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SUPERIOR COURT  
YAVAPAI COUNTY, ARIZONA

2012 DEC 28 PM 2: 26

SANDRA K HAZKHAH, CLERK  
BY: R ROMERO

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,

11 Plaintiffs,

12 vs.

14 DONALD COX and CATHERINE COX,  
15 husband and wife,

16 Defendants.

CASE NO. P1300CV20030399

**MOTION FOR SUMMARY  
JUDGMENT**

**(Oral Argument Requested)**

17 In accordance with Rule 56, Ariz. Rules of Civ. Proc., Plaintiffs, by and through their  
18 attorney undersigned, hereby move for summary judgment on all remaining issues in this case.

19 This motion is supported by the accompanying Memorandum of Points and Authorities and  
20 Plaintiff's Statement of Facts in Support of its Motion for Summary Judgment.

21 **MEMORANDUM OF POINTS AND AUTHORITIES**

22 **I. FACTUAL BACKGROUND**

23 The parties own property in an area known as Coyote Springs Ranch. The Coxes use  
24 their property ("subject property") as a "growing yard" for Prescott Valley Nursery and Prescott  
25 Valley Growers, the retail and wholesale nursery business they own in partnership with their  
two sons. Catherine Cox described the subject property in her deposition testimony as one of

1 “three locations” for the partnership. It is used to grow and store inventory for the other two  
2 locations that are outside of Coyote Springs Ranch. Partnership employees work at the subject  
3 property, but it is not open to the public, and no sales are conducted on it. The Coxes also live  
4 on the property part time. Plaintiffs’ Statement of Facts (PSOF) # 1.

5 In 2001, the Coxes applied for an agricultural use exemption for the property from  
6 Yavapai County. As part of the application for the exemption, Catherine Cox signed a  
7 Statement of General Agricultural Use and Affidavit, acknowledging:

8 The exemption for general agricultural purposes is an exemption  
9 from zoning regulations for the agricultural use of the land and any  
10 residential use thereof shall be customarily incidental to the  
11 established agricultural use. The primary use, therefore, is a[n]  
“agricultural use.” When the “agricultural use” is abandoned the  
zoning district regulations shall again be fully applied.

12 Any residential use of this property is secondary and must be an  
13 accessory use to the principle agricultural use as stated above.  
14 Should the property be used for any use not customarily incidental  
to the agricultural use, the exemption clause shall no longer apply.

15 “Agricultural Property” is defined in the Statement as:

16 property used for the purpose of agronomy, horticulture or animal  
17 husbandry:

- 18 1. In which the primary function is to produce an agricultural  
crop or commodity.
- 19 2. In which the primary investment is for the purpose of  
20 farming or stock ranching.
- 21 3. In which the property is capable of being utilized solely for  
22 it’s [sic] agricultural abilities to sustain economic self-  
sufficiency and return a nominal profit.

23 **PSOF # 2.**

24 Coyote Springs Ranch property is subject to a Declaration of Restrictions  
25 (“Declaration”) that provides in relevant part:

1           1. Each and every parcel of the above-described premises shall be known  
2 and described as residential parcels; that is to say, mobile, modular or  
3 permanent dwellings may be erected and maintained upon said premises,  
subject to limitations with respect thereto as herin below [sic] set forth.

4           2. No trade, business, profession or any other type of commercial or  
5 industrial activity shall be [initiated] or maintained within said property or any  
6 portion thereof.

6           .....

7           19. If there shall be a violation or threatened or attempted violation of any  
8 of said covenants, conditions, stipulations or restrictions, it shall be lawful for  
9 any person or persons owing said premises or any portion thereof to prosecute  
10 proceedings at law or in equity against all persons violating or attempting to,  
11 or threatening to violate any such covenants, restrictions, conditions or  
12 stipulations, and either prevent them or him from so doing or to recover  
13 damages or other dues for such violations. No failure of any other person or  
party to enforce any of the restrictions, rights, reservations, limitations,  
14 covenants and conditions contained herein shall, in any event be construed or  
15 held to be a waiver thereof or consent to any further or succeeding breach or  
16 violation thereof . . . .

13 **PSOF # 3.**

14           In their complaint against the Coxes, the Cundiffs alleged that the Coxes' use of the  
15 subject property violates section two of the Declaration. In response, the Cundiffs [sic, should  
16 read Coxes] asserted the defenses of abandonment, waiver, estoppel, lashes and unclean hands.

17 **PSOF #4.**

18           Coyote Springs Ranch has retained its fundamental character and its lots still contain  
19 nine acres as is evident by reviewing videos and personal observation. (PSOF # 5).

20 **II. STANDARD FOR GRANTING SUMMARY JUDGMENT.**

21           Summary judgment is proper when "there is no genuine issue as to any material fact and  
22 . . . the moving party is entitled to a judgment as a matter of law." Ariz. R. Civ. P. 56(c)(1). A  
23 court should grant summary judgment "if the facts produced in support of the claim or defense  
24  
25

1 have so little probative value, given the quantum of evidence required, that reasonable people  
2 could not agree with the conclusion advanced by the proponent of the claim or defense." *Orme*  
3 *Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990). We review de novo whether  
4 there are any genuine issues of material fact and whether the trial court applied the law properly.  
5 *Brookover v. Roberts Enters., Inc.*, 215 Ariz. 52, ¶ 8, 156 P.3d 1157, 1160 (App.2007). A mere  
6 scintilla of evidence or a slight doubt as to whether a material factual dispute exists is not  
7 sufficient to overcome summary judgment. *Orme Sch.*, 166 Ariz., at 309, 802 P.2d at 1008.  
8 When the material facts are not disputed, a trial court may decide the issues as a matter of law.  
9 *Ortiz v. Clinton*, 187 Ariz. 294, 298, 928 P.2d 718, 722 (App.1996).

### 11 **III. LEGAL ARGUMENT**

#### 12 **A. The Court of Appeals Analysis**

13 In its Memorandum Decision, the Court of Appeals addressed the Trial Court's  
14 disposition of various issues in this case. The Memorandum Decision is attached hereto as  
15 Exhibit 1. The Court of Appeals identified the sections of the CC&Rs at issue in this case. One  
16 of them was Section 2, which states:

17 2. No trade, business, profession or any other any other  
18 type of commercial or industrial activity shall be [initiated] or maintained  
19 within said property or any portion thereof.

20 The Cundiffs contended in their complaint that the Coxes' tree farm business violated  
21 paragraph 2. The Coxes asserted defenses of abandonment, waiver, estoppel, laches and  
22 unclean hands. The Cundiffs filed two motions for partial summary judgment. In one of those  
23 motions, the Cundiffs asserted that Section 19 of the CC&Rs contained a non-waiver clause  
24 which preserved the right of any person or party to enforce the CC&Rs regardless of their  
25 failure to do so in the past. Section 19 states as follows:

1 If there shall be a violation of threatened or attempted violation  
2 of any of said covenants, conditions, stipulations or restrictions,  
3 it shall be lawful for any person or persons owning said premises  
4 or any portion thereof to prosecute proceedings at law or in  
5 equity against all persons violating or attempting to, or  
6 threatening to violate any such covenants, restrictions, conditions  
7 or stipulations, and either prevent them or him from so doing or  
8 to recover damages or other dues for such violations. **No failure  
9 of any other person or party to enforce any of the restriction,  
10 rights, reservations, limitations, covenants and conditions  
11 contained herein shall, in any event be construed or held to  
12 be a waiver thereof or consent to any further or succeeding  
13 breach or violation thereof . . .**

14 (Emphasis added for the purpose of identifying the non-waiver clause).

15 In the other motion for partial summary judgment, the Cundiffs asserted that the Coxes'  
16 tree farm business violated Section 2 of the CC&Rs and that the Coxes could not prove the  
17 defenses they raised – estoppel, laches, unclean hands, abandonment and waiver. Although the  
18 this Court granted the Cundiffs' motion for partial summary judgment regarding the Coxes'  
19 defenses of estoppel, laches and unclean hands, it denied their motion regarding the defenses of  
20 abandonment and waiver. The Court of Appeals affirmed this Court's decision regarding  
21 estoppel, laches and unclean hands and agreed with the Cundiffs that this Court erroneously  
22 interpreted Section 2 of the CC&Rs (Mem. Dec. ¶¶11-21).

23 **B. The Conlin affidavit clearly establishes that the intent of the creator of the  
24 CC&Rs was to ensure not only a rural setting, but a rural, residential  
25 environment.**

As the Court of Appeals stated, both the Cundiffs and the Coxes relied on the affidavit of  
Robert Conlin, “an original grantor responsible for preparation and recording of the  
Declaration” (Mem. Dec. ¶19). The Court of Appeals included in its decision the following four  
paragraphs from the Conlin affidavit:

3. The recorded covenants and restrictions were intended to ensure that the Coyote Springs Ranch subdivision would be a residential community. The nine acre lots were intended to

1 ensure that the residential community would retain a rural  
2 setting.

3 4. To protect the rural, residential setting of the subdivision, a  
4 covenant was included strictly prohibiting trade, business,  
5 commercial or industrial enterprises [from] operating in the  
6 Coyote Springs Ranch subdivision.

7 5. The covenant against trade, business, commercial or industrial  
8 enterprises was not intended to prohibit against landowners or  
9 occupiers from maintaining a home-office in their residence,  
10 from parking or maintaining their business vehicles or  
11 equipment on their property, or from indicating to the public  
12 that they had a home office at their residence.

13 6. I have personally viewed the nursery operation engaged in by  
14 Catherine and Donald Cox on their property located in Coyote  
15 Springs Ranch. As an original grantor and creator of the  
16 recorded Declarations of Restrictions, June 13, 1974, it was  
17 my intention that the restrictions prohibit the very activity  
18 being conducted on the property by Catherine and Donald  
19 Cox. Furthermore, the express language of the restrictions  
20 provide such.

21 (Mem. Dec. ¶19).

22 The Court of Appeals held that the affidavit was relevant to Mr. Conlin's intent when he  
23 created the CC&Rs. (Mem. Dec. ¶19). Intent was the basis upon which the Court of Appeals  
24 vacated this Court's judgment in the Coxes' favor. The Court of Appeals stated in Mem. Dec.  
25 ¶13, (citations omitted):

The trial court interpreted existing Arizona case law to hold that restrictions are not favored and must be strictly construed. However, the trial court did not have the benefit of the Arizona Supreme Court's most recent pronouncement in this area. In *Powell*, our Supreme Court rejected the very rule of construction utilized by the trial court . . . The [*Powell*] court stated **the 'cardinal principle on construing restrictive covenants is that the intention of the parties to the instrument is paramount.**

(Emphasis added).

In holding that the Coxes' agricultural business violated Section 2 of the CC&Rs, the Court of Appeals stated: "[A]s confirmed in Conlin's affidavit, the Declaration ensures not only

1 a rural setting, but a rural, residential environment. Given that interpretation, the Coxes'  
2 agricultural business use of the property violates section two of the Declaration.” (Mem. Dec.  
3 ¶20).

4 This is now the law of this case. “Under the law of the case doctrine, an appellate  
5 court’s decision is controlling in both the lower courts and in subsequent appeals in the same  
6 case, so long as the facts and law remain substantially the same.” *Cooper Hills Enters., Ltd. V*  
7 *Ariz. Dep’t of Revenue*, 214 Ariz. 386, 390-91, 153 P.3d 407, 411-12 (App. 2007).

8 **C. The Court of Appeals affirmed this Court’s grant of summary judgment**  
9 **regarding the Coxes’ defenses of estoppel, laches and unclean hands; the**  
10 **only issues remaining in this case can be decided by a ruling in the**  
11 **Cundiffs’ favor on this motion**

12 Two issues remain in this case – abandonment and waiver. As the Court of Appeals  
13 stated, this Court did not have the benefit of the Arizona Supreme Court decision in *Powell v.*  
14 *Washburn*, 211 Ariz. 553, 125 P. 3d 373 (2006), at the time it made its initial decisions. This  
15 Court also did not have the benefit of the Court of Appeals decision in *College Book Centers,*  
16 *Inc., v Carefree Foothills Homeowners’ Association*, 225 Ariz. 533, 241 P.3d 897 (App. 2010).

17 In *College*, the Plaintiff, as did the Coxes in this case, presented evidence of prior  
18 violations of the CC&Rs in support of their argument that the HOA had waived its ability to  
19 enforce the CC&Rs because it had failed to enforce them on certain occasions in the past. The  
20 Court of Appeals determined that the evidence Plaintiff presented did not constitute frequent  
21 violations such that a jury might reasonably infer waiver. It went on to hold that “even if the  
22 two violations could reasonably be considered frequent, we hold that the HOA was entitled to  
23 JMOL based on Article VII, Section 1(b) of the CC&Rs, which provides as follows:

24 “The failure by an Owner to enforce any restrictions, conditions,  
25 covenants or agreements herein contained shall not be deemed a waiver  
or abandonment of this Declaration or any provision thereof.”

1 225 Ariz. 538, 241 P.3d. 902, ¶16. The language in the Coyote Springs CC&Rs is practically the  
2 same:

3 No failure of any other person or party to enforce any of the restriction,  
4 rights, reservations, limitations, covenants and conditions contained  
5 herein shall, in any event be construed or held to be a waiver thereof or  
consent to any further or succeeding breach or violation thereof . . .

6 As stated by the Court of Appeals in *College*:

7 On appeal, we recognized at the outset that absent a non-waiver provision,  
8 deed restrictions may be considered abandoned or waived “if frequent  
9 violations of those restrictions have been permitted.” *Id.* at 398, ¶ 21, 87 P.3d  
10 at 86. **But when CC&Rs contain a non-waiver provision, a restriction  
11 remains enforceable, despite prior violations, so long as the violations did  
12 not constitute a “complete abandonment” of the CC&Rs.** *Id.* at 399, ¶ 26,  
13 87 P.3d at 87. Complete abandonment of deed restrictions occurs when “the  
14 restrictions imposed upon the use of lots in [a] subdivision have been so  
15 thoroughly disregarded as to result in such a change in the area as to destroy  
16 the effectiveness of the restrictions [and] defeat the purposes for which they  
17 were imposed.” *Id.* (quoting *Condos v. Home Dev. Co.*, 77 Ariz. 129, 133,  
18 267 P.2d 1069, 1071 (1954)).

19 225 Ariz. 538-9, 241 P. 3d 902-3 (emphasis added).

20 According to *College*, the only way that the Coxes can prevail on the issues of waiver  
21 and abandonment is if they can establish that the Coyote Springs CC&Rs have been completely  
22 abandoned. As stated in *College*, above, complete abandonment means that the restrictions  
23 have been so thoroughly disregarded that the result is “such a change in the area as to destroy  
24 the effectiveness of the restrictions and defeat the purposes for which they were imposed”.

25 Mr. Conlin’s intention when he created the CC&Rs was to ensure that the Coyote  
Springs Ranch subdivision would be a residential community (Mem. Dec. ¶19). Mr. Conlin’s  
intention when he created the nine acre lot restriction was to ensure that the residential  
community retains a rural setting *Id.* A review of the video depicting the properties in Coyote  
Springs and a personal viewing, if the Court chooses to do so, will reveal overwhelmingly that  
the Coyote Springs area has retained its rural and residential character as envisioned by the  
creator of the CC&Rs, Robert Conlin. If the restrictions had been so thoroughly disregarded

1 that the result is “such a change in the area as to destroy the effectiveness of the restrictions and  
2 defeat the purposes for which they were imposed” then why would Coyote Springs look the  
3 way it does and why would the lots still contain nine acres?

4 **D. There is no material issue of fact regarding the nine acre parcels and the**  
5 **fundamental character of the Coyote Springs Ranch subdivision; the**  
6 **Cundiffs are entitled to judgment as a matter of law**

7 When the material facts are not disputed, a trial court may decide the issues as a matter  
8 of law. *Ortiz v. Clinton*, 187 Ariz. 294, 298, 928 P.2d 718, 722 (App.1996). There is  
9 absolutely no basis to argue that the CC&Rs have been so thoroughly disregarded as to destroy  
10 the effectiveness of the restrictions and defeat the purposes for which they were imposed. The  
11 most that can be argued is that there has been a partial disregard of the restrictions.

12 Thorough is defined as: “complete with regard to every detail; not superficial or  
13 partial” (Concise Oxford American Dictionary, Oxford University Press, Inc., 2006 Ed., p.  
14 946). Disregard is defined as: “pay no attention to; ignore *Id.* at p. 260. “Thoroughly  
15 disregard”, in the present analysis, means that every property owner in Coyote Springs Ranch  
16 pays no attention to every restriction in the CC&Rs. The most glaring contradictions to that  
17 statement are the physical appearance of the properties subject to the CC&Rs and that none of  
18 the lots contain less than nine acres. As the video reveals, acres and acres of land within the  
19 subdivision consist of flat, grassy, fenced, rural, residential properties. Even if the Coxes assert  
20 and prove that there is a property here and there that has the physical appearance of a  
21 commercial or industrial enterprise, certainly not all the properties appear so and the nine acre  
22 parcels still exist.

23 **E. The Coxes cannot possibly prove that there has been a thorough disregard**  
24 **of the CC&Rs**

25 The death knell for the Coxes’ abandonment argument is the fact that the nine acre  
restriction has not been violated. This means that any claim that there has been a “thorough  
disregard” of the CC&Rs cannot possibly succeed. Even if ten or twenty parcels had been

1 split, such is not “complete with regard to every detail”. Partial violation is not complete  
2 violation. In *Burke v. Voicestream Wireless Corp. II*, 207 Ariz. 393, 87 P. 3d 81 (App. 2004),  
3 the court determined, as a matter of law, that the CC&Rs in that case had not been abandoned.  
4 First, the court confirmed that the test for determining complete abandonment of deed  
5 restrictions was set forth in the Arizona Supreme Court in *Condos*, above:

6 Complete abandonment of deed restrictions occurs when “the  
7 restrictions imposed upon the use of lots in [a] subdivision have been  
8 so thoroughly disregarded as to result in such a change in the area as to  
9 destroy the effectiveness of the restrictions [and] defeat the purposes  
10 for which they were imposed[.]” *Id.* (quoting *Condos v. Home Dev.*  
11 *Co.*, 77 Ariz. 129, 133, 267 P.2d 1069, 1071 (1954)).

12 The *Burke* court then held:

13 . . . The violations of section 4 described by Voicestream and SWC have not  
14 destroyed the fundamental character of the neighborhood. We conclude, as a  
15 matter of law on the record before us, that the non-waiver provision of the  
16 Restrictions remains enforceable and the subdivision property owners have  
17 not waived or abandoned enforcement of section 4 even though they or their  
18 predecessors have acquiesced in several prior violations of its provisions.

19 *Id.* at 399, ¶27, 87 P. 3d at 87.

20 The fundamental character of the neighborhood in the present case is captured in the  
21 video of the entire Coyote Springs Ranch subdivision. The neighborhood has remained  
22 essentially the same. It still has dirt roads, slow speed limits, grassy fenced nine acre parcels  
23 and the physical appearance of a rural residential community – just as Robert Conlin  
24 envisioned and planned. There are not any material facts at issue regarding the physical  
25 appearance of the Coyote Springs Ranch subdivision and the size of the lots contained therein.  
As a result, the Cundiffs are entitled to judgment as a matter of law on all the remaining claims  
contained in their First Amended Complaint.

### 26 . III. ATTORNEYS’ FEES

27 As the Court of Appeals stated in paragraph 12 of its decision, “a deed that contains a  
28 restrictive covenant runs with the land and is a contract”. *Powell*, above, at 555, ¶8, 125 P. 3d

1 at 375. The Coyote Springs Ranch subdivision CC&Rs are a contract and as a result, according  
2 to A.R.S. §12-341.01, the Cundiffs are entitled to an award of their attorneys' fees from the  
3 outset of this case through the Court of Appeals proceedings and including all fees incurred in  
4 this Court from the Court of Appeals decision to the conclusion of this case.

5 **IV. CONCLUSION**

6 The Court of Appeals has resolved all the issues in this case except two defenses raised  
7 by the Coxes – abandonment and waiver. The Conlin affidavit clearly establishes that the intent  
8 of the creator of the CC&Rs was to ensure not only a rural setting, but a rural, residential  
9 environment. It is undisputed that there has not been a complete abandonment of the CC&Rs. It  
10 is undisputed that the CC&Rs have not been thoroughly disregarded as evidenced by the  
11 existing fundamental character of Coyote Springs and the continued existence of the nine acre  
12 lots. There is no material issue of fact regarding the nine acre parcels and the fundamental  
13 character of the Coyote Springs Ranch subdivision which means the Cundiffs are entitled to  
14 judgment as a matter of law.  
15

16 Accordingly, Plaintiffs pray for judgment against Defendants, and each of them, as  
17 follows:

- 18 A. Declaring that the recorded Declaration of Restrictions is valid and enforceable;
- 19 B. Declaring the rights and other legal relations of Plaintiffs and Defendants  
20 arising from the recorded Declaration of Restrictions;
- 21 C. Permanently enjoining Defendants from initiating, maintaining or expanding  
22 their current business enterprise on said property as violate of the recorded  
23 restrictions and covenants pertaining to the real property;
- 24 D. Ordering Defendants to remove any and all conditions or activities on said land  
25 that violates any restriction or covenant as provided in the recorded Declaration  
of Restrictions;
- E. Awarding Plaintiffs their reasonable attorney's fees and costs pursuant to

1 A.R.S. § 12-341.01; and,

2 E. For such other and further relief as the Court deems just and equitable under the  
3 circumstances.

4 RESPECTFULLY SUBMITTED this 28<sup>th</sup> day of December, 2012.

5 **J. JEFFREY COUGHLIN PLLC**

6  
7  
8 By: 

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