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SUPERIOR COURT
YAVAPAI COUNTY, ARIZONA
2014 JAN 22 PM 4:19 ✓
SANDRA K. HARKBATH, CLERK
BY: B. Ledemos

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

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

Plaintiffs,

vs.

DONALD COX and CATHERINE COX,
husband and wife,

Defendants.

CASE NO. P1300CV20030399

**PLAINTIFFS' JOINDER IN
JAMES VARILEK'S
CORRECTED AND RESTATED
RESPONSE
TO MOTION FOR NEW TRIAL
RE: GRANT OF PLAINTIFFS'
MOTION FOR SUMMARY
JUDGMENT**

AND

**PLAINTIFFS' RESPONSE TO
MOTION FOR NEW TRIAL RE:
GRANT OF PLAINTIFFS'
MOTION FOR SUMMARY
JUDGMENT**

(Oral Argument Requested)

Plaintiffs join James Varilek in his Corrected and Restated Response to Defendants' Motion for New Trial concerning the Summary Judgment this Court granted in Plaintiffs' and Varilek's favor on June 14, 2013. Plaintiffs also respond to Defendants' motion to demonstrate how simple and discreet the one remaining issue is in this case: whether there been a complete abandonment of the CC&Rs for the Coyote Springs Ranch subdivision.

1 Although in their Motion for Summary Judgment Plaintiffs asserted that after all the
2 lower and appellate court rulings, by December of 2012 there were only two remaining issues
3 (waiver and abandonment) only the abandonment issue truly remains and was the basis for Judge
4 Jones' ruling in Plaintiffs' favor.

5 None of the parties dispute that paragraph 19 of the CC&Rs contains the following
6 language: "[N]o failure of any other person or party to enforce any of the restriction, rights,
7 reservations, limitations, covenants and conditions contained herein shall, in any event be
8 construed or held to be a waiver thereof or consent to any further or succeeding breach or
9 violation thereof . . ." This is the non-waiver clause.

10 So the question is - if the provisions of the CC&Rs cannot be waived then can all
11 nineteen paragraphs be enforced? The answer is yes, unless there has been a complete
12 abandonment of the restrictions contained in all nineteen paragraphs. Has there been such an
13 abandonment? No. Why no? One reason is because when Judge Jones took this issue under
14 advisement, two hundred and eighty (280) out of two hundred eighty eight (288) parcels
15 consisted of at least nine acres, as required by Paragraph #3 of the CC&Rs.

16 The creator of the CC&Rs, Robert Conlin, stated in his affidavit that "[The] recorded
17 covenants and restrictions were intended to ensure that the Coyote Springs Ranch subdivision
18 would be a residential community. **The nine acre lots were intended to ensure that the
19 residential community would retain a rural setting.**" (emphasis added). Plaintiffs and
20 Defendants relied on this affidavit when they presented their case to the Court of Appeals. The
21 Court of Appeals relied on the affidavit for purposes of determining Conlin's intent. The Court
22 of Appeals discussed Conlin's intent because **the 'cardinal principle on construing restrictive
23 covenants is that the intention of the parties to the instrument is paramount'**. Court of
24 Appeals Mem. Dec. ¶13, (citations omitted)(emphasis added). Judge Jones adopted the Court of
25 Appeals findings regarding Conlin's affidavit and the clear intent expressed in that affidavit.

1 As they stated on pages eight and nine of their Motion for Summary Judgment,
2 “complete abandonment of deed restrictions occurs when “the restrictions imposed upon the use
3 of lots in [a] subdivision have been so thoroughly disregarded as to result in such a change in the
4 area as to destroy the effectiveness of the restrictions [and] defeat the purposes for which they
5 were imposed.”*College Book Centers, Inc., v Carefree Foothills Homeowners’ Association*, 225
6 Ariz. 533, 539, 241 P.3d 897, 903 (App. 2010)(quoting *Condos v. Home Dev. Co.*, 77 Ariz. 129,
7 133, 267 P.2d 1069, 1071 (1954)). The key phrase is “thoroughly disregarded”.

8 Thorough is defined as: “complete with regard to every detail; not superficial or partial”
9 (Concise Oxford American Dictionary, Oxford University Press, Inc., 2006 Ed., p. 946).
10 Disregard is defined as: “pay no attention to; ignore *Id.* at p. 260. “Thoroughly disregard”, in
11 the present analysis, means that every property owner in Coyote Springs Ranch pays no attention
12 to every detail of every restriction in the CC&Rs. A thorough disregard for the CC&Rs would
13 have to include the size of the real estate parcels. 97.22% of the lots consist of nine acres as
14 required by paragraph #3 of the CC&Rs. Can Defendants legitimately argue that 2.78% non-
15 compliance is “thorough”? No. They cannot. Thorough does not mean partial.

16 This exceptionally high percentage of compliance with the lot size restriction is an
17 insurmountable obstacle for Defendants. It is a barrier that completely wards off Defendants’
18 abandonment defense; it is a barrier that protects Coyote Springs residents by preserving what
19 Robert Conlin intended when he created the CC&Rs.

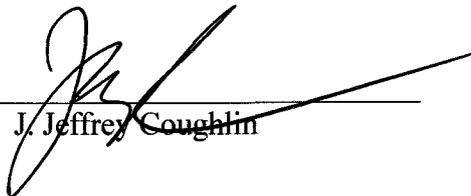
20 The fundamental character of the Coyote Springs neighborhood is captured in the video
21 of the entire Coyote Springs Ranch subdivision. The neighborhood has remained essentially the
22 same. Walmart next to Kohl’s next to Frys next to Buffalo Wild Wings next to the Harkins
23 Theater do not occupy the parcels adjoining Coyote Springs Road or Mountain View Road or
24 Pronghorn Lane or Lonesome Valley Road. Coyote Springs Ranch still has dirt roads, slow
25 speed limits, grassy fenced nine acre parcels and the physical appearance of a rural residential

1 community – just as Robert Conlin envisioned and planned. One only needs to view what
2 Defendants refer to as an amateur video (submitted with Plaintiffs’ Motion for Summary
3 Judgment) to realize how simple and rural and residential and wide open and beautiful an area it
4 is. It is not necessary for a professional film crew with a long list of credentials at the end of the
5 production to document such simplicity. The simple answer to the question of whether there has
6 been a complete abandonment is – no.

7 There is no reason for this Court to disturb Judge Jones’ June 14, 2013 ruling.
8 Defendants’ Motion for New Trial should be denied.

9 DATED this 22nd day of January, 2014.

10
11 **J. JEFFREY COUGHLIN PLLC**

12
13 By: 
14 J. Jeffrey Coughlin

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