

Rec'd 5-19-2021 2:18pm
Process Server by A. Langer

1 Paul A. Conant, 012667
Melissa A. Emmel, 023195
2 **CONANT LAW FIRM, PLC**
2398 East Camelback Road, Suite 925
3 Phoenix, Arizona 85016-9002
Telephone: 602.508.9010
4 Facsimile: 602.508.9015
5 Email: docket@conantlawfirm.com
Attorneys for Statutory Special Action Appellants

6
7 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
8 **IN AND FOR THE COUNTY OF COCHISE**

CV202100270

9 WILLCOX OC, LLC, an Arizona limited
liability company; KIM A. BENNETT, an
10 individual, as owner of the subject property;

11 **Plaintiffs/Special Action Appellants,**

12 vs.

13 **COCHISE COUNTY BOARD OF**
SUPERVISORS, a public entity; TOM
14 **CROSBY, in his official capacity as member**
of the Cochise County Board of Supervisors;
15 **PEGGY JUDD, in her official capacity as**
member of the Cochise County Board of
Supervisors;

16 **Defendants/Special Action Appellees,**

17 and

18 **APPLE ANNIE'S ORCHARD, INC. dba**
APPLE ANNIE'S FARM AND PRODUCE,
an Arizona corporation,
19 **Real Party in Interest/Defendant/**
20 **Special Action Appellee.**

Case No. _____

SUMMONS

(Tier 2)

21 **THE STATE OF ARIZONA TO:**

22
23 **Peggy Judd**
Cochise County Board of Supervisors
24 1415 Melody Lane, Building G
25 Bisbee, Arizona 85603

26
RECEIVED
COCHISE COUNTY
BOARD OF SUPERVISORS
MAY 19 2 18 PM '21

1 YOU ARE HEREBY SUMMONED and required to appear and defend, within the time
2 applicable in this action in this Court. If served within Arizona, you shall appear and defend
3 within 20 days after the service of the Summons and Amended Complaint upon you, exclusive
4 of the date of service. If served out of the State of Arizona -- whether by direct service, by
5 registered or certified mail, or by publication -- you shall appear and defend within 30 days after
6 the service of the Summons and Amended Complaint upon you is complete, exclusive of the
7 date of service. Where process is served upon the Arizona Director of Insurance as an insurer's
8 attorney to receive service of legal process against it in this state, the insurer shall not be required
9 to appear, answer or plead until expiration of 40 days after date of such service upon the Director.
10 Service by registered or certified mail without the State of Arizona is complete 30 days after the
11 date of filing the receipt and affidavit of service with the Court. Service by publication is
12 complete 30 days after the date of first publication. Direct service is complete when made.
13 Service upon the Arizona Motor Vehicle Superintendent is complete 30 days after filing the
14 Affidavit of Compliance and return receipt or Officer's Return. RCP 4; ARS §§ 20-222, 28-502,
15 28-503.

16 YOU ARE HEREBY NOTIFIED that in case of your failure to appear and defend within
17 the time applicable, judgment by default may be rendered against you for the relief demanded in
18 the Amended Complaint.


19 YOU ARE CAUTIONED that in order to appear and defend, you must file an Answer
20 or proper response in writing with the Clerk of this Court, accompanied by the necessary filing
21 fee, within the time required, and you are required to serve a copy of any Answer or response
22 upon the Plaintiff's attorney. RCP 10(d); ARS § 12-311; RCP 5.

23 Requests for reasonable accommodation for persons with disabilities must be made to the
24 division assigned to the case by parties at least ten (10) judicial days in advance of a scheduled
25 Court proceeding.

26 Requests for an interpreter for persons with limited English proficiency must be made to
the office of the judge or commissioner assigned to the case at least ten (10) judicial days in
advance of hour scheduled Court proceeding.

SIGNED AND SEALED this date: May 18, 2021

CLERK
By [Signature]
Deputy Clerk



FILED

2021 MAY 18 PM 5:13

CLERK OF SUPERIOR COURT

1 Paul A. Conant, 012667
2 Melissa A. Emmel, 023195
3 **CONANT LAW FIRM, PLC**
4 2398 East Camelback Road, Suite 925
5 Phoenix, Arizona 85016-9002
6 Telephone: 602.508.9010
7 Facsimile: 602.508.9015
8 Email: docket@conantlawfirm.com
9 *Attorneys for Statutory Special Action Appellants*

10 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
11 **IN AND FOR THE COUNTY OF COCHISE**

CV202100270

12 WILLCOX OC, LLC, an Arizona limited
13 liability company; KIM A. BENNETT, an
14 individual, as owner of the subject property;
15 **Plaintiffs/Special Action Appellants,**

Case No. _____

**COMPULSORY ARBITRATION
CERTIFICATE**

16 vs.

(Tier 2)

17 **COCHISE COUNTY BOARD OF**
18 **SUPERVISORS, a public entity; TOM**
19 **CROSBY, in his official capacity as member**
20 **of the Cochise County Board of Supervisors;**
21 **PEGGY JUDD, in her official capacity as**
22 **member of the Cochise County Board of**
23 **Supervisors;**

(Statutory Special Action)

24 **Defendants/Special Action Appellees,**

25 and

26 **APPLE ANNIE'S ORCHARD, INC. dba**
APPLE ANNIE'S FARM AND PRODUCE,
an Arizona corporation,
**Real Party in Interest/Defendant/
Special Action Appellee.**

Plaintiff certifies that this matter *is not* subject to court-annexed compulsory arbitration pursuant to the Uniform Rules of Procedure for Arbitration, as it seeks nonmonetary relief.

///

2021 MAY 19 PM 2:22

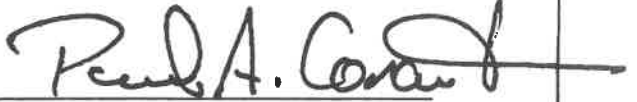
///

RECEIVED
COCHISE COUNTY
BOARD OF SUPERVISORS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

RESPECTFULLY SUBMITTED this 18th day of May, 2021.


CONANT LAW FIRM, PLC

By: 

Paul A. Conant
Melissa A. Emmel
2398 East Camelback Road, Suite 925
Phoenix, Arizona 85016
Attorneys for Special Action Appellants

ORIGINAL filed this 18th day of May, 2021 with:

The Clerk of the Court
COCHISE COUNTY SUPERIOR COURT

By: 
Paul A. Conant

FILED

2021 MAY 13 PM 5:14

COURT

1 Paul A. Conant, 012667
 2 Melissa A. Emmel, 023195
 3 **CONANT LAW FIRM, PLC**
 2398 East Camelback Road, Suite 925
 4 Phoenix, Arizona 85016-9002
 Telephone: 602.508.9010
 5 Facsimile: 602.508.9015
 Email: docket@conantlawfirm.com
Attorneys for Statutory Special Action Appellants

6 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
 7 **IN AND FOR THE COUNTY OF COCHISE**

8 WILLCOX OC, LLC, an Arizona limited
 9 liability company; KIM A. BENNETT, an
 10 individual, as owner of the subject property;
 11 Plaintiffs/Special Action Appellants,

vs.

12 COCHISE COUNTY BOARD OF
 SUPERVISORS, a public entity; TOM
 13 CROSBY, in his official capacity as member
 of the Cochise County Board of Supervisors;
 14 PEGGY JUDD, in her official capacity as
 member of the Cochise County Board of
 15 Supervisors;

Defendants/Special Action Appellees,

and

17 APPLE ANNIE'S ORCHARD, INC. dba
 18 APPLE ANNIE'S FARM AND PRODUCE,
 an Arizona corporation,
 19 Real Party in Interest/Defendant/
 20 Special Action Appellee.

Case No. **CV202100270**

**VERIFIED COMPLAINT AND
 PETITION FOR STATUTORY
 SPECIAL ACTION RELIEF
 PURSUANT TO ARS 9-462.06(K)**

(Tier 2)

Summary of the Case

21
 22
 23 Unfortunately, members of the Cochise County Board of Supervisors abused the
 24 narrow legal powers afforded to that body in a quasi-judicial setting to, on an *ex post facto*
 25 basis, attempt to create an arbitrary "rule" contrary to existing County law by overturning the

RECEIVED
 COCHISE COUNTY
 BOARD OF SUPERVISORS

1 applicant's Special Use Authorization ("SUA") approval for a marijuana cultivation facility
2 in accordance with that law to operate an outdoor cultivation facility. The applicant had fully
3 complied with all existing law and regulations existing, obtained Staff support for its
4 application, and obtained Planning and Zoning Commission approval of its application. If the
5 Cochise County Board of Supervisors wanted to make new zoning laws in Cochise County
6 concerning the state-legal cannabis industry, it could pursue such an initiative through a
7 proper lawmaking process in the future, but it was not proper for it to attempt to do so
8 retroactively by granting an unfounded appeal of the properly-approved SUA application of
9 this applicant. Because members of the Cochise County Board of Supervisors acted
10 arbitrarily, capriciously, erroneously and contrary to law in granting an appeal of the SUA
11 approval the applicant obtained (with conditions), the Court must invalidate those unlawful
12 actions, and order that the applicant's SUA application be deemed immediately approved,
13 with the stipulated conditions, as of the date of the unlawful denial, and issue any other relief
14 proper in the circumstances in favor of the applicant.

15 This Petition for Statutory Special Action invokes the Superior Court's appellate
16 jurisdiction to overturn the unlawful actions of members of the Cochise County Board of
17 Supervisors and, in this action, the Plaintiffs/Special Action Appellants seek from the Court
18 a briefing schedule to address and resolve this matter on an expeditious basis.

19 Accordingly, Plaintiffs and Statutory Special Action Appellants Willcox OC, LLC and
20 Mr. Kim Bennett, by and through undersigned counsel, for their Verified Complaint and
21 Petition for Special Action Relief state and allege as follows:

22 **I. PARTIES, JURISDICTION, AND VENUE**

23 1. Plaintiff/appellant Willcox OC, LLC ("Willcox") is an Arizona limited liability
24 company, which applied for and was granted Special Use Authorization by the Cochise
25 County Planning, Zoning, and Building Safety Commission, to operate an outdoor cultivation

1 facility for state-legal marijuana growing consistent with Cochise County Zoning
2 Regulations. It is that Special Use Authorization that was appealed and reversed by the
3 Cochise County Board of Supervisors as SU-21-02, which is the subject of this Complaint
4 and Special Action Petition. It is aggrieved by the decision of the Board and has standing to
5 bring this action.

6 2. Plaintiff/appellant Kim Bennett is the owner of the subject property which is
7 the subject of the application by applicant and Plaintiff/appellant Willcox and joins in this
8 Complaint and Special Action Petition. Mr. Bennett is a taxpayer in Cochise County, Arizona
9 and is aggrieved or affected by the decision of the Board and has standing to join in this action.

10 3. Defendant/appellee Cochise County Board of Supervisors is a municipal body
11 which assists in the administration of the special use authorization and permit application
12 process, including conducting hearings and deciding special use cases.

13 4. Defendant/appellee Tom Crosby is a member of the Cochise County Board of
14 Supervisors for District 1, and in his official capacity, was involved in the decision on appeal
15 reversing the special use authorization that is the subject of this Complaint.

16 5. Defendant/appellee Peggy Judd is a member of the Cochise County Board of
17 Supervisors for District 3, and in her official capacity, was involved in the decision on appeal
18 reversing the special use authorization that is the subject of this Complaint.

19 6. Real party in interest/defendant/appellee Apple Annie's opposed thereafter
20 appealed the grant of special use authorization to Willcox CO, LLC to the Cochise County
21 Board of Supervisors, which is the subject of this Complaint.

22 7. This Court has jurisdiction over this action under A.R.S. § 9-462.06(K), § 12-
23 123, 12-2021, the Arizona Constitution, Article VI, §§ 14, VI, § 18 (“[t]he superior court or
24 any judge thereof may issue writs of mandamus, quo warranto, review, certiorari, [or]

1 prohibition....”), and Rules 1(b), 3(c) and 4(a), Arizona Rules of Procedure for Special
2 Action.

3 8. A.R.S. § 9-462.06(K) states that “[a] person aggrieved by a decision of the
4 legislative body or board [of supervisors]...at any time within thirty days after the board, or
5 the legislative body, if the board decision was appealed pursuant to subsection J of this
6 section, has rendered its decision, may file a complaint for special action in the superior court
7 to review the legislative body or board decision.”

8 9. Defendants have caused events to occur in Cochise County, Arizona out of
9 which Plaintiffs’ claims arise.

10 10. Venue is proper in this Court under A.R.S. § 12-401.

11 **II. FACTS IN THE RECORD, BELOW.**

12 11. As the Court is sitting in this matter as an appellate court, the record in the case
13 is constrained to the record, below, and the following facts are therefore drawn from within
14 the record, below, as reflected in the submissions referenced herein and the transcripts of the
15 public hearings referenced herein, and provided to the Court contemporaneously herewith.
16 All references to language in quotation marks herein are taken from the record below, whether
17 staff reports, appeal submissions, or hearing transcripts.

18 12. The Cochise County Board of Supervisors consists of three persons, Tom
19 Crosby, Peggy Judd, and non-party and Chair of the Board, Ann English (District 2).

20 **A. The Planning and Zoning Commission Correctly Approved the**
21 **Application Through its Public Process.**

22 13. On January 29, 2021, through its legal counsel and its authorized agent for the
23 company, Hannah Blead, Willcox applied for a Special Use Authorization for a Marijuana
24 Cultivation and Infusion Facility proposed at 9910 North Fort Grant Road, near Willcox in
25 Cochise County, Arizona (the “Property”).

1 (6) of the factors. It partially complied with one (1) factor, it complied with conditions as to
2 two (2) factors, and it did not comply with one (1) factor.

3 21. Planning and Zoning Staff recommended imposition of certain conditions to
4 bring Willcox into compliance with all ten factors, to which Willcox agreed.

5 22. The only factor at issue in this Special Action is off-site impact in the form of
6 aroma to neighboring properties.

7 23. With regard to that off-site impact factor, Planning and Zoning Staff
8 recommended in their Staff Report that the Planning and Zoning Commission adopt two
9 conditions for compliance with the Special Use Authorization, as proposed by Willcox,
10 intended to proactively mitigate aroma, comprised of the following:

11 a. All indoor facilities to be equipped with current technology aroma control
12 filtrations systems, with no operable windows or exhaust vents on the side that
13 abuts a residential zone and with any box vents directing exhaust away from the
14 residential areas, with proper maintenance and subject to best practices; and,

15 b. All outdoor grow areas to be equipped with current technology aroma control
16 devices around the perimeter, to neutralize the cannabis aromas, with proper
17 maintenance and subject to best practices.

18 24. The Planning and Zoning Staff Report recommended approval of the Special
19 Use Authorization to Willcox with conditions.

20 25. Following the Staff Report and Staff recommendations based thereon, the
21 Planning and Zoning Commission opened the matter up for public comments at a scheduled
22 March 10, 2021 regular meeting of the Cochise County Planning Commission, at which time
23 Apple Annie's expressed concern over cannabis aromas.

24 26. An Apple Annie's representative addressed the Planning and Zoning
25 Commission on March 10, 2021 at its regular meeting, stating:

- 1 a. Apple Annie's has been in business 35 years and is open to visitors;
- 2 b. Apple Annie's is familiar with cannabis production because of the business of
- 3 its neighbor "across the road" called The Pharm, another cannabis cultivation
- 4 company;
- 5 c. During last year's four month season, 150,000 people visited the Apple Annie's
- 6 farm;
- 7 d. Apple Annie's claimed that customers allegedly experienced headaches from
- 8 the smell of cannabis coming from The Pharm, its existing cannabis company
- 9 neighbor;
- 10 e. Apple Annie's stated: "We think that, long-term, [the Willcox OC project] will
- 11 impact our business because of the smell. We sell recreation. Nobody wants to
- 12 come out and smell a truckload of dead skunks. That's the long and the short of
- 13 it."

14 27. Apple Annie's presented no evidence either before the Planning and Zoning

15 Commission Meeting on March 10, 2021, or at that meeting, in support of its allegation that

16 approving the application would have an alleged long term impact on its business; rather, its

17 evidence was instead that in 2020, approximately 150,000 customers patronized its business

18 within a four month season even though a neighbor directly across the street (The Pharm) is

19 a cannabis cultivation company which was fully operational during that same period.

20 28. Representatives of the Project then spoke to the issue of aroma concerns,

21 explaining as follows:

- 22 a. *David Sheehan*: The Project's plans include working with Fogco, an odor
- 23 mitigation company which works successfully to mitigate odors from waste
- 24 disposal centers and transfer stations "where people are actually dumping trash
- 25 right in the middle of metropolitan areas";

1 b. *David Sheehan*: “It is a very expansive odor-control system. And, like I said,
2 it’s been used in all sorts of types of businesses across many different
3 applications.”

4 c. *Adam Baugh*: “With regard to the odor mitigation, which I think seems to be to
5 be the overall largest concern, we’re doing something that nobody else has done
6 in this area.”

7 i. *Indoor*: “[W]e have redundant carbon filtration, negative air pressure,
8 and odor ionization technology. That is a technology that has been used
9 in other greenhouses...”

10 ii. *Outdoor*: Fogco for outdoor odor control applies “a state-of-the-art
11 technology that neutralizes those outdoor odors. It includes misters at the
12 property perimeter line that help stabilize and control that – capture that
13 odor....The other thing is, the trees we plant, even in a small degree or
14 way, also help neutralize some of that odor.” “[W]e’re the first that I’m
15 aware of that’s implementing this [Fogco] process here in this area.”

16 iii. *SUA Process*: “[T]his is a use that is permitted under the zoning code
17 subject to the SUP process. And that SUP process, staff has been able to
18 say: This use can operate compatibly if it can comply with these
19 conditions. So that’s why you have 12 conditions. And at the end of the
20 day, we meet the criteria of state law. We meet the criteria of the zoning
21 ordinance. We meet the criteria of the special use permit, and that criteria
22 is emphasized and highlighted by stipulations from staff regarding
23 lighting, odor control, hazardous materials, buffers and setbacks.”

24 29. Discussion among Planning and Zoning Commission members indicated that
25 the Planning and Zoning Commission discussed the aroma issue and was aware that the

1 application could be both approved, and controlled using, as Mr. Baugh had stated, the SUA
2 process:

3 a. *Ms. DePew*: “Question for staff. What can you do if you get a lot of complaints,
4 the odor is not mitigated after all is built and in production?”

5 *Ms. McLachlan*: “It’s – we’ve got the code enforcement, like any other code
6 violations, if they do violate it.”

7 b. *Mr. Baugh (to Chairman Gregan)*: “Mr. Chairman, these are conditions
8 stipulated to the case. And if not and it doesn’t comply with those conditions,
9 then the use – the special use permit can be revoked...”

10 30. Planning Staff recommended conditional approval of the special use
11 authorization, with conditions assure compliance with the SUA requirements, including odor
12 control:

13 a. *Ms. McLachlan*: “Ultimately, staff is recommending conditional approval. If
14 the commission does wish to grant approval, staff strongly recommends
15 attaching the following conditions [nine conditions specified]...The final two
16 conditions are intended to address indoor and outdoor odor mitigation. Specific
17 details of the proposed odor mitigation system and maintenance plan are
18 provided in the attached odor mitigation plan that was submitted with the
19 report.”

20 b. *Ms. McLachlan*: “And with that, I conclude my presentation. I’m available for
21 questions, and have included a simple motion on the following slide.”

22 31. The Cochise County Planning and Zoning Commission voted 5-2 to approve
23 the application, subject to the special use criteria, in favor of Willcox OC, LLC, SU-21-
24 000005 (MM Ft. Grant Rd.).

25

26

1 32. Chairman Gregan of Planning and Zoning Commission made the following
2 comment, suggesting that the Cochise County Board of Supervisors give the Planning and
3 Zoning Commission “something other” than “the criteria they gave us to begin with” for
4 marijuana cultivation facilities, which Chairman Gregan said “I think was wrong”:

5 ...I personally am going to vote yes on this. The simple reason is
6 that I would like to see, as (indiscernible) said, I would like to see
7 the people who are opposed to it take it to the Board of
8 Supervisors, express this to them, and maybe perhaps the Board
of Supervisors will do something other than give us the criteria
they gave us to begin with, which I think was wrong...

9 **B. A perceived competitor (The Pharm) and Apple Annie’s both appealed the**
10 **Planning and Zoning Commission’s approval of the application to the**
11 **Cochise County Board of Supervisors.**

12 33. Both a perceived cannabis cultivation competitor (The Pharm) and Apple
13 Annie’s thereafter appealed the Planning and Zoning Commission’s grant of SU-21-000005
14 (MM Ft. Grant Rd.) to the Cochise County Board of Supervisors, as special use appeal SUA-
15 21-02.

16 34. Apple Annie’s claimed that applicant Willcox “is deficient in the outdoor odor
17 mitigation plan”, and in an attachment to its appeal submittal, unfortunately grossly
18 mischaracterized the record at the Planning and Zoning Commission, significantly
19 misrepresenting the record there as follows: “...Applicant’s staff stated that no cannabis odor
20 would leave the property...”

21 35. As the official record of the Planning and Zoning Commission public meeting
22 on March 10, 2021 shows, there was never any statement by or on behalf of the applicant that
23 “no cannabis odor would leave the property”, and Apple Annie’s assertion that the applicant
24 made that remark is contrary to the actual record which, instead, indisputably shows:

- 25 a. The applicant spoke about odor mitigation;

- 1 b. The applicant referred to an overall odor “control” plan, using some specific
2 technologies and other mitigation efforts;
- 3 c. The overall plan was described as one that “neutralizes” outdoor odors, will
4 help to “stabilize and control” and “capture” the odor, and “help neutralize some
5 of the odor”; and,
- 6 d. Emphasized that the SUA can be “revoked” if the odor control plan is
7 unsuccessful in terms of meeting the stipulations included as part and parcel of
8 the approval.

9 36. The Apple Annie’s appeal also suggested or inferred or implied that the County
10 Board of Supervisors consider new and previously non-existent criteria: “At the Planning &
11 Zoning Commission meeting on March 10, 2021, I commented that Cochise County needed
12 to review their current Cannabis Regulations. The Commission Chairman stated that he hoped
13 that I would appeal this to the Board of Supervisors to bring this to their attention.”

14 37. An appeal of Willcox’s properly approved application is not the proper legal
15 mechanism to implore the County Board of Supervisors to institute a new change to “the
16 criteria they gave us to begin with”; rather, a change in the zoning rules and criteria is a
17 legislative matter that can only be addressed by an initiative to the County Board of
18 Supervisors to institute new legal rules through a text amendment to the County Zoning
19 Regulations or other lawmaking channels.

20 38. The Pharm’s appeal focused principally on an alleged concern about cross-
21 contamination of its crops, and Apple Annie’s appeal focused on the odor control issue.

22 39. Staff serving the Board of Supervisors prepared a Report on the appeal issues
23 for both The Pharm’s appeal and Apple Annie’s appeal:

- 24 a. *The Staff report for The Pharm appeal includes the following remarks by Staff:*
- 25
- 26

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

- i. "...staff does not agree that the decision [of the Planning and Zoning Commission] was erroneous, arbitrary, capricious or an abuse of discretion."
 - ii. "...staff does not agree that the commission's decision was erroneous, arbitrary, capricious or an abuse of discretion."
 - iii. "The commission correctly applied the level of analysis appropriate for a Special Use Authorization, and consequently their ruling was not erroneous, arbitrary, capricious, or an abuse of discretion."
 - iv. "The SUA ruling was not erroneous, arbitrary, capricious, or an abuse of discretion."
- b. *The Staff report for Apple Annie's appeal included the following remarks by Staff:*
- i. "The appellant [Mr. Holcomb, the Apple Annie's representative] was present and allowed to address the [Planning and Zoning] commission during the [public] hearing. His written objections to the SUA [Special Use Application] were also included in the staff report that was submitted to the commission prior to the hearing."
 - ii. "...Unlike a sound nuisance, where a decibel limit could be established, or a light nuisance where a lumen cap could be imposed, an odor abatement does not have a similar measurement threshold. Consequently, the mitigation measures mandated by condition were intentionally broad in scope and were results focused...."
 - iii. "...Although the SUA applicant proposed a very specific product to abate the transmission of odor, the condition mandates the installation and maintenance of a perimeter-based odor control system. The system

1 must be able to neutralize the odor to a degree that it cannot be detected
2 on the surrounding property. What this means, is if a surrounding
3 property owner detects the odor of cannabis, it would potentially
4 constitute a code violation that could be reported to the County. A Code
5 Compliance case could be opened to determine, first, whether this
6 property is responsible for the odor and, if so, how the property owner
7 will correct the problem...”

8 iv. “...the County is authorized to enforce the neutralization of the air, as
9 conditioned” citing Zoning Regulations 1716.03.G and 1716.03.H..

10 v. “The appellant states that Cochise County needed to review their current
11 Cannabis Regulations. They request that the Board of Supervisors direct
12 staff to review regulations from other cannabis growing areas and
13 compile a comprehensive set of cannabis regulations for Board
14 consideration. Furthermore, they suggest that it would be to the benefit
15 of both the residents and growers to have a well defined set of regulations
16 provided by Cochise County for an orderly growth of this industry.”

17 vi. “Quasi-judicial decisions involve the application of already established
18 zoning policies within the Zoning Regulations to individual situations.
19 These decisions must include the findings of fact regarding the specific
20 proposal and the exercise of some discretion in applying predetermined
21 policies to the situation. Whether additional regulations are required to
22 regulate the placement and operation of marijuana cultivation facilities
23 is not a matter that can be decided upon by the Planning and Zoning
24 Commission, and consequently, this information was not included within
25 SU-21-000005. Staff also believes it cannot be included in the context of
26

1 this appeal, because it [this appeal] is a review of a quasi-judicial
2 decision [of the Planning and Zoning Commission] by the Board. The
3 merits of this suggestion are most appropriately relegated to a text
4 amendment to the Zoning Regulations.”

5 40. The Board of Supervisors met publicly to consider the two appeals on April 20,
6 2021, at Agenda Items #15 (The Pharm appeal) and #16 (Apple Annie’s appeal), and they
7 were considered by the Board of Supervisors in that order.

8 41. The two appeals were prefaced by comments to the Board of Supervisors by
9 Cochise County Attorney, Christine Roberts, who was in attendance and made the following
10 legally-correct remarks on the record: “MS. ROBERTS: Excuse me, Madam Chair. Before
11 you go on to the next two, I just want to remind – CHAIRMAN ENGLISH: I’m sorry. I can’t
12 hear you. MS. ROBERTS: Before you go on to the next two items, they are appeals of special
13 use that was granted by the Zoning Commission. I just wanted to remind the board that, on
14 the appeal, you need to state your reasons on your record for either approving or denying the
15 appeal and to remind you that the decision has to be land use-based decisions. Just a
16 reminder.”

17 42. Counsel for Willcox made the following remarks to the Board of Supervisors:
18 “MR. BAUGH:I’m here on behalf of the applicant. And what’s interesting about this
19 process [today] is, whereas the P&Z is the first time you present a case and the facts for them
20 to make a decision, this is an appeal, which is a bit different standard.... And so the analysis
21 of this case is really straightforward. Does it meet the state law? Yes. Does it meet your
22 County ordinance requirements? Yes. Does it meet the special use permit criteria? Yes. That’s
23 why your staff has recommended approval; that’s why your P&Z board recommended
24 approval. We clearly meet all the requirements....”

25
26

1 43. Counsel for Willcox also remarked to the Board of Supervisors: "...it would be
2 extra-judicial to consider things that aren't present in your code today. If you decide to
3 evaluate that in the future, that would be a text amendment or policy decision by this board
4 down the road...."

5 44. Counsel for Willcox also warned against, in an appeal setting such as that
6 proceeding, making a decision that would be "a backdoor regulation".

7 45. Counsel for Willcox also explained: "... when I look at your code and what we
8 are proposing to do, we are proposing an odor mitigation plan and policy that is not required
9 by your ordinance, so we've gone above and beyond what you would normally expect from
10 an applicant, and that was voluntarily submitted. Additionally, we started our application with
11 170 acres, and we modified it to just only 20 percent of that now. And we did that in response
12 to the concern regarding odor. So we have taken proactive measures to reduce and address
13 that concern before that concern materializes....Because I'm co-located in an area where there
14 already is, on testimony, the presence an odor, that already now established the ambient
15 conditions.... But with that being said, we have proposed an odor mitigation plan. It is part of
16 our submittal....Because this is a special use authorization with a stipulation regarding odor
17 control, if we don't comply, staff notes that this can be revoked with a 30-day notice through
18 a co-compliance process, so in many ways you still have an informal mechanism down the
19 road...."

20 46. The owner of the property where the applicant wants to situate its operation,
21 Kim Bennett, also addressed the Board of Supervisors: "MR. BENNETT:...I am the owner
22 of the property in question, and what I would like to say is, also, I am a graduate of the
23 University of Arizona with a degree in agronomy and plant genetics, so I know what this is
24 sort of about. I'm also a licensed aviator, so I do know the prevailing winds in the area. And
25 I have owned the property for over 43 years, and so I do have The Pharm as my neighbor

1 down there. ...And because of the prevailing winds in the area, as in the Cochise County
2 airport there in Willcox, the runways actually run from 210 to 030, and because the winds
3 generally come out of the south/southwest and travel to the north/northeast.... So, that's
4 generally the way the winds blow in that area... And the – with regards to nuisance, there's a
5 greater chance of, actually, Apple Annie's farm being a nuisance, as they were stubble burning
6 a couple weeks ago and actually filled my house full of smoke all the time they were burning.
7 And that's because that's the way the prevailing winds go. And so the chance of my property
8 actually blowing the other way are slimmer...the prevailing winds from south/southwest and
9 then travel north/northeast. So my property actually would be traveling towards the north and
10 not towards the south [towards Apple Annie's].”

11 47. A Mr. Dana Peck, from Fogco, the company referenced in the non-required,
12 voluntarily-submitted Willcox odor mitigation plan, addressed the Board of Supervisors:
13 “MR. PECK:...Fogco is an international company. We're based in Chandler, Arizona. We
14 were founded in 1989. We have over 30 years of manufacturing high-pressure fog systems
15 which are used for cooling, humidification, dust suppression, special effects, and odor
16 mitigation. For odor mitigation, we provide solutions to any different industries, such as waste
17 transfer, landfills, petroleum. Basically, wherever there is an odor concern of a community
18 and the businesses that are in those communities, we have been there. Almost 10 years ago,
19 we brought this technology to the cannabis industry. It was based upon 20 years of proven
20 systems and technology. We were quickly able to establish ourselves as the leader in the
21 industry due to the effectiveness and reliability of our products and the solution. To date, we
22 have over 200 cannabis facilities nationwide and also in Canada without spraying the plant
23 itself. We also have roughly five times that amount in other industrial odor applications.In
24 summary, in my experience, I've found the opposition is normally opposed to odor control
25 due to a lack of knowledge and understanding of how effective our solutions are. So based

1 upon the approximate 200 cannabis sites, over a thousand of other industrial sites, the
2 continual effectiveness of our systems and referrals that we do receive, I can confidently state
3 without a doubt that, when designed properly, our systems are effective....”

4 48. A Mr. John Chapman, from Fogco, also addressed the Board of Supervisors:
5 “MR. CHAPMAN:...Some of our customers over the last decade are the biggest cannabis
6 greenhouse manufacturers in the industry...[E]very [Fogco] system is going to be different in
7 the delivery and the size and scope of our equipment. But after systems have been delivered
8 to sites and installed, again, from the feedback we get from them that they have no complaints
9 after the fact of installation and implementation...[A]gain, it’s my belief, as well as Fogco’s,
10 that we know without a doubt that this is going to be resulting in the most effective resolution
11 for them ant this site....”

12 49. The appeal by the perceived competitor, The Pharm, was denied by the Board
13 of Supervisors: “CHAIRMAN ENGLISH: Okay. All right. So we have spoken. We have
14 denied that....”

15 50. Certain members of the Board of Supervisors voiced comments during the
16 Apple Annie’s appeal discussion, including the following by Vice-Chairman Peggy Judd,
17 indicating dissatisfaction with the current state of the law in the Cochise County Zoning
18 Regulations: “VICE CHAIRMAN JUDD: ...It was interesting that the chairman [of the
19 Planning and Zoning Commission] – interesting to note that the chairman recommended it
20 would be appealed by the Holcombs [Apple Annie’s owner] so that we could review our
21 setbacks and other regulations regarding this. And I think that is – was real good advice, and
22 I think we’ve gotten to that point today, knowing that something needs to be done for further
23 – further approval, special use.”

24 51. As the appeal moved forward to the discussion stage, the Chair of the Board of
25 Supervisors again reminded all Board members of what they had been previously advised,
26

1 and that they have to state the reasons for their vote: “CHAIRMAN ENGLISH:. And,
2 remembers, when we make the motion this time, you have to state why or why not you are
3 voting for or against, okay?”

4 52. Eventually Vice-Chairman Judd did make a motion and did state reasons for the
5 motion to overturn the approval of Willcox’s application based on the Apple Annie’s appeal:
6 “VICE-CHAIRMAN JUDD: I’ll make this motion. Madam Chairman, I move to approve the
7 appeal – approve the appeal for docket SUA-21-02, overturning the March 10th, 2021,
8 approval by the Planning & zoning Commission, the factors in favor of the approval
9 constituting findings of facts. And that would be for the same things stated a few times today,
10 is that they were basing their nuisance on complete mitigation of odor and the odor would not
11 be an issue. And as we’ve talked about many times today, that we really can’t determine that.
12 And it was – so the odor – its based on the nuisance of odor that cannot complete by controlled,
13 as they stated it would be....”

14 53. The County Attorney Ms. Roberts pointed out that the motion by Vice-
15 Chairman Peggy Judd was at odds with the Board’s prior decision to deny the appeal by The
16 Pharm: “MS. ROBERTS: I’m not sure that I – I’m sorry. I’m not sure that I totally understand.
17 And one of the things that I want to point out is, this is the same establishment that we just
18 looked at in the appeal beforehand. ...It’s the same piece of property...Two different appeals
19 for two different reasons; right? One was cross-pollination, economic impact, so forth. This
20 one is odor. You guys [the Board] have already approved the special use and upheld the
21 Planning & Zoning on the first part of it....So I just wanted to make sure you [are] aware of
22 that....Concerning the odor, as I understand it, that is one of the conditions that the Planning
23 & Zoning area put on the special use application permit, that if they don’t comply with having
24 this odor mitigation plan, that their permit could be pulled.”

25

26

1 54. The Chair of the Board of Supervisors also emphasized that point as well:
2 “CHAIRMAN ENGLISH: Let me intervene here and say that was my understanding also, is
3 that while it was an unknown, the process of being able to get rid of the odors, they did specify,
4 the Planning & Zoning Commission did put in there that that was one of the reasons that they
5 could pull the special use permit, if they didn’t meet any of these standards. So did you not
6 read that in there, Peggy?”

7 55. Vice-Chair Peggy Judd then stated that she did not understand that, and so the
8 matter was clarified for her, that a condition of the SUA granted to the applicant included
9 effective odor control, and that the Board had already approved that as an acceptable
10 stipulation and requirement in the SUA granted to the applicant in the immediately prior
11 decision where the Board denied the appeal by The Pharm: “VICE CHAIRMAN JUDD: I did
12 not. Is that correct? MS. McLACHAN: That is correct. It’s a condition of the
13 permit...CHAIRMAN ENGLISH: So what I’m saying is, when they passed the special use
14 for this property, the Planning & Zoning Commission said, ‘Okay. We’re putting his in here
15 that they have to do this because it’s an unknown as to how it will happen,” just like any of
16 the other things, like the grading of the property. But it’s a – it’s stated now that they have to
17 mitigate the odors. So I guess I don’t understand how we can approve an appeal [by Apple
18 Annie’s] when we’ve already stated that they [the applicant] have to do that. Because
19 we’ve already positioned ourselves from the Planning & Zoning Commission to say, “Okay.
20 We’re going to give you this special use, but you have to do this [odor control] or we’ll take
21 it [the SUA] away because we have the right to do that. And we put in there that, yes, we
22 don’t know about this yet, whether you can meet this [odor control] criteria or not, but if you
23 don’t, then we’ll put the special use.’ Am I stating that correctly? MS. McLACHLAN: That
24 is correct. That’s one of the tools we have. It’s a zoning tool. And so we could also fine them.
25 We could also request a modification.....CHAIRMAN ENGLISH:I don’t know that we

1 have the basis to overturn – to approve the [Apple Annie’s] appeal because we’ve already
2 covered ourselves [in denying The Pharm’s appeal] by saying, ‘You have to do this, neutralize
3 the odor.’ Because that’s where my confusion comes from, is the fact that we’ve told them
4 [by denying the appeal by The Pharm] they have to do this, and now we have to give them a
5 chance to do it [the odor control] before we can pull the special use permit. MS. ROBERTS:
6 Madam Chair, that’s the correct understanding. It’s not like odor was not a consideration that
7 the P&Z looked at. They looked at it. They conditioned it. They approved it. The standard
8 that you’re looking at now is whether, you know, it was erroneous, capricious, or arbitrary, is
9 really the standard. You’re not re-, for lack of a better term, relitigating the merits of it.”

10 **C. Two Board Members Voted in A Manner Which Violated Arizona Law.**

11 56. After having Staff and the County Attorney and other Board discussion to
12 address the issue, Vice-Chair Judd still wanted to approve the Apple Annie’s appeal, and she
13 was redirected to the appropriate legal standard, again: “VICE-CHAIRMAN JUDD:
14 Everyone knows where I stand on this. Boy, but I’m going to have to --- CHAIRMAN
15 ENGLISH: But I think that you have to make sure that your stand isn’t emotional and that it’s
16 based on solid information....”

17 57. Another Board member weighed in with a comment to the effect that the Apple
18 Annie’s appeal should be granted, and the County Attorney again redirected to the proper
19 legal standard: “SUPERVISOR CROSBY: We can overrule the Planning & Zoning
20 Commission. So that’s – and that’s what we’re – that’s what I’m voting for by voting for the
21 top motion [on the list], is to overrule the Planning & Zoning Commission. Isn’t that correct?
22 MS. ROBERTS: You can uphold, you can overrule, you can modify the Planning & Zoning
23 Commission, but it has to be land use basis and the standard has to be that the Planning
24 Commission did something erroneously, arbitrarily, or capriciously.”

25

26

1 58. Voting to approve the Apple Annie’s appeal, Vice-Chair Judd did not identify
2 any land use basis but stated “odor mitigation” is the “focus of this.” Her prior statement on
3 the reasons for her vote focused on her wish that the law had already been changed to be
4 different than it is: “VICE-CHAIRMAN JUDD: ... We need to move forward with stuff that
5 will help in this situation, help the neighbors, help the businesses that are next door --.”

6 59. Voting to also approve the Apple Annie’s appeal, Supervisor Crosby did not
7 identify any land use basis either: “SUPERVISOR CROSBY: As it said, it [the appeal by
8 Apple Annie’s] says: Applicant staff stated no cannabis odor would leave the property. ... I
9 don’t think that can be done...” He did not explain how the Board could vote to deny the
10 appeal by The Pharm, and therefore permit the applicant to proceed with its planned use under
11 an SUA, subject to the stipulations and requirements, such as effective odor control, and yet
12 approve the appeal by Apple Annie’s.

13 60. Voting to deny the Apple Annie’s appeal, as with the appeal by The Pharm,
14 Chair English referenced land use bases for her vote: “CHAIRMAN ENGLISH: Okay. My
15 reasons for wanting to deny this appeal [by Apple Annie’s] are the fact that the Planning &
16 Zoning Commission adhered to all of the rules that the Board of Supervisors has made and
17 that they made the appropriate decision based on those rules to allow the special use...”

18 61. As a result, the appeal by Apple Annie’s was approved, meaning that although
19 the Board denied the appeal by The Pharm, and in so doing allowed the applicant to proceed
20 with the Project under an SUA subject to effective odor controls, the Board approved the
21 Apple Annie’s appeal.

22 62. Plaintiffs/Special Action Appellants either with this filing contemporaneously,
23 or shortly thereafter, the full record in the matter, below.

24
25
26

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

III. STATUTORY SPECIAL ACTION CLAIM.

63. Pursuant to A.R.S. § 9-462.06(K): “A person aggrieved by a decision of the legislative body or board or a taxpayer who owns or leases the adjacent property or a property within three hundred feet from the boundary of the immediately adjacent property, an officer or a department of the municipality affected by a decision of the legislative body or board, at any time within thirty days after the board, or the legislative body, if the board decision was appealed pursuant to subsection J of this section, has rendered its decision, may file a complaint for special action the superior court to review the legislative body or board decision. Filing the complaint does not stay proceedings on the decision sought to be reviewed, but the Court may, on application, grant a stay and on final hearing may affirm or reverse, in whole or in part, or modify the decision reviewed.”

64. It is not a proper basis for the Board, acting in a quasi-judicial capacity, to have approved the Apple Annie’s appeal (a) in order to attempt to change the law (a legislative action) in the County by such a vote in this one case, or (b) by contending that the applicant supposedly claimed that “no cannabis odor would leave the property”, when the record shows that it clearly it did not do that at either the Planning & Zoning Commission or at the Board of Supervisors.

65. Plaintiffs/Statutory Special Action Appellants seek an order and judgment of this Court reversing the decision of the Cochise County Board of Supervisors to grant the appeal of Apple Annie’s and, in so doing, overturn the grant to Willcox of the SUA, as alleged herein above.

66. The basis for the requested relief is that Defendants/Statutory Special Action Appellees made the above-referenced determination in an arbitrary and capricious manner and/or it was an abuse of discretion. See Rule 3(c), Arizona Rules of Procedure for Special Actions.


1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

IV. RELIEF REQUESTED.

67. Wherefore, having pled their claims for relief hereinabove, Plaintiffs/Statutory Special Action Appellants seek the following relief in their favor and against Defendants/Statutory Special Action Appellees:

- A. A Judgment of the Cochise County Superior Court in their favor and against Defendants/Statutory Special Action Appellees granting all relief requested by Plaintiffs/Statutory Special Action Appellants;
- B. Specifically, that the Judgment invalidate and annul, in whole, the decision granting the Apple Annie’s appeal, as alleged herein above, and thus reinstating the decision of the Planning and Zoning Commission granting Willcox the SUA as specified by the Planning & Zoning Commission; and,
- C. For such other and/or further relief as may be permitted and warranted in the circumstances.

RESPECTFULLY SUBMITTED this 18th day of May, 2021.

CONANT LAW FIRM, PLC
 By: /s/ Paul A. Conant 
 Paul A. Conant
 Melissa A. Emmel
 2398 East Camelback Road, Suite 925
 Phoenix, Arizona 85016
Attorneys for Special Action Appellants

ORIGINAL filed this 18th day of May, 2021 with:

The Clerk of the Court
 COCHISE COUNTY SUPERIOR COURT

 By: /s/Karen Stecker

1 Paul A. Conant, 012667
Melissa A. Emmel, 023195
2 **CONANT LAW FIRM, PLC**
2398 East Camelback Road, Suite 925
3 Phoenix, Arizona 85016-9002
Telephone: 602.508.9010
4 Facsimile: 602.508.9015
5 Email: docket@conantlawfirm.com
Attorneys for Statutory Special Action Appellants

6
7 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
8 **IN AND FOR THE COUNTY OF COCHISE**

9 WILLCOX OC, LLC, an Arizona limited
liability company; KIM A. BENNETT, an
10 individual, as owner of the subject property;
11 Plaintiffs/Special Action Appellants,

12 vs.

13 COCHISE COUNTY BOARD OF
SUPERVISORS, a public entity; TOM
CROSBY, in his official capacity as member
of the Cochise County Board of Supervisors;
14 PEGGY JUDD, in her official capacity as
member of the Cochise County Board of
15 Supervisors;

16 Defendants/Special Action Appellees,

17 and

18 APPLE ANNIE'S ORCHARD, INC. dba
APPLE ANNIE'S FARM AND PRODUCE,
an Arizona corporation,
19 Real Party in Interest/Defendant/
20 Special Action Appellee.

Case No. S0200 CV2021-00270

**NOTICE OF FILING
VERIFICATION**

(Tier 2)

(Statutory Special Action)

21
22 Plaintiffs/Special Action Appellants Willcox OC, LLC and Kim A. Bennett, through
23 counsel undersigned, hereby provide notice of filing Paul Conant's Verification to the
24 Verified Complaint and Petition for Statutory Special Action Relief Pursuant to ARS 9-
25 462.06(K) filed May 18, 2021, a copy of which is attached hereto.

RECEIVED
COCHISE COUNTY
BOARD OF SUPERVISORS
MAY 19 2 22 PM '21

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

RESPECTFULLY SUBMITTED this 19th day of May, 2021.

CONANT LAW FIRM, PLC

By: /s/Paul Conant
Paul A. Conant
Melissa A. Emmel
2398 East Camelback Road, Suite 925
Phoenix, Arizona 85016
Attorneys for Special Action Appellants

ORIGINAL e-filed this 19th day of May, 2021 with:

The Clerk of the Court
COCHISE COUNTY SUPERIOR COURT

By: /s/Karen Stecker

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

VERIFICATION

I, Paul A. Conant, hereby declare and state as follows:

I am counsel for Special Action Appellant in this matter.

I have read the Verified Complaint and Petition for Statutory Special Action Relief and upon my own personal knowledge, information and/or belief, I believe the same are true.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 18th day of May, 2021.


Paul A. Conant, counsel for Willcox OC, LLC