5TH CIRCUIT COURT
STATE OF HAWAII
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IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT

STATE OF HAWAII

STATE OF HAWAII	CR. NO. 12-1-0131
v.	MOTION TO SUPPRESS; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF COUNSEL; AFFIDAVIT OF TIMOTHY BYNUM; EXHIBITS A-J; NOTICE OF MOTION; CERTIFICATE OF SERVICE
TIMOTHY BYNUM, Defendant.	Hearing Date: March 27, 2012 Hearing Time: 9:00 a.m. Judge: Hon. Kathleen N.A. Watanabe Trial Date: April 23, 2012

MOTION TO SUPPRESS

Defendant TIMOTHY BYNUM, by and through counsel, moves the Honorable Judge for an Order suppressing all evidence discovered during and as a result of the searches of Mr. Bynum's home prior to and on April 14, 2010, being without a search warrant issued upon probable cause, and not falling into any of the exceptions to the warrant requirement. Defendant also moves to have all evidence discovered during a purportedly administrative search on April

13, 2011 suppressed due to the allegedly administrative search having actually been used as a pretext for a criminal investigation.

This motion is based on the evidence, which may be adduced at a hearing on this motion, the memorandum in support of this motion, the declaration herein and the attachments thereto.

Dated: Lihue, Hawaii, March 13, 2012.

Daniel G. Hempey
Attorney for DEFENDANT

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT

STATE OF HAWAII

STATE OF HAWAII	)	CR. NO. 12-1-0131
	)	
v.	)	MEMORANDUM OF POINTS AND
	)	AUTHORITIES
TIMOTHY BYNUM,	)	
	)	
Defendant.	)	
	)	
	)	
	)	

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF MOTION TO SUPPRESS

ITEMS TO BE SUPPRESSED

1. Any and all evidence which was discovered during and after the original warrantless search by the undisclosed person who made the initial complaint to the Planning Department or any other person, and whose identity has so far been kept anonymous by the Planning Department and Office of the Prosecuting Attorney; and

2. Any and all evidence which was discovered during and after the warrantless search on or about April 14, 2010; and

3. Any and all evidence gathered as a result of the search on or about April 13, 2011.

4. Any evidence garnered from any other unlawful search of deprivation of defendant's other constitutional rights including but not limited to the 5th and 6th Amendments to the United States Constitution.

STATEMENT OF FACTS

Defendant TIMOTHY BYNUM was charged, by way of Complaint filed on November 9, 2011, in the District Court of the Fifth Circuit, with two counts of "AGRICULTURAL DISTRICTS GENERAL PERMITTED USES AND STRUCTURES (8-7.2)" (Counts 1 and 3), and two counts of "ZONING PERMITS WHEN REQUIRED" (8-19.1) (Counts 2 and 4). Counts

1 and 2 arise from warrantless searches of defendant's personal home in 2010. Counts 3 and 4 apparently arise from a search of Defendant's home in 2011.

A. The 2010 Warrantless Searches

On or about December 14, 2011, the defense propounded a Discovery Request, attached as Exhibit "A". In response, the State provided various documents which suggest that the April 2010 charges are based, in large part, on observations of a person who wants to remain anonymous[1], and who reported that s/he saw an alleged illegal second kitchen (rice cooker and refrigerator) in Mr. Bynum's residence.

Upon information and belief, there was no warrant for this anonymous person to enter Defendant's private home for the purpose of investigating potential criminal offenses related to zoning [2].

The allegations were nonetheless passed on to the Planning Department by this as yet unknown person, and coupled with as yet unknown "corroboration" the County later sent an official to perform another warrantless search of Defendant's home.

Attached hereto as Exhibit "B" is an email exchange between the prosecuting attorney and the (then) planning director in which the prosecuting attorney refers to an "anonymous" complaint that Mr. Bynum was "renting out his house or a portion thereof" and offering that the Office of the Prosecuting Attorney had obtained "corroboration" of this anonymous complaint about a portion of the property being rented. Affidavit of Timothy Bynum at p. 21.

[1] See Exhibit "B" (Planning Department Complaint/Inspection Request Form Log # 2010-083, dated 3/26/10, noting that the complainer wants to remain anonymous).

[2] Because every search of the defendant's residence at issue in this motion begins, initially with a complaint from the, as yet, anonymous person, defendant seeks suppression of all evidence in this matter, particularly given the inability to confront and cross-examine the accuser and given the unknown nature of the evidence that allegedly corroborates the purportedly anonymous tip.

In this April 7, 2010 email, the prosecuting attorney wrote to the Director: "Aloha Ian, We received information to corroborate an anonymous complaint dated March 26, 2010 that was sent to the Planning Department and our office, that Councilmember Tim Bynum was renting out his house, or a portion thereof. Can you let me know if renting out a portion of his residence is illegal given his land status, and what ordinance/statute would he be violating by doing so? Please advise." (Exhibit B, emphasis added).

Director Costa, replied: "The CZO really doesn't prohibit renting portions of structures. Even the issue of "lock-outs" is not addressed. The CZO does not dictate where locks are permitted and not permitted (thank goodness!). The issue would be whether the area, in question creates a "multi-family" dwelling. What was permitted is a "single-family" dwelling based on "one kitchen". If a second kitchen (area used for the preparation of food) is present, then a violation would exist for an illegal "multi-family" dwelling unit..." See Exhibit "B" (Email exchange between Shaylene Carvalho and Ian Costa, cc'ing Sheilah Miyake, dated 4/7/10 and 4/8/11)[3].

Despite the Planning Director's response that no laws appeared to have been violated, on or about April 14, 2010, Kauai Planning Inspector Patrick Henriques went to Mr. Bynum's house for the purpose of investigating the anonymous complaint about perfectly lawful activity, looked into the windows of the family home, and allegedly saw a refrigerator and a rice cooker on a countertop in the family room area. Exhibit "C" (Field Investigative Report dated 4/14/2010).

The identity of whom, if anyone, ordered the planning inspector to enter onto the Bynum's property and look into the windows of the family's home, apparently looking for some

[3] It is worth noting that although this email exchange appears to contain clearly exculpatory information within the meaning of Brady v. Maryland (1963) 373 U.S. 83, that it was not provided to the defense in response to its discovery request, but instead, had to be obtained by use of subpoena.

evidence of illegal rental activity when such rental activity was not illegal in the first place, remains unknown to Defendant.

There is no evidence in the discovery documents provided to the defense to show that anyone from the Planning Department gave or attempted to give Mr. Bynum notice or obtain permission to enter onto Mr. Bynum's property prior to the April 14, 2010 search. In fact, it appears that the search was executed on a Wednesday, when a County employee would likely know that Mr. Bynum would not be home because he would be in a County Council meeting -- which in fact he was. Affidavit of Timothy Bynum. The April 15, 2010

On the next day, the inspector apparently prepared a "Zoning Compliance Notice" (Attached as Exhibit "G") but it was not immediately delivered to Mr. Bynum. However, on that date (April 15, 2010), another Kauai Planning Inspector, Sheila Miyake, emailed a copy of this "Zoning Compliance Notice" to (then) County Clerk, Peter Nakamura, in an email titled "4 your eyes only." Exhibit "H".

On May 12, 2010, while in a Mr. Bynum was attending a council meeting, inspector Henriques handed him the "Zoning Compliance Notice", dated April 15, 2010. (Attached as Exhibit "G"). In that notice inspector Henriques informs Mr. Bynum, inter alia, "The Planning Department conducted a site inspection on the property on April 14, 2010. There is no mention of a warrant or probable cause.

In order to access any window that could see into the family room of Mr. Bynum's property, a person would have to enter a gate into a fenced back yard, go up a ramp past bedroom windows to the back of the house, and across a lanai. Id.

The burden is on the State to invoke an exception to the 4th Amendment's warrant requirement. The defense expects the State to point to one sentence in a Use Agreement from

2005, which provides "The undersigned further agree(s) to allow periodic inspection of the premises and structure(s) by the Planning Department[.]" See Exhibit "D" (Use Agreement for TMK 4-4-11-36, dated 8/24/05). The Use Agreement does not address "notice" or contain a waiver of Fourth Amendment rights or consent for criminal searches. The Use Agreement is also not signed by the County.

B. The 2011 Searches

Detailed notes from Planning Inspector Henriques demonstrate he had full knowledge of the prior illegal search(es), and used the "evidence" discovered during those prior illegal search(es) as his primary tool to get "consent" for the later search. For instance, in notes for June 4, 2010, Mr. Henriques writes that he "asked to set a site inspection to resolve the violation [that was based on the 4/14/2010 warrantless search.]" See Exhibit "E" (Planning Department Notes by Patrick Henriques dated 6/4/10).

In addition, the County procured the "consent" through deception. Mr. Henriques wrote, "I made up some excuses cause my goal was to get him [Mr. Bynum] to set the date for the site inspection[.]" Ibid.

Mr. Henriques further noted, "I tolded [sic] him to remove all the portable appliances from the room. I explained many violators play cat and mouse games with the department inspectors. Remove and put back appliances after the inspector leaves." Ibid. Mr. Bynum in his affidavit also represents that Mr. Henriques told him to just hide the rice cooker during the inspection and "we can clear this thing up." Affidavit of Timothy Bynum.

Finally, Mr. Henriques writes, "I said...rice cooker on the counter next to a sink and an ice box in a room is called a kitchen. ... After all these so call [sic] questions he didn't agree to

set the site inspection to resolve the violation." See Exhibit "E" (Planning Department Notes by Patrick Henriques dated 6/4/10) (emphasis added).

These notes document in the county inspector's own words that he "made up excuses" to "so-called" questions to get consent. The notes also document how evidence that was allegedly discovered during the prior illegal searches was being used as a tool to obtain "consent" for yet another search – this search being demanded on the basis of "clearing" the "violation" found in the earlier illegal searches.

In response to Mr. Henriques' representations, Mr. Bynum contacted the Planning Department and arranged for an inspection of his home, which occurred on April 13, 2011.

Inspection notes by Mr. Henriques from the April 13, 2011 inspection state "the placement of the door and it's [sic] area it was placed, creates a seperate [sic] unit within the SFR." See Exhibit "F" (Field Investigative Report dated 4/13/2011).[4] This April 13, 2011 search was the basis for Counts 2 and 4 of the criminal Complaint. Those counts apparently concern the discovery of an internal door that had a lock during the 2011 inspection that was to "clear up the violation". The allegedly offending internal door lock appears to have been installed on doors leading to the home's laundry room. See Exhibit "I", drawing of building plans with handwritten notes regarding placement of door locks.

Exhibit "J" is a January 9, 2012 letter to Mr. Bynum fro the Planning Director notifying hi that there are no zoning encumbrances on the property. See Affidavit of Tim Bymum

[4] This is contradictory to the interpretation of former Planning Director Ian Costa's assessment that "The CZO really doesn't prohibit renting portions of structures. Even the issue of "lock-outs" is not addressed. The CZO does not dictate where locks are permitted and not permitted (thank goodness!)." See Exhibit "B" (Email exchange between Shaylene Carvalho and Ian Costa, cc'ing Sheilah Miyake, dated 4/7/10 and 4/8/11).

Whether the CZO, as it is being applied here, is so vague and overbroad that an average law-abiding citizen would contemplate that having an internal lock on an interior door to the laundry area could result in criminal charges, when even the Planning Director for the County believes that is not the case, is the subject of another motion.

Of course, there would not have even been a request for consent to search, or the meticulous discovery of a locking door inside of the house, but for the prior illegal search(es).

SUMMARY OF ARGUMENT

When, as here, a search is executed without a warrant issued upon probable cause, the prosecution has the burden of proving that the search falls within one of the well-recognized and narrowly-defined exceptions to the general warrant requirements of the fourth amendment.[5] The prosecution has neither alleged, nor proven any exception to the warrant requirement.

In the present case, all Counts in the Complaint are based on evidence resulting from several warrantless searches. Furthermore, consent to the 2011 search was tainted both by the prior illegal searches and by means of additional deception by County officials as well as what appear to have been warrantless criminal searches conducted under the guise of administrative searches. Finally, even if the searches at issue were deemed administrative, they were still illegally executed without the required warrant for administrative searches.

Therefore, all evidence discovered during and as a result of each of these searches should be excluded under the "fruits of the poisonous tree" doctrine.

[5] The email between the Prosecuting Attorney and then-Planning Director, establishes that the search was for the purpose for enforcement of criminal law. See Exhibit "B" ((Email exchange between Shaylene Carvalho and Ian Costa, cc'ing Sheilah Miyake, dated 4/7/10 and 4/8/11).

ARGUMENT

1. 2010 WARRANTLESS SEARCHES -- ALL EVIDENCE OBTAINED FROM THE ILLEGAL 2010 WARRANTLESS SEARCHES SHOULD BE SUPPRESSED.

The prosecution has the burden "of proving that the search falls within one of the well-recognized and narrowly-defined exceptions to the general warrant requirements of the fourth amendment," State v. Naeole, 80 Haw. 418, 423 (1996).

To meet its burden, the defense expects the State to rely on one sentence in a Use Agreement from 2005, which provides "The undersigned further agree(s) to allow periodic inspection of the premises and structure(s) by the Planning Department[.]" See Exhibit "D" (Use Agreement for TMK 4-4-11-36, dated 8/24/05).

a. In signing the Use Agreement with an Administrative Agency, Mr. Bynum never gave consent to warrantless criminal searches of his property.

Documents obtained through discovery show that prior to the April 14, 2010 trespass and warrantless search, a criminal investigation was in progress and establishes that the search was for the purpose of enforcement of a criminal law. [6]

The Use Agreement from 2005 provides, "The undersigned . . . agree(s) to allow periodic inspection of the premises and structure(s) by the Planning Department[.]." This cannot be construed to give unlimited consent to warrantless criminal searches of Mr. Bynum's property. The Agreement contains no language about consent for criminal searches, or any language about waiver of Fourth Amendment rights. Furthermore, The Use Agreement contains no parameters for notice, about who can inspect, or protocols that must be followed. It makes no physical provision for the safety of an inspector who enters private property without notice or a warrant and may encounter a citizen who treats him as one might treat someone caught looking one one's

[6] See Exhibit "B" ((Email exchange between Shaylene Carvalho and Ian Costa, cc'ing Sheilah Miyake, dated 4/7/10 and 4/8/11).

windows. It offers no legal protection the inspector will not be criminally charged with trespass or privacy crimes.[7]

Nor does it cite reasonable times of day within which inspectors may come on to the property. This lack of specificity demonstrates that this Use Agreement was not drafted as, or intended to be invoked as, carte blanche permission to the Government to enter upon Mr. Bynum's property for criminal searches (or even administrative searches, see section 4 below).

In Camara v. Municipal Court of City and County of San Francisco, 387 U.S. 523 (1967) 87 S.Ct. 1727, 18 L.Ed.2d 930 the United States Supreme Court held " that administrative searches ... are significant intrusions upon the interests protected by the Fourth Amendment, that such searches when authorized and conducted without a warrant procedure lack the traditional safeguards which the Fourth Amendment guarantees to the individual, and that the reasons put forth in Frank v. State of Maryland and in other cases for upholding these warrantless searches are insufficient to justify so substantial a weakening of the Fourth Amendment's protections.

Camera, infra, involved an action by lessee of ground floor of apartment building for writ prohibiting his prosecution in California municipal court on criminal charge of violating city housing code by refusing to permit warrantless inspection of his premises. Three lower courts denied his writ. The United States Supreme Court reversed, holding that administrative searches by municipal health and safety inspectors constitute significant intrusions upon interests protected by Fourth Amendment, and such searches, when authorized and conducted without warrant procedure, lack traditional safeguards which Fourth Amendment guarantees to individuals. The Court further held that probable cause must be present must exist in addition to

[7] Defendant takes no position as to whether the Court should advise the inspector of his rights or appoint counsel for the inspector at the hearing.

reasonable legislative or administrative standards for conducting area inspection with respect to particular dwelling. Id.

Here, there was no probable cause for the first or second search. There was no warrant for either search. Indeed, the second search was conduced even after the Director of the Planning Department informed the prosecutor that no law had been broken - even if what the anonymous tipster alleged was true. Moreover, there appear to be absolutely no legislative or administrative standards that were consulted prior to deciding to inspect the Bynum family dwelling. Most importantly, however, is the lack of a warrant issued by a neutral judge or magistrate.

"The deliberate use by the Government of an administrative warrant for the purpose of gathering evidence in a criminal case must meet stern resistance by the courts" Abel v. United States, 362 U.S. 217, 248, 80 S.Ct. 683, 701, 4 L.Ed.2d 668 (1960), (Douglas, J., dissenting). See also Michigan v. Tyler, 436 U.S. 499, 508, 98 S.Ct. 1942, 1949, 56 L.Ed.2d 486 (1978) ('if the authorities are seeking evidence to be used in a criminal prosecution, the usual standard of probable cause will apply "). Again, in this case, the State cannot be permitted to sustain a criminal prosecution based on evidence garnered in a criminal investigation, disguised as a routine planning inspection. See also Frank v. Maryland, 359 U.S. 360, 365, 79 S.Ct. 804, 808, 3 L.Ed.2d 877 (1959), Government cannot evade the Fourth Amendment "by the simple device of wearing the masks of [administrative] officials while in fact they are preparing a case for criminal prosecution".

b. Mr. Bynum never validly waived his right against warrantless criminal searches.

The classic description of an effective waiver of a constitutional right is the "intentional relinquishment or abandonment of a known right or privilege." College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 682 (1999) citing Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

"Constructive consent is not a doctrine commonly associated with the surrender of constitutional rights." College Sav. Bank, supra, 527 U.S. at 681 citing Edelman v. Jordan, 415 U.S. 651, 673 (1974).

In Fuentes v. Shevin, the United States Supreme Court, in assessing whether a waiver of a constitutional right was valid, asked whether the waiver was "voluntarily, intelligently, and knowingly" made. Fuentes v. Shevin, 407 U.S. 67, 94 (1972) citing D. H. Overmyer Co. v. Frick Co., 405 U.S. 174 (1972).

The Court in Fuentes stated that, foremost, "a waiver of constitutional rights in any context must, at the very least, be clear. We need not concern ourselves with the involuntariness or unintelligence of a waiver when the contractual language relied upon does not, on its face, even amount to a waiver." Fuentes, supra, 407 U.S., at 95.

Similarly, the Hawai'i Supreme Court ruled in State v. Pau'u, 72 Haw. 505, 510 (1992), that "Any waiver of one's constitutional rights must be voluntarily and intelligently undertaken, State v. Vares, 71 Haw. 617, 621[, (1990)], and it is the government's burden to show that the waiver was voluntary and uncoerced, State v. Kaahanui, 69 Haw. 473, 478[, (1987)]; State v. Merjil, 65 Haw. 601, 605[, (1982)]".

Here, the Use Agreement contains no language at all about waiver of Fourth Amendment rights, much less "clear" language "on its face" required under Fuentes, supra, 407 U.S., at 95. Therefore, the questions of voluntariness and intelligence may not even need to be addressed. Id.

However, "it is the government's burden to show that [any alleged] waiver was voluntary and uncoerced." Pau'u, supra, 72 Haw. at 510. The defense requests that the government be required to meet this burden.

2. ALL EVIDENCE OBTAINED FROM THE 2011 SEARCH WAS TAINTED BOTH BY THE PRIOR ILLEGAL SEARCHES AND BY MEANS OF ADDITIONAL DECEPTION BY COUNTY OFFICIALS, AND THEREFORE SHOULD BE SUPPRESSED.

a. All evidence obtained from the 2011 was tainted both by the prior illegal searches.

"Consent to search that is given after an illegal entry is tainted and invalid under the Fourth Amendment." U.S. v. Hotal, 143 F.3d 1223, 1228 (9th Cir. 1998) quoting United States v. Suarez, 902 F.2d 1466, 1468 (9th Cir.1990) (unjustified warrantless search of apartment unconstitutionally tainted drug defendant's subsequent consent to search), United States v. Howard, 828 F.2d 552, 553 (9th Cir.1987).

In Hotal, the Circuit Court reversed the defendant's conviction and ruled that, because "the initial entry was impermissible and that the evidence seized pursuant to the warrant must be suppressed, all of the other evidence seized must also be suppressed." Hotal, supra, 143 F.3d at 1228. The Court went on to rule that "[a]ccordingly, all of the items seized pursuant to the consent form, including those forming the basis of the second count, must be suppressed." Id. The Court also rejected the government's attempt to justify the seizure of evidence under the "plain-view" exception because "[t]he "plain-view" doctrine does not apply unless the initial entry is lawful, either pursuant to a valid warrant or under one of the recognized exceptions to the warrant requirement." Id. citing Horton v. California, 496 U.S. 128, 139–40 (1990).

The Hawai'i Supreme Court has similarly addressed the issue of tainted consent in State v. Pau'u, 72 Haw. 505, 510 (1992):

> Any . . . waiver, even though uncoerced and intelligently given, will be invalid if induced by a prior illegality. State v. Knight, 63 Haw. 90, 94[, (1980)]; State v. Kitashiro, 48 Haw. 204, 216[, (1964)]. When the defendant makes a showing that waiver was predicated upon an illegal search, the government's burden in rebutting the invalidity of the waiver is to show that the waiver "has [not] been come at by exploitation of that illegality [but] instead by means sufficiently distinguishable to be purged of the primary taint." Wong Sun v. United States, 371 U.S. 471, 488[, (1963)].
>
> State v. Pau'u, 72 Haw. 505, 510 (1992).

Here, detailed notes from Inspector Henriques demonstrate he had full knowledge of the prior illegal search, and used the results of the prior illegal search as primary tool to get "consent" for the later search, (I said … rice cooker on counter next to sink and ice box in a room is called a kitchen"). Exhibit, E. For instance, Mr. Henriques noted that he "asked to set a site inspection to resolve" the violation" [that was based on the 4/14/2010 warrantless search.]" See Exhibit "E" (Planning Department Notes by Patrick Henriques dated 6/4/10). The purported "violation" (of renting his property to relatives) was discovered based on the prior illegal searches, and as discussed above, those illegal searches formed the basis of every search that happened thereafter.

b. The Tainted Consent for the 2011 Search Was Also Procured By Deception.

"'Consent' that is the product of official intimidation or harassment is not consent at all. Citizens do not forfeit their constitutional rights when they are coerced to comply with a request that they would prefer to refuse." Florida v. Bostick, 501 U.S. 429, 438 (1991).

Furthermore, consent procured by deception is not deemed voluntary. Bumper v. North Carolina, 391 U.S. 543, 550 (1968) (where police officers obtained "consent" to search by falsely telling occupant that they had a search warrant, "consent" was involuntary and therefore not valid).

Here, the County procured "consent" to the 2011 search through deception. Mr. Henriques notes, "I made up some excuses cause my goal was to get him to set the date for the site inspection[.]" See Exhibit E (Planning Department Notes by Patrick Henriques dated 6/4/10).

Mr. Henriques also noted, "I tolded [sic] him to remove all the portable appliances from the room. I explained many violators play cat and mouse games with the department inspectors. Remove and put back appliances after the inspector leaves." See Exhibit E (Planning Department Notes by Patrick Henriques dated 6/4/10). Mr. Bynum in his affidavit represents that Mr. Henriques told him to just hide the rice cooker during the inspection and "we can clear this thing up." Affidavit of Timothy Bynum.

Finally, Mr. Henriques noted "After all these so call [sic] questions he didn't agree to set the site inspection to resolve the violation." Id. (emphasis added).

These notes document in the county inspector's own words that he "made up excuses" to "so-called" questions to get consent.

In response to Mr. Henriques' representations, Mr. Bynum contacted the Planning Department and arranged for an inspection of his home, which occurred on April 13, 2011. Thus it appears that consent to search was obtained after: 1) The original warrant-less searches; 2) The inspector told Mr. Bynum that they had already found violations at his home (during the warrantless search); 3) The inspector told Mr. Bynum that that the new inspection was for the purpose of "clearing" those earlier violations; 4) The inspector lied ("made up excuses") to Mr. Bynum to convince him to assent to the search; and 5) Mr. Bynum was reluctant to agree to the supposedly "administrative" search.

Under such circumstances, Defendant contends that the State cannot fairly demonstrate that the purported consent for the purpose of "clearing the violation" was constitutionally sufficient. Indeed it was tainted by illegal searches and lies that followed.

3. THE FRUITS OF THE ILLEGAL SEARCHES MUST BE SUPPRESSED.

Evidence seized as the result of a search or seizure that has exceeded permissible bounds is the "fruit of the poisonous tree" and must be excluded. Wong Sun v United States, 371 U.S. 471 (1963). The "fruit of the poisonous tree" doctrine "prohibits the use of evidence at trial which comes to light as a result of the exploitation of a previous illegal act[.]" State v Fukusaku, 85 Haw. 462, 475 (1997) citing State v. Medeiros, 4 Haw. App. 248, 251 n.4 (1983).

Here, if the prosecution does not meet its burden "of proving that the search falls within one of the well-recognized and narrowly-defined exceptions to the general warrant requirements of the fourth amendment," State v. Naeole, 80 Haw. 418, 423 (1996), then all of the fruits of the searches, including inspector testimony, notes and photographs must be excluded.

4. EVEN IF DEEMED ADMINISTRATIVE, THE ABOVE SEARCHES WERE ILLEGAL AND VIOLATED MR. BYNUM'S FOURTH AMENDMENT RIGHTS.

"Even the most law-abiding citizen has a very tangible interest in limiting the circumstances under which the sanctity of his home may be broken by official authority." Camara v. Municipal Court of City and County of San Francisco, 387 U.S. 523, 531 (1967).

"[T]he Fourth Amendment applies to searches and seizures in the civil context[.]" U.S. v. James Daniel Good Real Property, 510 U.S. 43, 52 (1993).

In Camara v. Municipal Court of City and County of San Francisco, 387 U.S. 523 (1967), the U.S. Supreme Court held that a warrant based on probable cause was required for

administrative search of residences for safety inspections, striking down an ordinance that allowed inspections without a warrant -- in spite of the requirements in the law "that the inspector display proper credentials, that he inspect 'at reasonable times,' and that he not obtain entry by force, at least when there is no emergency." Id. at 532.

Here, the Use Agreement signed by Mr. Bynum contains no language about notice, about who can inspect, or protocols that must be followed. Nor does it cite reasonable times of day within which inspectors may come on to the property. This lack of specificity demonstrates that this Use Agreement was not drafted as, or intended to be invoked as, carte blanche permission to the Government to enter upon Mr. Bynum's property – especially for the enforcement of the criminal laws.

Therefore, even if the searches were deemed administrative, they were still illegal, and the arguments above for suppression based upon illegal searches and tainted consent still apply.

CONCLUSION

For all of the above reasons, this Honorable Court should grant the motion to suppress.

Dated: Lihue, Hawaii, March 13, 2012.

Daniel G. Hempey
Attorney for DEFENDANT

IN THE CIRCUIT COURT OF THE STATE OF HAWAII

FIFTH JUDICIAL CIRCUIT

STATE OF HAWAII	) CR. NO. 12-1-0131
	)
vs.	) DECLARATION OF COUNSEL
	)
TIMOTHY BYNUM,	)
	)
Defendant.	)
	)
	)
	)
	)

DECLARATION OF COUNSEL

I, DANIEL G. HEMPEY, counsel for TIMOTHY BYNUM, hereby declare:

1. I am a citizen of the United States. I represent the defendant in the above-captioned case.

2. This motion is not brought for the purpose of delay of any other improper purpose.

3. Exhibit "A" attached hereto is a true and correct copy of the Discovery Request that my office served on the Office of the Prosecuting Attorney on or about December 20, 2011. I did receive some discovery from the Office of the Prosecuting Attorney, but that office did not provide what is attached as "Exhibit B" to me in response to that request. I assert that Exhibit B is clearly exculpatory information.

4. Exhibit "B" attached hereto is a true and correct copy of the Email exchange between Shaylene Carvalho and Ian Costa, cc'ing Sheilah Miyake, dated 4/7/10 and 4/8/11 provided to me in response to a Subpoena Duces Tecum issued to the Director of the Planning Department on 12/14/2011.

5. Exhibit "C" attached hereto is a true and correct copy of Planning Department Complaint/Inspection Request Form Log # 2010-083, dated 3/26/10 provided to me in discovery.

6. Exhibit "D" attached hereto is a true and correct copy of the Use Agreement for TMK 4-4-11-36, dated 8/24/05 provided to me in discovery.

7. Exhibit "E" attached hereto is a true and correct copy of the Field Investigative Report dated 4/14/2010 provided to me in discovery.

8. Exhibit "F" attached hereto is a true and correct copy of the Field Investigative Report dated 4/13/2011 provided to me in discovery.

9. Exhibit "G" attached hereto is a true and correct copy of a Zoning Compliance Notice sent to Mr. Bynum on April 15, 2010, as provided to me in discovery.

10. Exhibit "H" is an email dated April 15, 2010 from Planning Inspector Sheila Miyake to (then) county clerk, Peter Nakamura, titled "4 your eyes only" which I received in response to a subpoena on the Planning Department.

I declare under the penalty of law that the foregoing is true and correct to the best of my belief and information.

Dated: Lihue, Hawaii, March 13, 2012.

Daniel G. Hempey
Attorney for DEFENDANT

IN THE CIRCUIT COURT OF THE STATE OF HAWAI'I

FIFTH JUDICIAL CIRCUIT

STATE OF HAWAII,	)	CR. NO. 12-1-0131
	)	
v.	)	AFFIDAVIT OF TIMOTHY BYNUM
	)	
	)	
TIMOTHY BYNUM,	)	
	)	
Defendant.	)	
	)	
	)	

AFFIDAVIT OF TIMOTHY BYNUM

STATE OF HAWAI'I)
) SS.
COUNTY OF KAUAI)

TIMOTHY BYNUM, being first duly sworn on oath, declares:

1. In 2005, at times there were 4 generations of my family living in my home (my father, myself and my wife, my son, my daughter, our grandson and his mother). We decided to do an addition to our home. We wanted to create a living space that was integrated. We designed two bedrooms, a bathroom and family room. The addition also included a ramp because my elderly father was increasingly having difficulty negotiating the steps to the front door much less the stairs to the second story where the existing bedrooms were located.

2. When the drawings were done I took them to the County Planning department and the Building division for informal review. I was told everything was fine as long as no stove was installed.

3. Subsequently we submitted the plans to the County for formal review and approval. The plans were approved after being circulated to and approved by various departments including the Planning department.

4. We hired a contractor and built according to the plans. The County sent inspectors during construction including a final inspection after which we were issued a certificate of occupancy.

5. The addition remains as it was when "final inspection" occurred; nothing has been added or deleted. I have since been informed that one of the reasons I was charged was due to an internal door within my house that had a lock on the door. This is the same door lock that was installed by the contractor who did the remodel. No installed cooking facilities have ever existed in the addition.

6. Our home has one kitchen and one laundry room.

7. On May 12, 2010 while in a Council meeting staff informed me that there was someone "from the County" who wanted to speak to me. I left the meeting and a gentleman who said he was Patrick from Planning handed me a certified letter. The letter is attached to the Motion to Suppress as Exhibit "G".

8. The letter was three pages and said that Planning had inspected my home and alleged zoning violations including creating an illegal multi family unit.

9. I was surprised and told Patrick "We never put a stove in there." Patrick responded that he went to my house, looked in the windows, and saw a rice cooker on the counter. I am informed and believe that this took place on April 14, 2010.

10. One of my duties as a council member is to approve requests for a "right of entry" when any County entity want permission to enter private property. Yet in this instance I am informed that County "inspectors" have looked into the windows of my family home without any permission or even an attempt of notice.

11. Prior to the April 14, 2010 trespass "inspections" of my house, I was not contacted by anyone from the Planning Department to give me notice of an inspection or request permission to enter on to my property.

12. In order to access any window that could see into the family room a person would have to enter a gate into a fenced back yard, go up a ramp past bedroom windows to the back of the house, and across a lanai. When I shared this with my wife she was quite upset stating "what if I would have been home alone when this voyeur was peeping in our windows?" My whole family felt quite violated by this intrusion, particularly my wife and teenage daughter.

13. I later learned that this "inspection" occurred on April 14, 2010, a Wednesday, when one working for the County could know I would not be at home because I was in a Council meeting.

14. In subsequent conversations with Patrick he asked for an internal inspection stating, "Just hide the rice cooker while were there and we can clear this thing up." I told him that that was not acceptable for several reasons including that I did not believe a violation ever existed and what he was asking was to go on record that I had violated the law and needed to "correct" something.

15. At some time prior to October 15, 2010 I had a conversation with County managing Director, Gary Heu. Among other things, we discussed my situation regarding alleged zoning violations. I had previously shown him a letter that I received from Patrick Henriques at the Planning Department, accusing me of the alleged zoning violation. In this meeting Mr. Heu said, "You know where this came from don't you. Its Shaylene". He went on to say, "There was some kind of a domestic at your home, yeah?. There was a police report. A window got broken. Well that's where she got it."

16. In a subsequent meeting with Ian Costa on October 15, 2010 I told Mr. Costa that I had heard that the "Wants to remain anonymous" complainant may have been Prosecuting Attorney, Shaylene Iseri-Carvalho. Director Costa laughed out loud and as said, among other things, "Yes we can't believe it. I've never seen anything like it." He stated that a complaint from the prosecutor had never happened before.

17. Additionally at the October 15, 2010 meeting, Mr. Costa also notified me that in his interpretation of the CZO, a refrigerator, a sink, a door etc. did not constitute a "kitchen" because to be a "kitchen" the room needed to be used for cooking and that evidence of cooking would require *installed* cooking facilities or fixtures.

18. On approximately, November 5, 2010, I read a local internet blog, which discussed the alleged zoning violations. The blogger had apparently suggested that the prosecuting attorney had been involved in investigating me. The blog allows for people to post comments, and one comment was posted, purporting to be from the prosecuting attorney. It read "Mr. Parx, Your statements are completely erroneous. I was never involved in the investigation of Tim Bynum's violations. The entire investigation was conducted by the Planning Department."

19. On January 19, 2012, the prosecuting attorney sent an email to councilman Jay Furfaro, asking that I be recused from taking part in the oversight of the Office of the Prosecuting Attorney. In that email, the Prosecuting Attorney again disclaimed any involvement in the "investigation" of my alleged zoning violations. She wrote, among other things, "Bynum's paranoid belief that the actions taken by our office were calculated personal attacks against him is without any merit and is completely baseless. ...The case initiated against Councilmember Bynum was investigated by the Planning Department and referred to our office for criminal prosecution."

20. However, my attorney has obtained what appears to be an email exchange dated April 7, 2010, between former Planning Director Costa and the prosecuting attorney, in which it

appears that the prosecutor was involved in the investigation since its inception. The email exchange reads: "Aloha Ian, We received information to corroborate an anonymous complaint dated March 26, 2010 that was sent to the Planning Department and our office, that Councilmember Tim Bynum was renting out his house, or a portion thereof. Can you let me know if renting out a portion of his residence is illegal given his land status, and what ordinance/statute would he be violating by doing so? Please advise."

21. Director Costa, replied: "The CZO really doesn't prohibit renting portions of structures. Even the issue of "lock-outs" is not addressed. The CZO does not dictate where locks are permitted and not permitted (thank goodness!). The issue would be whether the area, in question creates a "multi-family" dwelling. What was permitted is a "single-family" dwelling based on "one kitchen". If a second kitchen (area used for the preparation of food) is present, then a violation would exist for an illegal "multi-family" dwelling unit..."

22. To this date, I have still not been informed of what alleged information to "corroborate" the "anonymous" complaint the prosecuting attorney was referring to in her email to Director Costa. I have not been provided with the source of the this alleged corroboration. I have not been told what the alleged corroboration was. And I am unaware of any witness to the alleged corroboration, other than the prosecuting attorney herself - as evidence by her email to Director Costa.

23. After I learned, fairly recently, that a planning inspector had entered my property without permission and peered into my windows, after the planning department had received the email from the prosecuting attorney stating that she had "corroboration" of the allegedly anonymous complaint - it appeared to me that individuals may have trespassed onto my property on two separate occasions - the first which was the "corroboration" that the prosecutor allegedly found, and the second was the peering into my windows without warrant or permission by a planning inspector. I am unaware of whether or to what extent the prosecuting attorney may have been involved in instigating either trespass onto my property. However, I have filed a police report asking that any unlawful trespass be prosecuted.

24. It appears from the "wants to remain anonymous" complaint form, that the Planning Department/Prosecutor commenced their "investigation" into my property on (or prior to) April 7, 2010 - the same day that the prosecutor sent the above email to the Planning Director. On this date, the investigation of my property was assigned by Sheila Miyake to Patrick Henriques - who was apparently peering onto the windows of our private family home just a week later. Thus it appears that the the Prosecuting Attorney actively investigated me, prior to the matter even being assigned to an investigator at the Planning Department.

25. Upon information and belief, there are no guidelines in the County's Comprehensive Zoning Ordinance, nor in any administrative regulations, that would identify any room in which a refrigerator and a portable rice-cooker are plugged in as being a "kitchen" within the meaning of the CZO. Similarly, as former Director Costa opined in this email, there are no regulations or laws that prevent the installation of a locking door within a private home.

26. Exhibit "J" to the Motion to Suppress is a copy of an as built floor plan for my home that has been approved by the building/planning department.

27. Exhibit "J" to the Motion to Suppress is a true and correct copy of the email received by me from Michael Dahilig dated January 19, 2012.

Further Affiant sayeth naught.

3/13/12 _____

TIMOTHY BYNUM

Subscribed and sworn before me
this 13th day of March, 2012.

Megan Deets

Notary Public, State of Hawai'i
Print Name: Megan Deets
My commission expires: 4/10/2015

MEGAN DEETS
NOTARY PUBLIC
No. 11-107
STATE OF HAWAII

HEMPEY & MEYERS LLP
DANIEL G. HEMPEY #7535
3175 Elua Street, Suite C
Lihue, Hawaii 96766
Telephone: (808) 632-2444
Facsimile: (808) 632-2332
Email: hempeymeyers@mac.com

Attorney for Defendant

IN THE DISTRICT COURT OF THE FIFTH CIRCUIT

STATE OF HAWAII

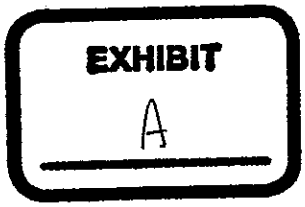
STATE OF HAWAII	) CR. NO. 5P111-2057
	)
vs.	) DEFENDANT'S FIRST WRITTEN
	) REQUEST FOR DISCOVERY;
TIMOTHY BYNUM,	) CERTIFICATE OF SERVICE
	)
	)
Defendant.	)
	)
	)
	)
	)
	)
	)
	)
	)

DEFENDANT'S FIRST WRITTEN REQUEST FOR DISCOVERY

PLEASE TAKE NOTICE that pursuant to Rules 16 and 16.1 of the Hawaii Rules of Penal Procedure, Defendant TIMOTHY BYNUM by and through his counsel, Daniel G. Hempey, hereby requests the State of Hawaii, by and through the assigned Deputy Prosecuting Attorney to provide defense counsel with the following within ten (10) calendar days:

A. CHARGING DOCUMENT

1. Copy of any charging document, Complaint and/or Indictment.



B. STATEMENTS

2. Statements from any person to whom police have spoken about this case regarding the whereabouts, actions, motives, intentions, or activities of Defendant on the day before, the day of and the day after the alleged incident for which he is charged in the above-entitled matter.

3. All statements or utterances by any person alleged to have committed and/or charged with committing a crime which arose out of or resulted from the same incident in which Defendant is charged, whether such statement is oral or written, however recorded or preserved, whether or not signed or acknowledged by Defendant.

4. Statements, oral or written, of each and every person ever interviewed by law enforcement and/or any law enforcement personnel (including the Victim Witness unit and/or any other staff within the Office of the Prosecuting Attorney) with regard to this matter, including the victim (a.k.a. complaining witness or "CW" herein).

5. Copies of any statements made by the police or other law enforcement personnel during interrogations, interviews, or other questioning about this case, to any person alleged to have committed and/or charged with committing a crime that arose out of or resulted from the same incident in which Defendant is charged.

6. All statements or utterances by any witnesses (including but not limited to the CW), whether oral or written, however recorded or preserved, whether or not signed or acknowledged by said witness, including documentation of dates, times and content regarding telephone or other electronic communications between law enforcement personnel (specifically including but not limited to telephone or other electronic communications involving any staff of the Victim Witness unit and/or any other staff within the Office of the Prosecuting Attorney) and said witness.

7. All written or recorded statements of witnesses who will testify at trial.

8. All written or recorded statements of percipient witnesses, whether or not they will be called to testify at trial.

9. All statements or utterances by the Defendant, oral or written, however recorded or preserved, whether or not signed or acknowledged by the Defendant.

C. BRADY

10. Any exculpatory evidence, information, documents, and other materials in the possession of, or that have come to the attention of, the Prosecuting Attorney's Office or of any law enforcement office involved in the investigation of the case

against Defendant. See Brady v Maryland (1963) 373 US 83, 83 S Ct 1194, 10 L Ed 2d 215; Giglio v U.S. (1972) 405

11. Any record of criminal arrests or convictions (whether for Felonies of Misdemeanors), including but not limited to crimes of violence, aggression and/or moral turpitude of any witness to be called to testify against the Defendant.

12. Complete police reports of any and all incidents within the last five (5) years in which any person charged as a result of the incident which led to Defendant's arrest, was suspected of criminal activity, charged with criminal activity or investigated for criminal activity.

13. The names, current addresses and telephone numbers of all witnesses to be called to testify against the Defendant at the hearing or at trial and of all percipient witnesses and potential witnesses, whether or not the prosecution intends to call the witness to testify against the Defendant at trial. See Brady v Maryland, (1963) 373 US 83, 83 S Ct 1194, 10 L Ed 2d 215.

14. Any and all documentation reflecting whether any person intended to be called as a witness at trial (including but not limited to persons who are now deceased but from whom preserved testimony is expected to be admitted at trial) has acted as an informant (whether paid, confidential or in any manner) for the police.

D. INVESTIGATION

15. Whether there has been any electronic surveillance (including wiretapping) of conversations to which the Defendant was a party or occurring on the Defendant's premises, and a copy of any such surveillance.

16. All notes or observations of any witness, victim or suspect's physical appearance, emotional state, or sobriety by law enforcement personnel or their agents at or near the time of this incident – whether or not said notes are kept separately from standard police reports.

17. All physical evidence obtained in the investigation of the case against any person charged with a crime related to this incident, particularly with regard to Defendant.

18. All photographs (color copies), transparencies, slides, diagrams, motion pictures, videotapes, and electronic surveillance of the scene of the alleged offense.

19. A copy of any and all police radio communications tapes concerning the case, including but not limited to any 911 phone call.

20. A copy of any all law enforcement communications, whether or not by radio, including but not limited to, calls from Kauai Police Department (hereinafter

"KPD") dispatch and from all law enforcement officers involved with this matter, on the date in question.

21. Any record of criminal arrests or convictions of Defendant, including both the CJIS and NCIC report(s).

22. All reports and notes of any law enforcement officer or investigator concerning Defendant that are maintained separately from the official file, e.g. as "current investigation files", "field identification notes", or "street files".

23. All photographic (color photos) or other evidence that documents the physical condition of any witness, victim or suspect at or within seven (7) days of the alleged incident, including but not limited to color copies of all photographs attached to the KPD report in this case.

24. A color copy of every photograph in the State's file or taken by the police or their investigators in this matter.

25. Any and all maps, diagrams, charts, pictures, or photographs that depict the scene of the alleged offense(s).

26. Any and all medial records of the victims, witnesses, Defendant, and any police officer in connection with this case from fourteen (14) days before the incident to fourteen (14) days after the incident.

27. A complete list of all evidence and/or property recovered in connection with this case, whether or not said items are expected to be introduced at trial.

28. The complete criminal history of the CW in this matter, including but not limited to all crimes of violence, aggression and/or moral turpitude.

E. EXPERTS

29. Copies of any and all scientific literature, studies, learned treatises or other materials on which any person intended to be called by the State as an expert witness in any hearing or at trial relied in forming his or her opinion about the matters about which said expert is expected to testify.

30. A list of the names and addresses of any witness the State intends to introduce as an expert at trial or at any hearing in this matter.

31. Copies of any reports prepared for law enforcement and/or the State by any expert consulted for any reason in relation to this case.

Pursuant to Hawaii Rules of Penal Procedure Rule 16(e)(2), if subsequent to compliance with these rules or orders entered pursuant to these rules, a party discovers additional material or information which would have been subject to disclosure pursuant to Rule 16, that party shall promptly disclose the additional material or information, and if the additional material or information is discovered during trial, the court shall also be notified.

DATED: Lihue, Hawaii, December 20, 2011.

DANIEL G. HEMPEY
Attorney for Defendant

IN THE DISTRICT COURT OF THE FIFTH CIRCUIT

STATE OF HAWAII

STATE OF HAWAII	)	CR. NO. 5P111-2057
	)	
vs.	)	CERTIFICATE OF SERVICE
	)	
TIMOTHY BYNUM,	)	
	)	
	)	
Defendant.	)	
	)	
	)	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document was duly served on the following party via email, facsimile and placement in his/her Court Jacket:

Jake Delaplane, Esq.
Office of the Prosecuting Attorney
3990 Kaana Street, Suite 210
Lihue, Hawaii 96766

Deputy Prosecuting Attorney

DATED: Lihue, Hawaii, December 20, 2011.

Megan Deets

Megan Deets
Legal Assistant

Sheilah Miyake

From: Ian Costa
Sent: Thursday, April 08, 2010 10:21 AM
To: Shaylene Carvalho
Cc: Sheilah Miyake
Subject: RE: COMPLAINT RECEIVED 3/26/10 RE: TIM BYNUM

Sorry for delay Shaylene!.....

The CZO really doesn't prohibit renting portions of structures. Even the issue of "lock-outs" is not addressed. The CZO does not dictate where locks are permitted and not permitted (thank goodness!). The issue would be whether the area in question creates a "multi-family" dwelling. What was permitted is a "single-family" dwelling based on "one kitchen". If a second kitchen (area used for the preparation of food) is present, then a violation would exist for an illegal "multi-family" dwelling unit.

I understand Sheilah has been assisting and monitoring.....let me know if we can be of further assistance.

-----Original Message-----
From: Shaylene Carvalho
Sent: Wednesday, April 07, 2010 7:54 PM
To: Ian Costa
Subject: COMPLAINT RECEIVED 3/26/10 RE: TIM BYNUM

Aloha Ian,
We received information to corroborate an anonymous complaint dated March 26, 2010 that was sent to the Planning Department and our office, that Councilmember Tim Bynum was renting out his house, or a portion thereof. Can you let me know if renting out a portion of his residence is illegal given his land status, and what ordinance/statute would he be violating by doing so? Please advise.
Much Mahalo,
Shay

EXHIBIT
B

( ) COMPLAIN ( ) INSPECTION REQUEST

DATE: 3.26.10	TIME:	RECVD BY:	TYPE
TMK: 4.4.011:036 0001		LAND AREA: 3.2 ac	LAND USE:
DIST: Kawaihau		LOC: Wailua Homesteads	
ZONING: Ag		OWNER: Timothy Bynum	
~~SLUC DIST:~~		~~LESSEE:~~	
LOG # 2010-083		SITE ADDR: 5935 Kolo'lia Place	

COMPLANER/REQUESTOR	COMPLAINEE/OWNER:
* wants to remain anon!	NAME: Timothy Bynum CPR1
	ADDR: 5935 Kolo'lia Place Kapaa, 96746
	PHONE:

NATURE OF COMPLAINT/REQUEST:

illegal dwelling / multi-family

(lot 9. Sleeping giant acres)

INSPECTOR: P.H.	DATE ASSGN: 4.7.10	ASSGND BY:

FIELD INVESTIGATIVE REPORT

	INITIATED BY:		DRIVE BY
	CITIZEN COMPLAINT		UNRELATED INSP.
	ROUTINE ENFORCMENT		REFERRAL FR. OTHER DEPT.

DATE: 4/14/2010	ARRIVE: 10:25 am	CONTACT:
	DEPART: 10:35 am	

DESCRIPTION OF INVESTIGATION: observed an full size ice box, and a rice cooker on the counter top.

EXHIBIT C

TO: Planning Department
County of Kauai

Re: Use Agreement for SINGLE FAMILY RESIDENCE
(use)

Tax Map Key: 4 - 4 - 11 - 36

KAPAA
City/Town

The undersigned hereby confirm(s) that the subject premises shall be utilized for only SINGLE FAMILY RESIDENCE purposes, as represented on the approved
(use)
plan designated as Application No. Z-98-06. It is further understood that unless approved by the Planning Department and all other affected government agencies, the specified use shall not be changed or altered to increase the intensity of the operations.

The undersigned further agree(s) to allow periodic inspection of the premises and structure(s) by the Planning Department and fully understand(s) that any violation of any of the laws, codes, ordinances, rules and regulations governing such uses, may result in revocation of any permit issued thereafter.

X _____ 8-24-05
Owner Date

_____ _____
Lessee Date

_____ _____
Planning Department Date

EXHIBIT
D

Phone Conversation

6/4/2010
time: 8.48

Per conversation with Tim Brynum, I asked to set a site inspection to resolve the violation or a written letter is needed w the date the inspection can take place. Asked how long do he have? I said 30 days before I go on to the next st

I told him to remove all the portab appliances from the room. I explaine many violators play cat and mouse gam with the department inspectors. Remove and put back appliances after the insp leaves.
Asked me how many bedrooms could he have, he told me is 5 the number. I said you could have 5 un related peo in your house. I made up some excuses cause my goal was to get him to set the date for the site inspection so the co could be resolved.
He went on talking about a kitchen. I said a kitchen is any room used or intended or designed to be used for cooking and preparing food. Rice cooke on the counter next to a sink and ice b

000058

EXHIBIT E

In a room is called a Kitchen. Till the C20 ordinance is changed.
Asked who changes the C20 Ordinance
Said the Planning department draft the let
and the Concil reviews and votes on
it pass or no pass.
Asked how many inspector are there,
answer 1 C20 inspector, 2 TVR inspecto
Asked about Supervisor said to him Shei
Miyake is my Supervisior.
After all these so call questions he didn't
agree to set the site inspection to
resolve the violation.
Said he'll call me back.

Satoru Yamagumi
Planning Inspector
6/4/2010

DATE: 3.26.10	TIME:	RECVD BY:	TYPE
TMK: 4.4.011:036.0001	LAND AREA: 3.2 ac		LAND USE:
DIST: Kawaihau	LOC: Wailua Homesteads		
ZONING: Ag	OWNER: Timothy Bynum		
SLUC DIST:	LESSEE:		
LOG # 2010-083	SITE ADDR: 5935 Kolo'ila Place		

COMPLANER/REQUESTOR	COMPLAINEE/OWNER:
* Wants to remain anon!	NAME: Timothy Bynum CPR
	ADDR: 5935 Kolo'ila Place Kapaa, 96746
	PHONE:

NATURE OF COMPLAINT/REQUEST:

illegal dwelling / multi-family

(lot 9. Sleeping giant acres)

INSPECTOR: P.H.	DATE ASSGN: 4.7.10	ASSGND BY:

FIELD INVESTIGATIVE REPORT

	INITIATED BY:		DRIVE BY
	CITIZEN COMPLAINT		UNRELATED INSP.
	ROUTINE ENFORCMENT		REFERRAL FR. OTHER DEPT.

DATE:	ARRIVE: 8:00 am	CONTACT:
4/13/2011	DEPART: 8:09 am	Tim Bynum

DESCRIPTION OF INVESTIGATION: Upon entry into Bynum's residence, I observed a unpremitted addition of a door and the alteration to the sink by placing a larger sink in it's place.

With the placement of the door and it's area it was placed, creates a seperate unit within the SFR.

EXHIBIT 000036 F

VIOLATION TYPE					
	NONE OBSERVED		SETBACK VIO.		JUNK YARD
	USE VIOLATION		ILLEGAL UNIT		POULTRY
	ILEGAL BLDG. STR.		LOT COVERAGE	✓	OTHER

COMMENTS & ANALYSIS: Addition of doors creates a separate unit within the SFR. Alteration to the sink, installing a larger sink with out proper permits.

Photos taken: (yes) / no

STORAGE LOCATION: Case File

VIOLATION CODE SECTION: Article 19 Zoning Permits

DATE:	DESCRIPTION OF FOLLOW-UP

ENFORCEMENT OFFICER: Patrick Neumayer

DATE SUBMITTED: 4/13/2011

9000869

BERNARD P. CARVALHO, JR.
MAYOR

GARY K. HEU
ADMINISTRATIVE ASSISTANT

IAN K. COSTA
DIRECTOR OF PLANNING

IMAIKALANI P. AIU
DEPUTY DIRECTOR OF PLANNING

COUNTY OF KAUA'I
PLANNING DEPARTMENT
4444 RICE STREET
KAPULE BUILDING, SUITE A473
LIHU'E, KAUA'I, HAWAI'I 96766-1326
TEL (808) 241-4050 FAX (808) 241-6699

ZONING COMPLIANCE NOTICE

CERTIFIED MAIL

April 15, 2010

LOT 9 SLEEPING GIANT ACRES
Timothy Bynum Unit 1
Virginia Bynum
5935 Kolo'lia Place
Kapaa, Kauai Hawaii 96746

Peter Welch Unit 2
5923 C Kolo'lia Place
Kapaa, Kauai Hawaii 96746

Maria Fabro Unit 3
Priscilla Fabro
Post Office Box 2182
Lihue, Kauai Hawaii 96766

SUBJECT: Change in USE (Single Family Residence) into a Multi-Family Residence & Illegal Conversion of the Family Room into a Dwelling Unit on CPR Unit 1:
TMK: (4) 4-4-011: 036 0001 5935 Kolo'lia Place
Wailua Homesteads, Kauai, Hawaii

The Planning Department conducted a site inspection on the subject property on April 14, 2010 and found the following violations of the zoning code :

EXHIBIT
G

a. **Article 19. Zoning Permits Sec. 8-19.1 When Required.** No person shall undertake any construction or development or carry on any activity or use, for which a zoning permit is required by this Chapter, or obtain a building permit for construction, development, activity or use regulated by this Chapter, without first obtaining the required zoning permit. (Ord. No. 164, August 17, 1972; Sec. 8-18.1, R.C.O. 1976)
Conversion of the Single Family Dwelling into a Multi Family Dwelling without proper permits constitutes a violation.
Conversion of the Family Room into a Dwelling Unit without proper permits constitutes a violation.

b. **Violation of the <u>USE AGREEMENT</u> executed between the owner (Unit 1) and the County of Kauai.**

Pursuant to Chapter 8, Kauai County Code, you are directed to comply with the following requirements immediately:

a. **Cease and desist use of above noted conversions as a dwelling unit and remove all illegal gas and/or electric service supplies along with cooking facilities.**

b. **Submit plans and applications along with filing fees for review by the Department for all illegal construction, additions and alterations. Such construction, additions and alterations without proper approval shall be demolished and removed.**

Please be advised that the State Department of Health have specific wastewater management requirements that will have to be addressed with regard to the kitchen that exists within the illegal Dwelling Unit.

Failure to contact the Planning Department within **15** calendar days upon receipt of this letter to provide a written acceptable plan for compliance provides us with no other alternative but to refer this matter to the Prosecutor's Office. Please call me at 241-6677.

Patrick Henriques
Planning Inspector

cc: County Attorney
Prosecuting Attorney
Department of Health, State of Hawaii
Department of Public Works, Building Division

4 your eyes only

Sheilah Miyake

Sent: Thursday, April 15, 2010 12:05 PM
To: Peter Nakamura
Attachments: 4-4-011-036 0001 bynum.doc (44 KB)

EXHIBIT
H

LEGEND

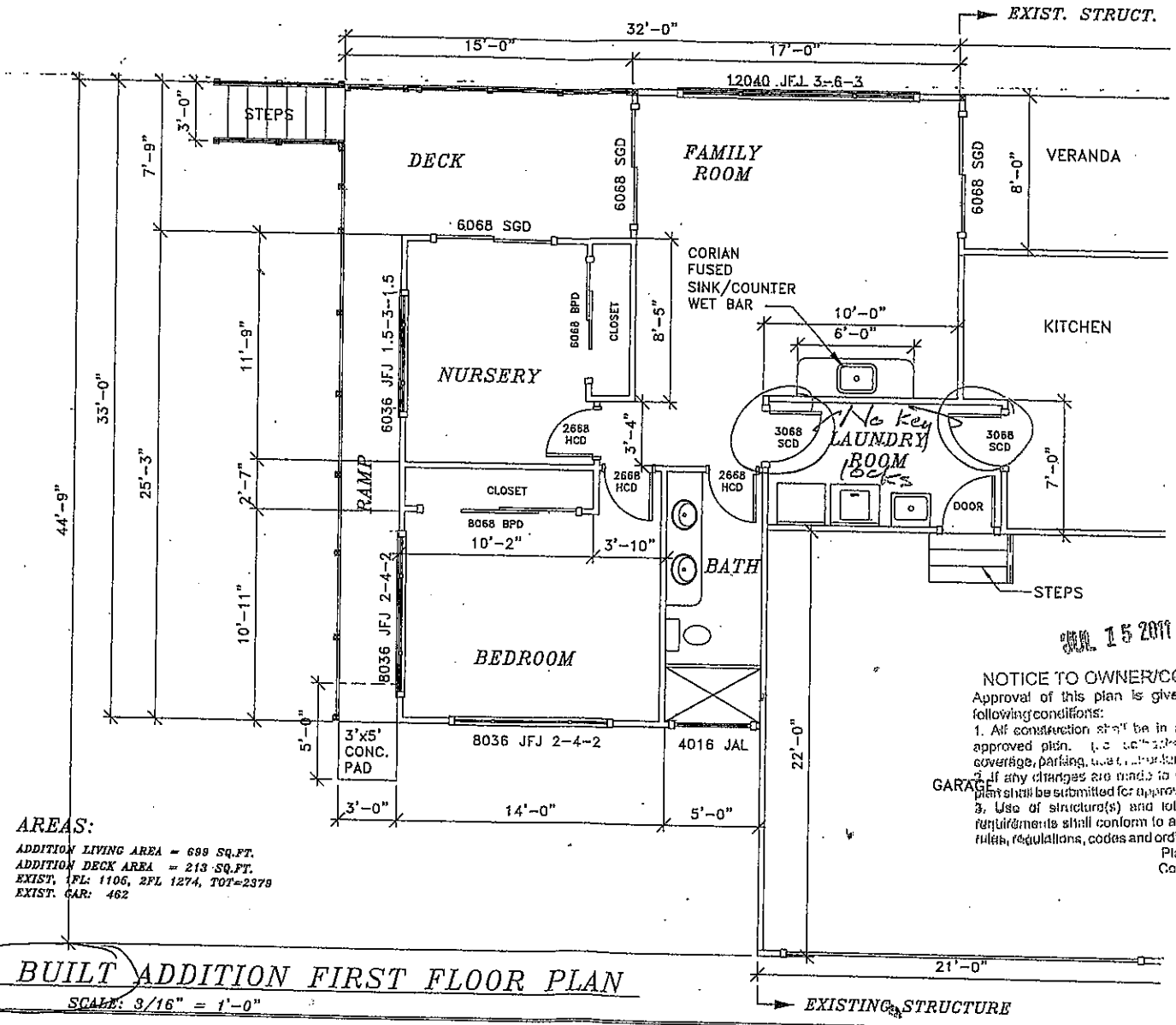
WINDOWS:*

AWN	=	AWNING
CASE	=	CASEMENT
DH	=	DOUBLE HUNG
FIX	=	FIXED
GB	=	GLASS BLOCK
GDN	=	GARDEN
JAL	=	JALOUSIE
JFJ	=	JAL/FIX/JAL
LVR	=	LOUVERED
SLDR	=	SLIDER
SCN	=	SCREEN

DOORS:

BEL	=	BEL-AIR
BFD	=	BI-FOLD
BPD	=	BYPASS
FD	=	FRENCH DOOR
GD	=	GARAGE
GLD	=	GLASS
HCD	=	HOLLOW CORE
LVD	=	LOUVERED
PD	=	POCKET
SCD	=	SOLID CORE
SCRN	=	SCREEN
SCSC	=	SOLID CORE SELF CLOSING
SFD	=	SINGLE FOLD
SGD	=	SLIDING GLASS
SHWR	=	SHOWER DOOR

*WINDOWS WITHIN 24" OF A DOOR SHALL BE GLAZED W/ TEMPERED GLASS



JUL 15 2011

NOTICE TO OWNER/CONTRACTOR

Approval of this plan is given subject to the following conditions:

1. All construction shall be in accordance to this approved plan. (i.e. setbacks, height, size, lot coverage, parking, use of structure, etc.)
2. If any changes are made to this plan, a revised plan shall be submitted for approval.
3. Use of structure(s) and lot and all minimum requirements shall conform to all State and County rules, regulations, codes and ordinances.

Planning Department
County of Kaua'i

AREAS:

ADDITION LIVING AREA = 699 SQ.FT.
ADDITION DECK AREA = 213 SQ.FT.
EXIST. 1FL: 1106, 2FL 1274, TOT=2379
EXIST. GAR: 462

RAFAEL J. CHOLODZINSKI
LICENSED PROFESSIONAL ARCHITECT
No. 7772
HAWAII, U.S.A.

7/6/11

AS BUILT ADDITION FIRST FLOOR PLAN

SCALE: 3/16" = 1'-0"

EXHIBIT 1

HIGH TECH DRAFTING AND DESIGN
4-1383 KUHIO HWY., KAPAA, HI. 96746
PHONE # (808) 821-2468 FAX # (808) 821-0482

DRAWN EXCLUSIVELY FOR:
MR. MRS. BYNUM
LOT DESCRIPTION: 9355 KOLOLIA PLACE, KAPAA, HI
TMK #: (4) 4-4-11-36-1

CHECKED:
DATE

DRAWING NUMBER
MDL598 AS B

DRAWN: NS
DATE: 6/29/11
SCALE:
SHT OF

REVISION

000001

---------- Forwarded message ----------
From: **Michael Dahilig** <mdahilig@kauai.gov>
Date: Mon, Jan 9, 2012 at 4:40 PM
Subject: Confirmation of encumberances at 5935 Kololia Place, Kapaa
To: "Tim Bynum (External)" <bynum.tim@gmail.com>

Aloha Tim,

Just to confirm, the Class I approval of your as-built plans was sufficient to rectify the previous violation notice on the property. At this time, there are no zoning encumbrances on the above referenced property.

If you have any questions, please do not hesitate to contact me.

Mike Dahilig
Director of Planning
County of Kaua`i
4444 Rice Street, Suite A473
Lihu`e, Hawai`i 96766
(808)-241-4050 <tel:%28808%29-241-4050>

EXHIBIT
J

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT

STATE OF HAWAII

STATE OF HAWAII	)	CR. NO. 12-1-0131
	)	
v.	)	NOTICE OF MOTION
	)	
TIMOTHY BYNUM,	)	
	)	
Defendant.	)	
	)	
	)	
	)	
	)	

NOTICE OF MOTION

TO THE OFFICE OF THE PROSECUTING ATTORNEY:

PLEASE TAKE NOTICE that on **March 27, 2012 at 9:00 a.m.** before the Honorable Judge presiding, the defendant, TIMOTHY BYNUM, will move to suppress the results of the warrantless searches of Mr. Bynum's residence prior to and on April 14, 2010 and April 13, 2011, as well as any other evidence obtained after or as a result of these searches, for the reasons set forth in the attached memorandum of law.

Dated: Lihue, Hawaii, March 13, 2012.

Daniel G. Hempey
Attorney for DEFENDANT

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT

STATE OF HAWAII

STATE OF HAWAII	)	CR. NO. 12-1-0131
	)	
vs.	)	CERTIFICATE OF SERVICE
	)	
TIMOTHY BYNUM,	)	
	)	
Defendant.	)	
	)	
	)	
	)	
	)	
	)	

CERTIFICATE OF SERVICE

I the undersigned hereby swear and affirm that I caused a copy of the foregoing motion to be delivered to the following via his court jacket at the Lihue Courthouse:

JAKE DELAPLANE, ESQ.
Office of the Prosecuting Attorney
3990 Ka'ana Street, Suite 210
Lihue, HI 96766

Deputy Prosecuting Attorney

DATED: Lihue, Hawaii, March 13, 2012.

COCO ZICKOS
Legal Assistant