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SUPERIOR COURT
YAVAPAI COUNTY, ARIZONA ✓
2013 APR 22 PM 4:18
SANDRA A. HARRHAM, CLERK
BY: V. REISINGER

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

8 JOHN B. CUNDIFF and BARBARA C.
9 CUNDIFF, husband and wife; ELIZABETH
10 NASH, a married woman dealing with her
11 separate property; KENNETH PAGE and
12 KATHRYN PAGE, as Trustee of the Kenneth
13 Page and Catherine Page Trust,

14 Plaintiffs,

15 vs.

16 DONALD COX and CATHERINE COX,
17 husband and wife,

18 Defendants.

CASE NO. P1300CV20030399

**PLAINTIFFS' JOINDER IN
JAMES VARILEK'S RESPONSE
TO DEFEDANTS' MOTION
FOR RECONSIDERATION RE:
RULING ON DEFEDANTS'
MOTION IN LIMINE RE:
ROBERT CONLIN
AND
RESPONSE TO DEFENDANTS'
MOTION FOR
RECONSIDERATION/MOTION
FOR CLARIFICATION RE:
RULING ON DEFENDANTS'
MOTION IN LIMINE RE
ROBERT CONLIN**

19
20 Plaintiffs join James Varilek in his response. In addition, Plaintiffs assert that
21 Defendants' motivation for trying to persuade this Court to keep the Robert Conlin affidavit from
22 being utilized in this case is clear. Defendants are trying to build support for their abandonment
23 defense by arguing that there have been so many violations of Section 2 of the CC&Rs (trivial or
24 not) that Section 2 has been abandoned. Defendants overlook the facts and the law; violations of
25 Section 2, regardless of the frequency, do not equate with abandonment of the entire set of

1 CC&Rs. As stated by the Court of Appeals in *College Book Centers, Inc., v Carefree Foothills*
2 *Homeowners' Association*, 225 Ariz. 533, 241 P.3d 897 (App. 2010).

3 On appeal, we recognized at the outset that absent a non-waiver provision,
4 deed restrictions may be considered abandoned or waived "if frequent
5 violations of those restrictions have been permitted." Id. at 398, ¶ 21, 87 P.3d
6 at 86. **But when CC&Rs contain a non-waiver provision, a restriction**
7 **remains enforceable, despite prior violations, so long as the violations did**
8 **not constitute a "complete abandonment" of the CC&Rs.** Id. at 399, ¶ 26,
9 87 P.3d at 87. Complete abandonment of deed restrictions occurs when "the
10 restrictions imposed upon the use of lots in [a] subdivision have been so
11 thoroughly disregarded as to result in such a change in the area as to destroy
12 the effectiveness of the restrictions [and] defeat the purposes for which they
13 were imposed[.]" Id. (quoting *Condos v. Home Dev. Co.*, 77 Ariz. 129, 133,
14 267 P.2d 1069, 1071 (1954)).

15 225 Ariz. 538-9, 241 P. 3d 902-3.

16 By arguing that even the most trivial activity should fall under the broad umbrella of
17 Section 2, Defendants subject all of those activities to exclusion when, in fact, the intent of
18 Robert Conlin was to the contrary. Defendants are throwing Coyote Springs Ranch property
19 owners under the bus. Plaintiffs are the ones arguing for the inclusion of Robert Conlin's view
20 of the future of Coyote Springs Ranch (thereby allowing more people to do what they want to
21 do). As he stated in his affidavit:

- 22 2. The covenant against trade, business, commercial or industrial
23 enterprises was not intended to prohibit against landowners or
24 occupiers from maintaining a home-office in their residence,
25 from parking or maintaining their business vehicles or
equipment on their property, or from indicating to the public
that they had a home office at their residence.

Defendants want to restrict owners from engaging in the above activities.

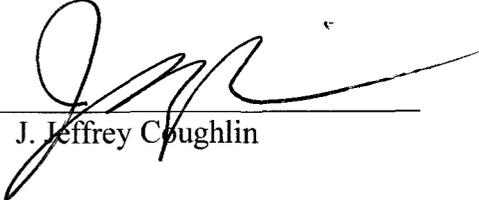
The Court of Appeals followed the most recent pronouncement of the Arizona Supreme
Court and stated that the **'cardinal principle on construing restrictive covenants is that the**
intention of the parties to the instrument is paramount. Mem. Dec. ¶13 (emphasis added).
Intent is the linchpin. Robert Conlin's intent was not only to preserve a rural and residential
environment, but also to preserve the ability of landowners or occupiers to maintain a home-

1 office in their residence, to park or maintain their business vehicles or equipment on their
2 property, and to indicate to the public that they had a home office at their residence. (Mem.
3 Dec. ¶19).

4 Defendants seem to be requesting that this Court cause the Court of Appeals to reconsider
5 its decision (a request that is procedurally impossible). In the opening lines of their Motion for
6 Reconsideration, Defendants state that they want this Court to “preclude Plaintiffs from utilizing
7 the affidavit of Robert Colin as evidence in this case or for purposes of interpreting the subject
8 Declaration of Restrictions” (Reconsideration, page 1). The problem with this request is that
9 the Court of Appeals has already held that the affidavit was relevant to Mr. Conlin’s intent when
10 he created the CC&Rs. (Mem. Dec. ¶19). This is now the unmistakable law of the case.
11 Defendants cannot change it and this Court should not change its mind regarding its initial ruling
12 regarding the affidavit of Robert Conlin. The Defendants’ Motion for Reconsideration should
13 be denied.

14
15 RESPECTFULLY SUBMITTED this 22nd day of April, 2013.

16 **J. JEFFREY COUGHLIN PLLC**

17
18 By: 
19 J. Jeffrey Coughlin

20 COPY of the foregoing
21 mailed this 22nd day of
22 April, 2013 to:

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