

ORIGINAL

BRONSTER HOSHIBATA
MARGERY S. BRONSTER #4750
ANDREW L. PEPPER #5141
1003 Bishop Street, Suite 2300
Honolulu, Hawai'i 96813
Telephone: (808) 524-5644
Facsimile: (808) 599-1881
Email: *mbronster@bhhawaii.net*
apecpper@bhhawaii.net

FILED IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

SEP 19 2012
at 9 o'clock and 46 min. M.
SUE BEITIA, CLERK

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

Attorneys for Plaintiff
TIMOTHY BYNUM

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

CV 12-00523 RLP

TIMOTHY BYNUM,

CIVIL NO. _____

Plaintiff,

COMPLAINT; DEMAND FOR JURY
TRIAL; SUMMONS

vs.

COUNTY OF KAUA'I; SHEILA
MIYAKE; SHAYLENE ISERI-
CARVALHO, individually and in their
professional capacities; DOE
DEFENDANTS 1-10,

Defendants.

COMPLAINT

Plaintiff, TIMOTHY BYNUM, by and through his undersigned attorneys, and for his Complaint against the Defendants in this matter, states and avers as follows:

PARTIES

1. Plaintiff TIMOTHY BYNUM (“BYNUM” or “Plaintiff”) is an elected member of the Kaua‘i County Council, and a citizen and resident of the County of Kaua‘i, State of Hawai‘i.
2. Defendant County of Kaua‘i (“County”) is a municipal corporation, which has the power to sue and be sued, and is a political subdivision of the State of Hawai‘i.
3. The Kaua‘i Planning Department (“Planning”) is an agency and entity of Defendant County of Kaua‘i.
4. The Office of the Prosecuting Attorney (“OPA”) is an agency and entity of Defendant County of Kaua‘i.
5. Defendant SHAYLENE ISERI-CARVALHO (“ISERI-CARVALHO”) is a citizen and resident of the State of Hawai‘i, and was the Prosecuting Attorney for the County of Kaua‘i at all times pertinent to this action.

6. Defendant SHEILA MIYAKE (“MIYAKE”) is a citizen and resident of the State of Hawai‘i, and was employed as a supervising Planning Inspector in the Kaua‘i Planning Department at all times pertinent to this action.

7. Except as specifically otherwise alleged, at all times relevant to this Complaint, Defendants were acting within the course and scope of their employment with the County of Kaua‘i.

8. At all times relevant to this Complaint, Defendants were acting under color of state law.

9. This Complaint is brought against Defendant County for actions of the Planning Department and the Office of the Prosecuting Attorney, and includes, but is not limited to, claims also brought against the individuals in their official and individual capacity.

10. This Complaint is brought against Defendants ISERI-CARVALHO and MIYAKE in their official and individual capacities.

11. DOE Defendants are sued under fictitious names because their true names, identities and/or capacities are presently unknown to Plaintiff, except that the Doe Defendants are or were or may have been in some manner connected with the Defendant, and/or were or are the agents, principals, officers, directors, servants, employees, employers, representatives, associates, consultants, attorneys, contractors, insurers, owners assignors, assignees of Defendant and are in some

manner responsible to Plaintiff, and Plaintiff prays leave to certify their true names, identities, capacities, activities, and/or responsibilities when the same are ascertained.

JURISDICTION AND VENUE

12. All matters set forth in this Complaint arose in the State of Hawai‘i, County of Kaua‘i.

13. This Court has jurisdiction over the federal claims in this action pursuant to 28 U.S.C. §§ 1331 & 1343, 42 U.S.C. §§ 1983, 1985, and 1988, as well as the First and Fourteenth Amendments of the Constitution of the United States. This Court has jurisdiction over supplemental state law claims pursuant to 28 U.S.C. § 1367. Those state law claims are so related to the claims in the action within the original jurisdiction of this Court, that they form part of the same case or controversy under Article III of the United States Constitution.

14. Venue is proper pursuant to 28 U.S.C. § 1391 because this is the judicial district in which the Plaintiff resides, in which all Defendants reside, and in which the events and/or omissions giving rise to the claim occurred.

FACTS

15. TIMOTHY BYNUM has been employed by County Kaua‘i as an elected member of the Kaua‘i County Council, the County’s legislative branch of government, for approximately 5 1/2 years, since December 2, 2006. He was first

elected in 2006 and reelected in 2008 and 2010 by the voters of the County of Kaua'i.

16. During the years 2007-2008, Plaintiff served on the Kaua'i County Council along with Defendant ISERI-CARVALHO.

17. Part of Plaintiff's role as an elected Council member is to question Kaua'i County Department heads, including the Prosecuting Attorney, about their Departments' operations, to engage in vigorous debate over political and/or budgetary issues and to vote on budgetary and other matters before the Kaua'i County Council related to such Departments.

18. Plaintiff has the right under the First Amendment to the United States Constitution and Article 1 Section 4 of the Hawai'i Constitution to engage in vigorous debate over budgetary and political issues concerning the operations of the Office of the Prosecuting Attorney (OPA) and to vote on matters before the Kaua'i County Council related to various government Offices, Departments or Agencies including the OPA.

19. Beginning in 2008, BYNUM, following legal guidance offered by the Kaua'i County Attorney's Office, voted for certain amendments to Kaua'i zoning laws with which Defendants MIYAKE and ISERI-CARVALHO disagreed.

20. BYNUM's right to vote as he did was protected by the First Amendment to the United States Constitution and his votes related to matters of public concern.

21. Defendant ISERI-CARVALHO left employment with the Kaua'i County Council after she began her term as Kaua'i County Prosecuting Attorney in 2008.

22. Defendant ISERI-CARVALHO has a history of animosity toward Plaintiff. She harbors personal animosity toward the Plaintiff. She vehemently disagreed with Plaintiff's vote for certain amendments to Kaua'i zoning laws beginning in 2008.

23. Defendant MIYAKE has a history of animosity toward Plaintiff. She harbors personal animosity toward the Plaintiff.

24. 2010 was an election year for the Kaua'i County Council. After the election, it was known that Deputy County Attorney Michael Dahilig would replace the sitting Director of the Kaua'i Planning Department, Ian Costa as of December 1, 2010.

25. Prior to the 2010 election, Attorneys Michael Dahilig and Ian Jung were employed as deputy county attorneys for the Defendant COUNTY OF KAUA'I. These two attorneys were tasked with, among other things, advising the various employees of the PLANNING DEPARTMENT including but not limited

to Defendant MIYAKE as to the proper interpretation and enforcement of the COUNTY OF KAUA'I's Comprehensive Zoning Ordinance ("CZO") as well as regarding the ability and/or constraints on Planning Officials to enter private property for the purpose of conducting inspections related to zoning compliance.

26. At all times pertinent to this matter, and to this day, Plaintiff was the owner of a single family home in Kapaa, Hawai'i.

27. Pursuant to the Kaua'i CZO, it is illegal to covert a single-family dwelling unit into a multi-family dwelling unit without an appropriate permit.

28. In 2005, BYNUM built an addition onto his home to accommodate the four (4) generations of family members living there at the time. The drawings for the addition went through informal and formal review by the Planning Department. Prior to permitting, a representative of the Planning Department informed BYNUM that the addition, as designed, was legal as long as no stove was installed. The plans for the addition were approved by the Planning Department, after being circulated to and approved by various departments including the Planning Department and a valid building permit was issued. The County sent inspectors during construction, and conducted a final inspection, after construction, after which the Plaintiff was issued a certificate of occupancy.

29. A laundry room separated the original home from the permitted addition. The door between the original home and the addition had a lock at the

time the addition was approved and permitted. The permitted addition also contained a counter top/bar and a sink, as well as several electrical receptacles.

30. In March and April 2010, plaintiff BYNUM allowed his daughter's friend, Victory Yokotake, to occupy a room in and reside in the BYNUM family home.

31. While residing at the BYNUM home, Ms. Yokotake had access to the family kitchen.

32. In early 2010 a female came to the BYNUM residence and allegedly assaulted Victory Yokotake. A police officer came to the house to investigate. The police officer generated a report that incorrectly characterized the addition to the BYNUM home as a separate apartment.

33. At the time it was generated, this police report regarding the assault of Ms. Yokotake was a protected and confidential document, only to be lawfully viewed by members of the police department and the Office of the Prosecuting Attorney.

34. In early 2010 an unknown person who had lawful access to the police report informed Defendants MIYAKE and ISERI-CARVALHO that s/he believed that BYNUM was "renting out a portion of his residence" illegally.

35. Defendants MIYAKE and ISERI-CARVALHO each knew or should have known at the time of the report that there was nothing illegal about plaintiff renting out a portion of his home to his daughter's friend.

36. Upon receiving the allegation that BYNUM was renting out a portion of his residence, Defendant MIYAKE wrote down the reporting person's name as "Kalani Martin" although, upon information and belief, she knew that not to be true. MIYAKE also claimed on the report form that she generated that the reporting person "wants to remain anonymous." Upon information and belief, "Kalani Martin" never made the subject report to MIYAKE, but his name was used falsely by MIYAKE as cover for the true reporting person. MIYAKE knew the true identity of the reporting person. Nonetheless, she treated the report as an anonymous complaint.

37. Defendant MIYAKE has stated that she acted on the subject report because, *inter alia*, the Kaua'i County Council Chair, "Kaipo Asing was asking."

38. Government Inspectors at the Defendant PLANNING DEPARTMENT are not legally authorized, absent a warrant or an exception to the warrant requirement, to enter onto private property to investigate an anonymous complaint that someone is renting out a portion of his or her home, especially where renting out a portion of one's home is not illegal.

39. On or about April 7, 2010, before the Planning Department had instigated any investigation of the “anonymous” complaint, defendant Prosecuting Attorney ISERI-CARVALHO emailed then-Director Ian Costa of the PLANNING DEPARTMENT, stating: “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.”

40. Mr. Costa responded to Ms. ISERI-CARVALHO’s email, advising her in relevant part: “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 Sheila has been assisting and monitoringlet me know if we can be of further assistance.”

41. Despite the Planning Director’s correct interpretation of the CZO, *i.e.* that the allegedly anonymous compliant did not allege any illegal activity,

Defendant MIYAKE nonetheless instructed her subordinate, Planning Inspector Patrick Henriques, to enter the BYNUM property and search for potential zoning violations. MIYAKE made no attempt to obtain a search warrant, or even consult with anyone about the necessity of a warrant before entering private property for the purpose of conducting a search for zoning violations.

42. Prior to searching Plaintiff's property without a warrant, MIYAKE made no attempt to contact BYNUM or anyone else in his household to schedule an inspection or offer him a chance to consent to or refuse the search.

43. In early April 2010 Defendant MIYAKE and Inspector Henriques entered BYNUM's private property without a warrant, without notice and without permission, went through a gate, walked up a wheelchair ramp in the rear of BYNUM's home, looked in his windows and took photographs of the inside of his home.

44. While conducting the warrantless search of BYNUM's home, Defendant MIYAKE allegedly observed a portable rice cooker and a refrigerator in the addition/family room in the family home.

45. Defendant MIYAKE specifically timed her entry on to Plaintiff's private property to a time and date when she knew Plaintiff would not be home – MIYAKE knew BYNUM would be attending a Kaua'i County Council Meeting at the time.

46. During a subsequent investigation into the allegations of zoning violations of BYNUM's property by the State Attorney General, Defendant MIYAKE claimed to a Special Deputy Attorney General, Richard Minatoya, that the previous Kaua'i County Attorney, Matthew Pyun had trained her that she could lawfully search a private home without the need for a search warrant and without notice or consent of the property owner, as long as the private home was associated with a use permit.

47. Upon information and belief, County Attorney Pyun never actually taught MIYAKE that she could conduct a warrantless search of a private residence, without notice to the property owner based solely on the existence of a use permit on the property.

48. After MIYAKE searched Plaintiff's house and allegedly observed the rice cooker, she consulted with deputy County Attorneys Jung and Dahilig about what she had seen. Each of those deputy County Attorneys advised MIYAKE that she had trespassed onto the BYNUM property, thereby engaging in an illegal warrantless search. One or both of the two deputy County Attorneys also advised MIYAKE that the presence of a rice cooker and a refrigerator in the lawfully permitted family room did not constitute a second "kitchen" within the meaning of the CZO.

49. Despite having been clearly informed by COUNTY lawyers that BYNUM had not committed a crime by allowing a tenant who allegedly put a rice cooker and a refrigerator in BYNUM's lawfully permitted addition, and despite having been informed by County lawyers that she had illegally trespassed onto the BYNUM property and engaged in an illegal warrantless search, Defendant MIYAKE nonetheless caused an Zoning Notice Violation to be issued to Plaintiff by the COUNTY OF KAUA'I.

50. At all times relevant to this Complaint, the KAUA'I PLANNING DEPARTMENT maintained an official policy or custom of inadequate training and supervision of its planning inspectors, with respect to what constitutes a "kitchen," the legal standards and requirements for searching private property, and Kaua'i planning inspectors have no uniform or written standards other than the CZO to as to what is or is not a kitchen.

51. Defendant MIYAKE has stated that "each inspector has his own kingdom" with respect to such determinations. There are no written guidelines for inspectors to follow when interpreting the Kaua'i CZO with respect to the definition of "kitchen" and such determinations are made ad hoc, arbitrarily and, in this case, capriciously and maliciously.

52. On or about April 15, 2010, MIYAKE directed Inspector Henriques to prepare a Zoning Violation Notice (“ZVN”) to be issued against BYNUM, using a standard PLANNING DEPARTMENT template.

53. On or about April 15, 2010, MIYAKE emailed the County Clerk, Peter Nakamura, with the subject line that read “4 your eyes only” and attached a copy of the April 15, 2010 ZVN. BYNUM was not informed of the ZVN for nearly one month later on May 12, 2010.

54. Defendant MIYAKE sent the email copy of the ZVN to the County Clerk, with the intent that it would later be made public and used against BYNUM in the coming 2010 election.

55. The Planning Department’s April 15, 2010 ZVN form, alleged that a zoning violation had been found to “exist” on the Plaintiff’s property. Such language, alleging the actual existence of a violation of the CZO, is necessary for such a Zoning Violation Notice to have legal effect – as due process requires the existence of an actual violation before civil or criminal prosecution for a violation of the CZO.

56. However, in BYNUM’s case, the PLANNING DEPARTMENT caused the standard ZVN form originally issued in April 2010 to be altered on or about November 10, 2010 to change the sentence “we have found that a zoning

violation exists” to “we have found that a zoning violation *may* exist.” (emphasis added).

57. At the time of the November 10, 2010 ZVN, there was no probable cause to believe that an actual zoning violation existed on BYNUM’s property.

58. Upon information and belief, the Zoning Notice Violation prepared against BYNUM was the only such notice ever issued by the County of Kaua‘i that had alleged a violation based on what “may” exist – instead of what actually did exist.

59. On or about November 10, 2010, then-Planning Director Ian Costa sent BYNUM a letter stating, “This notice shall supersede our letter dated April 15, 2010,” and stating that “we believe ... violations of Chapter 8, Kaua‘i County Code may exist.”

60. The November 10, 2010 ZVN did not allege probable cause to believe that either a civil or a criminal zoning violation had occurred.

61. Defendant MIYAKE then sent the uniquely modified November 10, 2010 Zoning Violation Notice, which claimed only that the Planning Department “believed” that a violation “may” exist to the Office of the Prosecuting Attorney.

62. Prior to the uniquely altered ZVN, the PLANNING DEPARTMENT routinely cc’d ZVN’s to the Office of the Prosecuting Attorney. However, until the BYNUM ZVN, the Office of the Prosecuting Attorney has never filed criminal

charges until and unless the Planning Department had made a specific request for such criminal charges to be filed.

63. In November 2010, Jacob Delaplane, Esq. worked under the supervision and direction of defendant ISERI-CARVALHO at the Kaua'i Office of the Prosecuting Attorney, as a deputy prosecuting attorney.

64. In November 2010, Defendant MIYAKE met with deputy prosecuting Attorney Delaplane to discuss the BYNUM zoning matter, in depth.

65. Delaplane was an attorney licensed to practice law in Hawai'i at the time he met with MIYAKE.

66. Delaplane secretly recorded the approximately two-hour long conversation with Defendant MIYAKE.

67. During the November 2010 meeting with deputy prosecuting attorney Delaplane, MIYAKE informed Delaplane that deputy county attorneys Jung and Dahilig had previously advised MIYAKE that she had illegally trespassed on the BYNUM property, and engaged in an illegal search when she entered Plaintiff's property without a warrant in April 2010 and allegedly saw the portable rice-cooker inside the BYNUM family home.

68. A portable rice-cooker is not an "installed appliance" within the meaning of the Kaua'i CZO.

69. During the November 2010 meeting with Delaplane, MIYAKE informed Delaplane that deputy county attorneys Jung and Dahilig had previously advised her that the evidence that she had allegedly observed during her warrantless search (a refrigerator and a rice-cooker in the family room addition) did not constitute a second kitchen with “installed appliances” as contemplated by the Kaua‘i CZO.

70. During the surreptitiously recorded meeting between MIYAKE and Delaplane, MIYAKE told Deputy Prosecuting Attorney Delaplane: “It is all political but I will never say on stand that it is political. It will be my demise.” The prosecution of BYNUM was indeed for political reasons. MIYAKE also opined on the secretly-recorded tape that “the good guys lost” in the 2010 election. Knowing that a new Planning Director was taking over the Planning Department as a result of the 2010 election, MIYAKE and DOE defendants then arbitrarily and capriciously issued the second ZVN against Plaintiff so that she could “cc” it to the Prosecuting Attorney just before the new Planning Director (*i.e.*, Dahilig – the former County Attorney who had concluded that MIYAKE had trespassed, engaged in an illegal search, and who had questioned whether Plaintiff’s home had a second kitchen within the meaning of the Kaua‘i CZO) took office.

71. Mr. Kaipo Asing was the Chair or the County Council at the time the revised ZVN was issued to BYNUM.

72. After MIYAKE told Delaplane about the advice she had received from deputy county attorneys JUNG and DAHILIG, (regarding trespass, illegal search and the definition of kitchen) and in response to further taped questioning by Delaplane, MIYAKE stated that she and PLANNING director Ian Costa issued the ZCN in November 2010: “Because Kaipo wanted it. Kaipo was asking. And I gotta answer to the Council Chair.”

73. In fact, Defendant MIYAKE had no obligation as a Planning Inspector to “answer” to the Council Chair as to who was charged with zoning violations by the Planning Department. To the extent that MIYAKE based her decision-making as a Planning Inspector on the malicious political wishes of the Kaua‘i County Council Chair at the time, her decision to issue the ZVN was arbitrary, capricious and malicious.

74. The November 2010 ZVN was not a valid ZVN based on admissible evidence of an actual zoning violation, but rather was a uniquely altered document that had no legal effect, did not state probable cause, and simply alleged a “belief” that a violation “may” have existed.

75. The November 2010 ZVN was issued against legal advice of at least one deputy County Attorney and was instead issued for political reasons at the urging of then Kaua‘i County Council chair – as established by MIYAKE’s taped admissions to Delaplane.

76. Despite having learned that the two deputy county attorneys who were tasked with advising the PLANNING DEPARTMENT had already advised that there was no probable cause to believe that BYNUM had violated any zoning ordinance, and despite knowing that the alleged rice cooker and refrigerator were only discovered as a result of an illegal warrantless search, and although the November 10, 2010 ZVN did not allege probable cause to believe that either a civil or a criminal zoning violation had occurred – Defendant ISERI-CARVALHO waited approximately one year (until the next election-year cycle) and then filed four criminal zoning charges against BYNUM in the District Court for the 5th Judicial Circuit.

77. Two of the four alleged criminal acts were based on the alleged presence of a rice-cooker and a refrigerator approximately one year and a half years earlier, and the other two charges were based on the alleged presence of a lock on the door between the addition and the original house – even though Planning Director Costa had already informed Defendant ISERI-CARVALHO that there was no law governing which doors inside a private home could or could not have locks, and even though the subject lock was the same lock that existed at the time the addition was permitted and the certificate of occupancy issued, years earlier.

78. There was no probable cause for Kaua‘i Prosecuting Attorney ISERI-CARVALHO to charge BYNUM with any crimes based on the alleged presence of a rice cooker and refrigerator in his lawfully permitted addition.

79. ISERI-CARVALHO would not have charged BYNUM with a crime had the Planning Department and MIYAKE not sent an unsolicited copy of the November 2010 ZVN to the Office of the Prosecuting Attorney.

80. Prior to charging BYNUM with four zoning crimes, ISERI-CARVALHO, or Delaplane, acting under her authority, had an investigator interview Victory YOKOTAKE about the BYNUM home. Although YOKOTAKE told the investigator that BYNUM was unaware of the rice-cooker in the addition and that she was welcome to use the BYNUM kitchen (such that she did not need a second kitchen) neither Delaplane nor ISERI-CARVALHO provided that investigator’s report to BYNUM or his attorney while ISERI-CARVALHO was prosecuting him, despite written requests for exculpatory information and the constitutional requirement that such material must be provided to a criminal defendant.

81. During ISERI-CARVALHO’s investigation into whether BYNUM had committed misdemeanors in connection with the rice-cooker and door lock, deputy prosecuting attorney Jake Delaplane ordered Lucas Burns, another deputy prosecuting attorney, to interview Victory Yokotake, the pretext of the interview

being that the interview was to assist with the prosecution of the earlier alleged assault against her, but with the real purpose of bolstering ISERI-CARVALHO'S case against BYNUM. The deputy prosecuting attorney was instructed to surreptitiously tape record the interview.

82. In April 2012, Lucas Burns testified about the unusually aggressive investigation technique involving misleading and surreptitiously recording a victim of an assault with the real intent of extracting from the assault victim, evidence against BYNUM's alleged zoning violations – having no real intent to bolster the assault case in any way.

83. From January 2012 until approximately May 2012, while the criminal zoning charges were pending against Plaintiff BYNUM, the Kaua'i County Council was simultaneously considering various matters related to the operations and budget of the Office of the Prosecuting Attorney.

84. BYNUM had previously been a critic of many of Prosecuting Attorney ISERI-CARVALHO's decisions and he had planned to question ISERI-CARVALHO about her operations and budget as was relevant to the matters on pending on the Kaua'i Council's agenda during these council meetings in early 2012.

85. Plaintiff BYNUM had constitutional rights under the First Amendment to the U.S. Constitution and the Hawai'i State Constitution to speak

about and debate, as an elected member of the Kaua‘i County Council, the operations and budget of the Office of the Prosecuting Attorney at official Kaua‘i County Council meetings.

86. However, on January 19, 2012, while the false criminal charges were pending against BYNUM, prosecuting attorney ISERI-CARVALHO wrote a letter to the entire Kaua‘i County Council, on Office of the Prosecuting Attorney letterhead, demanding that BYNUM be recused from County Council meetings involving legislative oversight of the prosecutor’s office, while the BYNUM’s criminal case was pending.

87. ISERI-CARVALHO initially stamped this January 19, 2012 letter as “confidential” but later released it to the public and to the mass media and press, with some names redacted.

88. The January 19, 2012 letter to the Council contained various erroneous statements of law to support ISERI-CARVALHO’s demand that BYNUM should be recused from legislative matters concerning the OPA.

89. The January 19, 2012 letter also contained numerous statements that are disparaging of Mr. BYNUM’s integrity including that “[Councilman BYNUM] has a clear financial interest in the operations of the OPA, as he would directly benefit if the OPA’s operations were negatively impacted by any action of the Council. By virtue of being a criminal defendant, he has a vested interest in

ensuring that the OPA not operate at peak efficiency” and “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.” ISERI-CARVALHO intentionally withheld from the public or the Council that Mr. the Director of the Planning Department had already “cleared” BYNUM of any violation or that BYNUM was innocent unless proven guilty.

90. When ISERI-CARVALHO demanded BYNUM’s recusal on the basis that ISERI-CARVALHO had charged BYNUM in a criminal case that was premised on an illegal warrantless search, without probable cause, and on an interpretation of the CZO that was contrary to that stated by then Planning Director Costa and contrary to the advice of deputy county attorneys Jung and Dahilig, she was acting under the color of state law.

91. BYNUM had a clearly established constitutional and statutory right to fulfill his responsibilities as an elected councilman and to fully participate in 2012 Council hearings related to the operations and budget of the Office of the Prosecuting Attorney.

92. ISERI-CARVALHO wrote the January 19, 2012 with the intent of denying BYNUM his rights guaranteed statutes and under the U.S. Constitution and the Hawai‘i State Constitution.

93. ISERI-CARVALHO wrote the January 19, 2012 under the color of her authority under state law as an elected public prosecutor.

94. ISERI-CARVALHO wrote the January 19, 2012 with the intent of silencing BYNUM in his capacity as an elected official with respect to the operations and budget of the Office of the Prosecuting Attorney.

95. ISERI-CARVALHO's conduct, in writing and publishing the January 19, 2012 letter and her making her comments derogatory comments about BYNUM on the Council floor would have chilled or silenced a person of ordinary firmness from future First Amendment activities.

96. Fearful of the Prosecutor's unprincipled ire, and not wanting to risk violating the law related to recusal as it was presented to the Kaua'i County Council by the Prosecuting Attorney, BYNUM ceded to ISERI-CARVALHO's demand for his recusal from the January, 2012 County Council Meeting. Thereafter BYNUM solicited an opinion from the County of Kaua'i Board of Ethics, which later concluded, contrary to the legal assertions made by ISERI-CARVALHO to the Kaua'i County Council, that BYNUM did not have a conflict of interest such that he should not be recused from fulfilling his duties as an elected councilman with respect to questioning ISERI-CARVALHO, as would any other elected member of the Kaua'i County Council, with respect to the OPA operations and budget.

97. On March 14, 2012 and again on March 21, 2012 there was a Special Council meeting item involving the Prosecuting Attorney's request for Council permission to hire a Law Office Assistant. At the opening of the latter meeting ISERI-CARVALHO notified the Council, through counsel, that she would be asking questions of BYNUM before she would agree to testify before the Council. The proposed questions to councilman BYNUM included whether he would "waive [his] rights" and if [he was] aware that "statements that you make can be used against you in the criminal proceeding."

98. This March 14, 2012 questioning of BYNUM on behalf of ISERI-CARVALHO would have chilled or silenced a person of ordinary firmness from future First Amendment activities.

99. During these 2012 County Council meetings ISERI-CARVALHO repeatedly referred to the charges that her Office had filed against BYNUM as the primary basis for removing him from any legislative oversight of the Office of the Prosecuting Attorney. In none of these references did ISERI-CARVALHO reference any presumption of innocence or acknowledge the fact of Plaintiff's innocence as established by the legal opinions of deputy County Attorney's Jung and Dahilig.

100. While all of these matters were happening, BYNUM had listed his home for sale. In the spring of 2012, he entered into a contract for the sale of his

home. The sale went into escrow. The buyers, however, became concerned that the house may not have been properly permitted after reading about the prosecution of BYNUM in the local newspaper. In response, the buyers went to the PLANNING DEPARTMENT and inquired whether there were problems with the permitting of the BYNUM property. The representative of the PLANNING DEPARTMENT wrongly and maliciously informed the buyers that the alleged zoning violations would run with the land and transfer to any new owners. The PLANNING DEPARTMENT employee then falsely informed the buyers that they would not be permitted to rent out any rooms in the residence if they bought the home. In response to these, and other false representations from the PLANNING DEPARTMENT, the buyers cancelled escrow. The house remains unsold. The loss of the sale of the home caused BYNUM to suffer significant financial damages to be proven at trial.

101. On April 5, 2012 a hearing was held in the Fifth Circuit Court, State of Hawai'i, after which the Honorable Kathleen N.A. Watanabe ordered that the Office of the Prosecuting Attorney was disqualified from further involvement in the criminal zoning case against BYNUM.

102. Thereafter, the State of Hawai'i Office of the Attorney General appointed a Special Deputy Attorney General to take over the case from the disqualified Office of the Prosecuting Attorney. The Special Deputy re-

investigated the facts and circumstances related to the alleged zoning crimes and very rapidly concluded that there was no provable case against BYNUM.

103. The Circuit Court, with the agreement and written consent of the Special Deputy Attorney General, dismissed the entire criminal case against BYNUM with prejudice.

104. Thereafter, First Deputy Prosecuting Attorney Delaplane, working under the authority of ISERI-CARVALHO told the local newspaper reporter that the dismissal did not equate to innocence.

COUNT I
(Federal Civil Rights 42 U.S.C. § 1983) – Defendants MIYAKE, ISERI-CARVALHO and COUNTY OF KAUA‘I

105. Plaintiff re-alleges and hereby incorporates by this reference paragraphs 1 through 104 inclusive, as if set forth in fully herein.

106. BYNUM's actions as an elected member of the Kaua‘i County Council in advocating for changes to Kaua‘i’s Comprehensive Zoning Ordinance in 2008 were exercise of his constitutionally protected interest in freedom of speech, constitutionally protected by the First Amendment to the Constitution of the United States. This protected speech was on a matter or matters of public concern within the meaning of *Rankin v. McPherson*, 483 U.S. 378 (1987). Thus, the speech was constitutionally protected.

107. Councilmember BYNUM's actions in attempting to question Defendant ISERI-CARVALHO about the operations and budget of the Office of the Prosecuting Attorney in 2012 were exercise of his constitutionally protected interest in freedom of speech, constitutionally protected by the First Amendment to the Constitution of the United States. This protected speech was on a matter or matters of public concern within the meaning of *Rankin v. McPherson*, 483 U.S. 378 (1987). Thus, the speech was constitutionally protected.

108. These aspects of protected speech were a substantial and/or motivating factor in the decision made by the County of Kaua'i and Defendant Planning Inspector MIYAKE to trespass onto BYNUM's private property, engage in an illegal warrantless search and ultimately charging BYNUM with a civil Zoning Violation, and then sending the same to Defendant ISERI-CARVALHO for criminal prosecution – all against the advice of the Kaua'i County Attorney's Office.

109. These aspects of protected speech were a substantial and/or motivating factor in the decisions made by the Defendant ISERI-CARVALHO to write the "confidential" January 19, 2012 letter to the Kaua'i County Council, to then release that letter to the public, to threaten Plaintiff in public that his questioning of the Prosecuting Attorney at a Council Meeting "may be used against you" in the criminal case and in the various other attempts to silence

Plaintiff as a critic and prevent BYNUM from exercising constitutionally-protected speech and legislative oversight of the OPA and ISERI-CARVALHO.

110. These actions by MIYAKE and ISERI-CARVALHO were taken pursuant to color of a statute, ordinance, regulation, custom, or usage, in that the actions against BYNUM and the inaction on matters which merited action to protect BYNUM were taken and caused by Defendant MIYAKE, ISERI-CARVALHO, and other Kaua'i County officials whose actions represent official policy, that is, Defendants MIYAKE and ISERI-CARVALHO who had final policymaking authority in the areas involved. These acts amounted to a deliberate indifference to or purposeful deprivation of Plaintiff's constitutional rights and the custom, in this regard, was the moving force behind the constitutional violations.

111. That authority of MIYAKE, ISERI-CARVALHO and Costa is established by the Revised Charter of the County of Kaua'i, which vests the Planning Department with the responsibility of enforcement and prevention of violations of the Kaua'i CZO.

112. For purposes of 42 U.S.C. §§ 1983 and 1985, Defendants COUNTY OF KAUA'I, MIYAKE and ISERI-CARVALHO are persons.

113. Each of those persons, under color of statute, ordinance, regulation, custom, and usage of the State of Hawai'i, and its municipal subdivisions, did subject, and cause to be subjected, Plaintiff, a citizen of the United States, to the

deprivation of rights, privileges, and immunities secured to him by the Constitution and laws of the United States.

114. Those rights are the rights to exercise protected speech under the First Amendment to the Constitution of the United States described above, as well as the right to equal protection of the laws, and to due process of law.

115. Defendants unlawfully charged Plaintiff with civil and criminal zoning violations after first illegally trespassing on his property and searching without the required warrant, and by their intentional, systematic, and continuous misconduct toward Plaintiff, Defendants totally disregarded his rights to substantive and procedural due process guaranteed by the Fourteenth Amendment to the United States Constitution and his rights to free speech as guaranteed by the First Amendment to the U.S. Constitution, and have caused Plaintiff injuries and irreparable harm for which Plaintiff is entitled to relief under 42 U.S.C. §§ 1983 and 1985.

116. Defendants are liable to Plaintiff because MIYAKE and ISERI-CARVALHO directly committed and commanded the intentional and malicious violations of Plaintiff's rights, and because Planning Officials caused or permitted the misconduct by MIYAKE and ISERI-CARVALHO by their direction, and by reason of their acquiescence in a longstanding practice or custom which constitutes

the standard operating procedure of the Kaua'i Planning Department, the OPA and the County of Kaua'i.

117. As a result of the unconstitutional deprivation of his rights by Defendants, Plaintiff has suffered monetary damages, and severe mental and emotional distress.

118. The actions of Defendants were willful, wanton, malicious, and in such callous and reckless disregard of civil obligations, as to entitle Plaintiff to recover punitive damages.

119. Thus, Plaintiff is entitled to recover general, special, and punitive damages in an amount to be proven at trial.

COUNT II

(Conspiracy to Violate Civil Rights 42 U.S.C. § 1985) - Defendants MIYAKE, ISERI-CARVALHO and COUNTY OF KAUA'I

120. Plaintiff re-alleges and hereby incorporates by this reference paragraphs 1 through 119, inclusive, as if set forth in full herein.

121. Defendants ISERI-CARVALHO and MIYAKE, and other officials on behalf of the COUNTY OF KAUA'I, conspired to violate the civil rights of Plaintiff described more fully above, in violation of 42 U.S.C. § 1985.

122. As a result of the unconstitutional deprivation of his rights by Defendants, Plaintiff has suffered monetary damages, and severe mental and emotional distress.

123. The actions of Defendants were willful, wanton, malicious, and in such callous and reckless disregard of civil obligations, as to entitle Plaintiff to recover punitive damages.

124. Thus, Plaintiff is entitled to recover general, special, and punitive damages in an amount to be proven at trial.

COUNT III
(Abuse of Process – Defendants COUNTY OF KAUA‘I and MIYAKE)

125. Plaintiff re-alleges and hereby incorporates by this reference paragraphs 1 through 124, inclusive, as if set forth in full herein.

126. In trespassing on and searching BYNUM’s private property illegally and without a warrant, issuing the Zoning Violations Notices against legal advice, changing the wording in the Zoning Violations Notice, and ultimately causing BYNUM to be civilly and criminally prosecuted without probable cause, Defendants MIYAKE and ISERI-CARVALHO acted with an ulterior purpose and issued various forms of process in connection therewith. Their actions were willful acts in the use of the process not proper in the regular conduct of a zoning case. MIYAKE and DOE defendants acted in definite manner not authorized by the process, or aimed at an objective not legitimate in the use of the process in making certain that BYNUM was subjected to unwarranted criminal and civil process.

127. Defendants MIYAKE and ISERI-CARVALHO employed the processes of the PLANNING DEPARTMENT and the OPA for an unlawful

object, not the purpose which it they were intended by the law to effect; in other words, a perversion of it.

128. As a result of these actions by Defendants, Plaintiff has suffered monetary damages, and severe mental and emotional distress.

COUNT IV
Trespass (Defendants COUNTY OF KAUA‘I and MIYAKE)

129. Plaintiff re-alleges and hereby incorporates by this reference paragraphs 1 through 128, inclusive, as if set forth in full herein.

130. By illegally entering onto BYNUM’s family property without permission or a warrant and illegally searching the property, MIYAKE directly interfered BYNUM’s constitutional and property rights to exclusive possession of his private property and to be free from any wrongful interference with possession of his property.

131. MIYAKE’s entry onto BYNUM’s property and her warrantless search was without consent or warrant constituted an unlawful trespass.

132. As a result of these actions by Defendants, Plaintiff has suffered monetary damages, loss of privacy, and severe mental and emotional distress.

COUNT V
**Violation of Rights Secured to Plaintiff Pursuant to the Constitution
of the State of Hawai‘i – (All Defendants)**

133. Plaintiff re-alleges and hereby incorporates by this reference paragraphs 1 through 132, inclusive, as if set forth in full herein.

134. The actions of Defendants as set forth above, violated Plaintiff's rights secured to him by the Constitution of the State of Hawai'i, including, but not limited to, rights to freedom of speech, to be free from unlawful searches of his home, privacy, due process of law, equal protection of the law, and the enjoyment of his civil rights.

135. As a result of the unconstitutional deprivation of his rights by Defendants, Plaintiff has suffered monetary damages, and severe mental and emotional distress.

136. The actions of Defendants were willful, wanton, malicious, and in such callous and reckless disregard of civil obligations, as to entitle Plaintiff to recover punitive damages.

137. Plaintiff is entitled to recover general, special, and punitive damages in an amount to be proven at trial.

COUNT VI
Tortious Interference with Prospective Economic Advantage
(COUNTY OF KAUA'I)

138. Plaintiff re-alleges and hereby incorporates by this reference paragraphs 1 through 137, inclusive, as if set forth in full herein.

139. COUNTY OF KAUA'I Planning Officials maliciously informed the people who had contracted to purchase the BYNUM property that the alleged zoning violations would run with the land and become zoning violations for the

purchasers if they closed the sale, with the intent of interfering with the contract between BYNUM and the buyers.

140. In making these false and malicious statements to the buyers, COUNTY OF KAUAI Planning Department Officials intentionally induced the buyers to terminate the written sales contract and cancel escrow.

141. As a result of the failed sale of Plaintiff's home, Plaintiff has suffered general and special damages in an amount to be proven at trial.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that judgment be entered as follows:

1. Pursuant to 28 U.S.C. § 1343, and 42 U.S.C. §§ 1983, 1985 & 1988, for general, special, and punitive damages in an amount to be proven at trial, for costs and attorneys' fees, and for such other and further relief as the Court deems just and proper;

2. Pursuant to the supplemental Hawaii State law claims, general, special, and punitive damages in an amount to be proven at trial, for costs and attorneys' fees, and for such other and further relief as the Court; and

3. Pursuant to all other claims and causes of action, appropriate injunctive and declaratory relief, including the, general, special, and punitive

damages in an amount to be proven at trial, attorneys' fees and costs, and such other and further relief as the Court deems just and proper.

DATED: Honolulu, Hawai'i, September 19, 2012.



~~BRONSTER HOSHIBATA~~

Margery S. Bronster

Andrew L. Pepper

HEMPEY & MEYERS LLP

Daniel G. Hempey

Attorneys for Plaintiff

TIMOTHY BYNUM