



## **COMMUNITY DEVELOPMENT DEPARTMENT**

*Planning, Zoning, and Building Safety*  
1415 Melody Lane, Bisbee, Arizona 85603

(520) 432-9240  
Fax 432-9278

### **SPECIAL USE APPLICATION FOR APPEAL**

NAME OF APPELLANT: Arthur V. Douglas

ADDRESS: 5242 East Spring Road, Hereford, Arizona 85615

PHONE NUMBER: 520 378 3493

EMAIL ADDRESS: sonora@creighton.edu

NUMBER OF DOCKET APPEALED: SU- 11 - 01

DATE OF COMMISSION DECISION: February 9, 2011

DATE OF APPEAL SUBMITTAL: 2/22/2011 FEE PAID: \$ 300.00

In addition to the \$300 fee, the following information shall be provided before an appeal can be accepted. If more room is needed please attach additional pages.

1. Description of the decision being appealed. An appellant can appeal the Commission's decision for approval or disapproval or any conditions stipulated as part of docket approval.

I am appealing the decision, in full, of the Planning and Zoning Commission to  
grant Mary Jo Ballator a Special Use Authorization for a Cultural, Nature or  
Historic Exhibit, per Section 607.31 of the Zoning Regulations.

2. A complete statement of all reasons why the appellant believes that the decision, or any part of the decision was erroneous, arbitrary, capricious, or any abuse of discretion.

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See attached Document.

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3. Written presentation of additional testimony & evidence. A full explanation of the additional testimony & evidence that will be submitted with explanation of why this was not presented to the Planning Commission.

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See attached Document.

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SIGNATURE

*Arthur V. Douglas Ph.D.*

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**2. A complete statement of all reasons why the appellant believes that the decision, or any part of the decision was erroneous, arbitrary, capricious, or any abuse of discretion.**

- I. In my letter to the Planning and Zoning Commission and in my personal address to the commission I asked the very important question: "1. Is it legal to open up a private road (i.e. Spring Road) to public ingress and egress?" in order for the public to have access to the Special Use property. Property along this road is subject to a 7.5' easement as part of a 15" private easement for ingress and egress of the residents. This private easement issue was never really addressed by Keith Dennis nor by the commission. However, I believe someone from the floor (maybe county counsel) stated (paraphrasing) "that this was not a county issue but one involving the property owners with the sheriff being called if there was a problem." The approval of the special use permit was thus made without resolving this question. I have obtained legal counsel regarding this question from a lawyer specializing in real estate and zoning. To summarize his legal advice:
  - a. Regarding the public use of the private road with the 7.5' easements: use of the road by the public is not legal without permission of the property owners along the easement right of way. Residents and their guests have the right to use the road but not the paying public (bed and breakfast, bird watchers and photographers are the paying public)
  - b. The county cannot grant permission to anyone to use the private land with specific ingress and regress rights attached to the properties along the road. That would amount to a "taking" on the county's part and they must pay compensation and go through an eminent domain action to do such.
  - c. Given that the county is aware of the issues regarding the private ingress and egress rights of the private property owners along the route to the Ballator birding area (as stated in my letters and at the hearing), owners could initiate litigation against the county for their wrongful entice arising from the granting of the permit in full knowledge that paid visitors would have to enter along the private road.
- II. The decision to grant the permit was made without the county sheriff's office or the Palominaš Fire District's input which Senior Planner Keith Dennis had requested. The planning and zoning commissioners commented on the fire hazards in this region and the possibilities of traffic congestion on a very narrow 15' wide road during a disaster, yet they approved the permit without seeing the property in question and without the vital input from the fire department and sheriff's office. A lack of submittal on the part of these two

agencies does not constitute approval and if this type of input is deemed important then it should be resolved before issuing a permit. I have contacted Chief James Leiendecker and asked that he review the safety issues surround the Ballator site and he expects to visit the property during the week of February 21, 2011. Per my discussion with Chief Leiendecker I found out that he may well have been on administrative leave when the planning and zoning request came into his office. Note too that prior to the commissioners meeting I was told by Keith Dennis that this review would be requested by their office but I did not learn until the meeting that the reviews were never made.

- III. To quote from the Herald Review "It was puzzling to the commissioners that after nine years, the neighbors would complain." This was probably in reference to the fact that the bed and breakfast at the Ballator property became operational in 2003 with the approval of the Planning and Zoning Commission and at the same time Ms. Ballator had started opening up her yard for birders and photographers (though this activity was not legally approved). The planning and zoning commissioners were probably aware of the fact that in 1992 the Ballator property and the two adjoining properties to the south of Spring Road also were purchased: The Blair Peterson property across the private road to her southeast and my property to the south. The assumption is flawed that I had been a neighbor for 9 years and had not complained. While my vacant property was purchased in 1992 I was employed full time at Creighton University in Omaha and at most I visited the area for only 3 to 4 weeks per year and I stayed in a hotel during these visits. These visits never occurred during the peak birding periods as I came primarily in mid July for a week, mid October (fall break) and early March (spring break). Eventually I was able to have my home built during the period October 2008 to June 2009 and I flew down once a month for 3-5 days for the building inspections. I then prepared my home in Nebraska for sale, the movers came in March 2010 and I drove here in mid May 2010. Once I arrived it did not take long to realize the problems with both road and parking traffic, as well as, the dust and soil erosion on the private road associated with the birding operations. That was from intense observation over a 6 month period and not 9 years.

But how can a resident home owner protest issues associated with a business that is not a legally an approved business? As for the Blair Peterson property (held in a trust) adjacent to mine, it should be noted that this older couple from South Dakota were only residents starting in 1992 from

November to March. This is outside the peak birding season when the traffic is bad. And due to illness their last extended winter stay was in 2007. They obviously were not in a position to comment on traffic conditions during peak birding periods or conditions in the area during the past three years (though their three children did visit periodically to look after the house). The fact that the Peterson's revoked the right of Ms. Ballator to allow her visitors to park on their property speaks for itself and this action is addressed in a letter to the commission from them. The third and final residence that is affected by the traffic on Spring Road is the Robert Wick residence. Once Ms. Ballator (formerly Ms. Cox) opened her yard to public bird watching in the 1990s, the Wick's soon felt the need to pave their portion of the private road due to the increased dust, soil erosion and traffic on the road. As this road is a fairly blind passage way, they had speed bumps placed in the road to slow the traffic which was a potential threat to their children and grandchildren.

Another unanswered question in the meeting was regarding the issuance of the bed and breakfast permit for Ms. Ballator's operation. I had asked in a phone call to Mr. Dennis how the commission received feedback from neighbors in that case from 2003. He said there probably was not paper work available to explain the process at that time, but I then said that I had never been asked to comment on the application. In talking with neighbors (the Schoenes, the Wicks, Ms. David Guy and the Petersons) they too were not asked or given the opportunity to provide comment on the bed and breakfast permit. So the perception at the meeting that there had not been any complaint to the bed and breakfast permit is not correct given the recollections of these neighbors and me.

**3. Written presentation of additional testimony & evidence. A full explanation of the additional testimony & evidence that will be submitted with explanation of why this was not presented to the Planning Commission.**

During the course of the commission's deliberation there was considerable discussion of the need to maintain the public birding at this small residential site despite the availability of more than a million acres of public land in Cochise County area (1,780,000 acres Coronado National Forest, 4,750 acres Coronado National Memorial and 56,000 acres San Pedro Riparian Conservation Area). Why has the commission decided to interrupt a residential area when natural areas paid by tax payers are in abundance in Cochise County? This action totally goes against why home owners in this area have bought their secluded acreage: the desire to live a private life away from business enterprises.

As a long time chair of the Environmental and Atmospheric Sciences department at Creighton University (1982-2007) I have a strong academic background regarding environmental issues and my area of study has always been the Southwest and northern Mexico. This area is a treasure of biological diversity and hence the strong ecotourism in this region. Thus, it seems a natural to support any attempt to increase this tourism per adding new natural viewing areas across Cochise County. But as stated above, with close to 2 Million acres of Public Land dedicated to use by the public, why infringe on residential areas.

But more importantly the discussion during the planning and zoning commission meeting never mentioned a possible down side to massive feeding of birds in a small restricted area. All the questions directed to me were about individual birds that might be affected by visitor numbers. But, are the commissioners aware of the fact that both Coronado National Memorial and Coronado National Forest have laws against feeding any animal, including birds, and even Ramsey Canyon Preserve has drastically cut down on the number of hummingbird feeders that they maintain? If you visited these areas in the 1980s you would have seen large feeding areas at visitor centers, but not now. This is an excerpt from one National Park Service home page:

**Protect Our Wildlife:** Help keep wildlife wild. Feeding wild animals within the Monument is prohibited. Ground squirrels, chipmunks, gray jays, and other wildlife lose their ability to forage when fed human foods, and become addicted to junk food like drug addicts. These animals often become a nuisance, and are usually very unhealthy (obese). In addition, many wildlife species will bite the hand that feeds them, and are known carriers of serious diseases.

With a less than two dozen hummingbird feeders, the Ballator property has 34 times more feeders than at Ramsey Canyon. Ramsey Canyon does not lack birds, but rather they are following better conservation practices. Yes, the intense feeding sure gets the job done in bringing in swarms of birds and birders, but this also preconditions the birds to rely on human provided sugar water rather than flower nectar and insects. What is the effect on the hummingbirds when they fly into Mexico where hummingbird feeders are virtually nonexistent? Is this part of the reason hummingbird numbers have been going down (in addition to deforestation and pesticide use)? The same can be said of the large feeding operations at the Ballator residence for suet and seed eating birds. This feeding brings in large numbers of birds into a small feeding area and this increases the chance for large outbreaks of bird viruses and pneumonias. The county is setting precedence when issuing a Special Use Permit for a natural area if they do not have guidelines setup which is consistent with the state and federal guidelines already in operation. This application is moving the bird feeding operation away from a simple home owner's set of preferences into the public domain of wild life protection which should involve Cochise County public policy.

The zoo-like atmosphere at the Ballator residence most certainly produces the bird numbers for the birding tours which makes the agents happy, but in the long run what is the possible effect on these birds? Minor backyard feeding is probably not a problem (and I confess to this practice) as small feeding efforts normally do not produce large concentrations of birds in a confined spot for days or weeks on end. By approving this large feeding operation at the Ballator's yard, the commission is basically rejecting the guidelines of the Fish and Wildlife Service, National Forest Service and National Park Service. Before the hearing on this special permit, the commission may want to contact these organizations which have had years of experience in wild life management.

## **CONCLUSION**

This is not just an appeal by me against the planning and zoning commission ruling on granting Mary Jo Ballator a Special Use Permit, but rather, this is a neighborhood concern that has bought about a unity of many home owners within 1,500 feet of the Ballator property. The following home owners have read this document and agree that the Special Permit should not be granted to Mary Jo Ballator for the reasons presented above.

Service, National Forest Service and National Park Service. Before the hearing on this special permit, the commission may want to contact these organizations which have had years of experience in wild life management.

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Catherine Peterson 755W Via De Arboles Queen Creek AZ  
85140

Printed

Cathie Peterson \_\_\_\_\_

Signed

ALAN PETERSON 755 W Via De Arboles Queen Creek AZ  
02.21.11 85140

Printed

Alan Peterson \_\_\_\_\_  
Signed

Daryl E. Peterson – Representative of the Peterson Trust, Parcel 104-21-025

Printed

Daryl E Peterson 2-20-2011

Signed

Jackie Peterson – Representative of the Peterson Trust, Parcel 104-21-025

Printed

Jackie Peterson 2-20-2011

Signed

SHIREEN TRUITT 9187 TURKEY TRACK  
HEREFORD, AZ 85615

Printed

Shireen Trutt 378-4029

Signed

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Printed

Howard Bodenhamer Robert J. Wick

Printed

*Howard Bodenhamer Robert J. Wick*

Signed

Cleo M. Bodenhamer Estelle Wick

Printed

Cleo Bodenhamer Estelle Wick

Signed *Jan Guy JAN GUY*

*Adelle R Moore Larry J. Kastens*

Printed ~~JAN GUY~~

Adelle R MOORE Larry J. Kastens

Signed

*Michael E Moore P.O.A. Carolyn D. Kastens*

Printed

MICHAEL E. MOORE Carolyn D. Kastens

Laura F. Schoen Donald L. Schoen \_\_\_\_\_

Printed

Laura F. Schoen Donald L. Schoen \_\_\_\_\_

Signed

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WATTHAN Yarbrough

WATTHAN Yarbrough 5335 Brushy Oak Ln. Hereford

Printed

Gayland Yarbrough Brushy Oak Lane, Hereford, Az.

Gayland Yarbrough 5382/5300

Signed

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Daryl E. Peterson – Representative of the Peterson Trust, Parcel 104-21-025

Printed

Daryl E Peterson 2-20-2011

Signed

Jackie Peterson – Representative of the Peterson Trust, Parcel 104-21-025

Printed

Jackie Peterson 2-20-2011

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85140

Printed

Cathie Peterson \_\_\_\_\_

Signed

ALAN PETERSON 755 W Via De Arboles Queen Creek AZ  
85140

Printed

Alan Peterson \_\_\_\_\_

Signed

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Printed

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Signed

Diane E. Aspengren - Representative of the Peterson Trust,  
2-21-11 Parcel 104-21-025  
Printed

Diane E. Aspengren - Representative of the Peterson Trust,  
2-21-11 Parcel 104-21-025  
Signed

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Signed

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Printed

<b>Signed Signature Names</b>	<b>Parcel (s)</b>
Howard and Cleo Bodenhamer	104-21-016
Jan Guy 104-20-002, 104-20-008, 104-20-012, and 104-20-017A	104-20-013
Michael and Adelle Moore	104-24-009
Robert and Estellean Wick	104-21-019
Larry and Carolyn Kastens	104-21-017 and 104-21-018
Donald and Laura Schoen	104-21-002A
Nathan Yarbrough	104-21-006 and 104-21-013B
Gayland Yarbrough	104-21-014E
Daryl and Jackie Peterson	104-21-025
Greg and Catherine Peterson	^^
Shireen Truitt	104-21-026

**Scanned and Emailed signature:**

Diane Apergren	104-21-025
Petitioner Art Douglas	104-21-020

TOTAL ASSESSED VALUES OF ALL PARCELS PROTESTING: \$3,539,336