

SUPERIOR COURT  
YAVAPAI COUNTY, ARIZONA

2005 JUL 18 PM 4: 39

JEANNE HICKS, CLERK ✓

C. SUTTON

BY: \_\_\_\_\_

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5 Attorneys for Plaintiffs

6 **IN THE SUPERIOR COURT OF ARIZONA**  
7 **COUNTY OF YAVAPAI**  
8

9 **JOHN B. CUNDIFF** and **BARBARA C. )**  
**CUNDIFF**, husband and wife; **BECKY NASH,** )  
10 a married woman dealing with her separate )  
property; **KENNETH PAGE** and **KATHRYN )**  
11 **PAGE**, as Trustee of the Kenneth Page and )  
Kathryn Page Trust, )

12 Plaintiffs, )

13 vs. )

14 **DONALD COX** and **CATHERINE COX,** )  
husband and wife, )

15 Defendants. )  
16 \_\_\_\_\_ )

Case No. ~~CV~~ 2003-0399

Division 1

**PLAINTIFFS' RESPONSE  
TO DEFENDANTS'  
MOTION *IN LIMINE***

17 Plaintiffs, John and Barbara Cundiff, Becky Nash, and, Kenneth and Katheryn Page, by and  
18 through undersigned counsel, hereby respond to Defendants Cox's motion *in limine* requesting that  
19 Plaintiffs be precluded from introducing (a) aerial photographs of the subject sub-division, and (b)  
20 witness or documentary testimony from a representative of Yavapai County Planning and Zoning  
21 regarding prior applications by sub-division landowners to operate a business which were denied  
22 based upon community response.

23 Defendants argue that this evidence must be excluded as Plaintiffs' disclosure statement fails  
24 to adequately apprise opposing counsel of the subject matter of the local government official's  
25 testimony, documents on file with the local government agency or the content of the aerial  
26 photographs. Defendants argument rings hollow and lacks any factual or legal basis. Defendants have

1 ample and adequate notice as to the subject matter of the witness's testimony, and any documents on  
2 file with the county agency. "The purpose of disclosure is...to give each party adequate notice of what  
3 arguments will be made and what evidence will be presented at trial." *Clark Equipment Co. v. Ariz.*  
4 *Prop. & Cas. Ins. Guaranty Fund, 189 Ariz. 433, 440, 943 P.2d 793, 800 (App. Div.1 1997) citing*  
5 *Rule 26.1, Ariz.R.Civ.Proc.* Plaintiffs provided precisely that: disclosure to Defendants that they  
6 intended on calling a representative of Yavapai County Planning and Zoning regarding prior denials  
7 by the agency of requests for variances to operate businesses in the area. That that individual is  
8 unnamed does not prejudice Defendants, as Plaintiffs are equally unaware of the individual's identity.  
9 The same holds true for any documents on file with the agency regarding such requests. Plaintiffs are  
10 not "hiding the pea" from Defendants. *Bryan v. Riddel, 178 Ariz. 472, 477, 875 P.2d 131, 136 (1994).*  
11 Rather, Plaintiffs have made a full and complete disclosure of all information in their possession as  
12 to the identity of the witness and the documents that may exist.

13         Moreover, the aerial photographs of the real property encompassed by the June 13, 1974  
14 recorded Declaration of Restrictions, at issue in this case, is neither new nor surprising demonstrative  
15 evidence. Defendants have disclosed well over 100 photographs of various properties in the sub-  
16 division. Defendants are obviously well acquainted with the sub-division and land contained therein.  
17 Defendants' objection to an aerial photograph is difficult to understand. An aerial photograph does  
18 not provide "new" evidence; rather, it provides only a different *perspective* of the same evidence that  
19 is already in Defendants' possession and of which they have actual knowledge.

20         Therefore, Plaintiffs request that this Court deny Defendants' motion *in limine* and allow  
21 Plaintiffs to introduce (a) aerial photographs of the real property subject to the June 13, 1974 recorded  
22 Declaration of Restrictions at issue in this case; and, (a) witness testimony and documents from  
23 Yavapai County Planning and Zoning regarding that agency's prior denials of requests for variances.

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RESPECTFULLY SUBMITTED this 18<sup>th</sup> day of July, 2005.

FAVOUR MOORE & WILHELMSSEN, P.A.

By:   
David K. Wilhelmsen  
Marguerite Kirk

Original of the foregoing  
filed this 18<sup>th</sup> day of July,  
2005, with:

Clerk, Superior Court of Arizona  
Yavapai County  
Prescott, Arizona

A copy hand-delivered this  
18<sup>th</sup> day of July, 2005, to:

Honorable David L. Mackey  
Division One  
Superior Court of Arizona  
Yavapai County  
Prescott, Arizona

and, a copy hand-delivered this  
18<sup>th</sup> day of July, 2005, to:

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