

PLANNING COMMISSION
COUNTY OF HAWAI`I

HEARING TRANSCRIPT
JUNE 4, 2004

A regularly advertised meeting on permittee **JACQUELINE BRITTAIN/OWEN SHEETS, JR.'s Use Permit No. 193** was discussed at 2:40 p.m. in the County Building, Councilroom – Room 201, 25 Aupuni Street, Hilo, Hawai`i, with First Vice-Chairman Earl Fujikawa presiding.

PRESENT: Earl Fujikawa
C. Kimo Alameda
Bill Graham
Jeffrey McCall
Hannah Springer
Bill Thibadeau

ABSENT & EXCUSED: Fred Galdones
Francis Smith

Joseph Kamelamela, Deputy Corporation Counsel
Christopher J. Yuen, Planning Director
Norman Hayashi, Planning Program Manager
Phyllis Fujimoto, Staff Planner
Jeff Darrow, Staff Planner

And approximately 3 people from the public in attendance.

PERMITTEES: JACQUELINE BRITTAIN/OWEN SHEETS, JR.

Review of compliance with conditions of Use Permit No. 193, which allowed the establishment of a two-bedroom bed and breakfast operation within an existing single family dwelling situated in the Single Family Residential – 10,000 square foot (RS-10) district. The property is located on the makai side of Kalanianaole Street, approximately 179 feet west of Akepa Street, Keaukaha, South Hilo, Hawai`i, TMK: 2-1-17:25.

FUJIKAWA: Item No. 7 Permittee, Jacqueline Brittain/Owen Sheets, Jr. This would be a review of compliance with the conditions of Use Permit No. 193, which allows the establishment of a two-bedroom bed and breakfast operation within an existing single-family dwelling situated in the Single Family Residential – 10,000 square foot (RS-10) district. Staff, proceed.

DARROW: Thank you, Mr. Chairman. Just for bearing, if I can direct your attention to the location map. This is located in South Hilo in the Keaukaha area. This is Kalanianaole Street, we're moving in an east-west direction. If you were traveling east on Kalanianaole through Keaukaha, you would, the Brittain bed and breakfast operation is located on the makai side of the road, just past the Hale Moana Apartments.

Again, we're here today for a compliance hearing for Use Permit No. 193. Use Permit 193 was approved on October 17, 2002 for a two-bedroom bed and breakfast. They were required by Condition M to return back to the Commission one year later to be able to follow up on compliance with the conditions.

The Applicant or the Applicant's representative has submitted a detailed written status report which has been submitted to all of you, in compliance with Condition M. I conducted a site inspection on May 3, 2004 and was able to verify that the physical conditions that are described in the permit have been complied with. There is an issue that has been raised regarding Condition H, the roof structure over the hot tub. And the issue was whether or not that roof structure should still be required to be built, even though the hot tub has been removed. We verified that the hot tub has been removed. But it may be an interpretation as to whether or not that still requires the need for the permanent roof structure or not. Are there any questions?

FUJIKAWA: No, I believe, well, I was on that case. Hannah, were you on this case, too?

SPRINGER: I was.

FUJIKAWA: Yeah, I guess the biggest concern at the time was the hot tub making a lot of noise, right, the people there? And now the hot tub has been removed. Okay, any questions, Commissioners, with staff? McCall?

MCCALL: Not a question but I just want to state for the record that I did, when we had the Contested Case, I recused myself because my mother-in-law is a owner, a part owner of the Hale Moana. And while I don't think we have any decision-making, I wanted to put myself on the record on that. I don't know, if counsel says I should recuse myself on this, I will, again, but -.

FUJIKAWA: Counsel, at this time, to refresh you, Mr. McCall's family member lived in the apartment next door, the condominium next door, so he had excused himself from that just so he won't, there won't be any interruptions or appearance of some sort. And now that it had gone through the Hearing Officer's hands, can he participate?

KAMELAMELA: Actually, that would be up to you whether -.

FUJIKAWA: I guess you may.

KAMELAMELA: Whether - .

MCCALL: Yeah, I don't know that we're really going to do any decision making anyway.

FUJIKAWA: Because the Hearing Officer was involved and, so, you may participate into that. Go ahead. Any other questions? Commissioner Springer?

SPRINGER: I haven't been a part of a compliance hearing before. What is the process here?

FUJIKAWA: Director?

SPRINGER: What's expected of us?

YUEN: I think you haven't been in one because there has never been another one. The Commission put this in as a condition. The Commission was a little bit, I think that when they passed the permit, they felt some concern about enforcement and follow-up. Normally, it's the administration, the Director is responsible for enforcement; and if we found a violation, we would bring it to the Commission for revocation. The condition is worded as it is, it's to be brought to the Commission. The Department does not see any violation, so that's the status here; and so it's in a report mode. If the Commission or if the Director were to seek a revocation, then this would, it would essentially be a Contested Case hearing on the part of the Applicant fighting against that. But the Department is, our recommendation is that they, the Commission also find that they're in compliance and, with the conditions, and then, that this condition then would have been met and they will then go on as a permitted operation. And if there are violations in the future, then that would be up to the Department to bring that to the Commission for enforcement, for a violation, for revocation. We could, we, the Department would seek to correct any violations and could impose fines. But the revocation would come back, any question of revoking the permit would come back to the Commission.

SPRINGER: So if revocation is not an issue at today's meeting, we'll be presented with information. We can determine whether or not that is an issue. But do we offer a motion then of having received the report or -?

FUJIKAWA: Well, I think, do we ask the Hearing Officer to step forward? Maybe they want to ask a question.

YUEN: This, we don't have a Hearing Officer -.

FUJIKAWA: No, we don't have any.

YUEN: No.

FUJIKAWA: Okay.

YUEN: I'm trying to remember if we did have a Hearing Officer. Okay, we didn't have a Hearing Officer in the first place and would not, we don't have one anymore for sure. So, but this is a, what Jeff has given us is the Department's review -.

FUJIKAWA: Oh, I see. Okay.

YUEN: The Department's recommendation on this. And the, if the, I suppose a motion to accept the Department's report would be in order. If, on the other hand, the Commission wanted to set it for, wanted to take further action, then I think the Commission would refuse to accept the Department's order, recommendation, and then set this for further action; and that would be the procedure here.

SPRINGER: So the motion would be to receive the staff report?

YUEN: Yes.

FUJIKAWA: Okay. Any questions, Commissioners? Would the Applicant or its representative, please step forward?

VAN DE CAR: Good afternoon.

FUJIKAWA: Hi. Okay. Would you kindly raise your right hand? Do you swear to tell the truth on this matter now before the Hawai'i County Planning Commission?

VAN DE CAR: I do.

BENSON: I do.

FUJIKAWA: Thank you. You want to state your name and your address, and then we go to you?

VAN DE CAR: My name is Diana Van De Car. I'm the attorney for the Applicants. My address is 101 Aupuni Street, Suite 238.

FUJIKAWA: Thank you. You?

BENSON: My name is Jay Benson. I'm the son of owners, co-owner, Hilo Oceanfront Bed and Breakfast. I reside at the bed and breakfast, 1923 Kalaniana'ole, Hilo.

FUJIKAWA: Thank you. Diana, you may proceed.

VAN DE CAR: I believe everything that was requested of the Applicant has been complied with. There was a request that a permanent roof be installed over the bed and breakfast to shield, visually shield the hot tub from the sight of the neighbors next door. That proved to be prohibitively expensive; and so, as a compromise, they just simply removed the hot tub to take care of that problem, which I think was a good step that the Applicants took. And all other conditions have been met, so I'd like to ask that, I guess

the pending motion be approved and they can move on as an established bed and breakfast.

FUJIKAWA: So it's the Commissioners' decision to remove that, accept the removal of the roof, right?

YUEN: Yes. From, this was discussed with us beforehand and we do concur that the spirit of the condition was to, that the roof was there to hide the hot tub -.

FUJIKAWA: Right.

BENSON: And, so, if the hot tub is gone there's no need for the roof.

FUJIKAWA: I understand. Commissioners, any questions? Ms. Springer?

SPRINGER: There was one Intervenor, Mr. Clark Lukens, who I believe is in the audience this afternoon. And I think that the, one of reasons that we asked for this precedent-setting condition was to satisfy some concerns that Mr. Lukens had about the process and about the, being assured that the review would be forthcoming. And I just wonder if he has any comments to us?

FUJIKAWA: No, I think what we're going to do is -.

SPRINGER: And I don't want to belabor the point, but -.

YUEN: No. When we're done with, my understanding is when we're done with the Applicant, that he can come forward and speak. It's not our wish that we, we're not trying to get a decision before he has a chance to say something.

FUJIKAWA: Sure. Yeah, why don't we just go ahead with the Applicants' representatives. Are you done on your part?

VAN DE CAR: I have nothing to add.

FUJIKAWA: Okay. You may testify.

BENSON: I can't think of anything at this time.

FUJIKAWA: Okay. You may sit there and can I have you come up? Staff, has he signed a paper, he don't have to?

DARROW: No.

FUJIKAWA: Okay, you want to raise your right hand, please? Do you swear to tell the truth on this matter now before the Hawai'i Planning Commission?

LUKENS: Yes, I do.

FUJIKAWA: State your name and your address.

LUKENS: Clark Lukens, 1911 Kalaniana'ole Avenue, Hilo.

FUJIKAWA: Okay. You have something to testify?

LUKENS: Yeah. I guess I'll start by reading the letter I sent in reply to Jay Benson's letter, my letter in response to the letter Jay Benson sent me telling me that they were going to go ahead with this meeting. You may or may not have a copy of this, I'm not sure. Just, "Thank you for your letter last week updating us on the current construction status of your bed and breakfast. We're sorry this process of renting your B&B has been so challenging and expensive. It's unfortunate that my attempt to break the ice at your yard a few months ago didn't work out better. But when you informed me that you were consulting your attorney about suing me and the fact that you both were set to planting 100-foot timber bamboo along our common property line to eventually block our view of the ocean, it left me with the impression that we are better off letting the Planning Commission handle our dispute. As far as meeting conditions set forth by the Planning Commission, we feel we must take exception to your attempt to satisfy Condition H. The trellis," at the time there was a trellis put up over there which has subsequently been removed, "The trellis you put up to cover the patio area does not solve our problem. First, the trellis does not obscure the hot tub from our condo units and, more importantly, it does nothing to address our chief concern of all the noise emanating from this patio area. The noise from this area has always been our primary complaint. It's a problem we felt can only be addressed by the construction of a permanent roofing structure as you agreed to at the Planning Commission meeting last year. Without this permanent roof structure, we are right back where we started. If we were to peacefully co-exist as neighbors, it's imperative that we resolve this noise issue. This is at the very heart of our concerns. We look forward to having better relationships in the future and hope this roofing structure problem can be adequately resolved."

Let's see, if I can find all my paperwork. And on Jeff Darrow's response to these, he actually says in here that Condition H does nothing to deter the noise that's coming up and affecting the condominium units. And, again, while there was some inappropriate behavior emanating from the hot tub and stuff, but always the problem for us was the noise because our building is almost like a sounding board up against the back of this. So while the noise that comes from that area comes straight up and while they did remove the hot tub, now they've replaced it with a large barbecue grill and a bunch of lawn chairs and stuff. So we're right back where we started from.

Again, our problem is the noise that's coming from this bed and breakfast and, again, this doesn't address the problem. Without the permanent roofing structure, which I thought we'd agreed upon, we no longer have any relief from the noise that's coming from there. And, again, that's always, if you read, go back further to the signed affidavits that all the neighbors sent in, you'll see that every single one of them stressed that the major problem

we're having is noise, it has always been noise. And, again, these conditions have done nothing to address the noise problem that we've had as neighbors are. Our whole complaint or whole problem with the bed and breakfast has really been the noise issue and, again, we haven't addressed it at all with these conditions.

SPRINGER: Mr. Chair?

FUJIKAWA: Springer?

SPRINGER: I would just turn to the Director and say that we hear the continued complaint from the neighbor and is there anything more that the Planning Department or the Planning Commission can do on this matter?

YUEN: I think that they are in compliance with the conditions of the permit. The conditions specifically require that the hot tub be obscured from the view of the condo by a roof structure. As far as the noise it was, part of the testimony was that because people congregated at the hot tub in the evening that that would be, as far as the noise problem -. To say that someone must cover a patio, or a deck, or their back yard because voices from the back yard can carry to the neighborhood to an adjoining building is, to me, putting a condition on a bed and breakfast that is, that limits it beyond that -. It's trying to stop the kind of thing that can happen from an ordinary residential use of a property on behalf of the adjoining neighbor. Part of our, the Department has, in my administration, we've recommended approval of all the bed and breakfasts, and I believe the prior administration did as well, and almost all of them were approved by the Planning Commission. And part of the idea if, that although there are impacts that can come to a neighbor from a bed and breakfast, that they're not markedly different in kind or in degree from that, from the kinds of things that happen at a single-family home. People have parties at their homes, they have guests at their homes, they may go out in their back yard or on their lanai and make noise and talk loudly and clink glasses until late into the night. And these are all things that may disturb the neighbors, but they're all part of the kinds of things that happen around an individual home. Someone may, you may have a very quiet neighbor or you may have a neighbor who's on the other end of the scale; but until you get, there is a level of nuisance, there's a level of calling the police. But somewhere short of that is where you will find the bed and breakfast, and somewhere short of that is where you'll also find the ordinary person's home. So to try to regulate that level of disturbance, I think, is beyond what we really, what we should be trying to do when we put conditions on a bed and breakfast.

So it's different than saying somebody can open up a store, or a 7-Eleven, or a gas station that, where the kinds of use and the kinds of impact, that's clearly different in both quality and quantity from that of a single-family home.

So the conditions that we have put on this establishment, I think, are commensurate with the kinds of impacts that it involves. And, so, to say that they need to put a covered roof over their patio so that when people go out on the patio that those voices can't be heard from the adjoining building, I do think is an excessive regulation.

FUJIKAWA: Springer?

SPRINGER: I'm looking at Condition I which says that "That the Applicants will not allow use of the hot tub and deck." So is that condition still germane?

YUEN: Yes. The deck is, because they still have the deck. There's no hot tub so that doesn't apply anymore. But they're still not supposed to have guest use of the deck between 9 and 8 a.m.

FUJIKAWA: Okay. Springer?

SPRINGER: Then, Mr. Director, might the neighbors, if there is a level of nuisance that's reached by the folks at the bed and breakfast, you would recommend that they carry out a complaint similar as if it was any other neighbor, file a -?

YUEN: Yes. Example, if your next-door neighbor is having a loud party at 2 o'clock in the morning and keeping you awake, you can call the police; and that's the remedy that we would recommend. We don't say, on the Planning Department side, thank God, we don't get involved in parties in neighborhoods. We do get involved in zoning, land use, bed and breakfast and the like; but there is a level of inter-neighbor problem that we're not involved in.

SPRINGER: Thank you.

FUJIKAWA: Any -. Go ahead.

LUKENS: Well, when we presented our case to the Planning Commission originally, they found that there was so much noise and so much problem emanating from this bed and breakfast that they took this extraordinary measure of having us come back and going through all these conditions. They recognized from the problems we were having this was an exceptional situation. And unless, you know, you're talking about a normal bed and breakfast, the normal noise and stuff. But I think that the documentation in this one affidavit that we presented showed that this was not a normal circumstance. We really feel that if we don't have that permanent roofing structure, then we've done nothing to address the noise problem that we're having. I mean, it's general understanding that the Commission is basically a rubber stamp for bed and breakfasts, like Mr. Yuen has suggested. They've never ever refused one. But I'm confused because right in the conclusions of law, it says that the granting the proposed bed and breakfast shall not cause adverse impacts to the surrounding properties. I just don't understand how this case could not be considered having an adverse impact to all properties when you've got so many neighbors that are ready to file sworn affidavits about all the problems that we've had there over a ten-year period.

FUJIKAWA: If I recall, that particular, we did a site visit and everything was focusing toward the hot tub area. We went to various floors to view the hot tub from up above; and that was your prime factor of noise -.

LUKENS: Yes, yes, exactly, 'cause the noise emanating from the hot tub area.

FUJIKAWA: And nothing was said anything about people sitting down in the lounge area making noise. It was just in the hot tub area.

LUKENS: But the hot tub area is the lounge area. Now that they've removed the hot tub, they've replaced it with a -.

FUJIKAWA: Yeah. You were saying that, they were saying that it was in the hot tub, the noise factor.

LUKENS: Before the hot tub took up that whole patio area. Now that the hot tub is gone, it has just been replaced by a grilling area and a lot of chairs. So we've really just, we haven't changed, all we've done is move the hot tub. It's still the congregation area for all of the visitors and all the guests and people that accumulate there, so we still are going to have the same noise problem that we have with the hot tub. The only thing is this time it's going to be the parties and drinking around the grill instead of around the hot tub. This really doesn't address the problem that we brought before the Planning Commission in the first place, which is the noise issue.

FUJIKAWA: Commissioner Springer?

SPRINGER: You were going to make a comment?

FUJIKAWA: No, go ahead.

SPRINGER: We also had, while the testifier is drawing our attention to those testimonies who had concern with the application and with the noise issue, we also had petitions in favor. So, once again, some folks were in favor, some folks were not.

LUKENS: But none of the owners that were around had any petitions in favor. The petitions in favor were from businesses that they do business with. All of the neighbors signed affidavits against the bed and breakfast.

SPRINGER: Okay. Thanks.

FUJIKAWA: Go ahead, Diana.

VAN DE CAR: You know, part of the problem that we sometimes have is that there's a neighbor-neighbor dispute. I don't see any of the other neighbors here. And, earlier, Mr. Lukens mentioned that he hasn't really had any problems within the last year but he wants this roof now. I think it's incumbent to remember that we're not, I don't

think we're here to revisit the same arguments that we were at the last time. It's very, very hard for me as an advocate for my client to prove a negative, to prove that there is no noise problem. If this was not a bed and breakfast and these people are out enjoying their evening on their front porch, they have the right to do that. They have the right not to do so to the exclusion and disturbance of their neighbors but within reasonable ranges; and there's no way for you folks to decide whether or not and to what extent the uses have been reasonable. I mean, we can put the parade of witnesses like we did the last time, we're going to say that there is no noise problem, and you'll have Mr. Lukens, who is arguing that there still is a noise problem. Now these people have gone out of their way to try to adjust and comply with everything that has been requested. They've hired an architect, they put up that pergola, the Planning Department said, "No, no, no. A pergola is not sufficient." And so they took the hot tub out altogether, which was quite an amenity making their bed and breakfast one that was more likely to get more people to come. So they've been willing to do that.

They also pointed out, and I think you've been provided with their folder, there is correspondence in there that their bed and breakfast use has been down substantially and they've only had a ten percent occupancy. So if they've only had a ten percent occupancy, then these noise complaints are noise complaints about the people who live there; and that's not something that's properly the subject of the Planning Commission to get involved with. I think you have to do, it's reasonable to require reasonable steps to be taken to address concerns that are related to the bed and breakfast use; but the bed and breakfast use I don't think is what is fueling things here. And if you'll look, I didn't put that folder together for you folks, the Applicants did, and I found out that it had been provided just recently. But if you look in there, there's correspondence from Mr. Benson asking Mr. Lukens to let him know when there's a problem; and then he references some of the problems that they've had. They've had a dispute about the nude photographs that were taken of Mr. Benson's girlfriend at the hearing, and they tried to introduce those at the hearing. Those kinds of things, those are neighbor-neighbor fights; and you folks should not be involved in considering neighbor-neighbor fights and really should be just addressing what is necessary for the use as a bed and breakfast. And I think if we, we don't go back and re-hash all the things that we had. They're subject to the same, as Mr. Yuen pointed out, the same laws anybody else has. So if they're making too much noise, their family, then these people can call the police and they can make a noise complaint.

But if you put us to the job of having to disprove allegations of too much noise by the bed and breakfast visitors, that's very difficult.

LUKENS: In actuality, Jay and I've talked and there hasn't been noise in the past year. That's been the whole point. He has only been running 10 percent, so the noise problem has disappeared. So we're not contending there has been noise over the past year. We're, our fear is that once they do start running we're right back where we started again. And she brought up the fact that why I'm the only one here, is because after the Commission granted the conditional permit for them, most of the other neighbors have left the building. Bob Hykes no longer, he has been staying, he moved to

Leisure World in L.A. His unit has sat vacant since this Commission passed that hearing. Frank Mamone sold his unit. Marion Mills now rents her unit out, she has moved back to Australia. There's virtually nobody left that signed these papers. They're all gone, they've all left the building because of the problem with the bed and breakfast. When you found in favor of the bed and breakfast, they abandoned the building.

FUJIKAWA: Any questions, Commissioners? None? Alameda?

ALAMEDA: So who's, just following up on that, so who's in opposition now that everyone's gone?

LUKENS: Well, they're still holding their apartments, they're just not living there anymore.

ALAMEDA: Oh, got you. Thank you.

FUJIKAWA: Any questions? Anyone has anything to say?

VAN DE CAR: Nothing further.

FUJIKAWA: Do I hear a motion from Commissioners to accept this staff report?

SPRINGER: So move.

FUJIKAWA: Can you make a motion?

SPRINGER: I move that with regard to this conformance hearing regarding Jacqueline Brittain and Owen Sheets, Jr. for Use Permit No. 193, the Hawai'i County Planning Commission accept the report submitted by the Planning Department's staff.

THIBADEAU: Second.

SPRINGER: Mr. Chair, under discussion?

FUJIKAWA: Yeah. It has been moved by, motion by Springer, seconded by Thibadeau, that this compliance be accepted. Question?

SPRINGER: It's just that I've listened carefully to the Planning Director's comments with regard to the concern in the neighborhood and also to Ms. Van De Car's comments, and it may be that a civil complaint or something of that nature is the recourse that's left to you.

FUJIKAWA: Okay. Any other? None? Staff, go ahead with the roll call.

DARROW: Thank you, Mr. Chairman. Commissioner Springer?

SPRINGER: Yes.

DARROW: Commissioner Thibadeau?

THIBADEAU: Aye.

DARROW: Commissioner Alameda?

ALAMEDA: Aye.

DARROW: Commissioner Graham?

GRAHAM: Aye.

DARROW: Commissioner McCall?

MCCALL: I'm going to abstain just so I don't, 'cause I think we have five votes and it'll be easier to -.

THIBADEAU: He's related to -.

FUJIKAWA: Yeah.

DARROW: And Mr. Chairman?

FUJIKAWA: Aye.

DARROW: The motion passes five to zero.

FUJIKAWA: Okay. Thank you.

BENSON: Thank you.

VAN DE CAR: Thank you very much.

The discussion ended at 3:08 p.m.

Respectfully submitted,

Sharon M. Nomura, Secretary

