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9 SUPERIOR COURT OF ARIZONA  
10 YAVAPAI COUNTY

11 JOHN B. CUNDIFF and BARBARA C. )  
12 CUNDIFF, husband and wife; ELIZABETH )  
13 NASH, a married woman dealing with her )  
14 separate properly; KENNETH PAGE and )  
15 KATHRYN PAGE, as Trustee of the )  
16 Kenneth Page and Catherine Page Trust, )  
17 )  
18 )  
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28 )  
Plaintiffs,  
v.  
DONALD COX and CATHERINE COX,  
husband and wife, et al., et ux.,  
Defendants.

Case No. CV 2003-0399  
Division 4  
(Assigned to Hon. Kenton Jones)  
**JAMES VARILEK'S  
CONSOLIDATED REPLY TO  
THE RESPONSES TO  
PLAINTIFFS' MOTION FOR  
SUMMARY JUDGMENT FILED  
BY DEFENDANTS COX  
AND VERES**

Property Owner James Varilek files this consolidated reply to the *Response to Plaintiffs' Motion for Summary Judgment* filed by Defendants Cox and to *Defendant's Veres Response to Plaintiffs' Motion for Summary Judgment Filed 12-28-12*. The two responses make essentially the same points.

**Judge Mackey's finding of a genuine issue of material fact in 2005 is not the "law of the case" in 2013**

On April 5, 2005, Judge Mackey entered an Under Advisement Ruling in which, *inter alia*, he denied Plaintiffs' motion for summary judgment on the Coxes' affirmative defenses of waiver and abandonment, finding "that there is a material factual issue regarding whether the restrictions in this case have been so thoroughly disregarded as to

1 regarding whether the restrictions in this case have been so thoroughly disregarded as to  
2 result in a change in the area that destroys the effectiveness of the restrictions.” In the  
3 same ruling, Judge Mackey did award partial summary judgment to Plaintiffs on the  
4 Coxes’ other affirmative defenses.

5 Judge Mackey later awarded partial summary judgment to the Coxes on Plaintiffs’  
6 claim that the Coxes’ use of their property in Coyote Springs Ranch violates paragraph  
7 two of the Declaration of Restrictions; this ruling was reduced to a partial final judgment  
8 pursuant to ARCP 54(b) early in 2006. Plaintiffs appealed the partial final judgment in  
9 favor of the Coxes, while the Coxes cross-appealed the award of summary judgment to  
10 Plaintiffs on the Coxes’ affirmative defenses other than waiver and abandonment. The  
11 Court of Appeals’ opinion, *Cundiff v. Cox*, No. 1 CA-CV 06-0165 (Mem. Op. 5/24/2007),  
12 is now the law of the case as to all matters decided by the appellate court.

13 Judge Mackey’s *denial* of summary judgment to Plaintiffs on the Coxes’  
14 affirmative defenses of waiver and abandonment, on the basis of the existence of a  
15 genuine issue of material fact, was not before the Court of Appeals at all because a denial  
16 of summary judgment is a non-appealable, interlocutory order. “It is well settled that a  
17 denial of a motion for summary judgment is a non-appealable, interlocutory order that  
18 may be reviewed only by special action.” *Sonoran Desert Investigations, Inc. v. Miller*,  
19 213 Ariz. 274, 276, 141 P.3d 754, 756 (App. 2006).

20 Nevertheless, Defendants Cox and Veres suggest in their responses that Judge  
21 Mackey’s ruling denying Plaintiffs’ motion for summary judgment on the Coxes’  
22 affirmative defenses of waiver and abandonment is itself now the law of the case as to the  
23 existence of a genuine issue of material fact – and, indeed, that Plaintiffs should be  
24 sanctioned for daring to renew their motion. Defendants’ understanding of the law of the  
25 case doctrine is *hopelessly confused*, and Varilek urges the Court not to become caught up  
26 in their confusion.

27 Even rudimentary research would have informed Defendants that an order denying  
28 summary judgment does *not* become the law of the case. There are literally *scores* of

1 reported decisions to this effect, but the following citations from the first few pages  
2 generated by Westlaw should serve to make the point:

- 3 • It is “simply wrong that [a] court's earlier ruling constitutes the law of  
4 the case: ‘an initial denial of summary judgment does not foreclose, as  
5 the law of the case, a subsequent grant of summary judgment on an  
6 amplified record.’” *Fisher v. Trainor*, 242 F.3d 24, 29 n. 5 (1st Cir.  
7 2001) (quoting *Bonnie & Co. Fashions, Inc. v. Bankers Trust Co.*, 955  
8 F.Supp. 203, 210 (S.D.N.Y. 1997).
- 9 • “A denial of a summary judgment motion does not constitute a final  
10 disposition of any issue in the case and does not become the ‘law of the  
11 case.’ An ‘order denying a motion for summary judgment is generally  
12 interlocutory and subject to reconsideration by the court at any time.’  
13 *Preaseau v. Prudential Ins. Co. of America*, 591 F.2d 74, 79–80 (9th Cir.  
14 1979). ... Accordingly, this Court rejects Plaintiffs' ‘law of the case’  
15 arguments.” *Andrews Farms v. Calcot, Ltd.*, 693 F.Supp.2d 1154, 1164-  
16 65 (E.D.Cal. 2010).
- 17 • “There is no merit to appellant's claims that the denial of appellee's first  
18 motion for summary judgment was a ruling that the trust was invalid, or  
19 that such a ruling is the law of the case. The order does not purport to  
20 decide the question. It merely denies the motion because, in the court's  
21 then view, there were ‘issuable facts.’ Such a denial merely postpones  
22 decision of any question; it decides none. To give it any other effect  
23 would be entirely contrary to the purpose of the summary judgment  
24 procedure. The court did nothing more than it purported to do, that is,  
25 refuse to grant the motion.” *Dessar v. Bank of America Nat. Trust. and  
26 Sav. Ass'n*, 353 F.2d 468, 470 (9th Cir. 1965).
- 27 • “Plaintiffs argue that the action of a different judge in denying  
28 defendants' motions for summary judgment established the law of the  
case and thus prevented the trial judge from granting a directed verdict  
based on similar legal arguments. Plaintiffs are mistaken. There is  
nothing in the law of the case idea that prohibits a trial judge from  
reconsidering a ruling that the judge made. Also, it does not prohibit one  
judge, in a multi-judge court, from reconsidering a ruling of a  
colleague.” *Brown v. Board of Educ.*, 139 P.3d 1048, 1051 n.4 (Or.App.  
2006) (citations omitted).

26 The foregoing principles are well-established in Arizona. In *State v. King*, 180  
27 Ariz. 268, 883 P.2d 1024 (Ariz.,1994), for example, our Supreme Court stated:

1 At the trial court level, the doctrine of the law of the case is “merely a  
2 practice that protects the ability of the court to build to its final judgment by  
3 cumulative rulings, with reconsideration or review postponed until after the  
4 judgment is entered.” 1B James W. Moore, *Moore's Federal Practice* ¶  
5 0.404[4.-1] (2d ed. 1992). “[T]his doctrine does not prevent a judge from  
6 reconsidering his or her previous nonfinal orders.” *Plumb v. State*, 809 P.2d  
7 734, 739 (Utah 1990). Nor does it prevent a different judge, sitting on the  
8 same case, from reconsidering the first judge's prior, nonfinal rulings. *See*  
9 *Broyles v. Fort Lyon Canal Co.*, 695 P.2d 1136, 1144 (Colo. 1985);  
10 *Stepanov v. Gavrilovich*, 594 P.2d 30, 36 (Alaska 1979); *State v. Carden*,  
11 170 Mont. 437, 555 P.2d 738, 740 (1976).

12 180 Ariz. at 279, 883 P.2d at 1035. *Accord*, *Bogard v. Cannon & Wendt Elec. Co.*, 221  
13 Ariz. 325, 331, 212 P.3d 17, 23 (App. 2009); *Zimmerman v. Shakman*, 204 Ariz. 231, 236,  
14 62 P.3d 976, 981 (App. 2003).

15 Notwithstanding decisions such as the foregoing, Defendants Cox and Veres  
16 absurdly suggest that because Plaintiffs’ motion for summary judgment on the Coxes’  
17 affirmative defenses of waiver and abandonment was denied by Judge Mackey on the  
18 basis of the existence of a genuine issue of material fact in 2005, Plaintiffs are precluded  
19 some *eight years later* from renewing their motion on the basis of a more fully developed  
20 record and more recent case law because *the existence of a genuine issue of material fact*  
21 *in 2005* has become *the law of the case in 2013*. Defendants’ gross misunderstanding of  
22 the law of the case doctrine would preclude a motion for summary judgment from ever  
23 being renewed, notwithstanding that this is an exceedingly common practice that  
24 contributes to the efficient administration of justice. As the Ninth Circuit recognized in  
25 *Dessar v. Bank of America, supra*, a denial of summary judgment on the basis of the  
26 existence of a genuine issue of material fact “merely postpones decision of any question;  
27 it decides none.” To suggest that “the existence of a genuine issue of material fact” can  
28 become “the law of the case” is, quite literally, nonsensical.

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1                   **Defendants misunderstand Plaintiffs' and Varilek's reliance on the Court of**  
2                   **Appeals' decision in regard to the character of Coyote Springs Ranch**

3                   Plaintiffs and Varilek have acknowledged that the Court of Appeals' decision is not  
4                   the law of the case in regard to the Coxes' affirmative defenses of waiver and  
5                   abandonment. Judge Mackey denied Plaintiffs' motion for summary judgment as to those  
6                   defenses, and the denial was not before the Court of Appeals. Those defenses (and only  
7                   those defenses) thus survived the Court of Appeals' decision.

8                   However, the Court of Appeals' decision is highly relevant to the abandonment  
9                   issue now before this Court. The Court of Appeals noted that both parties had relied on  
10                  the affidavit of original developer Robert Conlin in which he had stated, "The recorded  
11                  covenants and restrictions were intended to ensure that the Coyote Springs Ranch  
12                  subdivision would be a residential community. The nine-acre lots were intended to ensure  
13                  that the residential community would retain a rural setting." Mem. Op. at 11. The Court  
14                  of Appeals further noted that the Coxes had "seized on" Conlin's use of the word "rural"  
15                  to argue that their use of the property was typical of uses found in rural areas. *Id.* at 12.  
16                  In rejecting the Coxes' argument and holding that their use clearly violated paragraph two  
17                  of the Declaration of Restrictions, the Court of Appeals stated: "As confirmed in Conlin's  
18                  affidavit, *the Declaration ensures not only a rural setting, but a rural, residential*  
19                  *environment.*" *Id.* (emphasis added).

20                  The Court of Appeals' determination that the purpose of the Declaration is to ensure  
21                  a rural, residential environment was one of the foundation stones of the court's holding  
22                  that Judge Mackey had misinterpreted paragraph two and that the Coxes' use did violate  
23                  this paragraph. This determination as to the purpose and meaning of the Declaration thus  
24                  is the law of the case, even though the issues of waiver and abandonment remain open.

25                  As the Arizona case law cited in Plaintiffs' *Motion for Summary Judgment* and  
26                  Varilek's joinder makes clear, the critical issue when (as here) a declaration of restrictions  
27                  contains a non-waiver provision is whether *wholesale violations* of the *entire body of*  
28                  *restrictions* have been so pervasively ignored that the *fundamental character* of the

1 development has changed to such an extent that *enforcing the restrictions would now be*  
2 *pointless*. The Court of Appeals' decision establishes, as the law of the case, that Coyote  
3 Springs Ranch is fundamentally a rural, residential community. The decision establishes,  
4 as the law of the case, what Defendants must *prove* by clear and convincing evidence in  
5 order to establish that an abandonment has occurred – *i.e.*, that Coyote Springs Ranch is  
6 no longer a rural, residential community.

7 Whether every parcel in Coyote Springs Ranch ever was, or still is, precisely nine  
8 acres is irrelevant to the issue of whether the development retains its character as a rural,  
9 residential community. If lot-splitting in violation of the restrictions had reduced the vast  
10 majority of the original nine-acre parcels to quarter-acre lots, this would indeed be  
11 relevant and would be readily apparent from a view of the subdivision such as Plaintiffs  
12 and Varilek have urged the Court to undertake. But Defendant Veres' evidence that *one*  
13 parcel may have been divided into two parcels of 4.71 acres each (albeit still under  
14 common ownership) is simply irrelevant to the issue of whether Coyote Springs Ranch  
15 retains its character as a rural, residential community. The Court can readily see from the  
16 videos filed with Mr. Cundiff's affidavit, together with a view of the area, that Coyote  
17 Springs Ranch remains a rural, residential community by any reasonable interpretation of  
18 that phrase.

19 **Defendants' "violation counting" approach to abandonment**  
20 **is fundamentally misguided**

21 Varilek urges the Court to keep in mind, when ruling on the *Motion for Summary*  
22 *Judgment*, what Defendants have the burden of proving by clear and convincing evidence  
23 – *i.e.*, that the character of Coyote Springs Ranch as a rural, residential community has  
24 been so radically altered by wholesale violations of the Declaration of Restrictions that  
25 enforcing the restrictions would now be pointless. This standard is made clear in all of  
26 the Arizona decisions relied on by Plaintiffs and Varilek:

- 27 • *Condos v. Home Development Co.*, 77 Ariz. 129, 133, 267 P.2d 1069,  
28 1071 (1954): To constitute an abandonment, "the restrictions imposed

1 upon the use of lots in a subdivision [must] have been so thoroughly  
2 disregarded as to result in *such a change in the area as to destroy the*  
3 *effectiveness of the restrictions, defeat the purposes for which they were*  
4 *imposed* and consequently to amount to an abandonment thereof”  
(emphasis added).

- 5 • *Decker v. Hendricks*, 97 Ariz. 36, 41, 396 P.2d 609, 612 (1964):  
6 Abandonment occurs when “the changes in the surrounding areas are *so*  
7 *fundamental or radical as to defeat or frustrate the original purposes of*  
8 *the restrictions*” (emphasis added).
- 9 • *Burke v. Voicestream Wireless Corp. II*, 207 Ariz. 393, 87 P.3d 81 (App.  
10 2004): “No evidence was presented, however, that Desert Estates is no  
11 longer a ‘*choice residential district.*’ The violations of section 4  
12 described by Voicestream and SWC *have not destroyed the fundamental*  
13 *character of the neighborhood.*” 207 Ariz. at 399, 87 P.3d at 87  
(emphasis added).
- 14 • *College Book Centers, Inc., v. Carefree Foothills Homeowners' Assoc.*,  
15 225 Ariz. 533, 241 P.3d 897 (App. 2010): The court likewise quoted the  
16 *Condos* standard.

17 The difficulty of meeting this standard is emphasized in the *Restatement (Third) of*  
18 *Property (Servitudes)*:

19 The test for finding changed conditions sufficient to warrant termination of  
20 reciprocal-subdivision servitudes is often said to be whether there has been  
21 such a radical change in conditions since creation of the servitudes that  
22 perpetuation of the servitude would be of no substantial benefit to the  
23 dominant estate. ... *The test is a stringent one, and few cases that have*  
24 *reached the appellate level have resulted in termination of servitudes.*

25 *Restatement (Third) of Property (Servitudes) § 7.10 comment c* (2000) (emphasis added).

26 Defendants Cox and Veres demonstrate their fundamental misunderstanding of this  
27 standard by their misguided efforts to distinguish the *College Book Centers* decision.  
28 Plaintiffs and Varilek do not suggest that *College Book Centers* is of any particular *factual*  
relevance; they merely cite the decision as the most recent one emphasizing the stringent  
standard to be applied in determining whether an abandonment has occurred. The court in  
*College Book Centers* unsurprisingly found that two ostensible violations of a restriction  
against non-residential structures in a 76-lot subdivision (the violations being roadways)  
were insufficient as a matter of law to constitute a *waiver* of the restriction. This portion

1 of the *College Book Centers* opinion has little or nothing to do with the issues before this  
2 Court, but Defendants go to great lengths to distinguish the decision on the basis that they  
3 have found “lots more than two” violations in Coyote Springs Ranch (with something like  
4 90% of the parcels having “apparent violations,” according to them).

5 The critical point Defendants overlook is that proving abandonment is *not a*  
6 *violation-counting exercise*. The issue is whether whatever violations do exist *have*  
7 *resulted in such a fundamental change in the character of the area that Coyote Springs*  
8 *Ranch is no longer a rural, residential community*. To take as examples the sorts of petty  
9 “apparent violations” urged by Defendants, 100% of the parcels in Coyote Springs could  
10 have open propane tanks, abandoned trailers or unsightly accumulations of junk without  
11 altering *at all* the character of the development as a rural, residential community.

12 This is why the *Motion for Summary Judgment*, deceptively simple as it may seem,  
13 is well-taken. The Court can plainly see, from the videos filed with Mr. Cundiff’s  
14 affidavit, together with a view of the area, that Coyote Springs Ranch remains a rural,  
15 residential community. Defendants’ hyper-technical violation counting (or, more  
16 accurately, “apparent violation” counting) cannot alter this plain fact. As is discussed in  
17 the next section, Defendants have produced virtually *no* competent evidence of any  
18 violations – but even if they had, their violation-counting approach is fundamentally  
19 misguided and would not preclude summary judgment even if they could show that 100%  
20 of the parcels had violations of the sort that do not alter the character of Coyote Springs  
21 Ranch as a rural, residential community.

22 **Defendants have produced insufficient competent evidence to**  
23 **survive the *Motion for Summary Judgment***

24 The key question for the Court in ruling on the *Motion for Summary Judgment* is  
25 whether Defendants have produced sufficient competent evidence to create a genuine  
26 issue of material fact and thus survive the motion. Varilek respectfully suggests that they  
27 have not come close to meeting this standard.

1                   **The Court must view the evidence through “the prism of the substantive**  
2                   **evidentiary burden” Defendants are required to carry – i.e., the standard of**  
3                   **clear and convincing evidence.**

4                   If the party moving for summary judgment makes an initial showing of an absence  
5                   of any genuine issue of material fact, the party opposing summary judgment must produce  
6                   admissible evidence showing that some genuine issue of material fact exists. *Nat'l Bank*  
7                   *of Ariz. v. Thruston*, 218 Ariz. 112, 116-17, 180 P.3d 977, 981-82 (App. 2008); *GM Dev.*  
8                   *Corp. v. Cmty. Am. Mortg. Corp.*, 165 Ariz. 1, 5, 795 P.2d 827, 831 (App. 1990). If the  
9                   opposing party fails to present controverting facts through affidavit or other competent  
10                  evidence, the moving party's allegations of fact may be considered as true. *GM Dev.*  
11                  *Corp.*, 165 Ariz. at 5, 795 P.2d at 831. A mere scintilla of evidence, or evidence which  
12                  only creates slight doubt, is insufficient to defeat summary judgment. *Orme School v.*  
13                  *Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990). For an affirmative defense to  
14                  withstand a motion for summary judgment, the proponent of the defense must present  
15                  competent evidence “from which a reasonable jury could find, directly or by inference,  
16                  that the probabilities favored the proponent.” *Orme School*, 166 Ariz. at 310, 802 P.2d at  
17                  1009. Mere speculation or insubstantial doubt as to the facts will not suffice to defeat a  
18                  motion for summary judgment. *Badia v. City of Casa Grande*, 195 Ariz. 349, 357, 988  
19                  P.2d 134, 142 (App. 1999); *United Bank of Ariz. v. Allyn*, 167 Ariz. 191, 195, 805 P.2d  
20                  1012, 1016 (App. 1990).

21                  Critical here is the substantive evidentiary burden of proof that Defendants are  
22                  required to carry. As Varilek has shown in his joinder to the *Motion for Summary*  
23                  *Judgment*, an abandonment of subdivision restrictions must be proved by *clear and*  
24                  *convincing evidence*. This standard is highly relevant at the summary judgment stage.

25                  In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), a libel case, the Supreme  
26                  Court carefully analyzed whether a trial judge, in ruling on a motion for summary  
27                  judgment, should simply look for any genuine issue of material fact or should take into  
28                  account the substantive evidentiary standard of proof that would apply at trial – “clear and

1 convincing” in the case of the malice element of a libel claim. The Court concluded,  
2 “[W]e are convinced that the inquiry involved in a ruling on a motion for summary  
3 judgment or for a directed verdict necessarily implicates the substantive evidentiary  
4 standard of proof that would apply at the trial on the merits.” 477 U.S. at 252. “Thus, in  
5 ruling on a motion for summary judgment, the judge must view the evidence presented  
6 through the prism of the substantive evidentiary burden.” *Id.* at 254.<sup>1</sup>

7 The same year, the Arizona Supreme Court followed *Anderson* in *Dombey v.*  
8 *Phoenix Newspapers, Inc.*, 150 Ariz. 476, 724 P.2d 562 (1986), likewise a libel case. The  
9 court adopted the *Anderson* standard that “the appropriate summary judgment question  
10 will be whether the evidence in the record could support a reasonable jury finding either  
11 that the plaintiff has shown actual malice by clear and convincing evidence or that the  
12 plaintiff has not.” 150 Ariz. at 486, 724 P.2d at 572.

13 In *Orme School v. Reeves*, the Arizona Supreme Court extended *Anderson/Dombey*  
14 to “all civil cases” in which the clear and convincing standard applies. 166 Ariz. at 309,  
15 802 at 1008. The court reaffirmed this in *Thompson v. Better-Bilt Alum. Prods. Co.*, 171  
16 Ariz. 550, 558, 832 P.2d 203, 211 (1992): “We therefore hold that a motion ... for  
17 summary judgment on the issue of punitive damages must be denied if a reasonable jury  
18 could find the requisite evil mind by clear and convincing evidence. Conversely, the  
19 motion should be granted if no reasonable jury could find the requisite evil mind by clear  
20 and convincing evidence.”

21 Varilek thus urges the Court to keep in mind, in determining whether Defendants  
22 have produced a sufficient quantum of evidence to survive the *Motion for Summary*  
23 *Judgment*, that their evidence must be viewed through the prism of what they must prove  
24 by clear and convincing evidence – *i.e.*, that the character of Coyote Springs Ranch as a  
25 rural, residential community has been altered by wholesale violations of the Declaration  
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27 <sup>1</sup> Weirdly, Defendants quote *Anderson* at length while completely ignoring the above  
28 portions of the opinion or the fact that the actual holding is distinctly unfavorable to  
their position.

1 of Restrictions. Even when the evidence and all reasonable inferences are considered in  
2 the light most favorable to Defendants, Varilek respectfully urges that what Defendants  
3 have produced falls far short of the evidence required to survive the *Motion for Summary*  
4 *Judgment*.

5 **Defendants' evidence is almost entirely speculative and has little if any**  
6 **bearing on the character of Coyote Springs Ranch as a rural, residential**  
7 **community.**

8 Considering that this case has been pending for nearly *ten years*, it is quite  
9 remarkable that Defendants can point to no actual violations of the Declaration of  
10 Restrictions; they can only speculate about "apparent violations." Apart from hiring a  
11 private investigator to drive around Coyote Springs Ranch and (somewhat curiously)  
12 examine public records concerning the parcel owners, they appear to have undertaken no  
13 discovery in an effort to determine how properties in the subdivision are *actually being*  
14 *used* and whether those uses do, in fact, violate the Declaration.

15 The Coxes state in their response that, before purchasing their parcel, they drove  
16 around the area and "saw evidence of many types of business and commercial activities."  
17 The fact that Coyote Springs Ranch no longer retained its character as a rural, residential  
18 community was, they suggest, readily apparent to them even back then. The private  
19 investigator was hired, they say, merely to "verify" what they had observed. The  
20 investigator, Sheila Cahill, attaches to her affidavit photographs of the "apparent  
21 violations" she ostensibly observed on every parcel in Coyote Springs Ranch. All of this  
22 being the case, it is difficult to see how Defendants can have any objection to the videos  
23 filed with Mr. Cundiff's affidavit in support of the *Motion for Summary Judgment* or to  
24 the view suggested by Plaintiffs and Varilek. Based on what the Coxes say they have  
25 observed and their investigator says she has observed, they should *welcome* the videos  
26 and a view to confirm these observations. Unlike Defendants' "apparent violation"  
27 counting, the videos and suggested view are directly relevant to the central issue here –  
28 *i.e.*, whether Coyote Springs Ranch retains its character as a rural, residential community.

1           If Coyote Springs Ranch no longer retains its character as a rural, residential  
2 community, this fact should be readily apparent from the videos and a view, just as it was  
3 supposedly readily apparent to the Coxes when they drove the area more than a decade  
4 ago. In a tacit admission that this is not (and never was) really the case, Veres comically  
5 asserts in his response that the commercial activity in Coyote Springs Ranch is “not as  
6 readily apparent as it is in Times Square” and that violations of the Declaration of  
7 Restrictions “may, or may not be, readily apparent.” These statements further underscore  
8 Defendants’ confusion in regard to the test for abandonment. How could non-apparent  
9 violations *possibly* result in a change in the fundamental character of an area? Plaintiffs  
10 and Varilek encourage the Court to watch the videos and undertake a view because they  
11 are confident that what will *really* be readily apparent is that Coyote Springs Ranch  
12 remains a rural, residential community and that this is all the evidence the Court will need  
13 in order to grant the *Motion for Summary Judgment*.

14           The great bulk of the controverting evidence on which Defendants rely is to be  
15 found in the affidavit of investigator Cahill, and Varilek thus will focus primarily on this  
16 affidavit. In Judge Mackey’s April 5, 2005 Under Advisement Ruling, in which he also  
17 denied Plaintiffs’ motion *in limine* to preclude lay witness testimony about violations of  
18 the Declaration of Restrictions, he specifically addressed Cahill. He first stated, “The  
19 Court will not permit testimony that attempts to state a legal opinion regarding a violation  
20 of the Declaration of Restrictions. However, the Court will allow lay witnesses to testify  
21 regarding their personal observations and upon appropriate foundation opinions or  
22 inferences pursuant to Rule 701, Ariz.R.Evid.” Concerning Cahill, he stated that “even a  
23 paid investigator can testify as to personal observations and upon appropriate foundation  
24 offer opinions or inferences pursuant to Rule 701, Ariz.R.Evid.” Rule 701 concerns  
25 “Opinion Testimony by Lay Witnesses.”

26           The first point to be made is that, as Judge Mackey implicitly recognized, Cahill is  
27 not an expert. Nothing in her affidavit suggests that she has any specialized education,  
28 training or experience concerning real property matters in general or subdivision

1 restrictions in particular. She is simply a garden-variety private investigator who was  
2 hired by the Coxes to drive around Coyote Springs Ranch and delve into the public  
3 records and report what she had seen and found. She is merely a lay witness whose  
4 observations are entitled to no greater weight than those of anyone else (and considerably  
5 less weight, Varilek would respectfully suggest, than the observations of someone who  
6 actually lives in Coyote Springs Ranch and has observed the subdivision on a daily basis  
7 over a long period of time).

8         Second, all that Cahill can competently testify about her observations is that “I  
9 observed these particular conditions on this particular day.” When she characterizes what  
10 she observed as “apparent violations,” as she repeatedly does, and when Defendants then  
11 suggest that her affidavit constitutes “tangible, admissible evidence from an independent  
12 investigator of pervasive and ongoing violations of the Declaration” (Veres’ response at  
13 7), this goes too far. Whether any of the *conditions* Cahill observed rise to the level of  
14 *violations* of the Declaration, apparent or otherwise, requires a legal opinion of precisely  
15 the sort that Judge Mackey properly stated he would not allow lay witnesses to give.  
16 Determining whether particular conditions violate a particular restriction requires  
17 interpreting the language imposing the restriction and perhaps even the Declaration as a  
18 whole, an exercise in legal reasoning that is beyond Cahill’s competence. Varilek thus  
19 objects to all portions of Cahill’s affidavit in which she characterizes the conditions she  
20 has observed as apparent violations and moves to strike these portions of her affidavit as  
21 well as those portions of Defendants’ responses relying on her characterizations.<sup>2</sup>

22         Cahill and Defendants stray even further afield when they characterize what she  
23 found in the public records as “apparent violations.” The fact that a corporation, limited  
24 liability company, partnership or sole proprietorship uses an *address* in Coyote Springs  
25 Ranch as its statutory or mailing address tells the Court *precisely nothing* about what

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26 <sup>2</sup> Objections to documents supporting a motion for summary judgment or a response to  
27 such a motion may be made in a responsive filing or in a separate motion to strike.  
28 *Airfreight Exp. Ltd v. Evergreen Air Center, Inc.*, 215 Ariz. 103, 158 P.3d 232 (App.  
2007).

1 actually takes place on the property. The utter inanity of Cahill's approach is illustrated  
2 by entries in her affidavit such as these:

3 Parcel 103-01-120 Gwendolyn Anderson has a trade name registered for  
4 Coyote Springs Investments at this address, which is  
5 good until March 5, 2014.

6 Parcel 103-01-095K Lori-Beth Anglin, one of the owners, is a real estate  
7 agent, but she seems to have an office that she  
8 works out of in town.

9 Far from being apparent violations, findings such as the foregoing tell the Court  
10 precisely nothing about what is actually taking place on the subject parcels and would not  
11 even permit an inference of commercial activity. Cahill and Defendants are seemingly  
12 assuming that so much as using an address in Coyote Springs Ranch for business-related  
13 statutory or mailing purposes violates paragraph two of the Declaration of Restrictions –  
14 an utterly bizarre interpretation of paragraph two, in Varilek's view, but in any event an  
15 exercise in legal reasoning that is beyond Cahill's competence. Varilek thus objects to all  
16 portions of Cahill's affidavit in which she characterizes what she has found in the public  
17 records as apparent violations and moves to strike these portions of the affidavit as well as  
18 those portions of Defendants' responses relying on her characterizations.<sup>3</sup>

19 Cahill's affidavit is further defective in that she simply lists parcels and what she  
20 observed on each. She does not relate any of the observations to the specific restriction(s)  
21 they supposedly violate. She leaves it to the Court to guess at which restriction is  
22 supposedly being violated and why. For Defendants to characterize this affidavit as  
23 "tangible, admissible evidence from an independent investigator of pervasive and ongoing  
24 violations of the Declaration" is hyperbole of the highest order.

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25 <sup>3</sup> Varilek objects to and moves to strike the affidavit of James M. Cox attached to the  
26 Coxes' response, as well as the map attached thereto as Exhibit "1", on the same basis.  
27 Cox repeatedly refers to "apparent violations" that he and his parents have identified,  
28 with no foundation whatsoever and without even making clear what conditions they  
have supposedly observed.

1 Turning from the defects in Cahill's affidavit to the substance of it, Varilek again  
2 urges the Court to keep in mind that Defendants have the burden of proving by clear and  
3 convincing evidence that Coyote Springs Ranch has lost its character as a rural, residential  
4 community as a result of wholesale violations of the Declaration of Restrictions. Cahill  
5 summarizes her findings as follows in paragraph 10 of her affidavit:

6 All of the properties have a *propane tank in open view*. Others have other  
7 violations such as *trash receptacles being in open view; junk and*  
8 *abandoned vehicles* being on the property; *dwellings* on the property  
9 without a residence being erected; *travel trailers or campers* on the  
10 property; *two residences* on the same property; or they have more than one  
11 violation on the same property. On some of them, the *residences themselves*  
12 *are falling apart or are unlivable*. [Emphasis added]

11 Varilek urges the Court to ask itself whether these are the sorts of violations (if they  
12 are violations at all) that would alter the fundamental character of Coyote Springs Ranch  
13 as a rural, residential community? Varilek respectfully suggests that the answer is,  
14 "Obviously not." They are the sorts of conditions commonly found in large-lot, rural,  
15 residential communities.

16 When the Court reviews the parcel-by-parcel listing in Cahill's affidavit, it will see  
17 that the above summary is quite accurate. The listing is replete with entries such as  
18 "Empty house, overgrown weeds," "Only a little shed is on the property; no residence,"  
19 "Strange little building, may not comply with structure square footage requirements,"  
20 "People were unloading a large truck filled with tires," and "Excessive amount of dogs  
21 and kennels; other violations." These are obviously not the sorts of violations (if they are  
22 violations at all) that would alter the character of Coyote Springs Ranch as a rural,  
23 residential community. Entries that would even support a reasonable inference of  
24 commercial activity on the premises are few and far between – certainly not enough, in  
25 light of the clear and convincing standard, for Defendants to create a genuine issue of  
26 material fact on the issue of abandonment.

27 ///  
28

1 Cahill's ostensible identification of commercial activities is based almost entirely  
2 on her search of records in the offices of the Arizona Secretary of State, Arizona  
3 Corporation Commission, Arizona Registrar of Contractors and Yavapai County  
4 Recorder. She repeatedly notes such things as the fact that parcel owners hold licenses  
5 from the Registrar of Contractors and use their residence addresses for licenses purposes.  
6 This is scarcely even *relevant* to whether commercial or industrial activity is actually  
7 taking place on the premises in violation of the Declaration of Restrictions, and it is  
8 certainly not enough to support a reasonable inference of such a violation. Similarly,  
9 Cahill repeatedly makes speculative, conclusory statements to the effect that a particular  
10 business is being "run from" or "run out of" an address in Coyote Springs Ranch without  
11 making clear what she means by "run" or whether there were any observable conditions  
12 that would support such a speculative conclusion.<sup>4</sup>

13 When the Court focuses closely on Cahill's affidavit and Defendants' other  
14 supporting documents, it will see that there is exceedingly little competent evidence  
15 establishing, or even supporting a reasonable inference, that there have been violations of  
16 the Declaration of Restrictions. It will see that whatever violations have been shown or  
17 can reasonably be inferred are by no means of such nature and severity as to even vaguely  
18 suggest that Coyote Springs Ranch has ceased to be a rural, residential community.  
19 Indeed, nowhere in Defendants' responses or supporting documents is it explicitly stated  
20 that there *has been* such a change; Defendants are apparently under the mistaken  
21 impression that simply pointing to "lots of apparent violations" is sufficient, even if most  
22 of them are entirely speculative or in the petty vein of "open propane tanks." When the  
23 Court views the meager competent evidence Defendants have produced through the prism  
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25 <sup>4</sup> For example:

26 Parcel 401-01-042 Diana K. Garcia and Robert L. Weaver run Orion Land  
27 Surveying, Inc. from this address.

28 Varilek likewise objects to and moves to strike these speculative, conclusory portions  
of Cahill's affidavit.

1 of the clear and convincing evidentiary standard they are required to meet, and when the  
2 Court sees from the evidence Plaintiffs have produced and a view of the area that Coyote  
3 Springs Ranch speaks for itself in regard to its rural, residential character, Varilek  
4 believes the Court will see that there is no genuine issue of material fact precluding the  
5 granting of Plaintiffs' *Motion for Summary Judgment*.

6 RESPECTFULLY SUBMITTED February 21, 2013.

7 FAVOUR & WILHELMSSEN, PLLC

8  
9 By:



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11 Lance B. Payette

12 Attorneys for Property Owner James Varilek

13 Original of the foregoing filed  
14 February 21, 2013 with:

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16 120 S. Cortez Street  
17 Prescott, AZ 86302

18 Copy of the foregoing hand-delivered  
19 February 21, 2013 to:

20 The Honorable Kenton Jones  
21 Yavapai County Superior Court  
22 120 S. Cortez Street  
23 Prescott, AZ 86303

24 Copy of the foregoing mailed  
25 February 21, 2013 to:

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Attorney for Defendants listed in Answer  
to First Amended Complaint by Joined  
Property Owner Defendants  
Dated October 5, 2010

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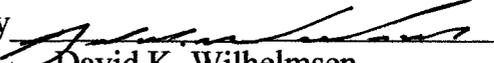
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