any type of business, including utilities. Dream Builders' principal place of business is 14 Dalton Circle, Branson, MO 65616, and the registered agent is also Ms. Davis, who may be served at 1655 S. Enterprise, Suite B-4, Springfield, Missouri 65804.

6. Horse Trading, LLC (Horse Trading) is a Missouri Limited Liability Corporation organized to engage in construction work, including sewers and water purification works, and to own, manage, operate, buy, mortgage, lease, hold and sell any type of business, including utilities. Horse Trading's principal place of business is 1655 S. Enterprise, Suite B-4, Springfield, Missouri 65804, and the registered agent is also Ms. Davis, who may be served at the same address.

7. Canyon Treatment Facility, LLC (Canyon Treatment) is a Missouri Limited Liability Company created to own and manage a sewage treatment plant. Canyon Treatment's principal place of business is 1655 S. Enterprise, Suite B-4, Springfield, MO 65804, and the registered agent is David Sanford, who may be served at the same address.

8. Super Market Merchandising & Supply, Inc. (Super Market) is a for-profit Missouri corporation whose primary purpose is to sell supermarket display cases. Super Market's principal place of business is 5200 Virginia Avenue, Saint Louis, MO 63111, and the registered agent is Kevin Knasel, who may be served at the same address.

9. Ms. Davis is the owner, an incorporator, and the President of the Association, the owner and organizer of Dream Builders, the owner and organizer of Horse Trading, and the owner and organizer of Canyon Treatment. Ms. Davis may be served at 1655 S. Enterprise, Suite B-4, Springfield, Missouri 65804.

10. Thomas Davis currently serves as a Director on the Association's Board of Directors, and may be served at 1655 S. Enterprise, Suite B-4, Springfield, MO 65804.

11. David Sanford currently serves as a Director on the Association's Board of Directors, and may be served at 1655 S. Enterprise, Suite B-4, Springfield, MO 65804.

12. Sammy Shrum is one of three incorporators of the Association and served as a Director on the Association's first Board of Directors. Mr. Shrum may be served at 1156 Foxborough Lane, Branson, MO 65616.

13. Vashti Shrum is another of the three incorporators of the Association, and served as a Director on the Association's first Board of Directors. Ms. Shrum may be served at 1156 Foxborough Lane, Branson, MO 65616.

14. Curtis Butrick served as a Director on the Association's Board of Directors from approximately August 2005 through August 2006. Mr. Butrick may be served at 518 Warren Street, Ozark, MO 65721.

15. Kevin Knasel is the President of Super Market, and the only Director on Super Market's Board of Directors. Mr. Knasel may be served at 5200 Virginia Avenue, Saint Louis, MO 63111.

Count I—Respondents are Subject to Regulation by the Commission

16. Section 386.020 (50) RSMo (Supp.2008) defines a "Sewer system" as

....all pipes, pumps, canals, lagoons, plants, structures and appliances, and all other real estate, fixtures and personal property, owned, operated, controlled or managed in connection with or to facilitate the collection, carriage, treatment and disposal of sewage for municipal, domestic or other beneficial or necessary purpose;....

17. Section 386.020 (49) RSMo (Supp. 2008) defines a "Sewer corporation" as

....every corporation, company, association, joint stock company or association, partnership or person, their lessees, trustees or receivers appointed by any court, owning, operating, controlling or managing any sewer system, plant or property, for the collection, carriage, treatment, or disposal of sewage anywhere within the state for gain, except that the term shall not include sewer systems with fewer than twenty-five outlets;....

18. Section 386.020 (43) RSMo (Supp. 2008) includes within the definition of "Public utility"

....every pipeline corporation, gas corporation, electrical corporation, telecommunications company, water corporation, heat or refrigerating corporation, and sewer corporation, as these terms are defined in this Section, and each thereof is hereby declared to be a public utility and to be subject to the jurisdiction, control and regulation of the commission and to the provisions of this chapter....

19. Pursuant to Section 386.250 (4) RSMo (2000), “[t]he jurisdiction, supervision, powers and duties of the public service commission....shall extend....[t]o all sewer systems and their operations within this state and to persons or corporations owning, leasing, operating or controlling the same.”

Respondents Are Public Utilities for Gain

20. Since about May 22, 2003, each individual Respondent and each entity Respondent, acting individually or collectively, have owned, operated, controlled or managed a sewer system for gain within the intent of Section 386.020 (49) RSMo (Supp. 2008), serving at least 180 residential sites and 5 non-residential sites in Red Cedar Point Subdivision, Celebration Cove, Compton, Cedar Landing, Canyon Park, Canyon Estates, New Castle Estates, Royal Vista, Stoneridge Estates, Longview Estates, and other areas (Service Area) in Stone County, Missouri.

21. Section 393.825 RSMo (Supp. 2008) governs the organization of nonprofit membership sewer corporations, which if properly organized and operated, fall outside the Commission’s jurisdiction (section 393.847.3).

22. The Association’s *Articles of Incorporation* states the Association is organized as a non-profit Chapter 355 mutual benefit corporation with members. However, the Association does not limit its service provision to its membership within Exhibit A of the *Bylaws*, does not limit its service territory to that stated in Exhibit A of the *Bylaws*, does not allow for the annual meeting of members and election of officers or other governance privileges granted by the *Bylaws*, and does not extend membership to all owners of property connected to the sewer system.

23. The Association’s *Bylaws* have not been amended since their execution in 2003, and are currently operative as executed.

24. Exhibit A of the *Bylaws* limits the sewer system service to the legally defined property located in the Canyon Estates and Red Cedar Point Subdivisions (referred to as the “described area”). The *Bylaws* allow the Association to connect any property located outside the described area to the sewer system, provided “....all such property and improvements which are permitted to be connected to the water system and sewer system shall be subject to all the terms, conditions and restrictions, rules and regulations of the corporation promulgated pursuant thereto.”

25. As noted above, the Respondents have failed to make the owners of property lying outside the described area and connected to the sewer system members of the Association. Instead, all Respondents have acted as public utilities by providing sewer service for compensation to members of the public without discrimination.

26. Currently, all Respondents own, operate, control or manage the sewer system, plant or property, for gain to properties within and outside the described area.

27. To the extent that the Respondent Association’s incorporation of a nonprofit membership corporation provides an exclusion from the Commission’s jurisdiction in this case, that benefit applies only to the Respondent Association.

28. Although the *Bylaws* provide that the Association “shall construct, maintain, operate, repair, improve and regulate the use of the sewer system...” and provide the terms for it to contract for the construction, repair and improvement of the sewer system, with the cost paid by the Association “....from the fees and special assessments made thereunder....” some or all of the Respondents have contracted or caused to be contracted expansions of the sewer system directly with Dream Builders, Horse Trading or others without adhering to the *Bylaws*.

29. The *Bylaws* provide for the monthly collection from members, and deposit into a “maintenance fund”, a maintenance charge for the actual costs of maintenance and operation of the sewer system serving the Service Area, with the Board of Directors of the Association to adjust the charge as required by the needs of the sewer system. Some or all of the Respondents charge or cause to be charged an initial hookup/capacity fee of approximately \$4,500 for residential customers to connect to the sewer system. Some or all of the Respondents charge or cause to be charged a monthly service fee to all customers for use of the sewer system.

30. Although required to do so by the *Bylaws*, such residential customers were never made members of the Association, have never received notice of or attended an annual or other Association meeting.

31. Although required to do so by the *Bylaws*, the Association’s Board of Directors does not determine the amount of the monthly service fee and the initial hookup/capacity fees charged to the Association’s members.

32. Some or all of the money collected as customer or member fees for hookup and use of the sewer system went to some or all of the Respondents and was deposited into those entities’ separate bank accounts for their benefit.

33. Some or all of the payments for expansion costs went from the customer requesting the expansion directly to some or all of the Respondents, except the Association.

34. Although it is required by the *Bylaws*, no maintenance fund has been created from the proceeds of or customers’ paid monthly service fees and initial hookup/capacity fees. The Association has no assets, and excess revenues from monthly fees and initial hookup/capacity fees are not returned, placed in such a fund, or refunded to customers.

35. In a July 6, 2009 deposition of Ms. Davis, she stated she owns the sewer system and in approximately 2006, sold part of the property the sewer system is located on to Super Market and Mr. Knasel.

Respondents Own, Operate, Control or Manage a Sewer Corporation For Gain Without
Commission Approved Certificates Of Necessity And Convenience

36. Section 393.170.1 RSMo (2000) provides “[n]o....sewer corporation shall begin construction of a....sewer system without first having obtained the permission and approval of the commission.”

37. Section 393.170.3 RSMo (2000) provides “[t]he commission shall have the power to grant the permission and approval herein specified whenever it shall after due hearing determine that such construction....is necessary or convenient for the public service.”

38. None of the Respondents possess a Certificate of Convenience and Necessity from the Commission to own, operate, control or manage a sewer system in the Service Area for gain.

Articles of Incorporation

39. Section 393.825 RSMo (Supp. 2008) provides in part “[t]he articles of incorporation of a non-profit sewer company shall recite in the caption that they are executed pursuant to Sections 393.825 to 393.861 and section 393.175, [and] shall be signed and acknowledged in duplicate by at least five of the incorporators....”

40. The *Articles of Incorporation* do not recite that they are executed pursuant to Sections 393.825 to 393.861 and Section 393.175.

41. Only three incorporators, Ms. Davis, Mr. Shrum and Ms. Shrum signed and acknowledged the Association’s *Articles of Incorporation*, in violation of the Section 393.825.

Board of Directors

42. Section 393.843 RSMo (2000) details the requirements for a non-profit sewer company's Board of Directors, the directors' powers and duties, and the requirement of not less than five directors, each of whom shall be a member of the company governed.

43. The *Bylaws* provide for the management of the Association's business affairs by a Board of Directors consisting of only three members serving five year terms, with the first board consisting of Sammy Shrum, Vashti Shrum, and Kandis Davis, with the directors elected by the members of the Association thereafter.

44. Mr. Shrum and Ms. Shrum executed the *Bylaws* on May 30, 2003. Ms. Davis executed the *Bylaws* on June 3, 2003.

45. From the Association's incorporation, through the date of this filing, the Association has been managed by only three directors at any given time, in violation of Section 393.843.

46. Since the expiration of the first Board of Directors' terms, there has been no election of directors for the Association's Board of Directors.

WHEREFORE, the Staff prays that the Commission will 1) give notice to all Respondents as required by law and, after hearing, find that all Respondents, are sewer corporations within the intent of Section 386.020 (49) RSMo (Supp. 2008), thus public utilities within the intent of Section 386.020 (43) RSMo (Supp. 2008), and subject to the jurisdiction, regulation and control of this Commission.

Count II—Authority to Seek Penalties for Unauthorized Provision of Sewer Service

47. Complainant hereby adopts by reference and re-alleges the allegations set out in paragraphs one (1) through forty-five (45) above.

48. Section 386.570 RSMo (Supp. 2007) provides:

1. [a]ny corporation, person or public utility which violates or fails to comply with any provision of the constitution of this state or of this or any other law, or which fails, omits or neglects to obey, observe or comply with any order, decision, decree, rule, direction, demand or requirement, or any part or provision thereof, of the commission in a case in which a penalty has not herein been provided for such corporation, person or public utility, is subject to a penalty of not less than one hundred dollars nor more than two thousand dollars for each offense.

2. [e]very violation of the provisions of this or any other law or of any order, decision, decree, rule, direction, demand or requirement of the commission, or any part or portion thereof, by any corporation or person or public utility is a separate and distinct offense, and in case of a continuing violation each day's continuance thereof shall be and be deemed to be a separate and distinct offense.

3. [i]n construing and enforcing the provisions of this chapter relating to penalties, the act, omission or failure of any officer, agent or employee of any corporation, person or public utility, acting within the scope of his official duties of employment, shall in every case be and be deemed to be the act, omission or failure of such corporation, person or public utility.

49. All Respondents have failed to comply with the Commission's statutes and rules through the provision of sewer service prior to the Commission's permission and approval of Certificates of Convenience and Necessity under Section 393.170 RSMo (2000). Each day's failure to comply with the law respecting the provision of sewer service since approximately May 2003 as sewer corporations and public utilities without the Commission's permission and approval is a continuing violation and constitutes a separate and distinct offense that carries a penalty of \$100 to \$2000 per day.

WHEREFORE, the Staff prays that the Commission will give such notice to all Respondents as is required by law, and after hearing, in the event that any of the conduct herein described is determined to be in violation of any law of the State of Missouri or of any order, decision, or rule of the Commission, deem each day that such violation existed to be a separate

offense, and authorize its General Counsel to proceed in Circuit Court to seek such penalties as are authorized by law.

Respectfully submitted,

/s/Jennifer Hernandez

Jennifer Hernandez

Legal Counsel

Missouri Bar No. 59814

Attorney for the Staff of the
Missouri Public Service Commission
P. O. Box 360

Jefferson City, MO 65102

(573) 751- 8706 (Telephone)

(573) 751-9285 (Fax)

jennifer.hernandez@psc.mo.gov