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SUPERIOR COURT OF ARIZONA

YAVAPAI COUNTY

JOHN B. CUNDIFF and BARBARA C. CUNDIFF, husband and wife; ELIZABETH NASH, a married woman dealing with her separate properly; KENNETH PAGE and KATHRYN PAGE, as Trustee of the Kenneth Page and Catherine Page Trust,

Plaintiffs,

v.

DONALD COX and CATHERINE COX, husband and wife, et al., et ux.,

Defendants.

Case No. CV 2003-0399

Division 4

(Assigned to Hon. Kenton Jones)

JAMES VARILEK'S RESPONSE TO DEFENDANTS' MOTION FOR RECONSIDERATION RE: RULING ON DEFENDANTS' MOTION *IN LIMINE* RE: ROBERT CONLIN

Property Owner James Varilek responds as follows to the Cox Defendants' *Motion for Reconsideration/Motion for Clarification Re: Ruling on Defendants' Motion in Limine Re: Robert Conlin*:

The Coxes themselves once relied – albeit unsuccessfully – on developer Robert Conlin's affidavit to support their interpretation of the Declaration of Restrictions. Nevertheless, they now seem to have great fear that Conlin's affidavit will torpedo their affirmative defense that the Declaration has been abandoned. The short answer to the Coxes' pending motion is provided by the Court of Appeals' opinion:

> Interpretation of the Declaration of Restrictions is an issue of law for the court. Therefore, to the extent Conlin's affidavit attempts

> to express a legal opinion, we disregard it. *Limited to evidence of intent, however, the affidavit is relevant.*

Mem. Op. at 12, ¶ 19 (emphasis added).

Despite the Court of Appeals' discussion of (and reliance on) Conlin's affidavit, the Coxes now argue that the Court of Appeals' decision establishes the *irrelevancy* of the affidavit as the law of the case! The gaping holes in the Coxes' logic are exposed when one focuses on how the Court of Appeals actually used Conlin's affidavit and what its decision actually established as the law of the case.

Paragraph 2 of the Declaration broadly prohibits any business or commercial use. Conlin had stated in his affidavit that the intent of the Declaration was to ensure a "rural residential" environment. The Coxes seized upon the word "rural" in Conlin's affidavit to argue to the Court of Appeals that their "typically rural" agricultural business should be deemed outside the scope of paragraph 2. In rejecting this argument, the Court of Appeals read Conlin's affidavit as "confirming" that the intent of the Declaration was to ensure a rural *residential* environment, not a rural *business* environment. Mem. Op. at 12, ¶ 20.

In interpreting paragraph 2 of the Declaration, the Court of Appeals stated that it would give the terms "business" and "commercial" their ordinary meanings and that the Coxes' tree farm was "clearly an agricultural business." Mem. Op. at 10, ¶ 17. In response to the Coxes' additional argument that their tree farm should be deemed outside the scope of paragraph 2 because it was really no different from "elaborate residential landscaping," the court stated:

> But nothing in the Declaration suggests that any one type of business was intended to be excluded from section two of the restrictions. *On the contrary, the wording used in the restriction is broad, prohibiting any "trade, business, profession or any other type of commercial or industrial activity."* Moreover, the trees and shrubs cultivated and stored on the property are grown and maintained there for business purposes. They are not landscaping.

Mem. Op. at 10, ¶ 17 (emphasis added).

What the Court of Appeals' decision established as the law of the case is that *the Coxes' business use of their parcel violates paragraph 2 of the Declaration.* This and nothing more. But just as the Coxes' previously seized upon Conlin's use of the term "rural" while ignoring the context in which it was used, they now seize upon the emphasized sentence in the quotation above (*"On the contrary, the wording used in the restriction is broad, prohibiting any 'trade, business, profession or any other type of commercial or industrial activity'"*) while ignoring its context.

The Coxes argue that the emphasized sentence establishes as the law of the case that *any non-residential activity, regardless of how minor and regardless of whether it is apparent to anyone else, violates paragraph 2.* In effect, they are arguing that "the Court of Appeals' decision *requires,* as the law of the case, that paragraph 2 must be interpreted so narrowly and woodenly that the residents of Coyote Springs Ranch cannot do *anything,* inside or outside of their homes, that is not strictly residential in character." This is a misuse of both the Court of Appeals' decision and the law of the case doctrine.

First, the emphasized sentence was not a definitive interpretation of the scope of paragraph 2. It was the Court of Appeals' *response* to the Coxes' argument that *their particular business* should be deemed outside the scope of paragraph 2 because it is a type of business commonly found in rural areas. The Court of Appeals said, in effect, "No, your tree farm is *unquestionably a business by the ordinary meaning of the term 'business,'* and there is no exemption in paragraph 2 for any particular type of business."

Second, as the Court of Appeals stated, the interpretation of paragraph 2 is always a question of law, with terms such as "business" and "commercial" to be given their ordinary meanings. In regard to any particular use of property in Coyote Springs Ranch, the issue for the Court will be whether the use constitutes a business or commercial activity by the ordinary meanings of those terms. The Coxes cannot foreclose the Court's process of interpretation by claiming that it is now the law of the case that *any non-residential activity* automatically constitutes a business or commercial use and thus violates paragraph 2.

What apparently strikes fear into the hearts of the Coxes is paragraph 5 of Conlin's affidavit, which is quoted in its entirety in the Court of Appeals' opinion. Conlin stated that paragraph 2 of the Declaration was not intended to prohibit in-home offices, the parking of business vehicles or equipment, or informing the public about in-home offices. It is *precisely* such innocuous activities on which the Coxes base their affirmative defense of abandonment. Indeed, the Coxes appear to contend that even an activity that is *absolutely invisible to any neighbor,* such as the installation of a commercial telephone line or the use of a spare bedroom to draft house plans, violates paragraph 2 and bolsters their defense of abandonment.

Varilek would not go so far as to suggest that paragraph 5 of Conlin's affidavit is sufficient in itself to establish that in-home offices or the parking of business vehicles do *not* violate paragraph 2 of the Declaration. This would give Conlin's affidavit the force of a legal opinion and usurp the role of the Court. However, just as the Court of Appeals regarded Conlin's affidavit as evidence confirming the intent of the Declaration, the affidavit is surely of at least some relevance to the issue of whether paragraph 2 should be interpreted as encompassing activities such as in-home offices and the parking of business vehicles. Just as with the Court of Appeals' interpretation of paragraph 2 in regard to the Coxes' business, the question of law for the Court will always remain, *"Is this particular in-home office [or parking of a business vehicle or other violation alleged by the Coxes] a business or commercial use within the ordinary meaning of those terms as used in paragraph 2?"*

The Court is undoubtedly aware that zoning ordinances commonly allow home occupations and some parking or storage of commercial equipment in residential zones. *See, e.g., State v. Trachtman,* 190 Ariz. 331, 947 P.2d 905 (App. 1997) (ordinance allowed "any occupation or profession customarily conducted entirely within a dwelling and carried on by a member of the family residing therein, and which occupation or profession is clearly incidental and subordinate to the use of the dwelling for dwelling purposes and does not change the character thereof, and in connection with which there

are no employees other than a member of the immediate family residing in the dwelling, and no mechanical equipment except for that which is customarily used for domestic, hobby, or household purposes"). This is because zoning ordinances are concerned with regulating only those uses that actually affect the character of a zone. They are not concerned with activities that are invisible to neighbors. Private restrictions such as those set forth in the Declaration are likewise concerned only with those uses that actually affect the character of the development. They are not intended to produce a reign of terror where "vigilante" residents hall their neighbors into court because they install commercial telephone lines, draft house plans in their spare bedrooms, store surveying equipment in their sheds, or have magnetic business signs on their trucks.

Whether the multitude of "violations" of this sort that the Coxes allege in support of their abandonment defense actually are business or commercial uses within the meaning of paragraph 2 will be a question of law for the Court, and the affidavit of Conlin as the original developer who was responsible for the Declaration of Restrictions will be of at least some relevance on the issue of intent. This is fully consistent with the Court of Appeals' decision – which does not by any means establish the Coxes' position as the law of the case – and the Court thus should not change its prior denial of the Coxes' *Motion in Limine.*

RESPECTFULLY SUBMITTED April 17, 2013.

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