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JUL 28 2004
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8 **IN THE SUPERIOR COURT OF ARIZONA**
9 **COUNTY OF YAVAPAI**

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

16 Plaintiffs,

17 vs.

18 **DONALD COX and CATHERINE COX,)**
19 **husband and wife,)**
20 **Defendants.)**

Case No. CV 2003-0399 DWL

Division 1

**Plaintiffs' Motion for
Summary Judgment
Re: Waiver of Restrictive Covenant
Prohibiting Business and Commercial
Enterprises**

(Oral Argument Requested)

21 Plaintiffs, by and through undersigned counsel, hereby move for summary judgment on
22 Defendants' affirmative defense of waiver of the prohibition against business and commercial
23 enterprises contained in the Declaration of Restrictions governing Coyote Springs Ranch.

24 This motion presents a pure question of law, and therefore, is appropriate for summary
25 judgment. This motion is supported by the following memorandum of points and authorities, separate
26 statement of facts with attached exhibits filed contemporaneously herein, as well as the entire record
in this proceeding.

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1 RESPECTFULLY SUBMITTED this 28th day of July, 2004.

2 FAVOUR, MOORE & WILHELMSSEN, P.A.

3
4 By Marguerite Kirk
5 David K. Wilhelmsen
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8 **MEMORANDUM OF POINTS AND AUTHORITIES**

9 **I. SUMMARY OF RELEVANT FACTS AND PROCEDURAL HISTORY**

10 Plaintiffs are all owners of real property located in Coyote Springs Ranch, Yavapai County,
11 Arizona. *Plaintiffs' Separate Statement of Facts in Support of Motion for Summary Judgment*
12 (*hereinafter "SSOF"*) at ¶¶1-3. Coyote Springs Ranch is subject to recorded Declaration of
13 Restrictions. The Declaration of Restrictions, provides in relevant part:

14 2. No trade, business, profession or any other type of commercial or industrial
15 activity shall be initiated or maintained within said property or any portion thereof.

16 * * *

17 7. (e) No structure whatsoever other than one single family dwelling or mobile
18 home, as herein provided, together with a private garage for not more than three (3)
19 cars, a guest house, service quarters and necessary out buildings shall be erected,
20 placed or permitted to remain on any portion of said property.

21 * * *

22 15. No outside toilet or other sanitary conveniences or facilities shall be erected or
23 maintained on the premises.

24 * * *

25 17. The foregoing restrictions and covenants run with the land and shall be binding
26 upon all parties and all persons claiming through them until June 1, 1994, at which
time said covenants and restrictions shall be automatically extended for successive
periods of ten (10) years, or so long thereafter as may be now or hereafter permitted
by law.

* * *

19. If there shall be a violation or threatened or attempted violation of any of said
covenants, conditions, stipulations or restrictions, it shall be lawful for any person or
persons owning said premises or any portion thereof to prosecute proceedings at law
or in equity against all persons violating or attempting to, or threatening to violate any
such covenants, restrictions, conditions or stipulations, and either prevent them or him

1 from so doing or to recover damages or other dues for such violations. No failure of
2 any other person or party to enforce any of the restrictions, rights, reservations,
3 limitation, covenants and conditions contained herein shall, in any event, be construed
4 or held to be a waiver thereof or consent to any further or succeeding breach or
violation thereof. The violation of these restrictive covenants, condition or stipulations
or any or more of them shall not affect the lien of any mortgage now of record, or
which hereafter may be placed of record, upon said premises or any part thereof.

5 *SSOF at ¶¶4-6.*

6 In April, 1998, Defendants Catherine and Donald Cox, purchased real property located in
7 Coyote Springs Ranch. *SSOF at ¶7.* Thereafter, in August 2000, Defendants Catherine and Donald
8 Cox commenced development and improvement of their real property in Coyote Springs Ranch. *SSOF*
9 *at ¶8.* Since approximately August 2001, Defendants Cox's improvements and development of the
10 subject land included drilling a well, obtaining electricity, construction of a driveway, placement of
11 a mobile home, erection of a perimeter fence, grading of the property, and installation of irrigation
12 lines that cover nine (9) acres of their land. *SSOF at ¶9.*

13 Since January 2002, Defendants Cox utilize their Coyote Springs Ranch real property for the
14 production of trees, shrubs, and the like for their nursery business. *SSOF at ¶10.* Since that time also,
15 Defendants Cox have had one-full time employee, who has been and continues to be assisted by two
16 to three other employees, that work exclusively at their Coyote Springs Ranch property who is
17 responsible for maintaining all trees produced on their property. *SSOF at ¶11.*

18 On May 15, 2003, Plaintiffs filed their complaint and request for injunctive relief against
19 Defendants on the grounds that Defendants' nursery enterprise located in the subdivision, violated the
20 recorded Declaration of Restrictions prohibiting business or commercial activity. *SSOF at ¶12.*

21 Defendants filed their verified answer to the amended complaint on May 21, 2004, specifically
22 raising the affirmative defenses of laches, waiver and estoppel. *SSOF at ¶13.* Defendants additionally
23 claimed as an affirmative defense that the complaint was "barred because of Plaintiffs' own
24
25
26

1 negligence, acts, omissions, carelessness and/or inattention.”¹ *SSOF at ¶14*. Defendants further
2 requested an award of their attorney’s fees and costs under A.R.S. §12-341.01. *Id.*

3 **II. LEGAL STANDARD FOR SUMMARY JUDGMENT**

4 A party is entitled to summary judgment where there is no genuine issue of material fact and
5 the moving party is entitled to judgment as a matter of law. *Orme School v. Reeves*, 166 Ariz. 301, 802
6 P.2d 1000 (1990); *Giovanelli v. First Federal Sav. & Loan Ass'n of Phoenix*, 120 Ariz. 577, 587 P.2d
7 763 (App.1978); *Dutch Inns of America, Inc. v. Horizon Corp.*, 18 Ariz.App. 116, 500 P.2d 901
8 (1972). A motion for summary judgment is appropriate and "should be granted if the facts produced
9 in support of the claim or defense have so little probative value, given the quantum of evidence
10 required, that reasonable people could not agree with the conclusion advanced by the proponent of the
11 claim or defense." *Orme School, supra*, at p.1008 ("[M]ere existence of a scintilla of evidence is
12 insufficient.")

13 In this case, there is no genuine issue of fact that Coyote Springs Ranch is subject to recorded
14 Declaration of Restrictions, which provide an unambiguous no-waiver provision. As a matter of law,
15 the non-waiver provision in the recorded Declaration of Restrictions is unambiguous and enforceable.
16 Therefore, Defendants are precluded by law from claiming that the restriction against business or
17 commercial activity in the sub-division has been abandoned by waiver of enforcement of the
18 provision.

19 **III. THE NON-WAIVER PROVISION IN THE RECORDED DECLARATION OF** 20 **RESTRICTIONS IS ENFORCEABLE AS A MATTER OF LAW**

21 It is well-established law in Arizona that covenants, conditions and restrictions “constitute a
22 contract between the subdivision’s property owners as a whole and individual lot owners.” *Ahwatukee*
23 *Custom Estates Mgmt. Assoc., Inc. v. Turner*, 196 Ariz. 631, 634, 2 P.3d 1276, 1279 (App. Div. 1

24
25 ¹Enforcement of restrictive covenants is clearly an action in contract, not tort. Defendants’
26 recognize as much considering their request for attorney’s fees under A.R.S. §12-341.01(A).
Therefore, Defendants’ cannot legally assert a contributory negligence defense.

1 2000) citing *Arizona Biltmore Estates Ass'n v. Tezak*, 177 Ariz. 447, 448, 868 P.2d 1030, 1031 (App.

2 1983). Thus, "contract interpretation presents questions of law..." *Ibid.* Furthermore,

3 Words in a restrictive covenant must be given their ordinary meaning, and the use of
4 the words within a restrictive covenant gives strong evidence of the intended meaning.
5 *Duffy v. Sunburst Farms E. Mut. Water & Agric. Co.*, 124 Ariz. 413, 416, 604 P.2d
6 1128, 1127 (1979). Unambiguous restrictive covenants are generally enforced
7 according to their terms. *Id.* at 417, 604 P.2d at 1128.

8 *Burke v. Voicestream Wireless Corp.*, 422 Ariz. Adv. Rep. 16, 87 P.3d 81, 83 (App. Div.1 2004),
9 citations in original.

10 Furthermore, A.R.S. §33-416 expressly provides:

11 The record of a grant, deed or instrument in writing authorized or required to be
12 recorded, which has been duly acknowledged and recorded in the property county,
13 shall be notice to all persons of the existence of such, grant, deed or instrument....

14 *Id.* The supreme court has held Arizona's constructive notice statute binds subsequent purchasers of
15 recorded restrictions:

16 The function of our recording statutes is to protect persons who deal with interests
17 in land by giving notice. This protects against claims or obligations by subsequent
18 purchasers without notice. Under the rules of constructive notice, a successor in
19 interest is charged with notice of any equitable covenant that is properly recorded in
20 a prior instrument and for which the successor is required to search. ***The successor
21 takes the property bound by the covenant and must comply with it.***

22 *Federoff v. Pioneer Title & Trust Co. of Arizona*, 166 Ariz. 383, 387, 803 P.2d 104, 108 (1990)
23 (internal citations omitted; emphasis added). Thus, notwithstanding any claim to the contrary by
24 Defendants that they may have lacked actual knowledge of the recorded covenants, they are legally
25 charged with constructive notice of the Declaration of Restrictions, and are must comply with the
26 restrictions.

Hence, by legal necessity Defendants have raised the affirmative defenses of waiver in order
to avoid enforcement of the recorded covenants. In *Burke v. Voicestream Wireless*, the appellate court
addressed the issue of "whether [an] express non-waiver provision in [the] Restrictions precludes a

1 finding of waiver.” *Id.* at ___, 87 P.3d at 86 (*internal citations omitted.*)² In that case, the appellate
2 court dealt with a non-waiver provision in the restrictions which stated:

3 “failure to enforce any of the restrictions, rights, reservations, limitation and covenants
4 contained herein shall not in any event be construed or held to be a waiver thereof or
consent to any further or succeeding breach or violation thereof.”

5 *Ibid.* The appellate court stated that notwithstanding “evidence that the homeowners in [the sub-
6 division] have acquiesced in prior violations” of the same restriction which they sought to enforce in
7 that action, courts generally must enforce “[u]nambiguous provisions in restrictive
8 covenants...according to their terms.” *Ibid.* Commenting on the non-waiver provision at issue in the
9 case before it, the appellate court stated:

10 These Restrictions were drafted to allow enforcement of restrictive covenants by
11 individual homeowners. The non-waiver provision, by its plain language, is intended
12 to prevent a waiver based on prior inaction in enforcing the Restrictions. ***To hold
otherwise would render the non-waiver provision meaningless and violate the
expressed intention of the contract among the property owners.***

13 * * *

14 The drafters of the Restrictions chose not to create a homeowners association. Without
15 the non-waiver provision, the inaction of a homeowner on one side of the subdivision
could result in a waiver of the right of a homeowner on the other side of the
subdivision to enforce the Restrictions in regard to an adjacent lot.

16 *Ibid.* (*internal citation omitted; emphasis added.*)

17 Finally, the Arizona court of appeals rejected defendants’ argument that the waiver of a
18 particular covenant was sufficient to constitute abandonment of the restrictions as a whole, thereby
19 rendering the non-waiver provision unenforceable. *Ibid.* The Arizona supreme court has held that
20 abandonment of restrictive covenants will only be established upon a showing that the restrictions,

21 ...have been so thoroughly disregarded as to result in such a change in the area as to
22 destroy the effectiveness of the restrictions, defeat the purposes for which they were

23
24 ²Neither the case before this Court nor the *Burke* appellate court deals with the issue of waiver
25 in the absence of a non-waiver provision in the Declaration of Restrictions. “In the absence of a non-
26 waiver provision, particular deed restrictions will be considered abandoned and waived, and therefore
unenforceable, if frequent violations of those restrictions have been permitted.” *Id.* at ___, 87 P.3d
at 86 (*internal citation omitted.*)

1 imposed and consequently [] amount to an abandonment thereof.

2 *Id. at ___*, 87 P.3d at 86-87, quoting *Condos v. Home Development Company*, 77 Ariz. 129, 133, 267
3 P.2d 1069, 1071 (1954).

4 The appellate court in *Burke* concluded that the evidence failed to establish that the prior
5 violations of the restrictive covenants had “destroyed the fundamental character of the neighborhood.”
6 *Id. at ___*, 87 P.3d at 87. Therefore, as a matter of law, the non-waiver provision was enforceable as
7 written, and plaintiff-homeowners were not barred from seeking judicial enforcement of the restriction
8 based upon their or their predecessors acquiescence in prior violations of that or other restrictive
9 covenants. *Ibid.*

10 In marked similarity to the present action, the drafters of the recorded Declaration of
11 Restrictions for Canyon Springs Ranch did not provide for creation of a homeowners association.
12 Instead, as did the drafters of the restrictive covenants in *Burke*, the recorded restrictions on the subject
13 real property contain an express non-waiver provision:

14 If there shall be a violation or threatened or attempted violation of any of said
15 covenants, conditions, stipulations or restrictions, it shall be lawful for any person or
16 persons owning said premises or any portion thereof to prosecute proceedings at law
17 or in equity against all persons violating or attempting to, or threatening to violate any
18 such covenants, restrictions, conditions or stipulations, and either prevent them or him
19 from so doing or to recover damages or other dues for such violations. **No failure of**
20 **any other person or party to enforce any of the restrictions, rights, reservations,**
limitation, covenants and conditions contained 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. The violation of these restrictive covenants, condition or
stipulations or any or more of them shall not affect the lien of any mortgage now of
record, or which hereafter may be placed of record, upon said premises or any part
thereof.

21 *Exhibit 1, Declaration of Restrictions at ¶19, p.1 (emphasis added).* The emphasized language in the
22 non-waiver provision is virtually identical to that dealt with by the *Burke* appellate court. *Burke*,
23 *supra*, 87 P.3d at 86 (non-waiver provision quoted herein at p.4.)

24 Defendants contend that the restriction prohibiting business or commercial activity has been
25 waived by subdivision homeowners’ acquiescence for alleged other violations of the same covenant.
26 However, even assuming for sake of argument only, the existence other business or commercial

1 activities conducted in the subdivision, the non-waiver provision does not foreclose enforcement of
2 the restriction against Defendants. As the *Burke* court stated, to “hold otherwise would render the
3 non-waiver provision meaningless and violate the expressed intention of the contract among the
4 property owners.” *Ibid.*

5 IV. CONCLUSION

6 Covenants and restrictions regarding the use of land constitute a contract between homeowners
7 and where properly recorded, are binding against subsequent purchaser. Interpretation of restrictions
8 and covenants is purely a question of law for the court. Unambiguous language in a covenant is
9 accorded its plain meaning under contract principles. Where, as here, the defense of waiver is asserted
10 against enforcement of recorded Declaration of Restrictions, the Arizona court of appeals has
11 definitively held that a plaintiff-homeowner’s, or predecessor’s, acquiescence in a violation of the
12 restriction does not, as a matter of law, constitute waiver of that covenant or preclude its subsequent
13 enforcement.

14 There is no genuine issue of material fact that the recorded Declaration of Restrictions in this
15 case contain a non-waiver provision; which bears striking similarity to the non-waiver provision
16 presented to the Arizona appellate court for interpretation and application. Therefore, as a matter of
17 law, Defendants cannot defend against enforcement of the prohibition against business or commercial
18 activity in the subdivision on the grounds of alleged waiver by acquiescence of alleged similar
19 violations by these Plaintiff-homeowners, their predecessors, or their neighbors. Consequently,
20 Defendants are precluded, as a matter of law, from introducing evidence of any other alleged business
21 operation in Canyon Springs Ranch to support a claim of waiver, estoppel or acquiescence in defense
22 of this action.

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1 DATED this 28th day of July, 2004.

2 FAVOUR, MOORE & WILHELMSSEN, P.A.

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11 ORIGINAL of the foregoing
12 filed this 28th day of July, 2004 to:

13 Clerk, Superior Court of Arizona
14 Yavapai County
15 Prescott, Arizona

16 A copy hand-delivered this 28th day
17 of July, 2004 to:

18 Honorable David L. Mackey
19 Division One
20 Superior Court of Arizona
21 Yavapai County
22 Prescott, Arizona

23 and, a copy hand-delivered this
24 28th day of July, 2004 to:

25 Jeffrey Adams
26 MUSGROVE, DRUTZ & KACK, P.C.
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By: Marguerite Kirk
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