

## County of Hawai'i

### PLANNING COMMISSION

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NOV 18 2002

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CERTIFIED MAIL – 7002 1000 0004 8650 1903  
Jacqueline Brittain & Owen Sheets  
1923 Kalaniana'ole Street  
Hilo, HI 96720-4919

Dear Ms. Van De Car, Ms. Brittain and Mr. Sheets:

Use Permit Application (USE 02-002)  
Applicant: Jacqueline Gail Brittain & Millard Owen Sheets, Jr.  
Request: Allow a 2-Bedroom Bed and Breakfast Operation Within a  
Single Family Dwelling  
Tax Map Key: 2-1-17:25

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The Planning Commission at its duly held public hearing on October 17, 2002, voted to approve the above-referenced application and adopted the attached Hearings Officers' Findings of Fact, Conclusions of Law, Decision and Order.

Use Permit No. 193 is hereby issued to allow a two-bedroom bed and breakfast operation (Hilo Oceanfront), within an existing dwelling situated in the County Single Family Residential (RS-10) zoned district. The property is located on the makai side of Kalaniana'ole Street, approximately 179 feet west of its intersection with Akepa Street, Keaukaha, South Hilo, Hawai'i.

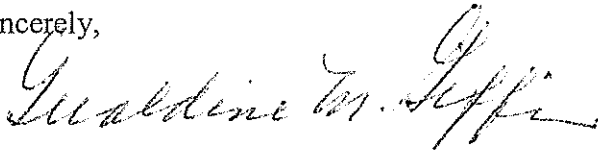
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Ms. Van De Car, Ms. Brittain and Mr. Sheets  
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Should you have questions regarding this matter, please contact Alice Kawaha of the Planning Department at 961-8288.

Sincerely,



Geraldine M. Giffin, Chairman  
Planning Commission

Att.

xc w/att.: Department of Public Works  
Department of Water Supply  
Real Property Tax Office  
Department of Land and Natural Resources  
Department of Health  
Brian Minaai, Director/Department of Transportation  
Mr. Clark Lukens - Certified Mail - 7002 1000 0004 8650 3976)  
Patricia K. O'Toole, Esq.

BEFORE THE COUNTY OF HAWAII

PLANNING COMMISSION

In the Special Permit Application ) USE 02-002  
 )  
 of ) FINDINGS OF FACT, CONCLUSIONS OF  
 ) LAW AND APPROVAL OF USE PERMIT  
 JACQUELINE GAIL BRITTAIN and ) APPLICATION  
 MILLARD OWEN SHEETS, JR. )  
 Request: To operate a bed and breakfast at the )  
 existing residential premises situated at 1923 )  
 Kalaniana'ole Street in Hilo, Tax Map Key: )  
 (3) 2-1-17:25. )  
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**FINDINGS OF FACT, CONCLUSIONS OF LAW  
AND APPROVAL OF USE PERMIT APPLICATION**

Pursuant to authorization by the Planning Commission, the Planning Commission as a whole and its counsel Ivan Torigoe presided over a contested case hearing on the application for a use permit by Jacqueline Gail Brittain and Millard Owen Sheets, Jr. (hereafter "Applicants") for a use permit to operate a bed and breakfast at the existing residential premises situated at 1923 Kalaniana'ole Street in Hilo, Hawaii. The hearing took place on July 19, 2002. In attendance were the Applicants and their counsel Diana L. Van De Car, Intervenor Clark Lukens (hereafter "Intervenor"), and the County of Hawaii Planning Department represented by its Director Christopher J. Yuen (hereafter "Planning Director") and its counsel Patricia K. O'Toole. The hearing officers, having considered the parties' evidence of record and arguments, hereby submit their findings of fact and conclusions of law in the above-entitled matter.

**FINDINGS OF FACT**

**A. Procedural Background:**

1. The land which is the subject of this proceeding (hereafter "Property") is located at 1923 Kalaniana'ole Street, Hilo, Hawaii, and is also identified by TMK No. (3) 2-1-17:25. The owner, Jacqueline Gail Brittain, Ph.D. and her husband Millard Owen Sheets, Jr., have applied for a use permit to operate a bed and breakfast in the residence on this property. The property is

presently used as the residence of Applicants and Dr. Brittain's son, Jay Benson.

2. The Planning Commission held a public hearing on the application on March 22, 2002, in the County Building, Councilroom, Room 201, 25 Aupuni Street, Hilo, Hawaii. At the public hearing, the Planning Commission considered a Petition for Standing in Contested Case Hearing signed by the following people who reside in the Hale Moana condominium: Clark Lukens and Paulette Berbelis (apartment PH5), Milos I. Hajek and Olga Hajek (apartment PH7), Robert L. Hykes (apartment 507), John Fillipini (apartment 605) and Marion Mills (apartment 607). Only one filing fee was submitted with this petition, and after consideration, these persons agreed that Clark Lukens would be the only formal intervenor, and the other signatories to the petition withdrew their request to be intervenors. With that adjustment, the Planning Commission voted to admit Intervenor Clark Lukens as a party, and to conduct the proceeding on the application in the manner provided by Chapter 91, Hawaii Revised Statutes, and Rule 4 of the Rules of the Planning Commission of the County of Hawaii. Further, the Planning Commission determined that the members of the Planning Commission themselves would hear the contested case as hearing officers, and would conduct a site inspection.

3. The applicants, Intervenor, and the Planning Department each filed a Statement of Issues, List of Witnesses and List of Exhibits, and submitted proposed exhibits on May 28, 2002, and affidavits from their witnesses on June 28, 2002.

4. A site inspection was conducted on July 19, 2002 at the subject property, attended by members of the Planning Commission, the commission's attorney Ivan M. Torigoe, Planning Director Christopher J. Yuen and attorney Patricia K. O'Toole, Applicants and their attorney Diana L. Van De Car, and Intervenor.

5. A public hearing and contested case proceeding was held on July 19, 2002, in the County Building, Councilroom, Room 201, 25 Aupuni Street, Hilo, Hawaii. before the Planning Commission acting as hearing officers.

6. Applicants originally asked for a use permit for a four-unit bed and breakfast, with the intention of operating with two existing units now, and adding two units in the future. At the hearing, the Applicants amended their application to seek approval of a two-unit bed and breakfast only.

7. Applicants had begun operating a bed and breakfast in the residence on the property years ago, using the existing two units. Jay Benson assisted Applicants in running this bed and breakfast. They previously applied for a use permit, but were denied because of existing violations of Building Code requirements. Applicants were given a cease and desist order on June 13, 2001, after which they stopped operating. This application for a use permit was submitted on December 21, 2001.

8. All parties' exhibits were stipulated into evidence, with the exception of Intervenor's photographs. Applicants objected to the photographs, and the objection was sustained.

**B. Substantive Facts:**

9. The subject property is a rectangular shaped lot, 17,900 square feet in size, and is located at 1923 Kalaniana'ole Street, Hilo, Hawaii. It is zoned RS-10. The State Land Use Designation is "Urban." The property is owned by the Jacqueline G. Brittain Trust. It is situated adjacent to the Lalakea Ponds. There is an existing two-story single family dwelling on the property. A lanai, hot tub and the two units for the bed and breakfast are located on the lower level of the dwelling. A maintained trail leads from the property to the Lalakea Ponds and ocean. Applicants reside on the property, as does Mr. Benson.

10. The soils on the property consist of well-drained, thin organic solid overlying pahoehoe lava bedrock. The soil above the lava is rapidly permeable. The pahoehoe lava is very slowly permeable, but water moves rapidly through the cracks. Runoff is medium, and the erosion hazard is slight. The property has been cleared and developed for several decades, so there are no archaeological or historic resources present. The property does not provide coastal access, but public shoreline access is located approximately 300 feet away. The property is landscaped along the road frontage with Areca palms, and the rest of the parcel is planted with tropical and edible fruits and ornamental plants, including bananas, pineapple, ti, iris, bromeliads, orchids and lawn.

11. No new construction is required, given Applicants' change to a two-unit bed and breakfast. The use as a bed and breakfast will not impact view planes.

12. The use as a bed and breakfast is not expected to greatly increase traffic flow. The property borders Kalaniana'ole Street, which is a County road with a 20-foot wide pavement and a five-foot paved shoulder. The roadway supports a medium level of traffic traveling at speeds appropriate for a low-density residential neighborhood.

13. The property is located in the shoreline management area, and Applicants were issued SMA Minor Use Permit No. 109 on January 28, 2002 to allow for the operation of the bed and breakfast. The SMA permit is conditional upon the granting of a use permit.

14. The property is bordered on the north by the Hale Moana condominium, and on the south by a single family residence. Located next door to that single family residence is the Hilo Seaside Retreat Bed and Breakfast. There is also another bed and breakfast establishment located nearby.

15. A Home Occupation Declaration was executed and filed with the Planning Department by Jacqueline Gail Brittain, Ph.D. on January 31, 2002. Dr. Brittain is a psychologist, and practices out of her home. Her office is located on the top floor of the residence.

16. A concern was raised by the County of Hawaii Building Department regarding a building permit, which remained open. A portion of the residence was remodeled in 1992. Building Department inspector Nani Masaki reported that building permit #920202 remains open. Jay Benson testified that in 1992, Applicants were remodeling a portion of the residence and building an addition. Building permits were taken out as part of that work. The Applicants also intended to rewire the older portion of the house. An electrical permit was taken out for this re-wiring, and Mr. Benson started to remove some old canec on the wall to access for the electrician. A building inspector came to inspect the remodeling work, and saw that Mr. Benson had removed some canec. The inspector told Mr. Benson that a permit was required for the canec removal. Mr. Benson took out a building permit for that work in 1992. The electrical re-wiring work was never done, however, and no further work was done on the canec removal. The electrical permit was voided, but the permit for the canec removal remains open. That permit could not be closed because it was taken out as part of the work intended by the electrical permit. Applicants retained Roy W. McCormick, Jr. of Royal Hawaiian Electric to re-apply for

the electrical permit, review the condition of the existing electrical wiring, and call for a final inspection on both permits. The final inspection had not yet taken place by the time of the hearing, but it was expected that approval would be obtained and the two building permits (the old 1992 permit and the new, just-pulled electrical permit) would be closed.

17. With respect to other conditions on the property, the building sewer line has been connected, and a required backflow preventer has been installed at the sewer connection. Sinks and appliances have been removed from the two units downstairs, and presently there is only one kitchen existing on the property. There is an existing driveway serving the property, and access to the property is over this driveway from Kalaniana'ole Street. Applicants propose to excavate a portion of their yard which is accessible by this driveway, and install five parking spaces in that location in a 45 degree diagonal from the driveway. The width of this area is large enough to accommodate the proposed five parking spaces. Applicants had been using an adjacent area of their yard for additional parking, and were accessing this adjacent area by a second entrance from Kalaniana'ole Street. Applicants have now closed off this second entrance, and have moved plants to this area.

18. The property is served by County water. Electricity service and telephone service are both available to the property. The property is located within the City of Hilo, and is in close proximity to police, fire protection and emergency medical services.

19. A petition signed by 37 people was received in support of the application. Letters and comments in support of the application were also received from William De Rooy, president of Nautilus Dive Center, Inc., Stacey Dorn, manager of Tropical Helicopters Island Adventures, Barbara A. Goss (owner of a condominium in Hale Moana), Madonna Stedman (who lives in Hale Moana), Patrica S. Oliver, Fred Yokoyama (president of Travel Professionals, Inc.), Jan, Sarah and Alice Moon, Polly Ellis, James Wohl, Albert G. and Valerie L. Hughes (out-of-state owners of a unit in Hale Moana), R. Winfrey, Sue E. Green, Ulf Wiel-Berggren and Vera Wiel-Berggren (who sell fruit at the Hilo Farmer's Market), Ilana Moidel of the Puhi Bay Store, David Palmer dba Café Pesto Restaurant, Amber Rose Schneider, Patrick Ng, Patrick Messenger of Organic Plant Management, attorney Harold Schwartz, Jerry L. Nahm-Mijo, M.A. and Trina Nahm-Mijo, Ph.D.

20. Letters and sworn statements opposing the application were received from Intervenor Clark Lukens and Paulette Berbelis, Frank P. Mamone, Marion Mills, Olga Hajek, Milos I. Hajek, Robert L. Hykes, and Marie Gibson, all of whom are residents of Hale Moana, and from Charles F. Mansfield, who lives on an adjacent street. These opponents complained of noise on the property from people using the hot tub and outdoor lanai area, noise from loud parties and large groups such as weddings and birthday parties for children and teenagers, nudity on the deck and in the hot tub, people coming and going at all hours, groups playing drums in the yard, barking dogs, and noise from weed-wacking to clean Applicants' yard area and to maintain one or more trails to the Lalakea ponds. Additionally, Intervenor and Paulette Berbelis testified that operation of the bed and breakfast continued until March 2002, and the noise problems did not stop until March 2002, leading them to conclude that the noise was from the bed and breakfast operation. Both testified that noise problems had been significantly reduced since March 2002. Ms. Berbelis also testified that the noise from the weed-wacker went on for hours and made her a "prisoner" in her own home.

21. Applicant Owen Sheets and Jay Benson testified that the bed and breakfast operation closed down after they received the cease and desist order, including shutting down the web site that they had operated. They testified that when they were operating, the bed and breakfast guests appreciated peace and quiet, and the house was therefore kept quiet for the guests. Mr. Sheets testified that with two exceptions, there were no parties or other events when bed and breakfast guests had been in residence which could be considered noisy at all. Regarding the two exceptions, Mr. Sheets testified that on one occasion many years ago, they had rented a unit for a group of teenagers, and then received complaints of noise, and so had never allowed such a rental again. Mr. Sheets also testified that on one occasion, a couple had rented a unit, and that day, had gotten married at the Lalakea Ponds and had guests for a small afternoon reception, with the couple staying alone that night in the unit. He testified that complaints of noise were received from neighbors, and no further weddings were allowed. He explained that he and his family have their own social functions from time to time, which have nothing to do with the bed and breakfast operation, and he does not believe that any noise from these social functions are unreasonable. Jay Benson testified that he has had private parties,

which could perhaps be considered noisy, but that this has had nothing to do with the bed and breakfast operation. Mr. Sheets also testified that Applicants have had friends and family members stay in their home as house guests at various times since they shut down their bed and breakfast operation, and these people have not been bed and breakfast guests nor have they made unreasonable noise. Mr. Sheets testified that with the permission of the State of Hawaii, Applicants have maintained the area of Lalakea Ponds located immediately in front of the property, and also maintained a single trail from the property to Lalakea Ponds. Applicants submitted affidavits from Richard Suinn, Ph.D., Trina Nahm-Mijo, Susan Cauley, M.D., Sue Green, Michael Holcomb and Eric D. Berger, all of whom described the property as being quiet and peaceful. They submitted an affidavit and live testimony from Katherine T. Cannon-Eger regarding an improvement project for the trails to Lalakea Ponds as an example of the type of event at the property which might cause noise, which has nothing to do with the bed and breakfast operation. Applicants also submitted affidavits from Sarah Moon and Janette M. Moon, who are neighbors, and from Patricia Oliver, who owns the Hilo Seaside Retreat bed and breakfast located two doors away from the property. Each of these persons said there was no noise problem from the property.

22. Applicants also submitted affidavits from Colin Nakagawa, owner of the Hilo Seaside Restaurant, and William De Rooy, owner of Nautilus Dive Center, Inc. Each said Applicants' bed and breakfast had been a benefit to their businesses while it was operating. Each said that Hilo's visitor industry needs to be strengthened, that tourists bring money into the local economy which is needed by local businesses, and that bed and breakfasts can accommodate tourists and encourage more visitors without making changes to the character of the Hilo community. Mr. De Rooy also testified that bed and breakfasts can help meet tourist accommodation needs during times of high visitor demand such as the holidays and the Merry Monarch Festival.

23. Applicants also submitted statistical information regarding the importance of tourism in the Hawaii economy, and a study of zoning controls on bed and breakfasts which recognized that bed and breakfasts can provide an "alternative type of transient accommodation, which increases the choice of lodging for tourists and travelers, by attracting lodgers who avoid

hotel-motel units in favor of a B&B, by providing lodging for tourists at tourism sites whose settings are not amenable to commercial hotels and motels, and by relieving any shortage of transients units during seasonal high occupancy periods and during major events.” Applicants’ Exhibit 10, page 5.

24. Applicants have proposed House Rules for their bed and breakfast guests which will restrict noise, restrict check-in and check-out hours, and prohibit nudity.

25. The testimony of the neighbors from the Hale Moana condominium suggests that the condominium residents have been affected by noise from the subject property.

### CONCLUSIONS OF LAW

26. Under Section 25-4-7 of the Hawaii County Code, the proposed use as a bed and breakfast is allowed in RS-10 zones, provided a use permit is obtained.

27. Under Section 25-2-65 of the Hawaii County Code, a use permit may be granted by the Planning Commission upon a finding that (1) the granting of the proposed use shall be consistent with the general purpose of the zoning district, the intent and purpose of Chapter 25 of the Hawaii County Code and the County of Hawaii general plan, (2) the granting of the proposed use shall not be materially detrimental to the public welfare nor cause substantial, adverse impact to the community's character, to surrounding properties, and (3) the granting of the proposed use shall not unreasonably burden public agencies to provide roads and streets, sewer, water, drainage, schools, police and fire protection and other related infrastructure.

28. The proposed use meets the requirements of Section 25-4-7 of the Hawaii County Code, in that the property is over 15,000 square feet in size, the maximum number of guests to be accommodated at any one time will be eight which is below the maximum allowed, and the Applicants will continue to reside in the home and use it as their principal residence, with the proposed use as a bed and breakfast subordinate to that principal use.

29. To comply with all parking requirements of the Hawaii County Code for the proposed use and the existing uses as a residence and a home office, the Applicants must provide five off street parking spaces.

30. The proposed use is consistent with the following objectives, goals and standards set forth in the Hawaii County General Plan:

*Economic:*

Goals:

- Provide residents with opportunities to improve their quality of life.
- Economic development and improvement shall be in balance with the physical and social environments of the island of Hawaii.
- The County shall strive for diversification of its economy by strengthening industries and attracting new endeavors.
- The County shall provide an economic environment which allows new, expanded, or improved economic opportunities that are compatible with the County's natural and social environment.

Policies:

- The County shall strive for an economic climate which provides its residents an opportunity of choice of occupations.
- The County of Hawaii shall encourage the development of a visitor industry which is consistent with the social, physical, and economic goals of the residents of the County.
- The County of Hawaii shall strive for diversification of its economy by strengthening existing industry and attracting new endeavors.

Standard:

- The island of Hawaii should be developed into a unique scientific and cultural model. The island should become a model of living where economic gains are in balance with social and physical amenities. Development should be reviewed on the basis of total impact on the residents of the County, not only in terms of immediate short run economic benefits.

These goals and policies provide for the general diversification of the economy by attracting new endeavors for expansion or for the improvement of economic opportunities that are compatible with the natural and social environment in the County of Hawaii. Approval of the use permit would foster the above-cited economic goal and policy of the Hawaii County General Plan by encouraging the continued development of a visitor industry which is compatible with the social and natural environment of the area.

31. Based on the above, the establishment of a two-unit bed and breakfast be approved subject to the following conditions. However, should any of the conditions not be met or substantially complied with in a timely fashion, the Director may initiate procedures to revoke the permit.

- A. The applicants, successors, or assigns shall be responsible for complying with all stated conditions of approval.
- B. The bed and breakfast shall be limited to the use of the existing two (2) guest units.
- C. The applicants shall comply with all applicable requirements as stated in the Zoning Code regulating bed and breakfast establishments.
- D. The applicants shall comply with all applicable laws, rules, regulations and requirements of other affected agencies, including the Department of Health for this use.
- E. The applicants shall establish five parking spaces accessed from the existing driveway and provide sufficient turnaround space to prevent vehicles from backing out onto Kalaniana'ole Street. Two on-site parking stalls are required for a single-family dwelling and an additional parking stall for the Home Occupation permit. Two parking places shall be for the two Bed and Breakfast guest units. There shall be no vehicle parking along Kalaniana'ole Street.
- F. The only egress and ingress to the subject property from Kalaniana'ole Street shall be the existing driveway. The alternate access previously used shall be blocked off and landscaped to prevent access and/or parking.

- G. The applicants shall adopt and enforce the submitted 'House Rules for the Hilo Oceanfront' pertaining to the bed and breakfast operation and have these Rules posted in all guest units and common areas.
- H. The hot tub shall be obscured from view of the Hale Moana condominium units at all times by a permanent roof structure to be erected within six months of approval of this permit.
- I. Applicants shall not allow use of the hot tub and deck by bed and breakfast guests between the hours of 9:00 PM and 8:00 AM.
- J. Check in time shall be limited to the hours of 2:00 PM through 6:00 PM unless necessitated by later arrival on the island.
- K. The applicants shall secure and finalize all necessary permits for the existing dwelling from the Department of Public Works, Building Division within six (6) months from the effective date of this permit.
- L. Prior to the establishment of the bed and breakfast business, Final Plan Approval shall be secured from the Planning Director in accordance with the Zoning Code, Sections 25-2-72. Plans shall identify all existing structures, driveway, landscaping, lighting, fire protection measures, parking stalls and exterior sign(s) associated with the business.
- M. Upon compliance with all conditions of approval, the applicants shall provide a written status report to the Planning Director.
- N. Applicants shall return to the Planning Commission, with notice to the Intervenor, as soon as may be scheduled by the Planning Commission after the elapse of one year from the date of approval of this permit, for review of compliance with all conditions. The Planning Commission may suspend or revoke this permit based upon any violation of conditions that may be proven to the Planning Commission. Applicants shall make any records kept in the normal course of operating their bed and breakfast business available to the Planning Commission and the Planning Director as may be necessary to verify compliance.

- O. If the Applicants fail to comply with the conditions of approval or are unable to resolve any public complaint(s), the Planning Director shall investigate and, if necessary, enforce the appropriate conditions. The Planning Director may, as part of any enforcement action, refer the matter to the Planning Commission for review. Upon appropriate findings by the Planning Commission, that the Applicants have failed to comply with the conditions of approval or have caused an unreasonable adverse impact on surrounding properties, the permit may be suspended or revoked.
- P. An initial extension of time for the performance of conditions may be granted by the Planning Director upon the following circumstances:
  - (i) Non-performance is the result of conditions that could not have been foreseen or are beyond the control of the Applicants, successors, or assigns, and that are not the result of their fault or negligence.
  - (ii) Granting of the time extension would not be contrary to the original reasons for granting of the permit.
  - (iii) Granting of the time extension would not be contrary to the General Plan or Zoning Code.
  - (iv) The time extension granted does not exceed the period originally granted for performance (i.e., a condition to be performed within one year may be extended for up to one additional year).

32. To the extent that any of these conclusions of law constitute findings of fact, they shall be so considered and construed.

The Planning Commission hereby approves Use Permit Application No. 02-002, subject to the conditions listed in paragraph 31 above.

Dated: Hilo, Hawaii, NOV 18 2002

By: Geraldine M. Giffin  
GERALDINE GIFFIN, Chairperson  
Planning Commission