

SUPERIOR COURT
YAVAPAI COUNTY, ARIZONA

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SUPERIOR COURT OF ARIZONA
YAVAPAI COUNTY

9 JOHN B. CUNDIFF and BARBARA C.)
10 CUNDIFF, husband and wife; ELIZABETH)
11 NASH, a married woman dealing with her)
12 separate property; KENNETH PAGE and)
13 KATHRYN PAGE, as Trustee of the Kenneth)
14 Page and Catherine Page Trust,)
15
16 Plaintiffs,)
17 v.)
18
19 DONALD COX and CATHERINE COX,)
20 husband and wife, et al., et ux.,)
21
22 Defendants.)

Case No. CV 2003-0399

Division 4

**JAMES VARILEK'S JOINDER IN
PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT**

Property Owner James Varilek joins in the *Motion for Summary Judgment* filed by Plaintiffs on December 28, 2012, and submits the following additional legal arguments in support of the motion:

The issues remaining in this case are extremely narrow

It cannot be emphasized too strongly that all the Court must decide in order to grant the *Motion for Summary Judgment* and bring this long-pending case to a conclusion is that Paragraph 2 of the Declaration of Restrictions of Coyote Springs Ranch (providing that "No trade, business, profession or any other type of commercial or industrial activity shall be initiated or maintained within said property or any portion thereof") has not been rendered unenforceable by virtue of *abandonment* or *waiver*. The decision of Division One of the Court of Appeals in *Cundiff v. Cox*,

1 No. 1 CA-CV 06-0165 (Mem. Op. 5/24/2007), which is now the law of the case, left standing
2 only these two affirmative defenses asserted by Defendants Cox. *Jordan v. Jordan*, 132 Ariz. 38,
3 40 n.3, 643 P.2d 1008, 1010 n.3 (1982) (Superior Court is bound by the Court of Appeals'
4 mandate on the same issues the Superior Court is being asked to address); *Copper Hills Enters.,*
5 *Ltd. v. Ariz. Dep't of Revenue*, 214 Ariz. 386, 390-91, 153 P.3d 407, 411-12 (App. 2007) ("Under
6 the law of the case doctrine, an appellate court's decision is controlling in both the lower courts
7 and in subsequent appeals in the same case, so long as the facts and law remain substantially the
8 same").

9 Specifically, the Court of Appeals decided that:

- 10 • **The Coxes are in violation of Paragraph 2 of the Declaration of Restrictions.** After
11 a careful analysis of the facts and law, the Court of Appeals stated that "the Coxes' tree
12 farm is clearly an agricultural business" (Mem. Op. at 10) and held that "the Coxes'
13 agricultural business use of the property violates section two of the Declaration" (*id.* at
14 12-13). There is no need for this Court to determine the intent or scope of Paragraph 2,
15 or to interpret how it might be applied in other circumstances, because the Court of
16 Appeals has determined that the Coxes *are in violation*.
- 17 • **Affirmative defenses other than abandonment and waiver are no longer available**
18 **to the Coxes.** This is because the Court of Appeals affirmed this Court's award of
19 summary judgment in favor of Plaintiffs on the Coxes' other affirmative defenses of
20 laches, estoppel and unclean hands. This ruling is likewise now the law of the case.

21 **The remaining issues are ripe for summary judgment**

22 It might seem at first blush that the affirmative defenses of abandonment and waiver are
23 fact-intensive ones for which summary judgment is unlikely to be appropriate. However, in the
24 context of a declaration of restrictions containing a non-waiver provision such as Paragraph 19 of
25 the declaration of Coyote Springs Ranch ("No failure of any other person or party to enforce any
26 of the restrictions, rights, reservations, limitations, covenants and conditions contained herein
27 shall, in any event be construed or held to be a waiver thereof or consent to any further or
28 succeeding breach or violation thereof"), the law imposes such a heavy burden on the party

1 asserting these affirmative defenses (here, the Coxes) that summary judgment may indeed be
2 appropriate.

3 **1. Abandonment or waiver must be proved by clear and convincing evidence.** The
4 Coxes have the burden of establishing abandonment or waiver by clear and convincing evidence.
5 20 Am.Jur.2d, *Covenants, Conditions & Restrictions* § 281 (“Similarly, the defendant has the
6 burden to prove the abandonment or other waiver of the restrictive covenant subject to the suit”);
7 *Swenson v. Erickson*, 998 P.2d 807, 812 (Utah 2000) (“Evidence of abandonment [of restrictions]
8 must be established by clear and convincing evidence”); *Tompkins v. Buttrum Const. Co. of*
9 *Nevada*, 659 P.2d 865, 867 (Nev. 1983) (abandonment or waiver of restrictions must be
10 established by clear and unequivocal evidence of acts of a decisive nature); *Lindner v. Woytowitz*,
11 378 A.2d 212, 216 (Md. App. 1977) (abandonment of restrictions “must be established by
12 evidence clear and unequivocal of acts of a decisive nature”). Although there are no reported
13 Arizona decisions specifically addressing the evidence required to prove an abandonment or
14 waiver of subdivision restrictions, see *Webber v. Smith*, 129 Ariz. 495, 498, 632 P.2d 998, 1001
15 (App. 1981) (abandonment or rescission of written contract must be proved by clear and
16 convincing evidence), and *Velasco v. Mallory*, 5 Ariz. App. 406, 412, 427 P.2d 540, 546 (1967)
17 (party asserting abandonment or forfeiture of mining claim has burden to prove abandonment or
18 forfeiture by clear and convincing evidence).

19 **2. When a declaration of restrictions contains a non-waiver provision, the affirmative**
20 **defense of waiver is not available and abandonment is near-impossible to prove.** The law in
21 Arizona has long been that the restrictions in a declaration of restrictions are separate and
22 independent, so that (for example) a violation of a restriction against *mobile homes* would not
23 constitute evidence that a restriction against *non-residential uses* had been waived. *Condos v.*
24 *Home Development Co.*, 77 Ariz. 129, 267 P.2d 1069 (1954). Whether a particular restriction has
25 been waived must be evaluated in the context of that restriction alone. This is true, the *Condos*
26 court stated, unless “the restrictions imposed upon the use of lots in [a] subdivision have been so
27 thoroughly disregarded as to result in such a change in the area as to destroy the effectiveness of
28 the restrictions, defeat the purposes for which they were imposed and consequently to amount to

1 an abandonment thereof.” *Id.*, 77 Ariz. at 133, 267 P.2d at 1071. In other words, if *all* of the
2 restrictions have been so thoroughly disregarded that the fundamental character of the
3 development the restrictions were intended to protect has changed to such a degree that enforcing
4 the restrictions would be pointless, a complete abandonment may be found.

5 Significantly, the restrictions at issue in *Condos* did *not* contain a non-waiver provision
6 such as Paragraph 19 of the declaration of Coyote Springs Ranch. The effect of a non-waiver
7 provision has been made clear in subsequent Arizona decisions, notably *Burke v. Voicestream*
8 *Wireless Corp. II*, 207 Ariz. 393, 87 P.3d 81 (App. 2004), and *College Book Centers, Inc., v.*
9 *Carefree Foothills Homeowners' Assoc.*, 225 Ariz. 533, 241 P.3d 897 (App. 2010). In *Burke*, as
10 here, the declaration of restrictions *did* contain an express non-waiver provision. The court first
11 noted that, *in the absence of such a provision*, disregarding frequent previous violations of a
12 particular restriction may constitute a waiver. But when there *is* a clear and unambiguous non-
13 waiver provision, it will be enforced in accordance with its terms. In *Burke*, therefore, several
14 previous violations of the use restriction at issue were rendered irrelevant by the non-waiver
15 provision. Consistent with *Condos*, the *Burke* court stated that the only way the defendant could
16 have succeeded would have been by showing that the *entire set of restrictions* had been so
17 *thoroughly disregarded* as to fundamentally *change the character of the development* and
18 constitute a *complete abandonment*:

19 The non-waiver provision would be ineffective if a complete
20 abandonment of the entire set of Restrictions has occurred. The test for
21 determining a complete abandonment of deed restrictions – in contrast to
22 waiver of a particular section of restrictions – was set forth by our supreme
23 court in *Condos v. Home Development Company*, 77 Ariz. 129, 267 P.2d
24 1069 (1954): “[W]hether the restrictions imposed upon the use of lots in
25 this subdivision have been so thoroughly disregarded as to result in such a
26 change in the area as to destroy the effectiveness of the restrictions, defeat
27 the purposes for which they were imposed and consequently amount to an
28 abandonment thereof.” *Id.* at 133, 267 P.2d at 1071.

29 No evidence was presented, however, that Desert Estates is no
30 longer a “choice residential district.” The violations of section 4 described
31 by Voicestream and SWC have not destroyed the fundamental character of
32 the neighborhood. We conclude, as a matter of law on the record before us,
33 that the non-waiver provision of the Restrictions remains enforceable and

1 the subdivision property owners have not waived or abandoned enforcement
2 of section 4 even though they or their predecessors have acquiesced in
several prior violations of its provisions.

3 207 Ariz. at 399, 87 P.3d at 87.

4 *College Book Centers* is essentially identical. As had the *Burke* court, the *College Book*
5 *Centers* court first explained that, *when the restrictions do not contain a non-waiver provision*,
6 disregarding frequent previous violations of a particular restriction may constitute a waiver. But
7 when the restrictions *do* contain a clear non-waiver provision, “a restriction remains enforceable,
8 despite prior violations, so long as the violations [do] not constitute a ‘complete abandonment’ of
9 the CC&Rs.” 225 Ariz. at 539, 241 P.3d at 903 (quoting *Burke*). The court then quoted the
10 same definition of “complete abandonment” set forth in *Condos* and previously quoted in *Burke*.

11 The upshot of these cases is that:

- 12 • In light of the clear and unambiguous non-waiver provision of Paragraph 19, the
13 Coxes’ affirmative defense of waiver must fail as a matter of law.
- 14 • The Coxes could succeed on their abandonment defense only if they could prove, by
15 clear and convincing evidence, that the Declaration of Restrictions had been so
16 thoroughly disregarded as to alter the fundamental character of Coyote Springs Ranch
17 as a large-lot, rural residential development and thus to constitute a complete
18 abandonment of the restrictions as a whole.

19 **3. The Coxes cannot possibly prove a complete abandonment of the Declaration of**
20 **Restrictions.** Together with the affidavit of John Cundiff, Plaintiffs have filed three recent
21 DVDs showing the entirety of Coyote Springs Ranch as it exists today – *i.e.*, still the large-lot,
22 rural residential development the original developer envisioned and the Declaration of
23 Restrictions was intended to ensure it remained. The Plaintiffs have also urged the Court to
24 conduct a view of the area, which is entirely appropriate:

25 Over the objection of appellants’ counsel, the trial judge granted
26 appellees’ request that he view the scene, stating that he would do so for the
27 limited purpose of helping him to understand the evidence received in court
28 and not as additional evidence. In contending that the judge abused his
discretion, appellants rely on *First National Bank v. Clifton Armory Co.*, 14
Ariz. 360, 128 P. 810 (1912). That case holds that a constituent fact may

1 not be determined by a view of the premises alone. The trial judge's
2 statement demonstrates his awareness of that rule, and as indicated above
there is ample evidence to support the judgment.

3 *Adams v. Lindberg*, 125 Ariz. 441, 442, 610 P.2d 75, 76 (App. 1980).

4 Mr. Cundiff's affidavit and the accompanying DVDs, together with a view by the Court to
5 aid in its understanding of the DVDs, will be more than sufficient to establish that Coyote
6 Springs Ranch remains what it has always been and that the restrictions set forth in the
7 Declaration of Restrictions have *not* been "so thoroughly disregarded as to result in such a change
8 in the area as to destroy the effectiveness of the restrictions [and] defeat the purposes for which
9 they were imposed" (in the words of *Condos, Burke and College Book Centers*). This would be
10 true even if the Coxes could prove by competent evidence that a myriad of violations existed
11 throughout the development when the *Complaint* was filed nearly a decade ago. Any such
12 violations would not alter the plain fact that the area remains the large-lot, rural residential
13 development it has always been. Unfortunately for the Coxes, Coyote Springs Ranch speaks for
14 itself.

15 For the foregoing reasons, Mr. Varilek urges the Court to grant Plaintiffs' *Motion for*
16 *Summary Judgment* and to award his costs and reasonable attorney fees pursuant to A.R.S. § 12-
17 341.01.

18 RESPECTFULLY SUBMITTED January 7, 2013.

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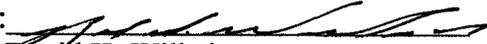
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