

GET Committee

From: Rick Markham <mrkham@aol.com>
Sent: Monday, July 13, 2020 8:48 AM
To: GET Committee
Subject: GET 7/14/20 Item 11-(35)
Attachments: Video of Dayle Yokoyama.mov; Video of Hank Horiuchi & County Inspector Gail Davis.MOV; Video of Lee Hayman.MOV; Video of Maurice Zane.MOV; COS v. Markham GET 11 (35).pdf

Aloha GET committee and thank you for your time. I am submitting this statement, procedural background and exhibits in support of approval of settlement of this matter, on the agenda as GET-11 (35).

My name is Rick Markham. I am a 33-year resident of Paia town where I raise my three children. Through my businesses and tenants, I am responsible for providing roughly 80 jobs for my local Pa'ia community.

In 2005, I purchased Nalu Kai lodge from the Miyahira family - the original owners. They were a Japanese family with deep rooted history in old Pa'ia town. I made a promise to make them proud and continue the history as they passed the torch to my family. Nalu Kai was an operating historical lodge at purchase and I was sensitive to keep the original name to respect the history. I was also sensitive in keeping the employees and caretaker that were already in place for nearly 25 years. This beautiful asset to the community was peacefully operating for 60 years and at year 55 a complaint comes in (from Will Spence) for operating and advertising a STRH (short term rental home) with heavy violation. STRH was a definition created in roughly 2012 but applied to the historical lodge, and its rooms without kitchens, from 1960. I worked in good faith to comply with the requests of planning dept and to have history told through the voices of the local kupuna via video testimonials or written affidavits, old reservation log books, taxes, utility bills, past employees, receipts and photos to show and bridge history totaling nearly 2300 pages of evidence. The definition of the STRH does not match in anyway and should have NEVER been applied to Nalu Kai Lodge, but that's how the fines grew. The Mayor has said: "Rick I want you and Nalu Kai Lodge to thrive in Pa'ia town and its up to county council to give it the final blessing of monetary approval as I am fine with it."

While this 5 year long run of standing up for what I truly felt was right, honest, and absolutely true defending my livelihood for my young family and the historical use of Nalu Kai Lodge has led me to this point today HOWEVER as much as that means or has meant to me and my true love and passion for Paia town, I can't afford for this not to settle today as I will likely lose everything I own in bankruptcy as Nalu Kai Lodge is attached to my other assets. On one hand, I am speaking absolutely from the heart for you to understand the history of Nalu Kai lodge and on the other hand I am here today begging to settle this during this difficult time so it doesn't take everything I worked for in my life away.

This has been devastating to me and my family! It has been a total disruption in my life, and a huge learning experience ... it's just been a very very hard and stressful time combined with the uncertainty of our health and financial future with this global pandemic. Many of my tenants cannot pay their rent at this time.

I ask you please look at the evidence and rich history of Nalu Kai and do what you feel in your hearts is truly right and fair. The \$ fine is one thing but please don't take away my tools to make the money back during this unprecedented time.

If there is one thing I can ask please let me settle this monetary fine TODAY, for another \$250,000 (totaling global settlement of \$500k) which I am borrowing, without further delay so I can move forward with some sort of certainty in my life during this uncertain time and finally place my focus on my family and rebuilding Paia town!

Thank you all for your time it's much appreciated and have a beautiful day! I am willing to correct the wrong but cannot do it by losing everything! Please let me make this right!

Aloha, Rick Markham

PROCEDURAL BACKGROUN: This case started with two notices of violation issued against the Nalu Kai Lodge on September 23, 2015, for operating and advertising a short term rental home without a permit. But Nalu Kai is a historical lodge was owned by the Miyahira family from approx. 1960 onward and provided short term affordable accommodation, consistent with the general or community plan. I purchased Nalu Kai in 2006 directly from the Miyahira family as a fully functional lodge and I kept two of their employees, Alice Yap and Benny Delos Santos. While doing my due diligence prior to purchase I was informed that if something was considered a non-conforming existing use it was lawful to continue to operate without any permit. I confirmed it with the zoning enforcement division in 2009. Ron Sandate conducted interviews with the old timers, and discussed the matter with both Aaron Shinmoto, his supervisor and Jeffrey Hunt, the Maui County Planning Director at the time and informed me that given its historic status the Nalu Kai was a lawful non-conforming use legal to continue without any permit. But on December 19, 2014, Will Spence, then Planning Director, made a complaint to initiate an investigation against Nalu Kai and the Notice of Warning was mailed to me. I immediately called Gail Davis and explained that Nalu Kai was not a short term rental, but a historical lodge, operating continuously since the 60s. I was asked to provide some evidence. At that time I only had two letters, one from Alice Yap and one Helen Kunichika confirming Nalu's historical use and an old menu from Larry's restaurant advertising rooms for rent at the Nalu Kai Lodge. Over the time I recorded testimony from the Paia old-timers confirming that the Nalu Kai was and remains one of the oldest established and continuously operated business in Paia. I recorded testimony from Miyahira family members, Paia residents (Stanley Takuchi, Maurice Zane, Dayle Yokoyama, Dane Kunichika, Benedict Delos Santos, Christabelle Delos Santos, Hank Horiuchi). Even Michele McLean admitted Nalu Kai's use continued uninterrupted, so "we would consider them existing non-conforming". After I got notices of violation I immediately called the department to explain that Nalu Kai was historical. Again I was asked for documents. I provided to Gail Davis and Michele McLean what I had. They said they would work with me. But my mistake was that I didn't appeal the Notices to the Board of Variances and Appeals. I trusted the department to work with me. While I was gathering documents, the fines continued at \$2,000 per day. On September 11, 2017, the County filed a lawsuit against me on the notices. I immediately met with the former Mayor Alan Arakawa, Will Spence, Pat Wong and Brian Bilberry to find resolution. I was assured that there were options available and that they wanted to help me. I started submitting my documents and video testimony from the old timers even directly to corp. counsel Bilberry. I had attorney Tom Cole helping me to get a settlement at that time. Tom referred me to Peter Horovitz. We were ordered to mediate the case and at few occasions we were close to settling but it was never formalized. Then in September of 2019 county offered to settle both my Nalu Kai and the shed case for \$500k (Judge Raffetto, the mediator was involved in the negotiations). While we were negotiating, I also had talks with Mayor Victorino who in October agreed to accept \$7,500 to settle Nalu Kai case (via email from Randy Piltz). When my attorney requested to enforce the \$7,500 all the negotiations on \$500k stopped. Bilberry did not agree to \$7,500 and we were forced to take it in front of Judge Cahill. Judge Cahill decided that there was no settlement and we had trial the next day. Ron Sandate confirmed that planning determined it was grandfathered. Michele McLean testified that the Mayor can direct the planning director to settle and Will Spence testified that the permit is not required if something is/was existing non-conforming. But because I did not appeal the notices, Judge Cahill couldn't decide on the grandfathered nature of the Nalu Kai lodge. We lost the trial on January 17, 2020 but Bilberry called Judge Raffetto and said the county will still settle. Same afternoon we offered \$500k to settle both cases and allow me to operate. We had Judge Raffetto contact Bilberry but for weeks there was no response. On January 23, 2020 I was forced to file bankruptcy. On March 13, 2020 I offered \$175k which was rejected by Bilberry. On April 2, 2020, I offered \$200k and asked for it to be presented to the county council before the meeting on April 3, 2020. We increased the offer to \$250k. On April 7, 2020 Bilberry emailed that my settlement offer(s) were not acceptable. On April 9, 2020 I offered \$300k as global settlement of both lawsuits and recognition of grandfathered use of the Nalu Kai lodge. The offer was rejected within 2 hours by Bilberry. The current offer is \$250k for this case (which is in addition to 250k on the shed case that the County Council accepted, which I am very thankful for). Mahalo for your time!!!

NALU KAI IS A HISTORICAL LODGE AND OPERATED CONTINUOUSLY AS CONFIRMED BY
GRANDDAUGHTER OF THE ORIGINAL OWNERS

- 6/29
1. I am a Hawaii resident living on the island of Hawaii.
 2. I am over the age of 18 and am competent to make this declaration.
 3. I have personal knowledge of the facts set forth in this declaration except and unless stated to be upon information and belief, and, if called to do so, I could testify competently to these facts.
 4. I am the custodian of the records attested to in this declaration.
 5. Nalu Kai Lodge located in Paia ("Nalu Kai") has existed since at least the early 1960 and belonged to my family.
 6. My grandmother Myrna Miyahira ("Myrna") managed the Nalu Kai by renting the rooms for periods as short as one (1) night from approximately 1960. Nalu Kai was also referred to as Larry's Apartments.
 7. I often visited the Nalu Kai Property.
 8. In late 1992 Myrna was diagnosed with Parkinson's disease and due to her deteriorating health, my mother, Barbara Yoshimura took over operations of Nalu Kai. In 1997 my mother passed away and my husband Dean Yokoyama and I became more involved in matters concerning the Nalu Kai.
 9. Between 1993 and 2006 Nalu Kai and the associated property was sold to North Shore Maui, LLC, Alice Yap took over most of Myrna's managerial duties concerning the Nalu Kai. We considered Alice our property manager for the Nalu Kai. She was in charge of the reservations and deposited money from the rental operations to Myrna's bank account at the Bank of Hawaii.
 10. In 1997, my grandmother, Myrna Miyahira established the Miyahira Family

Partnership and transferred the Nalu Kai to the partnership. Despite the change of ownership, the nightly rental use operations continued uninterrupted.

11. Following Myrna's death in 2003 we recovered Myrna's personal belongings. Amongst the items recovered from the Nalu Kai we found an old log book for the Nalu Kai dating back to 1963 that Myrna maintained throughout the years to register the guests visiting the Nalu Kai. The log book for the Nalu Kai had no signs of obvious alterations and remains in same condition until this day. I recognize the handwriting in the log-book as my grandmother's.

12. A true and correct copy of the Log Book that was recovered from the Nalu Kai and found amongst Myrna Miyahira's belongings is attached hereto as Exhibit "5".

13. Attached as Exhibit "6" is a true and correct copy of the video recording that I took with my cell phone on January 23, 2019 to describe the contents and condition of Myrna's Log Book which fairly and accurately depicts the condition of the book as I observed it. The video was not altered or edited since I recorded it.

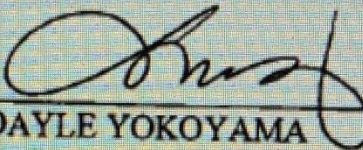
14. In 2004 we entered into negotiations to sell the Nalu Kai Lodge to North Shore LLC ("North Shore").

15. As part of the negotiations we disclosed that the Nalu Kai Lodge was subject to all the existing short term rental reservations. North Shore agreed to accept all the existing reservations and the sale was completed in June, 2006.

16. Based upon the records that are or were in my possession, and my actual knowledge, I affirm that Nalu Kai operated continuously as a hotel/overnight accommodations and without interruption for any period of time greater than twelve (12) months from approximately 1960-61 through to the time we sold the property to North Shore.

This Declaration is submitted in lieu of affidavit pursuant to Rule 7 of the Rules of the Circuit Court of the State of Hawaii.

Declared under penalty of perjury this 25 day of June, 2019


DAYLE YOKOYAMA



This photo shows Nalu Kai Lodge operating in the early 1970s

To whom It May Concern,

Re: Nalu Kai Lodge
18 Nalu La, Poina, B.H.

My name is Alice Yap and I was a former tenant of Mrs. Mynna Muiyabira, who is now deceased. I was a tenant of Mrs. Mynna since July, 1982 through Feb. 2006.

Mynna's illness with Parkinson's left her with limited work to do, so Mrs. Mynna turned to me to help run the Nalu Kai Lodge. I checked in and out of vacationers, renters, deposit renters money in B of H, Poina, washing of bedding, towels & bath ^{linen}. Someone else was hired to clean the rooms.

I helped managing the Nalu Kai Lodge from October, 1996 through March, 2006.

I am seventy seven years old and enjoying my retirement when my arthritis permits.

Sincerely
Alice Yap

Mrs. Alice H. Yap

EXHIBIT

THE FINES KEPT ACCRUING AT \$2,000 A DAY ALTHOUGH

EVEN MICHELE MCLEAN RECOGNIZED NALU KAI AS EXISTING NON-CONFORMING USE

at the area where it is considered as a store. I think the vacation rental is at the apartment located at the back, labeled as apartment in RPT, if they can justify that TVR has been in operational without break for more than 12 months then we can consider that as existing non-conforming use.

I'll update you when I get the box and had the chance to review the SMA boxes.

Thank you,

Avie

>>> Michele McLean 1/29/2016 1:24 PM >>>
Mahalo, Avie.

Yes, that makes sense. At that time, I think that the restaurant use had been continuous since the 1920s and 1930s. But then Willy's restaurant was never built, and the location was vacant for a long time. Now it's a bikini shop called San Lorenzo. There are several other business uses on the property: Ono Gelato (food retail), Honolua Surf Co. (retail), Prospect (retail), a tiny space with Alii Kula Lavendar (retail), Paia Bay Coffee (restaurant), plus the vacation rental.

I was hoping that there was correspondence from around 2003 that gave detail about the uses that we considered to be existing non-conforming at that time. Some have continued uninterrupted (vacation rental, retail) and so we would still consider them existing non-conforming. Others stopped operating (restaurant) and so any new uses in those spaces have to meet today's requirements.

Thanks again!
-Michele.

>>> Avelina Cabais 1/29/2016 9:08 AM >>>
Hello,

There is no parking analysis for the subject TMK. I also don't recall any permit that I've reviewed.

I've attached RPT record describing the type of use and when it was built: it says Restaurant and the year was 1931 and then the Tavern Bar was built in 1928. This can be the start then I saw in KIVA they have a building permit (B20031156) for Willy's Restaurant formerly called Kihata's Restaurant. I think the Department have accepted this as existing non-conforming parking because Planning approved the BP and the SMA minor was approved back in 2003.

Thanks,

Avie

>>> Chalsey Kwon 1/28/2016 5:16 PM >>>

PLANNING DEPARTMENT CONSIDERED NALU KAI ACCEPTABLE EXISTING NON-CONFORMING USE AS PER TESTIMONY OF RONALD SANDATE, INSPECTOR

can remember.

Q. Okay. And did you meet with Mr. Markham about an inspection of the Nalu Kai Lodge?

A. Yes. And I can't really remember if it was generated by an RFS or perhaps he had just come in to ask for some advice. And we had to trace down the chronology, so to speak, of the Nalu Kai. And it took some investigating, but we accepted affidavits and statements and spoke with witnesses and made the determination at the time.

Q. Okay. And what was the determination made?

A. The determination was that Nalu Kai had been in existence for a very, very long time as transient housing for the sugar cane workers and the use had continued throughout time without any interruption. And it was what my supervisor and the director of the planning department deemed that it was an acceptable existing nonconforming use.

Q. Okay. And who was your supervisor?

A. Aaron Shinmoto.

Q. And who is the planning director at that time?

A. Jeff Hunt.

Q. Okay. As part of your investigation, you said that you -- did you interview any residents of the area?

A. Yes, we did.

THE PURPOSE OF THE FINES IS TO GET COMPLIANCE NOT TO PUNISH
PER MICHELE MCLEAN TESTIMONY

1 (Witness sworn.)

2 MR. REVERE: May I have Exhibit D-83, please.

3 DIRECT EXAMINATION

4 BY MR. REVERE:

5 Q. Good afternoon, Ms. McLean.

6 The fines, as far as fines are concerned for Code

7 violations, the purpose of fines is not to make money for the

8 County, it's to encourage compliance. Correct?

9 A. That's the department's primary interest, yes.

10 Q. And the idea is they might be used to scare people, but
11 they're not intended to be a money maker for the County.

12 Correct?

13 Yes, Your Honor, that's

BUT NALU KAI WAS IN COMPLAINE AS EXISTING NON-CONFORMING USE AND DID NOT NEED A PERMIT AS CONFIRMED BY WILLIAM SPENCE (FORMER PLANNING DIRECTOR)

4 permit from the planning department, is the person who's
5 operating the use, who's using the property that's
6 grandfathered in, are they still required to apply for a
7 permit, but based upon the grandfathering, they are
8 automatically given the permit, or they don't have to
9 apply for anything?

10 THE WITNESS: I think it depends on what
11 the permit is they're being -- applying -- what they're
12 applying for.

13 THE COURT: Well, let's -- let's -- I don't
14 really want to get into the other matters. I'm talking
15 about specifically to operate a TVR. In other words,
16 would it be -- as far as you know, the department would
17 say, okay, you're grandfathered in, you've got to apply
18 for the permit, and when you apply it for, you get it?

19 THE WITNESS: No. If they're grandfathered
20 in, there's no need to apply for a permit.

21 THE COURT: Okay. Then you just saved them
22 a whole lot of time.

23 MR. BILBERRY: Thank you.

24 THE COURT: You just saved them a whole lot
25 of time. That's what I was told before, but honestly, you

SETTLEMENT TALKS (THIS IS PRESENTED TO SHOW WHY 500K WAS NOT FINALIZED NOT TO ARGUE \$7,500)

500k settlement (on both Nalu Kai and shed case) didn't go through because Mayor Victorino agreed to settle the Nalu Kai Lodge for \$7500 confirmed in writing by Randy Piltz

Rick- just got out of the meeting w/ the Mayor.

I TRIED CALLING
-your voice message system which is full.

He has accepted your \$7500 settlement & you on your own on the other item. NO MORE HELP FROM HIM & DON'T ASK

Randy Piltz
Community Liaison
Office of the Mayor
County of Maui
ph 270-8262
Randy.Piltz@co.maui.hi.us

Mayor Victorino testified that if the County Council is good with a settlement it works for him

1 system which is full. He has accepted your 7500 settlement,
2 and you're on your own on the other item. No more help from
3 him and don't ask.

4 Do you see that?

5 A. Yes, I see that.

6 Q. I take it as mayor, you got a million things going on
7 pretty much every day in your office?

8 A. That's a good assessment, yes.

9 Q. I might be off by a couple, but very busy.

10 So is it possible that you did have this meeting and
11 it's as described by Mr. Piltz, but you just don't recall the
12 details as you sit here today?

13 A. No, I didn't have this meeting. And the way he put, it
14 I never received this e-mail also.

15 Q. Okay. And so if you did receive this e-mail, what
16 would you have done?

17 A. Well, first of all, I would have gone to Mr. Piltz and
18 asked him why he sent it out.

19 Q. Okay.

20 A. Because our conversation was nothing of that nature.
21 All I said is if they will accept it, then fine, I'm good with
22 it, move on. And when I say "they accept it," I'm referring to
23 the Council.

24 Q. Okay. And did Mr. -- do you recall Mr. Markham sending
25 you a communication thanking you for settling the case?

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THE MOST RECENT SETTLEMENT PROPOSALS (on both cases including the shed case)

- On January 17, 2020, \$500,000 was offered to settle both cases and allow Mr. Markham to continue operating the lodge as a grandfathered use. There was NO response from Corp. Counsel despite Judge Raffetto's involvement.
- On March 13, 2020, \$175,000. was offered, Corp. Counsel responded on March 15, 2020 "Your clients' offer is appreciated but woefully deficient of what it is going to take to resolve this matter. My client has requested we let the bankruptcy proceeding play out."
- On April 2, 2020, \$200,000 we offered and asked for it to be presented to the county council before their meeting on April 3, 2020. Corp. Counsel responded:

"It is not possible to get this on the Maui County Council's agenda for tomorrow and provide required public notice, and moreover, the request to waive fines and penalties as a settlement proposal would have to go to the appropriate litigation committee for its recommendation to the council. I believe your office should understand this."
- Therefore, it was requested to present that offer in the regular course, so it gets on the council's agenda. Corp. Counsel responded on April 7, 2020 that the settlement offer(s) were not acceptable.
- On April 9, 2020, \$300,000.00 was offered as global settlement of both lawsuits and recognition of grandfathered use of the Nalu Kai lodge. The offer was rejected within 2 hours:

"Your clients' proposals are unworkable, and have already been rejected. You are not entitled to any further explanation or argument. Your latest iterations and your own argument do not warrant any change to the current state of affairs, nor would they change my recommendations."
- On June 9, 2020, \$500k was proposed in complete settlement of the two matters. The idea was that since, I am personally liable on both matters for approximately \$5.2 million in fines I can personally satisfy the settlement. The Corp. Counsel said that money is workable. The shed case was recently approved for \$250k (payment plan requested), the remaining one on Nalu Kai is another \$250k.

SOME OF THE AFFIDAVIT S IN SUPPORT FROM PAIA RESIDENTS

October 18, 2018

To whom it may concern,

Mr. Markham asked if I would write a letter of support for him/Nalu Kai Lodge (NKL) to present to the county, I am more than happy to do so. I was the caretaker for the Nalu Kai Lodge at 18 Nalu Place from 2006-2011. It was operating as a lodge when I moved in. I still work with Mr. Markham and the NKL currently.

The NKL provided me with housing and afforded me the opportunity to build a life in Maui where I currently own a home with my husband and two small children. I have been grateful for this work and this amazing property to share with vacationers from all over the world, to locals wanting a Paia retreat or a family gathering spot.

The Nalu Kai Lodge is indeed a hidden gem: Simple, funky and affordable! We need this type of ongoing business our small town.

Aloha,
Maria Rojas
46 South Laelua Place
Paia



10/19/18

CHRIS McNEIL, D.D.S.
1830 Wells St., Suite 201
Wailuku, Maui, HI 96793
Phone (808) 242-9708 • Fax (808) 242-9709

To Whom It May Concern,

We have owned, lived, raised our children and now currently operate a TVR at 15 Nalu Place in Paia since 1997.

Located directly across the street from us, the Nalu Kai Lodge is a historical lodge dating back to the 1960's. It was acquired by our neighbor Rick Markhan in 2005 and has continuously operated without lapse ~~since~~ thru 2018.

Nalu Kai Lodge is one of the longest running businesses in Paia Town and has been operating for nearly 60 years with many of the "old timers" living on Nalu Lane familiar with the long history.

Aloha,

Dr. Chris McNeil

Paia Surf Vacation Rental

ALOHA my name is
HANK S. Horiuchi. I am
90 years old. I was born
and raised in ^{UPPER} PAIA and lived
on at 22 NALU place since 1959

my family OWNED Horiuchi
MARKET IN PAIA. NALU KAI LODGE
HAS BEEN OPERATING AS A
Lodge / HOTEL since 1958.

I live right next door
to NALU KAI Lodge.

THANK YOU! Hank Horiuchi

1
She lived at 24 Malulu since 1958.

I used to clean the Malulu Lodge.

Malulu Lodge was a small living quarters.

Rick Thurman has done a lot of renovation

like covering up the "swamp" in the middle

of the Malulu Lodge. It was like a water

hole and he has done a good job. And

the whole Malulu Lodge has been a change

Helen Hennrichsen

82 yrs.

MAHALO