

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

<p>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,</p> <p style="text-align: center;">Plaintiffs,</p> <p>vs.</p> <p>DONALD COX and CATHERINE COX, husband and wife,</p> <p style="text-align: center;">Defendants.</p>	<p style="text-align: center;">Case No. P1300CV20030399</p> <p style="text-align: center;">UNDER ADVIESEMENT RULING</p>	<p style="text-align: center;">FILED</p> <p>DATE: <u>JUN 14 2013</u> <u>2</u> O'Clock <u>1</u> . M.</p> <p style="text-align: center;">SANDRA K. MARKHAM CLERK BY: <u>SHEETAL PATEL</u> Deputy</p>
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<p>HONORABLE KENTON D. JONES</p> <p>DIVISION 4</p>	<p>BY: Kathleen Cartier, Judicial Assistant</p> <p>DATE: June 14, 2013</p>
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THIS MATTER comes before the Court on numerous Motions:

1. **“Defendants’ Motion for Reconsideration/Motion for Clarification Re: Ruling on Defendants’ Motion In Limine Re: Robert Conlin,” filed March 28, 2013.**
 - a. James Varilek’s Response to Defendants’ Motion for Reconsideration Re: Ruling on “Defendants’ Motion *In Limine* Re: Robert Conlin,” filed April 17, 2013.
 - b. Plaintiff’s Joinder in James Varilek’s Response to Defendants’ Motion for Reconsideration Re: Ruling on Defendants’ Motion In Limine Re: Robert Conlin and Response to Defendants’ Motion for Reconsideration/Motion for Clarification Re: ruling on defendants’ Motion In Limine Re Robert Conlin,” filed April 22, 2013.
2. **Plaintiff’s, “Motion for Summary Judgment,” filed December 28, 2012.**
 - a. “James Varilek’s Joinder in Plaintiffs’ Motion for Summary Judgment,” filed January 7, 2013.

- b. "Defendant's Veres Response to Plaintiffs' Motion for Summary Judgment Filed 12-28-12; and Joinder," filed February 1, 2013.
 - c. Defendant's, "Response to Plaintiffs' Motion for Summary Judgment," filed February 11, 2013.
 - d. "James Varilek's Consolidated Reply to the Responses to Plaintiffs' Motion for Summary Judgment Filed by Defendants Cox and Veres," filed February 21, 2013.
 - e. "Plaintiff's Joinder in James Varilek's Consolidated Reply to the Responses to Plaintiffs' Motion for Summary Judgment Filed by Defendants Cox and Veres and Plaintiff's Reply in Support of their Motion for Summary Judgment," filed March 15, 2013
- 3. "James Varilek's Motion to Require Defendants Cox to Serve the Indispensable Parties with Documents Comporting with Due Process," filed April 8, 2013.**
- a. "Response to James Varilek's Motion to Require Defendants Cox to Serve the Indispensable [sic] Parties with Documents Comporting with Due Process and Motion to Dismiss for Failure of Plaintiffs to Join Indispensable [sic] Parties," filed April 25, 2013.
 - b. "Varilek's Reply to Defendants' Response to His Motion to Require Defendants Cox to Serve the Indispensable Parties with Documents Comporting with Due Process," filed April 30, 2013.
 - c. "Plaintiff's Joinder in Varilek's Reply to Defendants' Response to His Motion to Require Defendants Cox to Serve Indispensable Parties with Documents Comporting with Due Process and Varilek's Response to Defendants' Motion to Dismiss for Failure of Plaintiffs to Join Indispensable Parties," filed May 9, 2013.
 - d. Defendants, "Reply to Response to Motion to Dismiss Filed by Plaintiffs Cundiff, Nash and Page," filed May 20, 2013.

IN CONSIDERATION of the foregoing, oral argument was requested and held on April 16, 2013, and

BASED UPON the content of the foregoing and oral argument heard,

- A. "Defendants' Motion for Reconsideration/Motion for Clarification Re: Ruling on Defendants' Motion In Limine Re: Robert Conlin," filed March 28, 2013.**

Defendants' Motion for Reconsideration/Motion for Clarification is **DENIED**.

B. Plaintiff's, "Motion for Summary Judgment," filed December 28, 2012.

While the trial Court has previously granted partial Summary Judgment, and the Arizona Court of Appeals has affirmed the trial Court as to its determination in regard to the issues of estoppel, laches and unclean hands, the trial Court previously denied their Motion regarding the defenses of abandonment and waiver. Plaintiff and Veres, herein, ask the Court to revisit the issue of granting Summary Judgment as to abandonment and waiver.

As addressed by Plaintiff, the Court of Appeals Memorandum Decision affirmatively asserted that:

"...As confirmed in Conlin's affidavit, the [Coyote Springs] Declaration ensures not only a rural setting, but a rural, residential environment. Given that interpretation, the Coxes' agricultural business use of the property violates section two of the Declaration...."

(Mem. Decision, Page 13, Paragraph 20).

There is no question and no dispute that Section 2 of the Declaration states:

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

(Exhibit attached to Veres Response to Plaintiff's Motion for Summary Judgment).

Plaintiff goes on to cite *College Book Centers, Inc. v Carefree Foothills Homeowners' Association*, 225 Ariz. 533, 538-539, 241 P.3d 897 (App. 2010), wherein it states:

"...On appeal, we recognized at the outset that absent a non-waiver provision, deed restrictions may be considered abandoned or waived 'if frequent violations of those restrictions have been permitted.' ... **But when CC&R's contain a non-waiver provision, a restriction remains enforceable, despite prior violations, so long as the violations did not constitute a 'complete abandonment' of the CC&R's...** Complete abandonment of deed restrictions occurs when 'the restrictions imposed upon the use of lots in [a] subdivision have been so thoroughly disregarded as to result in such a change in the area as to destroy the effectiveness of the restrictions [and] defeat the purposes for which they were imposed.'..." [Emphasis Added].

The Court of Appeals, in the immediate case, found Defendants Cox to be in violation of the CC&Rs because they were operating a commercial business from their property. As addressed above, the Decision of the Court of Appeals turned on the fact that the CC&Rs were not only intended to insure a *rural* environment, but a *rural, residential* environment, and using the property not for residential purposes but for commercial activity was a violation of the CC&Rs. And it is clear that Defendants Cox do not believe their use of their property for commercial purposes has transmuted the property away from being rural, as they were specific in their argument before the Court of Appeals that their:

“...agricultural activity is typically found in rural settings...”

(Mem. Decision, Page 12, Paragraph 20).

With that the Court will not disagree. In fact, Webster’s Dictionary, Fourth Edition, 2004, Page 1217, defines “rural,” as:

“...Of, relating to, or characteristic of the country... Of or relating to people who live in the country. Of, or relating to farming; agricultural...”

Defendants have based their assertion of the abandonment and waiver of the CC&Rs on 1) an affidavit of Defendant Cox, and 2) a survey of the subdivision properties by a private investigator, Sheila Cahill, and research done by Ms. Cahill through the records of government offices. According to Defendants, Cahill determined 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...”

(Defendant’s Controverting Statement, Page 7, Section 10; Response, Page 8, Lines 8-11).

This assessment of the Cahill determinations is troubling as many of the notations of Cahill indicate conduct not “intended” to be prohibited under the CC&Rs as the Conlin affidavit indicates and the Arizona Court of Appeals has previously found. By example, numerous notations of Cahill indicate that the owners of the residential properties are principals in businesses with the records of the corporation commission reflecting the Coyote Springs address as that of the corporation. Additionally, it appears from the record that certain of the properties for which Cahill reviewed public records are construction companies that may simply take calls at their residences or park cars in front of their residences. The Conlin affidavit indicates that it was not the intention of the CC&Rs to preclude such activity.

Further, the Cahill assessment also lists residences that have horse trailers with the owner’s names on them. Horse trailers with signs stating, “Alvey Racing Diane Darrel Darcey” and “Saunders Racing Stables,” along with “the extra residences and all of the horses,” (Parcel 401-01-042B) do not necessarily illustrate that a business is operated from the property upon

which the trailer is sitting. Even more of a stretch as an apparent violation by a property owner is a licensed real estate agent with an office elsewhere.

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

Also listed are numerous owners who are principals in construction companies who apparently are asserted to err by driving their work vehicles home at night; or in some cases don't, but are listed anyway for no other better or apparent reason than because the Registrar of Contractors has a contractor's license issued to the property owner at that address. Typically, from the records of, “...the Arizona Secretary of State, the Arizona Corporation Commission, the Arizona Registrar of Contractor [sic], and the Yavapai County Recorder's Office,” (Defendants Controverting Statement, Page 8, Lines 20-23), Ms. Cahill asserts:

“...Parcel 401-01-037B – The owners, Shawn Timothy Kilduff and Virginia Marie Kilduff, have two licenses with the Registrar of Contractors, and a corporate filing with the Arizona Corporation commission, under the name of Custom Crete Inc., with their address showing as... in Coyote Springs.”

“...Parcel 103-01-067F – The owners, Grant and Pamela Griffiths, have a company licensed with the Arizona Registrar of Contractors, and registered with the Arizona Corporation Commission, under the name of New Life Landscapes Inc. The address is listed as... in Coyote Springs.”

“...Parcel 401-01-015D – One of the owners of the property, Robert K. Gardiner, has a listing with the Arizona Corporation Commission under the name of Valley to Valley Transport, Inc. With the Secretary of State, [sic] he has registered the tradename [sic] Valley to Valley Transport/Feed and shows himself as owner at the address... in Coyote Springs.

“...Parcel 401-01-020E – The owners, Ross Rozendaal and Kara Rozendaal, are members of Dependable Dutchman Excavating, LLC, with the address... in Coyote Springs. They are listed with the registrar of Contractors and the Arizona Corporation Commission.

“...Parcel 401-01-020D – The owners, Leo M. and Marilyn K. Murphy, are also members of Dependable Dutchman Excavating, LLC. There is also a sign at the driveway which shows “Registered Quarter Horses Prescott Valley, AZ.”

“...Parcel 401-01-005Z – Wiley L. Williams, the owner, currently has a corporation listed with the Arizona Corporation Commission, being Northern Arizona Hay, Inc. The domestic address of the corporation is... in Coyote Springs.”

“...Parcel 103-01-056B – Michael Glennon and Diane Glennon, have a corporation listed to this address with the Arizona Corporation Commission under the name of Sparrow Lab, Inc.”

“...Parcel 103-01-123D – The corporate records revealed that Michael T. Alexander, use [sic] the address... in Coyote Springs... for a corporation named Cobra Enterprises, Inc.”

“...Parcel 103-01-073D – Michael A. Kelly is currently listed with the Arizona Corporation Commission as the Statutory Agent, and Manager, of Northland Equipment Rental & Service, LLC. The address listed is... in Coyote Springs.”

This is not an exhaustive listing of these same types of purported violations, with numerous additional properties that could be added to the list including Parcel 103-01-131D where Cahill notes the records of the Registrar of Contractors indicate there *used to be* licensed contractors living on the property but the licenses were suspended for non-renewal four (4) years ago.

There are also circumstances where Ms. Cahill simply states that the owners run a business out of the property without any indication as to how she has determined that to be the case.

“...Parcel 401-01-015C – Owned by Robert Taylor, he is licensed with the Registrar of Contractors, and listed with the Arizona Corporation Commission under the name R T Contracting specialists LLC, *which appears is being operated at the property*. He also owns Parcel 103-01-130E.”

And, as referenced above, there are times when Ms. Cahill asserts that owners of businesses don't operate the business from the property but drive business vehicles home.

“...Parcel 401-01-038A – Michael and Julie Davis own this parcel, and Julie Davis works for Tarheel Towing, which is known as rollaway Enterprises, Inc. There are vehicles from Tarheel Towing at this property, even though their office is elsewhere.”

Finally, there are instances where Ms. Cahill clearly and unambiguously asserts that she is merely speculating.

“...Parcel 103-01-080K – Strange little building, may not comply with structure square footage requirements.”

Admittedly, there are also clear, observable, violations of the CC&Rs, such as, but not limited to, bottled gas tanks not below ground and trash receptacles visible; in one instance a couch sitting outside, and in another some amount of construction materials located on properties

where construction company owners reside. There are apparently boarded up properties and what appear to be dilapidated and/or trashed mobiles and properties.

However, the failing of utilizing this approach rather than actually knocking on doors or depositing property owners to determine what occurs on their property is that a vast portion of the properties assessed have violations of the CC&Rs attributed to them for conduct that, by appearances, was never intended to constitute a violation according to the Conlin affidavit, or assert violations where violations may not actually exist. The existence of numerous asserted violations is based upon conjecture. As a result, Defendants would ask a jury to join them in their speculation in regard to the nature and scope of violations, with the jury then directed to determine whether what the Defendants can show and otherwise simply speculate about has changed the subdivision away from being rural and residential.

In that regard, conclusory statements are simply insufficient to raise any genuine issues of material fact under Rule 56(e). *State Ex Rel. Corbin v. Challenge, Inc.*, 151 Ariz. 20, 26, 725 P.2d 727 (App. 1986). This rule requires personal knowledge and a showing that the affiant is competent to testify as to the matters. *Madsen v. Fisk*, 5 Ariz.App. 65, 68, 423 P.2d 141 (App. 1967). It has long been the rule in Arizona that in order to draw an inference from an inference, the prior inference must be established to the exclusion of any other reasonable theory rather than by a probability. *Buzard v Griffin*, 89 Ariz. 42, 47, 359 P.2d 155 (Sup.Ct. 1961).

But even more fundamentally, the issue before the Court is whether this matter should proceed to trial based solely upon defenses of waiver and/or abandonment of the CC&Rs as a result of the restrictions imposed upon the use of the properties having been so thoroughly disregarded as to result in such a change in the area as to destroy the effectiveness of the restrictions and defeat the purposes for which they were imposed. The issue is whether the property remains rural and whether the property remains residential, or whether the property is no longer rural or no longer residential.

As addressed above, the Court finds no real debate that the property remains rural. Further, an assessment of whether the CC&Rs might have been violated as a result of commercial businesses being run from residential properties, something clearly in violation of the CC&Rs, does not obviate the fact that the properties, themselves, remain residential. To the Court's understanding, the only portion of Coyote Springs that has been utterly given over to a non-residential use¹ is that of Defendants Cox; that being their use of their 19 acres for purely commercial purposes.

Those items addressed by Cahill and upon which Defendants rely, while reflecting violations of the CC&Rs to some degree; even possibly to a large degree, do not illustrate, in any fashion, a complete abandonment and thorough disregard of the intention of the Declarants that the property remain rural and residential. Admittedly, there is probably no denying that Coyote

¹ Admittedly ignoring the church that exists on one of the lots and the Court electing not to address the first amendment ramifications of attempting to "zone out" religious edifices.

Springs is a rural, residential environment where a number of property owners both reside and operate businesses out of their homes as Conlin indicated was appropriate. Admittedly, there may be circumstances where contractors are using the property where they live to stack materials and that may well be a violation of the CC&Rs. However, nothing presented to the Court supports a finding that Coyote Springs has become anything other than, a rural, residential subdivision.

BASED UPON the foregoing, Plaintiff's and Varilek's Motion for Summary Judgment is GRANTED.

C. "James Varilek's Motion to Require Defendants Cox to Serve the Indispensable Parties with Documents Comporting with Due Process"

Based upon the foregoing, the Court deems this matter MOOT.

- cc: ✓ J. Jeffrey Coughlin — J. JEFFREY COUGHLIN PLLC
✓ Jeffrey Adams — THE ADAMS LAW FIRM, PLLC
✓ David K. Wilhelmsen — FAVOUR MOORE & WILHELMSEON, PLC
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Karen L. Wargo/Michael P. Wargo — 9200 E. Spurr Lane, Prescott Valley, AZ 86315
Linda J. Hahn - 10367 W. Mohawk Lane, Peoria, AZ 85382
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William R. and Judith K. Stegeman Trust - 9200 E. Far Away Place, Prescott Valley, AZ 86315
Sergio Martinez and Susana Navarro - 10150 N Lawrence Lane, Prescott Valley, AZ 86315
Robert and Patricia Janis - 7685 N. Coyote Springs Rd., Prescott Valley, AZ 86315
William and Shaunla Heckethom - 9715 E. Far Away Place, Prescott Valley, AZ 86315
Leo and Marilyn Murphy - 9366 E. Turtlerock Road, Prescott Valley, AZ 86315
~~James and Leslie Richie - 9800 E. Plum Creek Way, Prescott Valley, AZ 86315~~ NO CURRENT ADDRESS
Rhonda Folsom - 9305 N. Coyote Springs Rd., Prescott Valley, Arizona 86315
Kenneth Paloutzian - 8200 Long Mesa Drive, Prescott Valley, AZ 86315
Robert Lee and Patti Ann Stack/Robert Lee and Patti Ann Stack Trust - 10375 Lawrence Lane, Prescott Valley, AZ 86315 966 N STIRRUP HIGHWAY W. DEWEY 86327
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