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April 1, 2011

## **VIA E-MAIL AND U.S. MAIL**

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Re: Special Use Permit SU-11-01 (Mary Jo Ballator, dba Ash Canyon B&B)  
Cochise County Parcel No. 104-21-022

Honorable Chairman and Supervisors:

This firm has been retained by Mary Jo Ballator to provide a legal opinion in relation to the appeal by Arthur Douglas and others (collectively "Douglas") of the Cochise County Planning and Zoning Commission's ("CPZC") approval of Special Use Permit SU-11-01 (Ballator). On February 9, 2011, pursuant to Cochise County Zoning Regulation 607.31, the CPZC granted by a unanimous vote Ms. Ballator's request for a special use permit. The conditional permit expressly authorized Ms. Ballator to use her property (Parcel No. 104-21-022) to cater to bird watchers and other nature enthusiasts, some of whom are guests of Ms. Ballator's one-room bed and breakfast (Ash Canyon B&B), and most of whom are members of the general public.

The exclusive access to Ms. Ballator's property is via Spring Road, a private road with an easement expressly designated for ingress and egress to her property and other similarly situated properties. As explained herein, Ms. Ballator's use of the easement appurtenant to her property

for the purpose of granting bird watchers limited ingress and egress rights is not only appropriate and permissible under Arizona law, it is encouraged by Arizona's public policy that all land be put to socially productive use.

Among other reasons, it appears that Douglas objects to Ms. Ballator's special use permit because he believes that her guests are not entitled to use the easement that provides access to her property. Specifically, Douglas argues that Ms. Ballator must first obtain his consent and that of the abutting neighbors before her guests may use her property in the manner authorized by the special use permit. In other words, even though there is no claim of trespass upon his property, and even though there is no claim that Ms. Ballator or her guests might infringe on his own use of the easement, Douglas argues that Ms. Ballator requires his permission in order to use her property in a manner that is lawful and serves a useful social purpose. Arizona law does not support Douglas' argument.

Douglas further objects to the special use permit because he claims that Cochise County's approval thereof might constitute a taking. Douglas alleges that Cochise County has no right to "grant permission to anyone to use... private land," despite the fact that the County's issuance of a special use permit does not in any way restrict Douglas' rights in relation to the subject easement. Rather, the special use permit affects only the character of Ms. Ballator's property. It neither expands nor restricts anyone's rights or privileges in relation to the easement. Again, Douglas' overly restrictive argument finds no support under Arizona law.

### Legal Analysis

I. Ms. Ballator and her guests may use the easement so long as their use does not interfere with the ingress and egress rights of dominant estates.

Ms. Ballator's property is zoned rural (RU-4) and is dominant to a servient estate created by the express conveyance of an easement. The servient estate consists of a fifteen-foot private easement (roadway) for ingress and egress to Ms. Ballator's property. Each of the properties that benefit from the easement are separate dominant estates. Douglas objects to Ms. Ballator's and her guests' use of the easement because he claims that their use "is not legal without permission of the property owners along the easement right of way." Douglas' assertion is flatly incorrect.

Arizona law unambiguously provides that "the holder of an easement... is entitled to use the servient estate in a manner that is reasonably necessary for the convenient enjoyment of the servitude. The manner, frequency, and intensity of the use may change over time... to accommodate normal development of the dominant estate or enterprise benefited by the servitude." RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 4.10 (2000); see also Powell v. Washburn, 211 Ariz. 553, 557, 125 P.3d 373, 377 (2006) (adopting and applying the Restatement). As such, Ms. Ballator is entitled to use the easement in a manner that is reasonably necessary and that accommodates the normal development of her property. Here, such development entails providing peaceful, non-exploitative wildlife watching experiences for her guests.

Furthermore, it is clear that Ms. Ballator and her guests are using the easement in a reasonable manner. In Paxson v. Glovitz, 203 Ariz. 63, 70, 50 P.3d 420, 427 (Ct. App. 2002), the Arizona Court of Appeals addressed a complaint, much like Douglas' here, that a dominant estate was using an easement for improper purposes. The Court of Appeals rejected the complaining property owner's protestations because he failed to prove that his neighbor was causing "unreasonable damage or interfering unreasonably with the enjoyment of his property, nor is there any evidence that [the neighbor] was using her property in an unlawful manner." Id. For similar reasons, Douglas' claims in relation to Ms. Ballator's property are insufficient to sustain his appeal of her special use permit.

Here, as in Paxson, Douglas fails to present any evidence to suggest that Ms. Ballator is using the easement unreasonably. See id. Ms. Ballator and her guests are using the easement for ingress and egress to a dominant estate. This is precisely the stated purpose of the easement articulated in the conveying document. Ms. Ballator and her guests use regular passenger vehicles (an average of 2-3 per day) to reach her property, never park on or block the roadway, and do not travel onto Douglas' or any other person's property. As such, they do not unreasonably use the easement, do not interfere with Douglas' right to ingress and egress, do not use the easement for unlawful purposes, and, importantly, do not interfere with Douglas' enjoyment of his property. See id. Accordingly, Ms. Ballator has the right to grant her guests access to her property via the easement in accordance with the use authorized by the special use permit. See id. Absent proof of unreasonable damage or interference caused to Douglas' property by Ms. Ballator and/or her guests, Douglas simply has no right to interfere with Ms. Ballator's reasonable use of her property and the easement providing access thereto. See id.

Moreover, not only is Ms. Ballator's use of the easement reasonable, any change in the manner, frequency, and intensity of use of the easement is acceptable so long as it is appropriate to accommodate the normal development of her property. RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 4.10 (2000). Ms. Ballator is using her property in a manner that is wholly consistent with its normal development. See id. Her property is zoned RU-4. In Cochise County, RU zoning districts were established to achieve several purposes including, but not limited to, "encourag[ing] those types of non-residential... activities which... provide a service and are compatible with rural living;" and "to provide recreational support services that are compatible with rural living." Cochise County Zoning Regulations 601.02 and 601.05; see also, 607.31. Because Ms. Ballator is using her property to provide a recreational service that is plainly compatible with rural living, she is using her property in a manner consistent with its normal development. See id. Accordingly, Ms. Ballator is entitled to change the manner, frequency, and intensity of her use of the easement.

To be sure, by offering extraordinary bird and wildlife viewing opportunities Ms. Ballator attracts persons to her property who would not visit in its absence. In other words, the frequency and intensity of use of the easement certainly have increased as a result of her dedicated stewardship of native species and habitats on her property. Over the course of a typical year, Ms. Ballator welcomes onto her property, on average, 2-3 vehicles per day. This figure is, of course, higher during peak bird watching season, but goes down to zero for a significant portion of the

year. The modest increase in the frequency and intensity of the easement's use is both reasonable and in accordance with the character and normal development of Ms. Ballator's property. See RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 4.10 (2000). There is no evidence of any activity on Ms. Ballator's that might warrant an alternative conclusion.

An analogous case to Ms. Ballator's is Logan v. Brodrick, 631 P.2d 429, 430-32 (Wash. Ct. App. 1981), where the owner of a private roadway complained that the easement holders were overburdening the easement by welcoming, on certain weekends, over 80 cars onto the dominant estate through the easement. The Court held, "the law assumes parties to an easement contemplated a normal development under conditions which may be different from those existing at the time of the grant... Normal changes in the manner of use and resulting needs will not, without adequate showing, constitute an unreasonable deviation from the original grant of the easement." Here, Ms. Ballator is using her property in a manner consistent with its normal development. Further, even during peak bird watching season, Ms. Ballator typically welcomes no more than 30 vehicles onto her property on any given day. On most days, there are far fewer.

Since the 80 vehicles at issue in Logan were found to constitute a reasonable use of the easement, surely the 30 vehicles that might visit Ms. Ballator's property on an unusually busy day would similarly be deemed reasonable. See id. Douglas does not, and cannot, present any evidence that Ms. Ballator's use of her property is inconsistent with the purposes that are contemplated, and even encouraged, by her RU-4 zoning. Similarly, Douglas does not, and cannot, present any evidence that her use of her property is not in accordance with the normal development thereof. As such, because it is reasonable and in accordance with normal rural development, and because it does not unreasonably damage or interfere with Douglas' use of his property or the easement, Ms. Ballator's use of the easement for the benefit of her and her guests is both legal and appropriate. See id.

## II. Public policy supports the issuance of a special use permit to Ms. Ballator.

Arizona public policy supports Ms. Ballator's contemplated use of her property, her and her guests' use of the easement, and the approval of her special use permit. See Hunt v. Richardson, 216 Ariz. 114, 121, 163 P.3d 1064, 1071 (Ct. App. 2007) ("In resolving conflicts among the parties to servitudes, the public policy favoring socially productive use of land generally leads to striking a balance that maximizes... aggregate utility...") (internal citation omitted).

By opening her property to visitors who admire Southern Arizona's unique landscape, Ms. Ballator is using her property in a socially productive manner. Not only is Ms. Ballator generating significant income and tax revenue for Cochise County (the scope of which is more thoroughly described and quantified in some of the hundreds of letters provided by Ms. Ballator's supporters), she is also contributing to the awareness and appreciation of wildlife and nature. Ms. Ballator is doing so without interfering with anyone else's property rights or right to ingress and egress via the easement. Given that Ms. Ballator's intended use of her property in accordance with the conditional special use permit provides an impressive range of positive impacts, counterbalanced by no measurable detriments, the Board of Supervisors should uphold

CPZC's decision and encourage Ms. Ballator's continued operation of her bird watching operation. See id.

II. Cochise County's issuance of a special use permit to Ms. Ballator is not a taking.

Douglas' claim that the issuance of a special use permit by Cochise County might constitute a taking of his property is wholly without merit. Douglas does not even own the property that Ms. Ballator and her guests are using to access her property. Furthermore, neither Ms. Ballator nor her guests ever travel onto Douglas' property or the portion of the easement that is adjacent to his property. Ms. Ballator's parking area is east of Douglas' property, such that no vehicles proceed west past Ms. Ballator's property to the area where Douglas' property is located.

Finally, the owners of record of the servient estate are Harold and Florence Fanning and Henry T. Iida. Accordingly, Douglas has no standing to assert a taking claim, even notwithstanding the other shortcomings of any prospective claim he might make in relation to Ms. Ballator's operations as a wildlife viewing site. See Ripptoe v. O'Dell, 276 S.E.2d 793, 796-97 (W. Va. 1981) (only the present owner of the roadway [servient estate] has standing to raise an objection to the alleged violation of the terms of an easement). Because neither Ms. Ballator nor her guests are using or damaging Douglas' property, and because they are not interfering with Douglas' ingress and egress rights, Douglas' property interests have suffered no harm, and will suffer no harm, as a result of Ms. Ballator's use of her property in accordance with the special use permit. See Hunt, 216 Ariz. at 121, 163 P.3d at 1071 (estate holders are "entitled to make any use of the servient estate that does not unreasonably interfere with enjoyment of the servitude."); Ripptoe, 276 S.E.2d at 796-97.

**Conclusion**

Ms. Ballator is using her property in a reasonable manner that is in accordance with the normal development of her property. Douglas' arguments to the contrary are incorrect, and unsupported by Arizona law. Not only is her use of her property lawful, Ms. Ballator is providing a valuable service that attracts thousands of visitors to Cochise County every year. These visitors, in turn, spend a significant amount of money in Cochise County, thus generating substantial revenue and creating hundreds of jobs. These considerations, especially when balanced against Douglas' baseless claims, strongly support the CPZC decision to grant Ballator a special use permit. The Cochise County Board of Supervisors should uphold the CPZC's issuance of a special use permit to Ms. Ballator, because the CPZC decision was not erroneous, arbitrary, capricious, or an abuse of discretion. To the contrary, CPZC acted appropriately and responsibly in issuing the special use permit to Ms. Ballator.

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Should you have any questions or concerns, please do not hesitate to contact me.

Sincerely,

FARHANG & MEDCOFF, P.L.L.C.

*s/ Mich Coker*

Mich Coker

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Mary Jo Ballator (via email)