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JEANNE HICKS, CLERK

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4 Attorneys for Defendants

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.)
CUNDIFF, husband and wife; ELIZABETH)
9 NASH, a married woman dealing with her)
separate property; KENNETH PAGE and)
10 KATHRYN PAGE, as Trustee of the Kenneth)
Page and Catherine Page Trust,)

11 Plaintiffs,

12 v.

13 DONALD COX and CATHERINE COX,)
14 husband and wife,)

15 Defendants.

CASE NO. [REDACTED] 0399

DIVISION 1

SUPPLEMENTAL CITATION ✓
OF AUTHORITIES

(Assigned to the Hon. David L. Mackey)

17 Defendants Donald Cox and Catherine Cox (hereinafter "Cox") supplement their Response
18 to Plaintiffs' Motion for Summary Judgment Re: Waiver of Restrictive Covenant Prohibiting
19 Business and Commercial Enterprises at page 4, line 16, with the following supplemental Citations
20 of Authorities:

- 21 1) In Burke v. Voicestream Wireless Corp., 207 Ariz. 393, 399, 87 P.3d 81 (App.
22 2004), the Court stated:

23 ... No evidence was presented, however, that Desert
24 Estates is no longer a "choice residential district."
25 The violations of section 4 described by Voicestream
26 and SWC have not destroyed the fundamental
27 character of the neighborhood. We conclude, as a
28 matter of law on the record before us, that the non-
waiver provision of the Restrictions remains
enforceable and the subdivision property owners have
not waived or abandoned enforcement of section 4
even though they or their predecessors have

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1 acquiesced in several prior violations of its
2 provisions.

- 3 2) Neither Cox's Separate Statement of Facts in Support of Response to Motion for
4 Summary Judgment filed on September 29, 2004 nor Cox's Separate Statement of
5 Facts in Support of Response to Motion for Summary Judgment filed on January
6 11, 2005 were controverted by the Plaintiffs. Accordingly, the facts contained
7 therein are undisputed and at a minimum create a genuine issue of material fact in
8 dispute which prevents summary judgment being granted to Plaintiffs, on the issue
9 of wavier. Rule 56(c), Ariz. R. Civ. Proc., Choisser v. State, 12 Ariz. App. 259, at
10 260, 469 P.2d 493 (1970), rev. den.; Maxwell v. Aetna Life Ins. Company, 143
11 Ariz. 205, 693 P.2d 348 (App. 1984).
- 12 3) The facts asserted by Cox in their Separate Statement of Facts dated September 29,
13 2004 include the following:

14 8. Since the Plaintiffs filed their lawsuit on May
15 16, 2003, in which they alleged that Defendants had violated
16 paragraphs 2, 7(e) and 15 of the Declaration, Defendants
17 have obtained personal knowledge of, and have observed,
18 numerous other commercial businesses being operated in
19 the Coyote Springs subdivision in which the Property is
20 located. Those businesses and commercial operations are
21 located as depicted on the map attached as Exhibit "1" to the
22 Response to Plaintiffs' Request for the Court's On-Site
23 Inspection of Subject Real Property Subdivision filed on
24 August 11, 2004. Defendants possess photographic
25 evidence of business activities being conducted on
26 properties in the portion of Coyote Springs Ranch
27 purportedly governed by the Declaration. ... Defendants
28 have also obtained documentary evidence supporting their
contention that businesses are being conducted on properties
in the portion of Coyote Springs Ranch purportedly
governed by the Declaration. ...

10. A private investigator was hired to
investigate potential violations of the Declaration. ... In
conducting her investigation, the private investigator found
that in all of Coyote Springs, only 38 non-vacant properties,
or approximately ten percent (10%) of the total properties in
Coyote Springs that were viewed, did not appear to have a
violation of the Declaration. ... Thus, approximately 90
percent (90%) of the properties that were investigated in

1 Coyote Springs appeared to violate the Declaration. ...
2 During her investigation, the private investigator observed
3 numerous apparent violations of paragraphs 6, 7(a), 7(b),
4 7(c), 7(e), 8, 9, 12, 13 and 16 of the Declaration.

5 4) The facts asserted by Cox in their Separate Statement of Facts dated January 11,
6 2005 include the following:

7 6. Prior to purchasing the Subject Property, the Coxes drove
8 around the Coyote Springs Ranch area and saw evidence of many
9 examples of non-residential improvements and activity, including:

- 10 (1) a church;
- 11 (2) llama farms;
- 12 (3) alpaca farms;
- 13 (4) horse breeding;
- 14 (5) boarding and training facilities;
- 15 (6) a hay sales facility;
- 16 (7) a general contractor's warehouse;
- 17 (8) a shipping company;
- 18 (9) a Christmas tree farm; and
- 19 (9) numerous commercial vehicles.

20 26. Furthermore, an investigation of the Coyote Springs Ranch
21 subdivision has revealed that few property owner have complied
22 with the Declaration.

23 27. The CC&Rs violations are broad-based and include
24 violations of virtually every restrictive covenant set forth in the
25 Declaration, including numerous violations of the provision dealing
26 with business and commercial activities that have existed, in many
27 cases, for decades.

28 28. Plaintiffs are included amongst those in violation of the
Declaration of Restrictions. For example, Plaintiffs have installed
and continue to maintain above-ground water tanks on their property
in violation of ¶ 16 of the Declaration.

29 Further, Plaintiffs admit to attending a meeting in 2003, in a
Church located within Coyote Springs Ranch, to discuss violations
by other property owners, including ostensibly the Coxes; admit that
a Church is not a residence and admit that it violates the Declaration.

30 Plaintiff Kenneth Page admits that repairing cars in exchange
for payment is considered a business. In fact, Plaintiffs Kenneth
and Kathryn Page and Becky Nash themselves have solicited -- or
"initialed" -- automotive repair since at least 1999 from Coyote
Curt's Auto Repair, located in Coyote Springs. The Plaintiffs
themselves have "initialed" or solicited business within Coyote
Springs. Based on the sheer volume of violations, especially
those numerous violations of the prohibition of business and

1 commercial activities, the Declaration has been abandoned by the
2 owners of properties in Coyote Springs Ranch. Restrictions on
3 business operations may have, at some time prior to the Coxes'
4 purchase, been effective. However, they long since have been
5 abandoned, as Plaintiffs themselves implicitly acknowledge through
6 their conduct. In short, Plaintiffs have no viable answer to
7 Defendants' equitable defenses. ***.

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10 31. Neither Plaintiffs nor any other Property owners have
11 attempted to enforce the Declaration against any other property
12 owner, despite the noted violations.

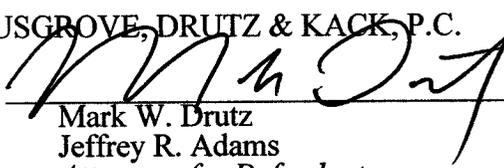
- 13
- 14 5) Plaintiffs conceded at oral argument on January 31, 2005 that they were not seeking
15 summary judgment on Cox's affirmative defense of abandonment. Plaintiffs
16 acknowledged that the affirmative defense of abandonment is an issue for trial.
17
- 18 6) Since at a minimum there is a genuine issue of material fact in dispute as to
19 whether the Plaintiffs have abandoned the entire set of Declaration of Restrictions,
20 summary judgment on the affirmative defense of waiver is not proper. Burke,
21 supra, at p. 399.

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RESPECTFULLY SUBMITTED this 15th day of February, 2005.

MUSGROVE, DRUTZ & KACK, P.C.

By


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A copy of the foregoing was
hand-delivered this 15th day of
February, 2005 to:

The Honorable David L. Mackey
Yavapai County Superior Court
Division 1
Yavapai County Courthouse
Prescott, Arizona

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